`"Statutory Construction": Commentary[1]

Justice Malcolm Craig

1. I commend to you for serious consideration the paper prepared by Stephen Free. The examples that he gives well illustrate how the principles of legality have influenced statutory construction in a number of recent cases, the one most recently achieving notoriety being the decision of the High Court in *Cunneen*.[2]

2. More and more in the area of civil disputes, statutes and their proper interpretation intrude where once the resolution of the dispute was governed wholly by the application of principles developed by the common law. That proposition is exemplified by the impact upon tort law by the *Civil Liability Act 2002*. The construction of the provisions of that Act has given rise to a number of cases which, understandably, seek to test, by a process of statutory construction, the extent to which common law principles of tort law have either been modified or extinguished by that Act.

3. Importantly, planning and environmental law is statute based. The Land and Environment Court in which the majority of litigation founded in planning or environmental law is conducted is itself, a statutory court whose exercise of jurisdiction is circumscribed by statute. As a consequence of these two observations, the principles of statutory interpretation are almost daily grist for the mill of litigation that comes before the Court.

4. Although I have referred to the importance of statutes intruding into civil litigation, the principles of statutory construction are not so confined. Those principles are equally important to the operation of

[1] Notes as a commentator upon a paper entitled "Statutory Construction" by Stephen Free delivered at the EPLA Conference on 16 October 2015.
[2] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 318 ALR 391.

the criminal law. Particularly is this the case having regard to the ever increasing number of offences created by statute. The old principle applied to the interpretation of what was described as a penal statute was this: if a reasonable construction of the statutory provision in question was open that would avoid the imposition of a penalty, that construction of the provision was the one that must be adopted. However, that approach to the interpretation of a penal provision was soundly scotched in *Beckwith v The Queen*,[3] where Gibbs J said at 576:

> "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."

5. My reference to the *Civil Liability Act*, the statutory foundation for planning and environmental law and the observations in *Beckwith* are intended to emphasise the significance of understanding the principles of statutory construction. Having so stated, I would not want to suggest that the task of applying those principles is easily essayed. However, it is not my purpose today as a commentator on Stephen's paper to provide an erudite exposition of those principles, assuming that I could ever display either erudition or offer an appropriate exposition of them.

6. Nevertheless, there are two questions that I want to pose for consideration. The first arises from the opening part of Stephen's paper. The manner in which I pose the question is this:

[3] [1976] HCA 55; 135 CLR 569.

In its statement of principles, has the High Court moved from a purpose/context based approach to a literal approach when construing a statutory provision?

My second question is this:

How, if at all, do the principles of statutory construction differ when applied to delegated legislation?

Purpose based or literal approach

7. Posing this question was, in part engendered by an observation of Kirby J in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*[4] in 2008. His Honour's judgment opens with what might be considered as a convenient summary of the relevant principles:

> "1 The interpretation of legislation is one of the most important functions of Australian courts. A significant change in this area is the move away from the notion that language has clear and incontestable meanings that are ascertainable from a close study of the words alone.
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> 2 This 'literal' or 'grammatical' approach to interpreting statutory texts has gradually given way to an appreciation that legal interpretation is a more complex task. Whilst the starting point in interpretation must still always be the text, it is now appreciated that context and purpose are also vitally important. Further, this approach is not limited to cases where the text appears on its face to be ambiguous."

8. Having stated the principles in that manner, his Honour then addressed the judgment of the plurality in that case. In their reasons, the plurality had considered it unnecessary to invoke a principle of beneficial construction in order to resolve the issue before the Court. Their focus was upon the words of the statute under consideration. Kirby J continued at [7]:

[4] [2008] HCA 48; 237 CLR 285 at [1]-[2].

> "Not for the first time, with respect, I see in this approach hints of a return to the literal interpretation of legislation which this Court has (in my view rightly) earlier discarded. It is as if words, without more, will yield the answer to a problem of statutory interpretation presented by a case such as the present. I would resist any return to that earlier narrowing of the judicial focus."

9. The articulation by the High Court of the "modern approach" to statutory construction is found in *CIC Insurance Ltd v Bankstown Football Club Ltd*[5] and *Project Bluesky Inc v Australian Broadcasting Authority*.[6] In *CIC Insurance* the plurality said at [88]:

> " … the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy … if the apparently plain words of a provision are read in the light of the mischief that the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."

The articulation of the principle in *Project Bluesky* is stated at [5] of Stephen's paper.

10. A departure from this approach was perceived to arise from pronouncements by the High Court in cases decided around the end of the first decade of this century. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*,[7] decided in 2009, Hayne, Heydon, Crennan and Kiefel JJ observed at [47]:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text

[5] [1997] HCA 2; 187 CLR 384.
[6] [1998] HCA 28; 194 CLR 355.
[7] [2009] HCA 41; 239 CLR 27.

> itself … . Historical considerations and extrinsic materials cannot be relied upon to displace the clear meaning of the text … . The language which has actually been employed in the text of 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."

11. Focus upon the words actually used in the legislative provision under consideration was again stated by the plurality in *Saeed v Minister for Immigration and Citizenship* in 2010.[8] It was there stated at [33] that it was "erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction". That observation seems to infer (perhaps unintentionally) that reference to "extrinsic materials" is not a component of "the ordinary rules of statutory construction".

12. In *Commissioner of Taxation v Consolidated Media Holdings*,[9] the plurality repeated the opening sentence in the passage quoted from *Alcan* that the task for statutory interpretation must begin with a consideration of the text itself. They then added at [39]:

> "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."

13. These latter approaches, so it seems to me, reflect a difference in emphasis rather than a change of course from the "modern approach to statutory construction" as articulated in *CIC Insurance*. Indeed, the statement of the "modern approach" in *CIC* cited an observation to similar effect by Mason J (as his Honour then was) in *K & S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd*,[10] decided in 1985. The citation of that reference by the High Court in

[8] [2010] HCA 23; 241 CLR 252.
[9] [2012] HCA 55; 250 CLR 503.
[10] [1985] HCA 48; 157 CLR 309.

Cunneen, extracted at [13] of Stephen's paper, supports my view that the fundamental approach has not changed but the emphasis has shifted. That change in emphasis is, with respect, well stated by Weinberg JA in *S M v R*,[11] where his Honour said at [55]:

> "The fact that the High Court now regularly reminds courts that the process of statutory interpretation requires them to focus first upon the structure and text of the Act, and to move to broader contextual matters only at a later stage, most definitely does not mean that these 'purposive' considerations can be ignored. However, the emphasis in statutory interpretation does seem, in recent times, to have shifted somewhat. It might be said that the current approach to the interpretive task requires courts to both begin and end with the text. That is, of course, always bearing in mind that any provision must be read in context, and against the background of the Act as a whole."

14. Perhaps, too often, in the conduct of litigation, attempts to derive a meaning that suits the position that the party seeks to achieve by reference to "purpose", is founded upon a concept of what the advocate would wish the provision to say, rather than first focussing upon the words of the provision that are actually used. As Stephen points out, any attempt to divine the legislative purpose, must properly be undertaken by reference to the provisions of the statute itself, rather than from some preconceived view as to what the legislature may have wished to say or was thought to have intended.

Interpretation of delegated legislation – planning instruments

15. Among the legislative provisions that so often call for interpretation in litigation before the Land and Environment Court are the provisions of statutory planning instruments. We are told by the High Court in *Collector of Customs v Agfa-Gevaert Ltd*[12] that the principles of statutory construction apply equally to the interpretation of a regulation. Those same principles are applicable

[11] [2013] VSCA 342.
[12] [1996] HCA 36; 186 CLR 389.

to the construction of an environmental planning instrument. So much appears from the oft quoted statement of McColl JA in *Cranbrook School v Woollahra Council.*[13]

16. In accordance with the principles earlier discussed, that requirement necessarily means that a focus must be upon the particular provision or provisions of the instrument that is being construed. That instrument is not to be interpreted by reference to some preconceived view of what constitutes planning in general or planning for the area in question. With statements of aims and objectives that appear in planning instruments, one may too readily succumb to the temptation to commence the process of construction by resorting to those aims and objectives, whether expressed generally or in respect of a particular zone, without first focussing upon the text being considered and its immediate context.

17. The error in so doing is exemplified by the observations of Jagot J in *Matic v Mid-Western Regional Council*.[14] There, the question arose as to whether subdivision was permissible under a planning instrument that allowed the creation of a concessional allotment or allotments when subdividing land. In addressing the Council's submission that the subdivision was prohibited, her Honour said:

> "10 The Council's submission did not recognise the primacy of the text of the LEP. Instead the Council called in aid the objectives of the LEP and the zone, and a particular view about the historical function of concessional lots in a rural context, to support its position that the applicant's argument was inconsistent with the planning policy of the instrument. There are numerous difficulties with this approach.
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> 11 First, the objectives of the LEP and the 1(a) zone do not disclose a coherent planning policy of the kind articulated by the Council. The objectives are broadly stated and

[13] [2006] NSWCA 155; 66 NSWLR 379 at [36].
[14] [2008] NSWLEC 113.

> involve contestable facts. They do not form a hierarchy so it is not possible to know if one objective takes precedence over another in the event of conflict. There is also substantial scope for conflict between the objectives.
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> 12 Secondly, 'concessional allotment' … is not a defined term. Contrary to the Council's apparent assumption, it is not possible to vest that term with some meaning derived from general (and possibly or probably incomplete and inaccurate) suppositions about how environmental planning instruments have dealt with rural land in the past."

18. The observations there made about objectives are apposite to most contemporary planning instruments, including those made in conformity with the Standard Instrument prescribed under s 33A(1) of the *Environmental Planning and Assessment Act 1979*.

19. Against the requirement for focus upon text and context, there must be recognised the drafting infelicities that often occur in planning instruments. Judicial observations to this effect include those of Meagher JA in *Egan v Hawkesbury City Council*[15] where his Honour said of the planning instrument there being considered that it was "drafted in specialised bureaucratic jargon to whose authors neither logic nor clarity has urgent attraction". Another difficulty in seeking to divine a contextual or purposive meaning in a planning instrument is exemplified by the observations of Tobias JA in *Calleja v Botany Bay City Council*[16] where his Honour notoriously said at [25] that "any attempt to always find planning logic in planning instruments is generally a barren exercise".

20. These observations demonstrate that sometimes relaxation of the principles of construction will need to be adopted when interpreting delegated legislation. That latitude was recognised in relation to planning instruments by Cripps J in *Hecar Investments (No 6) Pty*

[15] (1993) 79 LGERA 321.
[16] [2005] NSWCA 337; 142 LGERA 104 at [25].

Ltd v Lake Macquarie Municipal Council,[17] where his Honour said at 323:

> " … when interpreting delegated legislation, the Court ought be concerned with practical considerations rather than construing it by meticulous comparison of the language of the various provisions such as might be appropriate in construing sections of an Act of Parliament and that if that language is capable of more than one interpretation, a Court ought discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonably practical result."

The approach there taken was accepted as appropriate by the Court of Appeal in *Port Stephens Council v Chan Industrial Pty Ltd,*[18] decided in 2005, and again in 2006 by that Court in *Westfield Management Ltd v Perpetual Trustee Company Ltd*.[19] The source of the principle, namely the speech of Lord Reid in *Gill v Donald Humberstone & Co Ltd*,[20] was more recently applied to the interpretation of a local environmental plan by Leeming JA in *Tovir Investments Pty Ltd v Waverley Council.*[21]

21. How then should one rationalise the superficially conflicting requirements to focus upon the text of the statutory instrument on the one hand and on the other to give practical effect to the terms of that instrument, having regard to the circumstance that it is a form of delegated legislation? The answer, so it seems to me, lies in a close consideration of the terms in which the principle directed to the construction of delegated legislation is stated. If the language used in the provision or provisions being construed is or are reasonably capable of more than one interpretation, that which closely accords with the natural meaning of the language used ought to be applied. However, if application of that natural meaning leads to an "unreasonable result", the available alternate

[17] (1984) 53 LGRA 322.
[18] [2005] NSWCA 232; 141 LGERA 226.
[19] [2006] NSWCA 245.
[20] [1963] 3 All ER 180.
[21] [2014] NSWCA 379.

construction which leads to a reasonably practical result is the one that ought to be adopted. Importantly, there must be two (or more) interpretations of the provision being construed that are reasonably open, applying ordinary cannons of construction, before the "practical result" principle can be applied.[22]

22. I conclude where Stephen Free began. Read the provision to be construed; read the statutory or regulatory context in which the provision is found; read it again! The text, in context, is fundamental to its proper construction.

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[22] *Australian Tea Tree Oil Research Institute v Industry Research and Development Board* [2002] FCA 1127; 124 FCR 316.