Statutory construction

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1. If you are here for practical guidance on the principles of statutory construction, the best that I can offer is three words – read the statute. Read it carefully, read it again. Take a break, refresh your mind and read it again.

2. Time and again the High Court has emphasized that the answer to most questions of statutory construction is to be found in a careful analysis of the statutory text, understood in its proper context.[1] In many, perhaps most, cases that will be the beginning and the end of the exercise.

3. But at the margins, there are issues that turn on particular canons of construction that operate either to guide the reader of text in a particular direction, or to warn away from a particular conclusion. You may be relieved to hear that I do not intend to invoke any of the antiquated latin phrases that tend to feature more in first year university courses than they do in the decisive passages of modern construction cases.

4. My paper is primarily concerned with the principle of legality, one canon of construction that has been prominent in recent decisions of the High Court. I wish to highlight some features of that principle and consider some examples of its recent application. In doing so I also wish to draw some comparisons between that principle and the principle of purposive construction. That principle is, of course, that

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[1] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46, [47] Hayne, Heydon, Crennan and Kiefel JJ reiterated that "[t]he Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself". It cited five recent decisions in support of that proposition. The passage was cited with approval in *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39], which was in turn approved in *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22].

legislation should be construed in a way which achieves the intended result.

5. At the risk of repeating what will be elementary to most of you, the modern principles of statutory construction are those stated by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky* at 384, [78]:

> *[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*.

6. There are some other aspects of this passage that I wish to draw to your attention.

7. First, there is the careful use of the phrase "the meaning that the legislature is *taken to have intended*". It is common for those engaged in the task of statutory construction to use shorthand references to "the intention of the legislature" or what the "parliament intended". As shorthand, such language does help to emphasise the centrality of purpose or intention in the exercise of construction. But it can be apt to mislead if taken too literally. The High Court has made clear that the concern is not to discover what the legislature in fact intended in enacting a particular provision. The task instead is to divine objectively the correct interpretation of enacted words according to settled principles. The answer generated by that exercise is the result "taken to have been intended" by the legislature.

8. The High Court tells us that speaking in terms of the actual collective purpose of the legislature is not even a convenient fiction. In *Lacey v*

Attorney-General of Queensland [2011] HCA 10 the majority, after referring to the above passage from *Project Blue Sky,* said at [43]:

> *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. [footnotes omitted]*

9. References to "legislative intention" are thus to be understood as a description of the conclusion drawn after applying the settled principles of construction. Legislative intention is not a historical, collective state of mind to be rediscovered through a series of clues.

10. Their Honours in *Lacey* also referred back to what the Court had said in *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28]:

> *[J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in* ***NAAV v Minister for Immigration and Multicultural and Indigenous Affairs****, the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy*. [footnotes omitted]

11. I will return later to this notion that the principles of statutory construction involve a compact between the arms of government, or at least a set of rules that everyone expects to play by.

12. The next key point to be noted from the passage in *Project Blue Sky* is the importance of context. Their Honours referred in that passage to the "legal meaning" of a provision, as distinct from the grammatical meaning. As they noted, the legal meaning may frequently align with the grammatical meaning. The grammatical meaning is only one of a

number of factors to be taken into account in discerning the legal meaning. Critically, the text cannot be understood without an appreciation of the context in which it appears. While the grammatical or ordinary meaning of words is a logical starting point, there is no need to find ambiguity in the text before one can justify recourse to considerations of context.

13. In the recent High Court decision of *ICAC v Cunneen* the majority emphasised the primacy of context. At [57] their Honours cited with approval the approach adopted by Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315:

> *[T]o read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context … Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.* [references and footnotes omitted]

14. "Context" is a broad concept. It encompasses the immediate textual context – comparison with the words of other provisions in the statute and an appreciation of the overall scheme of the statute. One of the other principles emphasized in *Project Blue Sky* (at 381-2, [69]-[70), and again by the majority in *Cunneen* (at [31]), is that a provision is to be construed in the context of the statute as a whole, on the prima facie basis that the provisions of any Act are intended to give effect to harmonious goals.

15. In *Alcan (NT) v Territory Revenue* (2009) 239 CLR 27 at 47, [47] the plurality held that context also includes the general purposes and

policy of a provision, in particular the mischief it is seeking to remedy. The purpose is to be understood as woven into the contextual fabric of the statute. While it is customary to speak of text, context and purpose, in one sense purpose is a subset of context.

16. The next question to consider is how the purpose of a provision is to be identified. The first (and always the most important) source for discerning the purpose of a provision is the text itself. In *Alcan* the plurality held that that "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention". But recourse is also permitted to secondary materials outside the statute. In *Federal Commissioner of Taxation* v *Consolidated Media Holdings* (2012) 250 CLR 503, at 519 [39], the Court stated that context includes "legislative history and extrinsic materials".

17. In *Lacey* the majority synthesized these different concepts in the following way, at [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 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.*

18. As far as extrinsic materials are concerned, two points arise. First, there is no threshold test to be satisfied before it becomes permissible to have regard to extrinsic materials. The broad definition of "context" in this area means that such recourse is always legitimate. However, the second point is that recourse to extrinsic materials is of limited utility. The main point of the exercise is usually to identify the mischief to which an Act or a provision was directed: see *Harrison v Melhem* (2008) 72 NSWLR 380 at [13], [172]. That then serves as a guide

to understanding the text. But that is the extent of the assistance. As the Court said in *Commissioner of Taxation v Consolidated Media Ltd* (2012) 250 CLR 503 at [39] statutory construction begins and ends with the text. "Legislative history and extrinsic materials cannot displace the meaning of the statutory text".

Purpose as a guiding principle

19. The point of fixing upon the identified purpose of a provision is that it ought to provide the key to giving the text a coherent interpretation which accords with a broader scheme. Like many areas of the law, the cases on statutory construction are rich with metaphors. I would like to refer to a couple of the more vivid ones that have been used to describe the role of purpose in construction.

20. In *Visy Paper Pty Ltd v ACCC* (2003) 216 CRL 1 at [70] Kirby J (in dissent) said the following about the assistance to be gained from identifying the purposes of the *Trade Practice Act 1974* (Cth) when interpreting its particular provisions:

> *It is in the context of such legislative opacity and unwieldiness that it is essential, in my view, to adopt a construction of the TPA that achieves the apparent purposes of that Act by furthering the objectives of Australian competition law. Keeping such purposes in mind helps to shine the light essential to finding one's way through the maze created by the statutory language. Even then, there is a substantial danger of losing one's way in the encircling gloom.*

21. Another enduring image comes from an extrajudicial comment of Lord Diplock which was picked up by McHugh J in the Court of Appeal in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424:

> *If the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed.*

22. Considerations of text and context may yield a number of plausible possibilities for reading the language of the statute. The Chief Justice calls these "constructional choices". As part of the majority in *Cunneen* at [57] his Honour said that 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." To take up Justice Kirby's torch metaphor, identifying the purpose of a provision should serve to shine a light on the correct choice within the range of possibilities.

Principle of legality

23. The principle of legality provides a different conceptual framework for choosing between constructional possibilities. The principle was described by the majority in *Attorney-General [NT] v Emmerson* [2014] HCA 13 at [86] in the following terms:

> [*Legislation] affecting fundamental rights must be clear and unambiguous, and any ambiguity must be resolved in favour of the protection of those fundamental rights.*

24. In the United States this is known as the "clear statement rule": *United States v Fisher* [1805] USSC 18; 6 US 358 at 390 (1805). This is a label which, it must be said, is considerably more illuminating than the "principle of legality".

25. In terms of the mechanics of construction, there are two key concepts at play. First, the legislation must be found to have an impact, or potential impact, upon "fundamental rights". If so, a special standard of interpretation is engaged. That leads to the second concept, namely that in such circumstances the statutory text is subjected to an especially strict reading. A distinction emerges between the meaning of words understood in their proper context, and the especially clear manifestation of intent that is required to arrive at a construction that interferes with fundamental rights.

26. There is an underlying question as to what is the rationale for this principle. I do not propose to dwell on that question in this paper, although I commend to you the outstanding paper on the topic by Brendan Lim published in the *Melbourne University Law Review*.[2] In that paper Brendan observes that there has been a significant shift from the original justification for the principle, as articulated by Justice O'Connor in *Potter v Minahan*. In that case his Honour said that:

> *It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.*

27. Justice O'Connor therefore founded the principle of legality on an empirical observation about the likelihood or unlikelihood of the legislature intending a particular result. That in turn reflected a historical understanding about the primacy of the common law and the rarity of statutory incursions into the common law.

28. In more recent times the empirical justification has largely fallen away in favour of alternative rationales. One is that there is an important constitutional value to the courts insisting on clear statutory words to effect an interference with fundamental rights, because it will lead legislators to pay particular attention before interfering with fundamental rights. Thus in *Coco v R* (1993) 179 CLR 427 at 437 Mason CJ, Brennan, Gaudron and McHugh JJ said:

> *[C]urial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.*

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[2] "The Normativity of the Principle of Legality" *Melbourne University Law Review* Vol 37: 372.

29. A variation on that theme is that the principle of legality ensures that when the legislature wishes to proceed in a way that interferes with fundamental rights, it must "squarely confront what it is doing and accept the political cost" before it can achieve such ends: *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffman.

30. I return though to the mechanical aspects of applying the principle of legality. As explained above, the first step in the exercise is to identify a "fundamental right" which is apt to be impaired by a particular interpretation of a provision. In most cases in which the principle of legality has been invoked, this is not a controversial step. Nor should it be – one would hope that one of the characteristics of "fundamental" rights is that there is little trouble in identifying them.

31. In *Emmerson* the provisions in question were forfeiture provisions under the *Criminal Property Forfeiture Act* (NT), so that the issue of construction was the degree of impact on the property rights of individuals. *Coco v R* (1994) 179 CLR 427 was another case involving the application of the principle in respect of property rights. In that case the question of construction was whether a statutory power to install listening devices, expressed in general terms, carried with it an implied power to enter private property without warrant. In *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 the principle of legality was engaged because the provision in question (being s. 93X of the *Crimes Act* which created a consorting offence) had the capacity to impact on freedom of association and freedom of communication. Freedom of communication was also at stake and the principle invoked in *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 149 CLR 1 at [42].

32. I will return shortly to the recent decision in *ICAC v Cunneen*, which involves an application of the principle in circumstances where there was not the usual direct contest between a fundamental right and a possible construction.

33. Turning to the second step in the application of the principle of legality, once it is found that the principle is engaged, the stringency of the standard of interpretation becomes the key. There have been a number of different formulations of the test. In *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [29], French CJ cited *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252 as authority for the principle being that a provision, in its operation in relation to fundamental rights, will be construed as "effecting no more than is strictly required by clear words or as a matter of necessary implication". In *Potter v Minahan* Justice O'Connor referred to "irresistible clearness" as the species of clarity required to be satisfied that the legislature intended to impair fundamental rights. In *ACMA v Today FM (Sydney) Pty Ltd* [2015] HCA 7 Gageler J, at [67], referred to the principle of legality as requiring "manifestation of unmistakable legislative intention". The general notion is to require something like the statutory construction equivalent of beyond reasonable doubt.

34. The principle leads the courts to adopt, unapologetically, a form of results driven reasoning. In some applications, it seems to require an "anything but" exercise of construction – if there is any plausible construction of a provision that is open and which avoids the impairment of the fundamental right, it is to be taken as the correct construction. This was effectively how French CJ expressed the principle in *Momcilovic v R* at [43] – if constructional choices are "open", then the principle of legality requires that a statute be construed to avoid or minimise encroachment upon rights and freedoms at common law.

35. It follows that if a fundamental right has been identified as being impacted, the application of the principle of legality is constrained only by the ingenuity of courts and advocates in identifying constructional choices. For those seeking to read a provision down to avoid a particular application, the aim becomes to identify any plausible reading of the statute that is open according to considerations of text and context.

ICAC v Cunneen

36. The recent decision of the High Court in *ICAC v Cunneen* [2015] HCA 14 serves to illustrate a number of these concepts in action. As many of you will be aware, the High Court's decision in *Cunneen* turned on the definition of corrupt conduct in s. 8(2) of the *ICAC Act*. That definition in turn served to define the scope of ICAC's investigative and inquisitorial powers.

37. The critical words in s. 8(2) were "adversely affect", in the sense of conduct that could adversely affect the exercise of official functions by any public official. The majority found that the reference to conduct that could "adversely affect" was to be understood as meaning "adversely affect" in a particular way. Their Honours then identified two possibilities. The broad option was that the provision meant conduct that could adversely affect the *efficacy* of the exercise of an official function. The narrow option was that it meant conduct that could adversely affect the *probity* of the exercise of an official function. The majority preferred the narrow option.

38. In reaching this conclusion the majority relied upon the principle of legality. That is, they found that the first step was satisfied and the principle applied to the constructional issue before the Court. Having found the principle to be engaged, the majority therefore applied the heightened level of scrutiny to the contested construction. Their Honours found, at [54], that there was no "clearly expressed legislative

intention to override basic rights and freedoms on such a sweeping scale as ICAC's construction would entail".

39. The reasons for the majority do not articulate the particular fundamental rights and freedoms said to be impaired by the construction of s. 8(2) that was contended for. The reasoning in paragraph [54] alludes to the coercive powers that are conferred on the ICAC by other provisions of the *ICAC Act* in investigating corrupt conduct. Those include the compulsive powers associated with the conduct of private and public hearings. But those powers were at least one step removed from the issue of construction before the Court. The majority seems to have engaged in a novel extension of the principle of legality. The implicit reasoning appears to be:

    a. on the interpretation of s. 8(2) advanced by the ICAC, a broader range of conduct will fall within the scope of "corrupt conduct";

    b. consequently, if that construction is accepted, there will be a broader range of conduct that may be subject to investigation and action by the ICAC;

    c. in the course of investigating corrupt conduct, the ICAC can exercise various coercive powers that infringe fundamental rights; and

    d. in the circumstances, the interpretation of s. 8(2) advanced by the ICAC will have consequential impacts on fundamental rights that are sufficient to trigger the application of the principle of legality.

40. In dissent, Gageler J at [86]-[88] was unusually scathing in his criticism of the application of the principle of legality in this context. His Honour observed that no attempt had been made in argument before the Court to:

identify any right or principle said to be put in jeopardy by an interpretation of the ICAC Act which would permit ICAC to investigate criminal conduct which has the potential to impair the efficacy of an exercise of an official function by a public official …

41. His Honour did not agree with the proposition that, because ICAC can exercise coercive powers for the purpose of conducting investigations, the Court should strain to adopt a narrow definition of the provisions of the *ICAC Act* which define the types of conduct that ICAC can investigate. As his Honour put it, at [87], there "is no common law right not to be investigated".

42. In the recent case of *ACMA v Today FM (Sydney) Pty Ltd* [2015] HCA 7, Gageler J had referred, at [69], to a more orthodox example of the application of the principle of legality in *Balog v ICAC*. In that case the High Court adopted a narrow construction of a particular power of the *ICAC Act*, being the power to make findings in a report. The Court held that the power did not extend to the making of findings that a person was guilty of a criminal offence.

43. There was no equivalent power at issue in *Cunneen*. One of the ironies of the reasoning of the majority in *Cunneen* is that their Honours appeared to proceed on the basis that the relevant coercive powers conferred on the ICAC under the *ICAC Act* are intended to override fundamental rights. Yet the very presence of a clear intention to override fundamental rights in relation to particular powers was relied upon as a reason for reading down other provisions that had an impact on the range of matters in respect of which those powers could be exercised.

44. If the reasoning of the majority in *Cunneen* is followed in future cases, the principle of legality has the potential to operate as a general constraint on the jurisdiction of public authorities. While ICAC has special notoriety as a body entrusted with coercive powers, it is far

from unique. For example, the WorkCover Authority and its inspectors, have various coercive powers under the *Work Health and Safety Act 2011*. The reasoning of the majority in *Cunneen* could suggest that there is reason to adopt a narrow construction of the various definitions that set the boundaries of WorkCover's jurisdiction, if any narrow construction is open on the words.

45. Returning to the dissent of Gageler J in *Cunneen*, his Honour finished with the following comments:

> *[88] Unfocussed invocation of the common law principle of construction sometimes now labeled the "principle of legality" can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy.*

46. The final reference – to "democratic legitimacy" – is particularly significant. As noted above, the Court has said in the past that the rules of interpretation are accepted by all arms of government in the system of representative democracy. Gageler J appears to be suggesting that it may not be a fair application of the rules of the game for the principle of legality to be extended too far. There is force in that concern. Because the principle leads to the application of such an exacting standard of legislative clarity, there is much greater potential for the legislature to misfire. If the courts are driven to any construction that is open on the words that avoids the offending result, the potential for counterintuitive and obscure interpretation increases. Of course, the legislature must be taken to have intended whatever it is found to have enacted. But at the very least there is a greater chance that the Parliament will miss the target it *thought* it was aiming for.

47. The traditional answer to this concern is that the legislature knows the rules of the game. So long as it follows those rules, it can achieve whatever result it wishes. The principle of legality was described by

the majority in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (quoting *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ)) as "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted".

48. In *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at [182] per Crennan, Kiefel and Bell JJ noted that on this basis it can be argued that the Parliament can be taken to know that the presumption against abrogation of fundamental rights will be applied in the courts, so that an absence of clear words is therefore affirmative evidence of an intention not to rebut the known presumption. The other point of this approach is that the Parliament can always just elect to use clear words if it wishes to.

49. The difficulty with the kind of extended application of the principle of legality adopted by the majority in *Cunneen* is that it becomes much more complicated for the Parliament to legislate in a way that properly anticipates the principle of legality. It is one thing to say that the legislature must act with unmistakable clarity if it wishes to authorise officers to enter onto private property. It is a much more complicated notion to say that the legislature must act with unmistakable clarity in defining the scope of matters which can be investigated by a public authority, including by reference to a series of definitions. It is much harder in that context to draft legislation in a way which excludes the possibility of narrow constructional choices being identified.

50. Finally, there is the impact on those who have to interpret and apply the law. The principles of statutory construction are not just a compact between the arms of government. They are also a compact with the users of law. Any principle of construction which requires the courts to strain against the ordinary meaning of words, or require a special

standard of clarity before a particular operation is achieved, has consequences for those who have to interpret it and those who try to abide by it. In *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319 at 349, [42] French CJ made the following observations:

> *The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this … The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished.*

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