

PUBLIC LAW – EXAM CHECKLIST

Go through every relevant provision, even the clear issues, eg:

- ‘The first three elements of the offence are clearly satisfied’
- ‘Clearly a smartphone falls within the definition of s3’
- Anticipate arguments on both sides
- State conclusion – consequences for client

IDENTIFY THE AMBIGUITY

- Write the phrase/section of concern and what are the competing interpretations
- What is the key issue(s)? → One at a time
 - Drafting mistake: *Taylor v Owens*
 - Inconsistent provisions: *Project Blue Sky*
 - Meaning of text: *VCF v Brown*
 - Scope of text: *AB and AH*
- Consequences of competing interpretations for each party
 - Eg. consequence A means this, consequence B means this
 - Eg. narrow interpretation v broad (*AB and AH*)
- Word ‘judge’: consider whether such function is antithetical to judicial process
 - Some powers are inherently judicial eg. interpretation of ‘public interest’
 - Hard to point to any specific judicial power
 - The main issue, however, is whether determining the scope of the term ‘public interest’ is non-judicial because it requires the determination of non-legal and broad standards (cf *Thomas v Mowbray*). Here, however, the text and context is quite different from that in *Mowbray* – the judicial discretion is constrained by factors that they must consider; the term ‘public interest’ is constrained by the surrounding context of the Act; and the phrase ‘public interest’ is a commonly used one in statutes.

Commonwealth legislation

Acts Interpretation Act 1901 (Cth)

- S15A: every act shall be construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth
- **S 15AA: Interpretation best achieving Act's purpose or object**

S 15AB: Use of extrinsic material in the interpretation of an Act:

1. Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
 - a. To confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

Primary, always do these

- Don't use them as headings, use key words or sections as headings eg. if s32 is ambiguous, use that as the heading
- Pg 30 for different approaches

Text (literal rule)

- Interpretation must begin with the ordinary text itself (*Alcan v Comm for Territory Rev*)
- Must consider the natural and ordinary sense of the language in its context (*Cooper Brooks*)
- Primary purpose is to construe the provision so that it is consistent with the language and purpose of all of the provisions in the statute (*Project Blue Sky*)
- The court must strive to give meaning to every word of the provision ([Griffith CJ](#) in *Comm v Baume*, citing *R v Berchet*)
- Words cannot be made void or meaningless if by any other construction, they may be useful or pertinent (*Project Blue Sky*)
 - Ordinarily, the legal meaning will correspond with the grammatical meaning, but sometimes grammatical meaning can be ambiguous
- Must be constructed on a prima facie basis that the provisions intended to give effect to harmonious goals (*Project Blue*)
- Can't depart from literal rule any time it does not conform with legislative intent as discerned from other provisions (*Cooper Brooks*) or contexts, including EM (*CIC Insurance*)
- Read words in light of mischief (McHugh JA in *Isherwood*)

Examples:

- Can use dictionary, but don't usually end up with literal result as have to consider surrounding provisions
- Eg. 'sell or distribute' in *Evans v NSW*
- *Golden rule*: if it leads to absurd result, can modify
- 'And' generally means 'and', not 'and or'
 - Might not mean just 'and' if it results in absurdity
 - 'And' and 'or' cannot be interchangeable (*VCF v Brown*)
- Do not stray from Parliament's intention (*Project Blue Sky*)
- *Kable doctrine*: does the power invested in the court diminish the institutional integrity of the court?
 - Ch III constrains courts by separation of powers
 - Cannot exercise executive or legislative powers
- If there's no definition within the Act, this allows a broad interpretation
- You can depart from the literal meaning of the text if a contrary intention appears
- Suggested courts cannot issue advisory opinions

Purpose

- Is this interpretation consistent with the purpose of the Act?
- Primary objective of interpretation is to construe the relevant provision so that it is consistent with language and purpose of all of the provisions in the statute (*Project Blue*)

Also consider

- Long title of the Act, preamble, objects clause
 - If an Act has none of these, look at Act as a whole
 - What is the Act trying to achieve?
- Can consider extrinsic materials – but remember these are not conclusive
- Presumption from *Taylor v Owens*:
 - Beneficial statute, wider interpretation
 - Penal statute, narrow, strict interpretation

Explanatory Memorandums

- Court may consider law reform body reports to ascertain mischief the statute is intended to cure (*CIC Insurance*)
 - Plain words, read in light of mischief, may wear a different appearance
- Historical considerations and EM cannot be relied upon to displace clear meaning of text (*Alcan v Comm for Territory*)

Context

- Modern approach: context should be considered regardless of ambiguity (*Cooper Brooks*)
- Consider extrinsic materials
- Mischief – what's the problem the law is seeking to remedy (*Alcan*)
 - Eg. *Taylor* – compensation claims too high
- State of the law eg. past cases, legislative history
 - Eg. *Lacey*
- Surrounding conditions
- Real world context
- Immediate context (*noscitur a sociis*): other words & phrases used in section eg. Stab, cut or wound a person (can we shoot?)
- Class rule (*ejusdem generis*): where 2+ specific words followed by general words, general words should be interpreted to accord with specific words eg. beer, wine & other *liquids*
- *The meaning of public interest is to be ascertained by....* Looking at the Act as a whole, considering policy issues and consequences

Secondary:

Presumptions

Type of offence (*Taylor v Owens*)

- If it creates an offence, more narrow
- If it's a beneficial statute, more broad

Drafting errors

- *Taylor v Owners* outlined if there is a negative consequence of a literal interpretation, judges can change it if they satisfy 4 requirements:
 - Allows for minor amendment, but can't draft a new clause
1. Know what they're trying to achieve
 2. Have to be clear a mistake has been made
 3. Possible to be certain the additional word that would be inserted by the draftsman
 4. Must be consistent with wording
 - This is most difficult to prove, have to be certain, high threshold
 - Confined certainty, conservative argument against judicial law-making

Presumption of legality

- **“Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation”** (Brennan J in *Re Bolton*)
- Can't abrogate fundamental common law rights unless parliament clearly states to the contrary (*Evans*)
 - **Improbable the legislature would overthrow fundamental principles**, infringe rights, or depart from general system of law, **without expressing its intention with irresistible clearness** (*Potter v Minahan*)
- Interpret it as legislature intended
- Parliament cannot override fundamental rights by general or ambiguous words (*Meagher*)
 - Can be done by plain words (*Re Cuno*)
 - General words are rarely sufficient (*Coco*)
 - Can be done by necessary implication (*Melb Corporation v Barry*)
- Limited to only those rights and freedoms historically recognised by the common law (French CJ speech, cited in *Meagher*)
 - Right of access to the courts
 - Immunity from deprivation of property without compensation
 - Legal professional privilege
 - Privilege against self-incrimination
 - Immunity from the extension of the scope of a penal statute by a court
 - Freedom from extension of governmental immunity by a court
 - Immunity from interference with equality of religion
 - Right to access legal counsel when accused of a serious crime
 - No deprivation of liberty, except by law