

LEGISLATION AND STATUTORY INTERPRETATION

LAWS 1201 FOUNDATIONS OF AUSTRALIAN LAW

SEMESTER 1 2017 FINAL EXAM STUDY NOTES

THE CONSTITUTION OF AUSTRALIA

WEEK 7

TITLE: Commonwealth of Australia Constitution Act (The Constitution)

DATE: 9 July 1900 (Assent), 1 January 1901 (Commencement)

PURPOSE: The supreme law under which the government of the Commonwealth of Australia operates, which established Commonwealth and State authority once united.

PARLIAMENT: Parliament of the United Kingdom, Commonwealth of Australia Constitution Act 1900 (Imp)

FEATURES OF POWER:

- The Federal Parliament (Chapter I):
 - The Queen (Part 1):
 - Represented by the Governor-General (s 2).
 - The Senate (Part II):
 - Composed of senators for each State, voting as one electorate (s 7).
 - Each State must have the same number of senators (excluding non-originals) (s 7).
 - One senator is chosen as the President of the Senate (s 17).
 - Each senator has one vote, inc. President (s 23).
 - The House of Representatives (Part III):
 - Composed of members directly chosen by the people; the number of members should be approximately twice the number of senators (s 24).
 - The number of members chosen in each State should be in proportion to the respective numbers of their people, given the formula of s 24 (s 24).
 - One member is chosen as the Speaker of the House (s 35).
 - Each member has one vote, not inc. Speaker unless equal (s 40).
 - Powers of the Parliament (Part V):
 - Making of laws for the peace, order, and good government of the Commonwealth, including trade, commerce, taxation, debt, public services, military, quarantine, scientific observations, census, currency, marriage, external affairs, amendments, etc. (s51).
 - When a proposed law is passed by both Houses of the Parliament it is presented to the Governor-General for the Royal Assent, although it may be withheld (s 58).
- The Executive Government (Chapter II):
 - The executive power is vested in the Queen, by the Governor-General (s 61), under advisement of the Federal Executive Council (s 62).
 - This power extends to the execution and maintenance of this Constitution, and of other laws (s 61).
 - Ministers of State may be appointed to administer departments of State (s 64).
- The Judicature (Chapter III):
 - The judicial power of the Commonwealth is invested in the High Court of Australia and in other federal courts (s 71).
 - The High Court has appellate jurisdiction, and the judgment in all such cases is final and conclusive (s 73).

NOTE: SEPARATION OF POWERS
An important constitutional principle which avoids concentration of government power by dividing it up between the three arms of government; the legislature (which enacts laws), the executive (which applies those laws individually), and the judiciary (which resolves disputes of law). The Constitution establishes and distinguishes the separation of powers between these arms. (2.19)

REMAINING CHAPTERS: Covering clauses, Finance and Trade (Chapter IV), The States (V), New States (VI), Miscellaneous (VII), Alteration of the Constitution (VIII).

COMPONENTS OF A STATUTE

(9.29-9.42)

- **NUMBER:** Unique to each statute.
- **DATE:** The date on which the statute received assent. Not always the date of commencement.
- **LONG TITLE:** States the purpose of the statute (An Act to...).
- **SHORT TITLE/TITLE/NAME:** Identifier used to refer to a statute. e.g. *Hawkers Act 1934* (SA)
- **PREAMBLE:** States the reason the statute has been enacted (Whereas...).
- **SECTIONS:** A statute is commonly divided into (sub)sections ((sub)paragraphs, (sub)clauses).
- **CHAPTERS, PARTS, DIVISIONS, SUBDIVISIONS AND HEADINGS:** Used to arrange groups of sections in lengthy statutes. They are usually provided with headings for particular groups.
- **TABLE OF CONTENTS AND INDEXES:** Used particularly in long statutes.
- **PURPOSE OF OBJECTS CLAUSES:** Like the preamble, it enables the user more clearly to understand the reason(s) the legislation was passed, and its purposive context for interpretation.
- **INTERPRETATION SECTIONS:** Definition sections, found in multiple places throughout the Act. Includes open ('includes' – non-exhaustive) and closed ('means' – exhaustive) definitions
- **HEADINGS TO SECTION:** Short notes above sections for content/history. Often not part of the Act.
- **SCHEDULES:** Appendices to statutes for tables, forms, lists, or international conventions.
- **PLUS: REPRINT NUMBER, TABLE OF CONTENTS.**

TYPES OF STATUTES

(9.48-9.55)

- **PUBLIC ACTS:** Apply to public at large, however sometimes with restricted application.
- **PRIVATE ACTS:** Passed for a particular individual or group. Different procedures are required under parliamentary standing orders for the passage of public and private Acts.
- **CODES:** A statute which draws together both statute and case law on a topic; a complete statement of the law at the time of enactment. e.g. *Criminal Code Act 1995* (Cth).
- **UNIFORM LAWS:** Effected by passing a template statute in one jurisdiction which is then copied, wholly or substantially, in other states, territories, or the Commonwealth.
- **CONSOLIDATIONS:** Acts which bring together the original statute law on a topic and the subsequent amendments. Not a reprint; in this case, it is a formal process of Parliament.
- **REPRINTED ACTS:** The original Act is reprinted to incorporate the text of amendments which have been made, usually done routinely as an alternative to the enactment of consolidating Acts.
- **DECLARATORY ACTS:** Statutes passed by Parliament to clarify doubts about meaning, scope, or validity of a particular law.
- **OMNIBUS ACTS:** An Act which incorporates amendments to a number of different Acts. Conventionally, they should include insignificant amendments only.
- **COGNATE ACTS:** An Act which is subsidiary to a principal Act which generally deals with consequential or transitional matters which flow from the passage of the principle statute.

DEVELOPMENT OF COMMON LAW APPROACHES TO LEGISLATION

WEEK 8 (10.1-10.8)

NOTE: The Commonwealth, states, and territories all have statutory provisions that set out the general approach to be taken to the interpretation of legislation, however common law approaches are still relevant as they have not been superseded by the legislation. The relationship between them remains unclear.

1. **LITERAL APPROACH:** words in a statute must be interpreted in the context in which they appear, according to their plain and ordinary meaning.
 - *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) (exclusive def.)
 - *Reid v Reid* (1979) (inclusive 'starting point' def.).
 - *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) (suggests possibility for alternative approaches).
 - *Higgin v O'Dea* (1961) (e.g. of a 'ridiculous' result from the literal approach).

STRENGTHS: simple; keeps strictly to how Parliament grammatically expounded it; prevents manipulation in common law.

WEAKNESSES: assumes that words/phrases have only one meaning, when an Act may have no single, ordinary meaning; may produce inconvenient, impolitic, or improbably results.

2. **GOLDEN RULE:** it is permissible to depart from the grammatical and ordinary meaning of words to avoid an absurd result.
 - *Grey v Pearson* (1857) (suggests a limited exception for documents containing an error with absurdity or inconsistency in the language itself).
 - *Footscray City College v Ruzicka* (2007) (exception is extended for unintended results).
 - *Wills, Probate and Administration Act 1898* (NSW) (e.g. of legislation with an error – and/or – *R v O'Neil, Ex parte Moran, Smith v Papamihail*).
3. **PURPOSIVE APPROACH:** words in a statute may be interpreted so that they promote the purpose they were enacted to address.
 - *Heydons's Case* (1584) (sets out the mischief rule).

MISCHIEF RULE: words in a statute may be interpreted with reference to the mischief they were enacted to address, so that the mischief is suppressed. Origin of the purposive approach.

 - *Mills v Meeking* (1990) (explains that before AIAs, purposive was used only when the literal approach produced ambiguity or inconsistency).
 - *KP Welding Construction Ltd v Herbert* (1995), *Peninsula Group Pty Ltd v Registrar-General for the Northern Territory* (1996) (NT cases suggesting the preferability of the purposive approach, generally at this time by looking at the statute as a whole).
 - *Pambula District Hospital v Herriman* (1988) (comment on consideration of previous statutes and historical context).
 - *Avel Pty Ltd v Attorney-General (NSW)* (1987) on *Gaming and Betting Act 1912* (NSW) (search for purpose of a legislative provision not successful).
 - *Maritime Services Board of New South Wales v Posiden Navigation Inc* (1982) (e.g. of successful application of the purposive approach)

STRENGTHS: interpretations may be closer to the original intentions of the author; can avoid absurd results and ambiguity; may avoid disrepute of the law.

WEAKNESSES: risk of identifying an incorrect purpose; risk of identifying a self-serving intention, leading to biased interpretation.

PURPOSIVE APPROACH UNDER LEGISLATION (s 15AA AIA 1901 (Cth) and similar provisions)

HISTORY:

(10.9)

- Public criticism of the literal approach led to the enactment of s 15AA of the *Acts Interpretation Act 1901* (Cth) in 1981, which was later amended in the *Acts Interpretation Amendment Act 2011* (Cth). In the years following, similar provisions were enacted in the states and territories.
- The current s 15AA allows for the possibility of a choice between two or more interpretations each of which would promote the Act's purpose or object, in which event the interpretation that would be achieve that purpose or object must be chosen, compared to the previous provision, below:

s 15 AA <i>Acts Interpretation Act 1901</i> (Cth)	s 15 AA <i>Acts Interpretation Amendment Act 2011</i> (Cth)
In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.	In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

OPERATIONS:

(10.10)

- Allows judges to consider the possibility of more than one construction by way of the purposive approach even if not immediately apparent on its face.

s 15AA must mean that 'the purposes... are to be taken into account... not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open.' (*Mills v Meeking* (1990))

'The requirement... is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule... [as the] approach required by... [s 15AA] needs no ambiguity or inconsistency'. (*Mills*)