

# LAWS 5820

## Legislation in Practice



SAMPLE EXTRACT

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## *Interpretative Process*

### **ACT**

1. Commencement (Act & relevant provision).
2. Jurisdiction (subject to WA or Cth legislation).
3. Applicability (natural vs legal person).
4. Text.
5. Context (intrinsic materials).
6. Purpose.
7. Extrinsic Materials (shed light on purpose).
8. Conclusion.
  - (a) Meaning of the text.
  - (b) Effect of the legislation.

### **DELEGATED LEGISLATION**

1. Is it delegated legislation? (WA or Cth).
2. Commencement (delegated legislation & relevant provision).
3. Empowering Act.
  - (a) Meaning of phrases/words used.
  - (b) Text, context, purpose.
4. Subsidiary Act.
  - (a) Words in doubt.
  - (b) Text, context, purpose.
5. Ambit.
  - (a) Beyond power.
  - (b) Inconsistency.
  - (c) Reasonable proportionality.
  - (d) Unreasonable.
  - (e) Certainty.
  - (f) Benevolent approach?
6. Severance? (if outside power).
7. Conclusion.
  - (a) Within power?
  - (b) Meaning of the text.
  - (c) Effect of the legislation.

# *Legislative Intent & Text*

## **LEGISLATIVE INTENT**

- ❖ Metaphor/construct (*Mills v Meeking* (1990) HCA).
- ❖ Objective intention (*Singh* (2004) HCA).
  
- ❖ Intention revealed/manifested by the words of the statute, what is actually said, or what the Parliament is taken to have intended (outcome of the interpretation process; it is assumed that the rules of construction are known to Parliament).

**Ordinary & grammatical meaning of the words of the provision having regard to their context & legislative purpose (*AEU* (2012) HCA).**

## **MEANING OF THE WORDS**

- ❖ Statutory construction must begin with a consideration of the text (*Alcan* (2009) HCA).
- ❖ Statutory construction must start & end with the text (*Consolidated Media Holdings* (2012) HCA).
  
- ❖ **Definitions in the Statute**
  
- ❖ **Definitions in AIA/IA**
  - Defined terms subject to contrary intention (AIA ss2B-2G; IA s5).
  - Variants of words have the same meaning (AIA s18A; IA s9).
  - Gender includes other gender & singular includes plural & vice versa (AIA s23; IA s10).
  
- ❖ **Dictionary**
  - Caution! (not a substitute for the interpretive task) (Mason P; *House of Peace* (2000) NSW).
  
  - Absent a definition in the Act, the ordinary meaning should prevail subject to context (Hall J; *Australian Leisure & Hospitality Group* [2012] WASC).
  
- ❖ **Legal, Technical, or Trade Meaning**
  - Look for the meaning best suited to the statutory document as a whole (Priestly JA; *Gamer's Motor Centre* (1985) NSW).
  
  - The query is whether you identify the word/phrase being used in a different sense than in ordinary speech (*Collector of Customs* (1996) HCA).
  
  - *Herbert Adams* (1932) HCA – exemption for ‘pastry but not including cakes or biscuits’. Held: ‘sponge’ fell within definition of ‘cakes’, trade manuals/textbooks used, a revenue law directed to commerce usually adopts meanings used by those exercising the trade concerned.
  
  - *Palgo Holdings* (2005) HCA – Act did not define ‘pawn’ or ‘pawned goods’. Held: ‘pawn’ has a long-established legal meaning, transaction of pawn or pledge involves a bailment of personal property as security for a debt with a right to sell on default, the Act does not extend the meaning of ‘pawn’ beyond the legal meaning.

### COMMON LAW PRINCIPLES

- ❖ Court must **strive to give each word meaning** (*Baume* (1905) HCA; *Project Blue Sky* (1998) HCA; *Saeed* (2010) HCA).
  - Ensure words of limitation are given effect (e.g. ‘solely’, ‘only’, ‘exclusively’ etc.).
- ❖ **Words assumed to be used consistently** across an Act (*Franzon* (1975) HCA; *Kline* (2013) HCA) [therefore different words are presumed to have different meaning].
  - Can be rebutted by context & purpose.
  - If an idea in a new Act is expressed with different words to how it was expressed in an old Act, then the ideas shall not be taken to be different merely because of the different form of words (AIA s15AC).
- ❖ Words of the statute are ‘**always speaking**’ (**ambulatory**) (IA s8) (*Aubrey* (2017) HCA).
  - Presumed to be drafted to embrace ‘future changes in the subject matter’ (Pearce & Geddes).
  - Not an automatic update of the Act.
  - **Connotation** (essential attributes) of a word establish a genus fixed at time of enactment, but **denotation** (things that fall within that genus) may change (*Aberdare* (1970) HCA) [connotation determines the scope of the denotation].
  - *Yemshaw* (2011) UK – construing ‘violence’. Held: could be extended to any harmful or abusive action (i.e. beyond physical violence), updated the Act [not permitted in Australia].
  - *Wilson* (1988) NSW – Held: video tape could not be construed as a ‘motion picture film’ under the *Stamp Act 1920* (NSW) [the more specific the word the harder it is to argue that its essential attributes to apply to something new].
- ❖ Act Divided into Parts.
  - If Parts are self-contained – then it could be argued that the scope of the words is derived from the Part rather than the Act as a whole (Sinnaiah [2013] FCAFC) (Pearce & Geddes).
- ❖ Reconciling Conflict between Sections.
  - Rule of last resort = later section prevails (*Mt Isa Mines* (1976) HCA; *Lyons* (1981) HCA).
  - May need to determine hierarchy (leading vs subordinate) (*Project Blue Sky* (1998) HCA).

### DEEMING DEVICE

- ❖ To create a statutory fiction or to designate fact or remove doubt.
- ❖ *Kumar* (2017) HCA – K applied for 572 visa on the basis he held a 485 visa, the 485 visa expired on a Sunday, K argued that AIA s36(2) (which provides that where the last day for a thing to be done under an Act is a Saturday/Sunday/holiday then the thing to be done may be done on the next day) extended time limit to Monday to make the application. Held: no time limit imposed expressly or by necessary implication by the Act or regs re applying for a 572 visa, the last day K could have applied was on the Sunday when his 485 visa expired, AIA s36(2) does not deem that the 485 visa was still in operation on Monday (cannot deem a state of affairs that existed on an earlier date to be in existence on a later date).

## *Drafting Errors & Implications*

### PRINTING OR SIMPLE GRAMMATICAL ERRORS

- ❖ Incorrect cross-reference, obvious grammatical errors, spelling etc.
- ❖ Long established practice to read legislation in correct form (Pearce & Geddes).
- ❖ Parliamentary Counsel authorised to make minor editorial/presentational changes in most jurisdictions.

### IMPLICATIONS

- ❖ Too great a departure from the statutory text to achieve purpose may violate separation of powers (*Taylor* (2014) HCA).
- ❖ Longstanding controversy (*Brokman Iron* [2016] WASCA; *Ardrey [No 2]* [2017] WASCA).
- ❖ Tricky with principle of legality.
- ❖ Discretionary power (CL; IA PtVII; AIA Pt7).

### **Lord Diplock (*Wentworth* (1980 UK) as Modified by *Inco Europe* (2000) (UK):**

- ❖ Adopted in Australia (*SZJGV* (2009) HCA; *Taylor* (2014) HCA; *Brockman Iron* [2016] WASCA; *Ardrey* [2017] WASCA).
- ❖ Court may be justified where **abundantly sure** that it is:
  1. Possible to determine precisely the mischief/purpose of the provision.
  2. Clear that a mistake has been made (inadvertently overlooked).
  3. Possible to state the substance of the provision that would have been inserted.
  4. Consistent with the wording of the provision & the statutory scheme of the Act (DPP v Leys (2012) Vic) [**possible fourth condition**].
- ❖ Not sufficient – task remains the construction of the words enacted (*Taylor* (2014) HCA).
- ❖ Guidelines considered IAW conventional construction techniques (*Raj* [2014] WASC).
- ❖ Insertion cannot be too much at variance (*Taylor* (2014) HCA; *Raj* [2014] WASC).
- ❖ Should not be accepted that a purposive construction may never allow reading additional words with the effect of expanding its field of operation (Taylor (2014) HCA) [**Lord Diplock's test can be used to read additional words into, as well as read down, the text**].
- ❖ Distinguish between simple drafting error & a gap in the legislation (*Taylor* (2014) HCA).
  - Mahoney JA; *Tokyo Mart* (1988) NSW (cited in Taylor [2009] NSW):
    - Draftsman failed to provide for a particular matter (not permissible).
    - Draftsman failed to provide appropriate express words (permissible).

### STRAINING MEANING

- ❖ Meaning consistent with purpose but contrary to ordinary grammatical meaning (*Lumb & Christensen*).
- ❖ Text can be strained if the construction is reasonably open & more closely conforms with purpose (*Cooper Brookes* (1981) HCA).