

# LLB1160

## Problem

### question notes

#### **PLEASE READ:**

- On the following page is a step-by-step guide of how to navigate these problem question notes. They detail the relevant content that you will have to use for your response in the exam and what page to find it in my notes.
- Passages of text coloured **green**, such as that on page 3, are generally passages that have been pre-written to be able to copy them directly into the exam at a certain point in your response. They are generic statements based on important case law or legislation from this subject and should be mentioned no matter what the hypothetical situation is that you are given
- Passages coloured **red** are generally just important words or phrases that should be taken notice of, to help them pop out during the exam
- Passages coloured **blue** are merely side notes
- **NB:** It helps to have the step-by-step guide as a separate page from the rest of the notes in the exam.

1. Check jurisdiction & commencement date (*consider commencement in reference to the conduct in the PRQ*)  
(a) S15A of the AIA states: An Act commences on the date of assent except so far as the Act otherwise expressly provides.

#### Intrinsic Meaning:

1. Find operative provision – give it its ‘natural and ordinary meaning’ – (*top of p. 4 – Engineers*)
2. Consider ‘meaning of words’ subheadings (*definitions section, AIA, common expressions, technical and trade meanings etc. – p. 4-6*)
3. If there are typographical errors in the statute – correct/delete/substitute them (*mid-p. 8*)

Is there more than one interpretation open on the words of the act?

- (i) *If so, give effect to the one that best promotes the purpose of the Act*

Is there more than one purpose?

- (i) *If there is just one purpose, does your interpretation support the purpose?*

4. Provision is still ambiguous – state ‘ambiguity def. & (*at the start*) purpose/intention’ quote (*p. 3*)

#### Intrinsic context to ascertain purpose:

5. Then consider ‘intrinsic context’ using ‘Metropolitan Gas Co.’ (*top of p. 7*) – (*objects section, long title, definitions, consistency of meaning, surplusage, p. 7–8*)

#### Maxims/linguistic canons to apply:

6. Quote Project Blue Sky ‘before canons’ (*p. 3*)
7. Consider if any maxims are applicable to the words (*p. 9*)
8. Intrinsic/maxims are of some assistance, but need to find general v specific purpose (*Brown – p. 3*) – recourse to extrinsic material

#### Extrinsic context to ascertain purpose (*must be ambiguous*):

9. Quote 15AB/CIC/Saeed distinction – ‘requires ambiguity’ (*p. 3*)
10. Consider extrinsic material (*legislative history, amendments, regulations etc. – p. 10*)
11. Quote ‘after intrinsic and extrinsic’ (*p. 3*)

If there is more than one meaning and more than one purpose, select the **dominant purpose**

Is your reading of purpose supported by context? (*if not, use straining, readings up/down etc*)

Do purposes conflict or represent compromise? (*inconsistency between provisions – p.7*)

- (i) *If not, choose the dominant applicable purpose*  
(ii) *If yes, return to the provision – can you work out how the balance is struck?*

#### Presumptions:

- Check relevant presumptions (*fundamental CL rights, validity and effect, extraterritorial application, binding the Crown, retrospectivity, consistency with international law*) (*p. 11-13*)
- Check presumptions of particular Acts (*Amending Acts, Taxing Acts, remedial/beneficial*) (*p. 14*)
- Quote s 15AA ‘at the end’. more than one meaning open (*p. 3*)
- Use straining, reading up/down if need be (*bottom p. 8*)

#### Delegated legislation

- Simple Ultra Vires (*p. 15-16*), Grounds other than simple Ultra Vires (*p. 17*), interpreting sub. leg. (definitions section also applies to delegated) (*p. 18*)

**Conclude** – (*wrap up key findings of intrinsic/extrinsic, purpose, context, presumptions etc – court’s likely interpretation*)

## Interpreting the law – problem question notes

### Purpose/intention

- At the start - ambiguity definition: not restricted to lexical ambiguity, but includes when the intention of the legislature is doubtful – *Repatriation Commn v Vietnam Veterans' Assn*
- At the start: The court will attempt to find the meaning and resolve the ambiguity. Meaning will not be ascertained by assessing the psychological state of intention of the legislature (*Zheng v Cai*). Such approaches are now considered obsolete. Rather meaning is found through the modern preferred approach of giving effect to the provision's purpose in remedying a particular mischief, which includes a consideration of context (*CIC Insurance, Project Blue Sky, Lacey*).
- In the middle somewhere: Important to ascertain purpose of act as a whole as well as the specific provision under consideration (as they may be different/narrower) – *Brown*
- At the end – more than one meaning open: The interpretation which best achieves the Act purpose will be preferred to all other interpretations (*15AA AIA, Aus Education Union v Dpt of Education & Children's Services*). As such..... However, it is important to note that pursuing a purpose to the fullest possible extent may be contrary to the manifest intention of the provision, so..... – *Carr v WA*

### Context

CIC Insurance (intrinsic and extrinsic – provision or whole Act)

- Context should be considered at first instance (for intrinsic, not extrinsic – per Saeed)
- Context should be considered in its widest sense to include: the existing state of the law and the mischief the statute was intended to remedy (extrinsic, after ambiguity – per Saeed)

S 15AB of AIA (specifically for extrinsic – particular provision only [including objects section])

- Court may refer to extrinsic material to determine meaning of provision if ambiguous (**s 15AB (1)(b)**)
- **S 15AB(2):** such material includes: (e) explanatory memoranda, (f) second reading speech

Saeed (can only use extrinsic where there is ambiguity – provision or whole Act)

- Requires element of ambiguity, mandates that ordinary rules of construction must be exhausted before recourse to extrinsic material
- Before canons: 'canons' of construction' may lead the court to depart from the literal interpretation – *Project Blue Sky*
- After intrinsic and extrinsic: context may displace literal meaning to one which more closely conforms to the purpose of the statute (*Project Blue Sky*), provided it does not give the provision a meaning which it cannot reasonably bear (*Momcilovic v The Queen, 15AB(3)(a) AIA*)

## Intrinsic – Meaning of words

### Natural and ordinary meaning

- The words of a statute should prima facie be given their natural and ordinary meaning (*Engineers*)
- There may be several 'ordinary meanings' of a word but only one 'natural' meaning in its context

### Changing meaning over time

- **Connotation v denotation**
- New ideas/concepts that have developed since enactment of a statute can fit within its terms if they are within the contemporary 'denotation' of those terms
  - (a) But the connotation does not change from time of enactment – *R v G*
- Where legislation adopts a high level of generality, should be interpreted that the intention was that the particular application of the provision may vary over time – *Clark v Deputy Federal Cmmr of Taxation*

### Dictionaries

- It is permissible to have regard to 'well-known and authoritative' dictionaries to determine the ordinary meaning of a word – *R v Peters*
- A court is not bound by dictionary meanings, but they are a useful starting point

### Technical and trade meanings

- Technical legal words: where a word in a statute has an established legal meaning, it is assumed that it is used with that meaning unless the context indicates a different meaning – *Davies v WA*
- Technical non-legal words: whether a word which has a non-legal technical meaning will be interpreted as having that meaning or its ordinary meaning depends on the context. If it is used in the context of a statute dealing with that field in question, then it will have its technical meaning – *HR Products v Collector of Custom*

### Definitions section

- Recourse to the definition section to elucidate the term – *Gibb v Federal Cmmr of Taxation*
- Definitions also apply to any regulations under the act (subject to contrary intention) – s 46 AIA
- Limitations and qualifications on definitions can be read in ONLY IF necessary to give effect to the evident purpose of the Act, and should be altered only once read into the substantive enactment – *Kelly v The Queen*
- 'Means' – exhaustive
- 'Includes' – non-exhaustive

## Meanings of words established in AIA

### Person

- Defined to include a corporate body (s 2C(1) AIA)
- 'Individual' defined to mean a natural person (s 2B(1) AIA)

### Gender

- Subject to contrary intention, the AIA provides a word that indicates one or more particular genders shall be taken to indicate every other gender (s 23 AIA)
- 'Unless the context otherwise requires, the masculine includes the feminine and vice versa – *Automobile fire & general insurance co v Davey*.

### Plural or singular

- Subject to any contrary intention, words in the singular include the plural and words in the plural include the singular (s 23 AIA)
- Words emphasising singularity is not enough to exclude plurality – *Blue Metal Industries v Dilley*

### Distance

- AIA provides the measurement of distance shall be in a straight line on a horizontal plane (s 35 AIA)

### Time

- AIA: Depends on the words used e.g. "at", "on", "from", "after" (s 36(1) AIA)
- The AIA extends the period for something to be done if the last day for doing something is on a Saturday, Sunday or public holiday (s 36(2) AIA)
- 'Month' equals calendar month, not 28 days (s 2G AIA)
- Fractions of a day: where a day is included or excluded in a period specified in a statute, generally the whole day is so included or excluded – *Saunderson v Gregg*
  - (a) Exception: *two events occurring in one day*

### May, Must and Shall

- Stating something 'must' or 'shall' be done usually imposes an obligation (must = modern)
- Both have their ordinary meanings – *Posner*
- A provision which uses the word 'may' is prima facie permissive – *Ward v Williams*
  - (a) i.e.: there is discretion - (s 33(2A) AIA)

### Service of documents

- Provides that serving a document to a natural person must be done by delivering it to them personally, or by leaving it at or sending it by prepaid post to their last known business/residential address (s 28A AIA)

### Contrary intention

- The AIA applies subject to any contrary intention (s 2(2) AIA)
- Contrary intention need not be expressed or by necessary implication, but may appear from the context, scope, nature and subject matter of legislation

.....*The rest of the problem question notes have been omitted from this sample document, but are provided in the full version. Sample essay responses below.....*

# **LLB1160 Essay**

## **notes**

Discuss the court's approach to the *principle of legality*, how is it used to ensure that interpretation of statutes does not interfere with fundamental common law rights?

1. Explain the principle of legality

- The principle of legality is a tool of statutory interpretation which presumes that in the absence of clear and unambiguous language, parliament does not intend for a statute to abrogate any established fundamental CL right.
- The rationale of the principle is that it is in the last degree improbable that Parliament would intend to violate CL rights unless they make such an intention unambiguously clear (*Potter v Minahan*).
- While parliamentary sovereignty dictates that legislation prevails over the common law generally, CL rights and principles which attract the label of 'fundamental', usually those associated with the protection of liberty, require a higher threshold of clarity in the intention of parliament to alter such rights by legislation.
- However, it is often unclear what the criteria for a fundamental CL right is, and the strength of the presumption with regards to certain rights is not impervious to change, depending on how important the protection of that particular right is regarded at a particular time (*Bropho*).

2. Explain how it is used by the courts to protect fundamental CL rights

- In various authoritative statements in recent years, most prominently in *Coco v The Queen*, the courts have expressed that when interpreting legislation, in order to breach fundamental CL rights there must be an indication or manifestation in the legislation that parliament determined upon doing so.
- While in the case law, ambiguity is usually present in instances where the principle has been invoked, a higher threshold has been suggested by *Bourke*, as evidenced by Gleeson CJs dissenting judgement in *Al-Kateb*, that even where unambiguous, there must be evidence that the legislature directed its attention to, and consciously decided upon, the abrogation of fundamental CL rights.
- In *Al-Kateb v Godwin*, the HC found that the indication of legislative intent in s 196 of the *Migration Act*, which mandated the continuation of detention until granted a visa or removed from Australia, was too clear to presume that parliament did not intend to abrogate personal liberty and thus Mr Al-Kateb's indefinite detention was considered lawful as no other country would accept him.
- The threshold for clarity of parliamentary intent to curtail a right has been said to be less reliant on the nature of the right itself than the extent of intrusion upon it (*Al Masri*).
- Even where intention to interference with a right is made clear, if the legislative purpose could still be achieved by partial interference only, then the courts will assume that parliament did not intend to fully override the fundamental right.



### Governing relationship between legislature, executive, parliament

- The principle plays a fundamental role in governing the relationship between the judiciary, executive and the parliament. As these fundamental rights are well known to and respected by the parliament and courts, it has been described as an aspect of the rule of law to assume that absent of express indication, such longstanding rights are to be unaffected (*Gleeson CJ – Al-Kateb*)

The consequence is that the legislature must squarely confront the political costs of its actions, (*French reading*). In this way, the principle has been said to have a constitutional character by ensuring that parliament does not leave it up to the courts to assume or fill in policy matters via interpretation (*Momcilovic v The Queen*). In other words, if intended to violate CL rights, such policy should be made perfectly clear in the legislation, or otherwise be assumed to not exist.

- Conversely, it has been noted that a contemporary controversy of judicial activism is for the judiciary to respect parliamentary supremacy and by extension, the Constitutional boundary imposed by the principle, to remember that the presumption is rebuttable and clear intent manifested in legislation must prevail (*Spigelman reading*).
- Overall, the principle encourages a process of reciprocal restraint between the courts and parliament, requiring clear statement on the one hand, and respect of that clear statement when it is present on the other.

Discuss the various approaches which have been observed to the interpretation of legislation in light of *international law*. Include a discussion of Kirby's interpretive principle

**1. Traditional view**

- The traditional view when interpreting legislation in light of international law is to only do so when such international law or treaties have been implemented into domestic law by express inclusion.
- Where this is the case and the terms are clearly reproduced in domestic law in the same form as in the international law or treaty, the meaning of those words is to be ascertained by reference to the principles applicable to the interpretation of international agreements. I.e.: use the '*Vienna Convention*' (**Textbook, p 273**). Nevertheless, it is how these laws are implemented into the domestic legislation that is litigated, not the international instrument itself.
- Further, where there is ambiguity in a statute, it may be read in light of Australia's international treaty obligations, but only if that statute was intended to be consistent with such obligations.
- While recourse to certain extrinsic material when interpreting the Constitution is permissible without the presence of ambiguity, the HC, and courts in general when interpreting legislation, have exercised a high degree of caution with international instruments so as to avoid an overextension of the role of the judiciary.
  - (a) **McHugh J** commented in *Al-Kateb* that 'it is not the role of the courts to determine whether the course taken by parliament in implementing legislation is contrary to international law'.

**2. Kirby's interpretive principle**

- An alternative view which has been posited regarding the use of international law in interpretation is that of Justice Kirby's interpretive principle. In interpreting the Constitution and by extension statute law, Kirby argues that they should be read in light of international law and specifically, human rights, without departing from the legal text.
- From this viewpoint, recourse may be had to international instruments as a 'special kind' of contextual principles forming part of the overall context of the Constitution or particular Act, irrespective of whether or not parliament clearly intended to legislate in accordance with such international instruments.
  - (a) *E.g.: Kartinyeri v Commonwealth* (1998) – Kirby J (dissenting): **race power not to be interpreted for detriment or adverse discrimination against people of race**
- Kirby sees this principle as a constitutionally legitimate exercise in judicial creativity. He argues that the judicial role in interpreting the constitution, as well as domestic legislation in the presence of ambiguity, necessitates an endeavour to do so in light of the growing body of international human rights laws and principles.
- Overall, this approach of utilizing international law as part of the greater context in which statutes and the constitution should be construed may have some weight as a legitimate method of interpretation

### 3. A critique of Kirby's interpretive principle

- A common criticism levelled against Kirby's principle is that while ostensibly drawing on international law as if another element of the political, social and economic developments in which the Constitution, and by extension statute law, is to be construed, its true purpose is merely as a means to achieving natural justice, dignity and human rights.
- **Beck** argues that Kirby's attempt to ground his principle in the greater context within which the Constitution is to be construed is not convincing. He argues that it goes beyond merely using context to elucidate the proper meaning and application of the Constitution and instead attempts to extend its meaning and scope to promote the human rights principles manifested in international instruments as ends in themselves.
- Kirby does attempt to draw legitimacy for his principle from the Constitution, however it is noted that the Constitution was not created with an expectation of protecting rights of individuals and there appears very few provisions that may be characterised as guaranteeing such rights (**Beck**).
- From this perspective, it appears that a focus on the human rights principles underpinning international law, rather than those laws themselves, places such principles on a plane above and independent of positive law. A pursuit of natural law under the guise of 'the wider context' of the Constitution and statutory provisions undermines parliamentary sovereignty and oversteps the judicial function.

### 4) Extra: (would put before Kirby's principle, include if question is slightly different)

- There is also another approach which has received minimal attention but gained prominence in the controversial case of *Toeh*, which held that an Act can be subject to international treaty obligations even if that particular Act does not mandate that the treaty be taken into account. It is enough to create a 'legitimate expectation' that the Act would operate in accordance with treaty obligations.

*Toeh* (1995) – Considered the CROC (Convention for the Rights of the Child)

- (a) Where the legislation is consistent with terms of international instrument – the obligation should be used
- (b) As a result, the expressed principle is a canon of construction, not an importation of rights or obligations as such
- (c) Ratification is a positive statement by the executive that they will act in accordance with the obligation (absent of contrary intention) – this creates a legitimate expectation
- (d) Not necessary that a person seeking to pursue this 'legitimate expectation' should be aware or 'personally entertain' the expectation – it is enough for the expectation to be reasonable and there are adequate materials to support compliance
- (e) *Extra note: the executive had ratified the CROC treaty and that's why they considered it, but there was no express mention in the relevant legislation*