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## WEEK 1: WORDS

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### Step 1: Interpreting the offence provision

**Starting point:** “Construction begins with the words of the section. It requires reference to their ordinary meaning, their context, the purpose of the Act and the purpose of the section”. (*Hogan v Hinch* [2011] HCA 4, [5] per French CJ, see also: *Project Blue Sky*).

The relevant ways to read a statutory offence's words:

#### 1. LANGUAGE

Read statutes according to their ordinary meaning, that is, in the same way we would read any words. Language is a prerequisite to using any other relevant method of interpretation.

##### ♥ **Remember:**

- To find and take into account other relevant statutory words → **Definition section**; exceptions.

##### ♥ **If not defined in the provision:**

- Read according to its ‘*natural and ordinary meaning*’ as per the key Australian precedent *Coleman v Power* (HCA, 2004)

##### ♥ **Problems:**

- People of the Parliament make mistakes with language (E.g. Police Act 1892 (WA) s 84)
- Not all language is ordinary (technical meanings of words)
- Complexity because most words carry several possible meanings

##### ♥ **Method to avoid some of the flaws of relying on dictionaries**

- Corpus linguistics: draws on databases of examples of actual prose to explore the prevalence of particular usage of a word.
- Dictionaries - If helpful – look into dictionaries for guidance on meaning → Note: need to look into more than one if using this technique. (Often this is not very helpful, issues also with that statutes are not dependant on what dictionary writers think words mean). However, dictionaries have some risks: multiple definitions; ambiguity/ vagueness; insensitivity to context.

#### 2. CONTEXT

What is the best usage among numerous possible usages which works best and fits best with the context?

- ♥ ***Gummow and Hayne JJ* (*Coleman*; 174): “...not to be construed by taking the language of the section & divorcing individual elements from the context in which they appear.”**

##### ♥ **What counts as context?**

- The rest of the statute: other provisions, structure, notes and examples
- Other statutes
- Extrinsic materials

##### ♥ **Problem:**

- Misleading nature of context
- Technical assumptions peculiar to Statutes (*Ejusdem generis* rule → later general words are read as limited to the same class as earlier more specific words)
- Complexity

## WEEK 2: CHOICES

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Difficulties of statutory language:

- ◆ Can be ambiguous
- ◆ Can be absurd

### Choosing boundaries

However, the role of people in criminal justice made it possible for nearly everyone to live with this problematic statutory provision.

- ◆ Discretionary permission to do otherwise criminal acts but provision was incomplete – no criteria who should get a permit – i.e. flexible regime & each manager could develop their own rules → Good or bad?
- ◆ Discretionary enforcement – police can decide who to arrest and most of the time they only arrest those who persists despite a warning.
- ◆ Discretionary prohibitions

Basically, despite being detailed, the actual words of a provision are not determinative of the question of what was or was not permitted in Townsville malls, because of the significant role played by people in regulating conduct in pedestrian malls.

### Choosing outcomes

The Australian system's multiple discretions are not concerned merely with matching prescribed outcomes to proscribed behaviour, but rather with the continuous management of potential and actual offenders. This approach has laudable effect of personalising the criminal justice system, including ensuring that mild people pay little or no price for some criminal conduct. However, as Coleman's case illustrates, such a system may lead to serious outcomes for unusual people, no matter how trivial their transgression.

### Policing choices – how to deal with a possible criminal

- ◆ Policing decisions include risk management, swift judgements and the immediate control of situations.
- ◆ And they are not the exclusive province of police officers.
- ◆ They are driven primarily by social and institutional norms, rather than transparent legal rules.
- ◆ When to police? – Crimes Act 1914 (Cth): S 3W (Page 63 TB)
  - ♣ Despite these provisions, the power's exercise is lawful even if later events show that the police officer's suspicion or belief was inaccurate.
  - ♣ 2 requirements: criminality and purpose
- ◆ How to police?
  - ♣ A police power is a permission to breach other laws. An arrest power, for instance, allows someone to stop and control someone else's body, despite tort and criminal laws against assault.
  - ♣ How far can police go? One answer arises from the rules of statutory interpretation – any breach of common law rights (or IHRL) must be an express or necessary part of the statutory power. A further partial answer is that police powers are limited to their purpose.
  - ♣ Limitations on the federal arrest power – S 3ZC (Page 67 TB)

## WEEK 3: CONDUCT

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### Introduction

- ♥ One of the GCL's foundational concept: **Conduct**
- ♥ Chapter's illustration: driving offences (*Harvey v Police*, SASC, 2009)
- ♥ The body of GCL in **Victoria** → common law (applying rules developed in decided cases)
- ♥ GCL can be good and bad at the same time
- ♥ GCL – generalised set of suggested rules on how you should apply criminal offences.
  - ◆ They are not mandatory rules – just a set of tools in understanding offence provisions – basically they are a starting point
  - ◆ If there is a conflict between GCL and statutory provision, the latter prevails.
  - ◆ No difference between GCL and common law for conduct.

### Problem of conduct

- ♥ See *Harvey's* example – The RTA 1961 prohibits **driving** in certain circumstances and Harvey was a drunk passenger in an unregistered and uninsured car who started the ignition and turned the steering wheel. Did these particular acts amount to **driving**?  
2 different ways to determine whether someone breaches the criminal law's e.g. conditional prohibition on driving.

- ♥ Defining conduct
  - ◆ The word **drive**, like many other ordinary words, describes very **complex behaviour**. No particular sort of movement is determinative of driving. Nor is it determined by the many things that Harvey **didn't do** such as sitting in the driver's seat; successfully starting the engine; pushing the accelerator. The court held that courts have been unable to develop a single test with which to determine whether a person was driving a vehicle. It involves a finely balanced decision. It was held that he was not driving because of his overall lack of access to many of the vehicle's controls, the brevity of the car's journey.
- ♥ Attributing conduct (Responsibility for conduct)
  - ◆ **Victoria** → Common law addresses the issue of who is responsible for conduct
    - ♣ *He Kaw Teh*, as per *Brennan J* at 570 → Voluntariness and general intent are generally implied in a statute creating an offence as mental elements applicable to the act involved in the offence.
    - ♣ However, application of this common law rule always remains a question of statutory interpretation of each offence provision.
    - ♣ In **common law jurisdictions (Victoria)**: the prosecution must prove that the defendant intended the conduct, unless the offence provision expressly or implicitly provides otherwise.
  - ◆ **Commonwealth's GCL**: Federal Criminal Code → rests on 3 foundational concepts
    - ♣ **Elements**
      - *Section 3.1 of Criminal Code (Cth)*
        - 1) An offence consists of **physical** elements & **fault** elements.

2) However, **the law that creates the offence** may provide that there is no fault element for 1 or more physical elements.

3) **The law that creates the offence** may provide different fault elements for different physical elements.

❖ **Distinction between physical and fault elements<sup>1</sup>**

- **Section 3.2 of CC (Cth) – Establishing guilt in respect of offence**

In order for a person to be found guilty of committing an offence the following must be proved:

a) The existence of such physical elements as are, **under the law creating the offence**, relevant to establishing guilt;

b) In respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

- The **difference** between is not expressly stated in the federal code, however, it does list types of each sort of element:

- **Section 4.1 Physical Elements**

1) A physical element of an offence may be:

a) conduct; or

b) a result of conduct; or

c) A circumstance in which conduct, or a result of conduct, occurs.

2) Conduct means an act, an omission to perform an act or a state of affairs.

Engage in conduct means:

a) Do an act; or

b) Omit to perform an act.

- **Section 5.1 Fault Elements**

1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

❖ **Distinction between different types of physical elements.**

- 3 types: see [section 4.1](#)

**Procedural Rules for all elements (whether physical or fault):**

♥ **Section 13.1 – Legal burden of proof – Prosecution**

1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

♥ **Section 13.2 – Standard of proof – Prosecution**

1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

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<sup>1</sup> The precise **distinction** between physical and mental elements is actually between things that are on the outside and inside the conscious part of the defendant's brain. **Physical elements** cover:

- Things happening outside the defendant's body – e.g. Car's lack of registration; Harvey's lack of license
- Interactions between the defendant's body & the outside world – e.g. Harvey turning the key
- Things happening inside the defendant's body but outside his conscious brain – e.g. Harvey flexing his wrist or alcohol in his bloodstream.

**Fault elements** are things that happen in defendant's brain or assessments of what he did or thought.

**Remember:** [section 3.2](#) provides that the physical elements are always found in the law creating the offence, while for fault elements, it might be in offence provision or the GCL.

**Common law terminology:** Physical elements → *actus reus*; mental elements → *mens rea*

- 2) *Subsection (1) does not apply if the law creating the offence specifies a different standard of proof*

**Default fault requirement for all conduct: Intention**

**Conduct** is one of the **physical** elements. As per the running example of this topic, **drive** would be the conduct element of all the offences Harvey was charged with.

**Section 5.6 Offences that do not specify fault elements**

- 1) *If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, **intention** is the fault element for that fault element.*
- ♣ Proving an intention (what is going on in someone's brain) → By observing what they do and the circumstances they do it in.
    - Remember: Questions of proof of fault elements must be resolved by reference to the burden and standard of proof.
    - Court must acquit if it has a reasonable doubt about whether or not the defendant has the required intention.
    - Both the criminal burden and standard of proof preclude any reliance on a legal presumption that people have or don't have a particular state of mind. It is a question of fact.
  - ♣ Meaning of intention – **Section 5.2**

*(1) A person has intention with respect to conduct if he or she means to engage in that conduct.*

    - *Harvey can only be regarded as having intended to drive if he actually wanted to drive.*
  - ♣ Meaning of conduct – Not mere bodily movements – extends to<sup>2</sup>:
    - A consequence which the bodily movement is apt to effect and is inevitable and which occurs contemporaneously with the bodily movement (Falconer)
    - The circumstances that are the integral part of the action and which give it its character (He Kaw Teh)
  - ♣ When unintended conduct will suffice for an offence? When the offence provision expressly provides so. If Harvey was prosecuted under this rule, the prosecution would not have to prove that he intended to drive the car.
    - **Section 3.2 (2) & (3)**
    - **Section 6.1 Strict Liability**

*(1) If a law that creates an offence provides that the offence is an offence of strict liability:*

      - a) *There are no fault elements for any of the physical elements of the offence...*

In jurisdictions that do not have section 6.1 → The equivalent common law rule merely describes intention as a 'general'

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<sup>2</sup> It was not enough to prove that Harvey meant to turn the key or the wheel, but nor is the prosecution required to prove that Harvey intended for the car to lurch forward. Rather, the prosecution had to prove that Harvey intended, not only his bodily movements, but their inevitable, contemporaneous consequences – the starter motor starting, and the car swerving – and the integral circumstance that the handbrake was not on (and hence could start moving without pressing the accelerator). The upshot is that Harvey could indeed be regarded as meaning to steer, but could not be regarded as meaning to start the car moving in the first place.