

JURD7141 Principles of Public Law

Problem Method and Statutory Interpretation

Contents

- Statutory interpretation: the method
- The interpretation provisions
- The authorities and the line each is cited for
- The universal problem method
- Problem scaffolds with sentence stems

A. The method

PART A, IN ORDER

1. Before writing anything, work out whether the hypothetical statute is NSW or Cth from the title tag, and lock in the right interpretation Act for the whole answer: *Interpretation Act 1987* (NSW) ss 33, 34 for a NSW statute, *Acts Interpretation Act 1901* (Cth) ss 15AA, 15AB for a Cth one. Citing the wrong one is a pure giveaway of marks.
2. Isolate the exact question asked (has X contravened s 9(1)? does the Secretary have power to do Y? is Z an 'occupier'?) and underline the single word or phrase in the provision whose meaning decides it. Everything you write must earn its place against that word.
3. Open with one sentence that answers the question in the terms the question uses, then one sentence flagging the two tasks: what the provision means, and how it applies to these facts. Two sentences, about 40 words, no essay introduction and no restatement of the facts.
4. Do the text first and do it properly. Set out the ordinary and grammatical meaning of the contested word, its grammatical setting in the provision (which words it qualifies, whether it is exhaustive or inclusive, 'means' versus 'includes'), and any definition in the Act's dictionary or definitions section. Cite *Alcan (NT) v Commissioner of Territory Revenue* for the proposition that the text is the surest guide to meaning and that construction begins and ends with the text.
5. Still within text, check how the same word is used in other provisions of the Act and whether a different word is used elsewhere for a related idea, and draw the inference that the drafter meant something different. Cite *Project Blue Sky v Australian Broadcasting Authority* for the requirement that the language be construed in context and so as to be consistent with the language and purpose of all the provisions.
6. Name the indeterminacy out loud in a sentence. Say whether the word is ambiguous (two candidate meanings), general (a criterion of wide but uncertain reach) or vague at the margin, and identify the two rival constructions as construction A and construction B. This sentence is what turns a description into legal analysis, and it also sets up s 34(1)(b) NSW or s 15AB(1)(b) Cth later.
7. Turn to context and purpose together, not in separate blocks. Cite *CIC Insurance v Bankstown Football Club* for the point that context is used in its widest sense and from the outset, not only after an ambiguity is found, and then run the context: the objects or purpose provision, the Part and Division in which the provision sits, headings, the surrounding sections, any penalty, and the mischief the Act addresses.
8. Derive the purpose from the statute itself and say where you got it. Cite *Certain Lloyd's Syndicates* for the rule that the purpose must be derived from what the legislature has said in the Act and not judicially imputed, and cite *Lacey v Attorney-General (Qld)* for the point that legislative intention is a conclusion reached after applying the rules of construction, not an assumption you start with.
9. Apply the purposive command expressly and quote its terms. For NSW, s 33 requires the construction that would promote the purpose or object underlying the Act to be preferred to one that would not; for the Cth, s 15AA requires the interpretation that would best achieve the purpose or object. Then say which of construction A and construction B that preference selects, and why.
10. If the problem hands you an extrinsic source (a second reading speech, explanatory note, report), use it under s 34 NSW or s 15AB Cth and name the limb you are relying on: s 34(1)(a) or s 15AB(1)(a) to confirm the ordinary meaning conveyed by the text, s 34(1)(b) or s 15AB(1)(b) to determine the meaning where the provision is ambiguous or obscure or where the ordinary meaning leads to a manifestly absurd or unreasonable

Part E: Problem micro-scaffolds

One per issue. The trigger tells you when it is live, the steps give the test in order, the stems are sentences you can write straight out with the facts filled in, and the traps are where marks are lost.

Implied freedom of political communication

TRIGGER (spot it when ...)

A statute, by-law or regulation that stops, licenses, fines or conditions speech about government or politics. Concrete cues: a permit or approval needed before a rally, march, ad or broadcast; a ban on political advertising in a window before polling day; a move-on power, exclusion zone or anti-protest offence (forestry, business premises, clinics); an offence for insulting, offensive or threatening words directed at police or officials; caps or bans on political donations or on a class of donor; a prohibition on a group or an employee commenting on government policy; a defamation or secrecy rule applied to criticism of an MP or a department. Also cue on the person: someone prosecuted, fined, refused a permit or removed from a place for communicating about a candidate, party, policy, government decision or public office holder. State and Territory laws count, not just Cth laws.

RUN IT IN THIS ORDER

1. Frame it as a limit on legislative and executive power, not a personal right (*Nationwide News*; *ACTV*; *Lange*). The question is whether the impugned provision is beyond power, so name the exact section and the action taken under it.
2. Name the source of the implication: ss 7, 24, 64 and 128 (representative and responsible government). The freedom protects communication on government and political matters at federal, State and local level, and binds State and Territory laws in the one integrated system (*Lange*).
3. *Lange* Q1, part one: characterise the communication as political. Does it bear on the choices electors make, or on the conduct of government and public officials? Purely commercial or private speech falls outside.
4. *Lange* Q1, part two (burden): does the law effectively burden that communication in its terms, operation or effect? Identify who is burdened and how (content, speaker, manner, time, place). An indirect or partial burden is enough. If there is no burden, say so and stop.
5. *Lange* Q2 (legitimate purpose, as reformulated in *Coleman v Power*): is the law's purpose, and the means adopted, compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (*McCloy*)? State the end the law actually pursues; an end aimed at suppressing political communication itself is not legitimate.
6. *McCloy* proportionality stage 1 (suitable): is there a rational connection between the means and that purpose?
7. Stage 2 (necessary): is there an obvious and compelling alternative, equally effective but significantly less restrictive? Name the alternative concretely, do not just assert one exists.
8. Stage 3 (adequate in balance): weigh the importance of the purpose against the extent of the burden, using severity, content neutrality, prior restraint and timing. Compare the calibration in *ACTV* (targeted ban on core electoral speech, invalid) with *Brown v Tasmania* (broad protest law applied to political protest, invalid for want of necessity and balance).
9. Consequence and tentative conclusion: if invalid, the prosecution, fine or refusal falls with the provision, subject to reading down or severance. Add a short 'if the court found

8. Consequence: s 109 says the State law is 'invalid' to the extent of the inconsistency, but the settled reading is that the State law is rendered inoperative rather than void ab initio, so it revives if the Commonwealth law is repealed or amended. Identify exactly how much of the State provision is displaced.
9. Conclude provision by provision, and say what happens to the prosecution, penalty, refusal or claim the facts actually turn on.

SENTENCE STEMS (fill the blanks)

- Both laws must be valid before s 109 engages: the ____ Act ____ (Cth) is supported by s 51(____), and the ____ Act ____ (NSW) is within the plenary grant recognised in *Union Steamship*.
- The collision is between s ____ of the Commonwealth Act, which ____, and s ____ of the State Act, which ____.
- On simultaneous obedience, ____ could comply with both by ____, so obedience to both is (impossible / possible) and this limb (is / is not) made out.
- Even if both can be obeyed, the State provision alters, impairs or detracts from the operation of the Commonwealth provision because ____ (*Clyde Engineering v Cowburn*; *Momcilovic*).
- Section ____ of the Commonwealth Act confers a (right / liberty / authorisation) to ____, and s ____ of the State Act takes that away by ____, which is the conferred-rights form of direct inconsistency.
- On indirect inconsistency the field is best drawn from the Commonwealth Act as _____. Its ____ (detailed licensing scheme / objects clause in s ____ / evident need for national uniformity) indicates an intention to state the law on that field (exhaustively / non-exhaustively), so the State law (does / does not) intrude, notwithstanding that its terms are consistent.
- Section ____ of the Commonwealth Act provides that it is not intended to exclude or limit the operation of State laws, which negatives any covering-the-field argument, but it cannot cure the direct inconsistency identified above.
- Tentatively, s ____ of the State Act is inoperative to the extent of the inconsistency. Although s 109 speaks of invalidity, the accepted effect is that only ____ is displaced, and the provision would revive on repeal of s ____ of the Commonwealth Act.
- It follows that the (prosecution / penalty / refusal) of ____ under s ____ cannot stand while the Commonwealth provision remains in force. If the court drew the field more narrowly as ____, the State law would operate and ____ would follow.

TRAPS

- Running s 109 before establishing that both laws are valid, which throws away the easy marks in characterisation and *Union Steamship*.
- Saying the State law is 'invalid' or 'struck down' full stop, when the accepted effect is that it is inoperative to the extent of the inconsistency and revives on repeal of the Commonwealth law.
- Asserting inconsistency from mere difference or duplication (a harsher State penalty, an overlapping offence) without committing to a limb and applying it.
- Drawing the field at the highest level of generality ('road safety', 'the environment') so that every State law intrudes, instead of drawing it from the Commonwealth scheme's actual detail.
- Treating an express 'not intended to exclude State laws' clause as curing everything, when it answers only the covering-the-field question.

- The nationhood argument would be that ____ is peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation (*Pape*; *Davis*), but *Pape* turned on a short-term national fiscal emergency, and here ____ is ____, so the analogy is ____.
- Even accepting a capacity to contract and spend, *Williams* [No 1] holds that a program of this kind needs statutory authority beyond an appropriation, and on these facts the only appropriation is ____ with no authorising provision.
- Because the act interferes with ____'s liberty (property), it is not a bare capacity: on Gageler J's reasoning in *Plaintiff M68* it must be prerogative or statutory, and in *M68* the detention was supported by s 198AHA rather than bare s 61. The equivalent provision here is ____ (there is none).
- Section 61 reaches only the execution and maintenance of the Constitution and the laws of the Commonwealth, so ____ must show that a law to the same effect could rest on ____, for example s 51(____), and that the action does not offend responsible government or Ch III.
- The better view is probably that ____'s act was unauthorised, so ____ could seek a declaration and an injunction, or prohibition under s 75(v) or s 39B. If a court instead accepted the ____ characterisation, the act would be within s 61 and ____ would be left with only ____.

TRAPS

- Jumping to s 61 when a statute is on the facts. Statute first, every time, and construe it before reaching for prerogative or nationhood.
- Treating an appropriation as authorisation. *Williams* [No 1] is about the need for a statute, not about whether the money has been appropriated.
- Inflating nationhood into a general welfare or emergency power. Keep it to the *Pape* and *Davis* formulation, and remember *Davis* also polices proportionality where the measure is coercive.
- Inventing a prerogative, or saying statute repeals it. It is a historically fixed residue that cannot be enlarged (*Bancoult*), and statute displaces or suspends it while the statute stands (*De Keyser*) without abolishing it.
- Reading *Plaintiff M68* as authority that s 61 supports detention. The majority relied on s 198AHA, inserted retrospectively; the Court largely avoided deciding whether non-statutory power could have done the work.

Choosing the accountability mechanism

TRIGGER (spot it when ...)

A client is unhappy with a government decision and asks what can be done. Cues: the decision was harsh, unfair or simply wrong on the facts but plainly within power; or a hearing was denied, the decision-maker prejudged, took an irrelevant consideration into account or asked the wrong question; or there was delay, a lost file, rude treatment, no reasons and an unanswered complaint. What the client wants is the giveaway: the outcome changed, an apology, compensation, documents, or an explanation. Also: a Minister refuses to produce papers or answer questions, or an upper House resolves to compel documents and the Minister claims legal professional privilege, public interest immunity or Cabinet confidentiality.

RUN IT IN THIS ORDER

1. Name the defect precisely before naming a mechanism: legality (power exceeded, jurisdictional error, procedure breached), merits (lawful but wrong or unfair on the facts,