

LAWS4110: INTERPRETATION

key

Start of topic

Section in code

Element

case

or (case)

WHAT IS LEGAL INTERPRETATION?

- “...the legally authoritative resolution of questions about what the content of the law is in its application to particular cases.”
 - Scott Soames, 'Toward a Theory of Legal Interpretation' (2011) 6(2) *New York University Journal of Law & Liberty* 231, 231

INTERPRATIVE THEORIES

- Literalism: ‘no blood will be shed if you surrender’
 - The literal rule declares that the literal or ordinary meaning of the words used must be followed, whatever the result
- Textualism: prohibition on the ‘importation ... of ... immigrants ... under contract ... to perform labour in the United States.’
 - Focuses only on the words of the statute
- Intentionalism: prohibition on the ‘importation ... of ... immigrants ... under contract ... to perform labour in the United States.’
 - Go back to when the statute was being made and look at what the meaning was at the time it was made
- Purposivism: prohibited weapons includes guns ‘capable of firing bullets in rapid succession.’
 - Object of this act
- **Australia adopts aspects of textualism, intentionalism and purposivism**

AIM OF STATUTORY INTERPRETATION

- What is legislative intent?
 - An objective construct - what the legislature is *taken to have* intended the words to mean.
- It is not
 - Legislative intent is not the collection of the subjective intentions of the individual members of parliament,
 - It is an attribution to parliament,
 - It is *not* equivalent to the *purpose* of the statute,
 - It is useful as a guiding notion that reminds the interpreter that they operate under institutional (e.g.: separation of power) constraints
- When the meaning of a word in a statute is contested, the interpretation process may assist in resolving the source of doubt. The goal of this approach is to ascertain the objective legislative intent (**Project Blue Sky**)

PROCESS TO FIND LEGISLATIVE INTENT

- “The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense...”
 - Context of sentence its in, statute its in and wider context
- Identifying doubt and text
 - “Statutory construction when meaning is contested, is not usefully described as the resolution of ‘ambiguity’ The reality is that statutory interpretation is all about choice of available meanings.”

AMBIGUITY

- Semantic
 - A word has more than one meaning

- Syntactic
 - o Arrangement of the words that give rise to the ambiguity
- Can arise from indefinite/open textured
 - o Example: *Criminal Code* (Cth)
 - “A person is guilty of an offence if ... the person uses a postal service ... in a way that reasonable persons would regard as being ...menacing, harassing or offensive.”
 - Not completely defined the full extent of the words

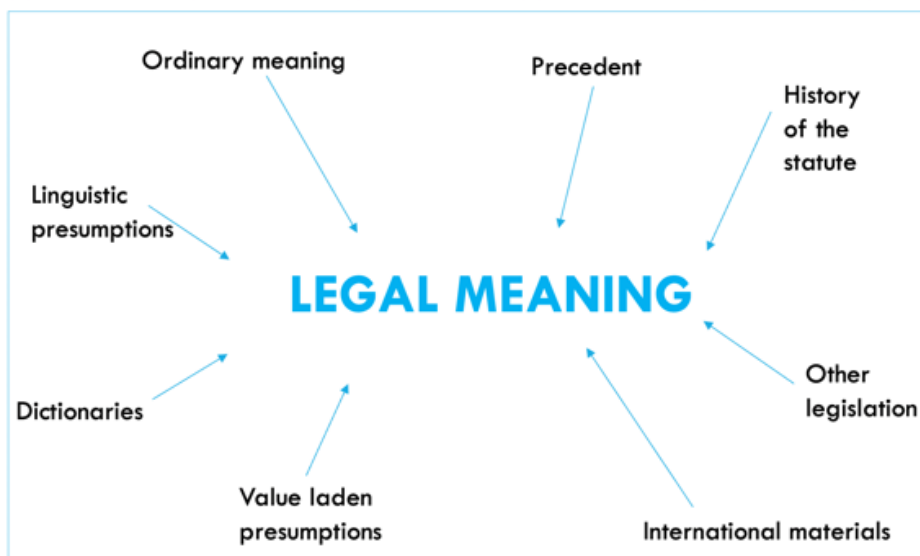
ELLIPSIS

- We say things making assumptions about what our audiences understand
- Need to be careful about making these assumptions unless they are backed up by evidence
- *The plausible alternative interpretations of text are sometimes called the “constructional choice”*

CONSTRUCTIONAL CHOICE

- Choice between possible meanings of statutory text
- Rival contentions as to meaning of statutory text
- The ‘text’ refers to the words of the legislation whose meaning is in issue.
- Example
 - o Statutory rules: ‘No vehicles in the public park’
 - If it’s a bicycle, does this constitute a vehicle?

LEGAL MEANING



- The “ordinary” or “natural” meaning of the words in question is the presumptive starting point
 - o Not a rule it is a presumption
- Ordinary meaning refers to the meaning which the words ordinarily convey
 - o May be ‘shades’ of ordinary meaning
 - o Word may not have an ‘ordinary’ meaning (
- If the text is not defined, dictionaries may be useful interpretative aid.
 - o The common law has ‘long approved of dictionary definitions to assist in statutory interpretation’
 - o High Court of Australia typically uses Oxford or Macquarie.
 - o Dictionaries to be used with caution – no substitute for interpretative task:
 - not bound by the dictionary meaning
 - dictionary offers ranges of meaning

- dictionaries give abstract meaning without any context to the statute so USE WITH CAUTION
- Expert evidence *cannot* be given (i.e., is not admissible) as to *ordinary* meaning

SAME WORD, SAME MEANING

- Words are presumed to be used consistently within an Act
- Logical converse – presumption that different words in a statute are to be taken as intending a different meaning
- As with presumption of consistency, can be rebutted:
 - By context or other interpretative factors. Eg: *Zhang v Minister for Immigration and Citizenship* [2007] FCAFC 151, [26]-[30]
 - notice was not sent to “last residential address, business address or post box address”
 - Choices of meaning: “post office box address” or “postal address for service”
 - Differences attributed to, at least in part, frequent amendment.
 - Differences attributed to different drafting style. See s 15AC of AIA.

CONTEXT

- Clues in the statute that indicate what the text mean
- When the text is said/where it is said
- Contextual matter must be:
 - recognized by legislative or common law as *legitimate interpretative criteria*, and
 - *relevant* to the particular interpretative task.
- Context *must* always be considered and must be considered *from the start* of the interpretation process.

CIC insurance Ltd v Bankstown Football Club Ltd

- “[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.”
 - No uncertainty or ambiguity on face of text is needed to consider context,
 - Comments in some mid-2000 High Court cases were taken to suggest a more restricted role for context but these comments have since been clarified by HCA
 - However, contrary to the restricted role, the High Court of Australia position now clear based on the *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, which confirms CIC Insurance case position
- Contextual matters may supply *indications* of meaning (e.g. may indicate that a particular meaning is intended).
- Degree of assistance of contextual indicia will depend on evaluation of weight of indicator in the context of other indicia.
 - “Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.” *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (the Court) (citations omitted)

COMPONENTS OF A STATUTE

- What is context?
 - “In ascertaining the reasonably intended meaning of Parliament context is, literally, those matters to be considered (simultaneously) together with the text. Context can give words an

interpretation that is the opposite of their ordinary meaning and grammatical sense.”

(emphasis added) *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064, [64] (Edelman J)

- Intrinsic context: text in the context of the whole Act:
 - o “The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”” (**Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355, [69] (McHugh, Gummow, Kirby and Hayne JJ.)
 - o “...includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole.” *R v A2* (2019) 269 CLR 507, 521 [33] (Kiefel CJ and Keane J).
- Components of an Act
 - o Headings (to sections, Parts, Divisions etc)
 - o Short and long titles
 - o Preambles
 - o Defined terms (usually at the front but can also be at the very back)
 - o Purpose/Objects provision (sets out what the object of the statutes is)
 - o Notes (marginal, foot, head, notes to section)
 - o Examples
 - o Schedules
 - o Simplified Outline (mostly Commonwealth)
 - o Punctuation
- Acts interpretation act (Cth):
 - o **s 2** - Application
 - o **s 13** (inserted in 2011)
 - details the material that is part of an Act
 - holistic approach
 - o **s 15AD** (inserted in 2011) – examples (“may extend the operation”)
- Interpretation act (WA):
 - o **s 3** - Application
 - o **s 31** (preambles, schedules etc)
 - o **s 32 (1)** (some headings included)
 - most headings are excluded as part of the act but this section details which are not
 - o **s 32(2)** (some headings and components excluded)
 - o No section on ‘examples’

DEFINING TERMS

- Looking for defined term → (1) statute itself, then → (2) interpretation act WA or Acts Interpretation Act Cth (as relevant) then → (3) presumption of ordinary meaning and dictionary
 - o **S 2B-2G acts interpretation act (Cth)**
 - o **S 5 interpretation act (WA)**
 - o Unless ‘contrary intention’
- Function of a defined term is a drafting device (*Moreton Bay regional Council v Mekpine Pty Ltd* (2016))
- Presumption that definitions are not intended to have substantive effect (*Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628, 635 (Barwick CJ, McTiernan and Taylor JJ) given its function:
 - o ‘[T]he function of a definition is not to enact substantive law. It is to provide aid in construing the statute ... [O]nce it is clear that the definition applies, ... the only proper ... course is to read the words of the definition into the substantive enactment and then construe the substantive enactment ... To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment...’ (*Kelly v The Queen* (2004) 218 CLR 216, 253 [103] (McHugh J))

- When we look at a defined term we start with the presumption that they are not used to override obligations but they are simply there to help with interpretation
- Interpretation act (WA) s8 and acts interpretation act (Cth) s18A is used when a singular word is defined to give a plural of that word the same meaning

EXHAUSTIVE VS INCLUSIVE WORDS

- 'means' vs 'includes'
 - Means is exhaustive = it can only mean what is listed
 - Includes is inclusive = could include more than is just listed

Harvey v Minister for Primary Industry and Resources [2024] HCA 1, [76] (Gageler CJ, Gordon, Steward and Gleeson JJ):

- About the McArthur river mine about zinc and other minerals, the minerals were transported to Bing Bong loading facility, then these minerals were transported via boat out of the gulf of Carpentaria to a larger ship for exportation to other countries. They had to dredge the gulf to create a channel to the larger ship which created sediment. They deposited the sediment on the land (which you need a licence to do). They used up their allocated licence land and needed more land but, requesting this would interfere with the native title land. Was the list which indicated where they could dump the sediment an exhaustive list and therefore, didn't allow them to dump on native land. The court decided it was not an exhaustive list.
- "On 51 occasions Parliament uses the word "means" to indicate that what follows is an exhaustive definition. ... Throughout s 253 Parliament has thus made choices about how to express a given definition and uses the word "includes" in contrast to the word "means". The function served by using the word "includes" in contrast to the word "means" in a definition, as it was put in *Corporate Affairs Commission (SA) v Australian Central Credit Union*, "is commonly both to extend the ordinary meaning of the particular word or phrase to include matters which otherwise would not be encompassed by it and to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases". (emphasis added)

PLACEHOLDER OR MEANINGFUL LABEL

- Can the 'label' (i.e. word/phrase being defined) be used as an interpretive aid? (i.e. mere placeholder or meaningful label?)
 - Mere placeholder? - *Owners of Shin Kobe Maru v Empire Shipping Company Inc* (1994) 181 CLR 404, 419 (the Court): "The use of the word "proprietary" in the term to be defined does not colour the meaning to be given to the definition which follows it. It would be quite circular to construe the words of a definition by reference to the term defined."
 - You cannot use the word that needs to be defined to interpret the words in its meaning i.e. pet includes a dog or cat: you cannot use dog to define pet
 - Meaningful label? Shin-Kobe approach questioned by some intermediate court authorities in NSW/Federal Court (eg: *Federal Commissioner of Taxation v Auctus Resources* (2021) 284 FCR 294, *[59]-[69] (Thawley J); *Singh v Lynch* (2020) 103 NSWLR 568, *[111], [128]-[130] (Leeming JA).
- In the decision *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* [2024] HCA 37 the High Court, in a unanimous judgment, effectively **rejected** the *Shin Kobe* principle. The key paragraph in the judgment on this principle follows:
 - [32] "SkyCity [*one of the parties*] is right to say that there is no rule against construing words of a definition by reference to the term that those words define [*referring to the Shin Kobe principle*]. The orthodox interpretative principle, properly understood, is more nuanced, as has been recognised in this Court and in intermediate courts of appeal. A definition "shortens, but is part of, the text of the substantive [provision] to which it applies". The defined term itself forms part of the context within which the definition so applying must be construed. The point of the orthodox interpretative principle is not to deny that the defined term itself forms part of the context but to emphasise that the purpose of a definition is to fix or to clarify the meaning of the defined term. Fidelity to that purpose makes it of "fundamental importance" that definition is construed in the context of the substantive provision to which it applies ..."

LINGUISTIC PRESUMPTIONS

- **‘Noscitur a sociis’ presumption**
 - o The meaning of a word or phrase is derived from immediately surrounding words – its “associates”
- **‘ejusdem generis’ presumption**
 - o General matters are constrained by reference to specific matters – sub-set of *noscitur a sociis*
- **‘expressio unius est exclusion alterius’ presumption**
 - o An express reference to one matter indicates that other matters are excluded

TECHNICAL MEANINGS

- There is a presumption that where a word has acquired a technical meaning, the legislature intended to use that word in that technical, rather than ordinary, sense (*Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389)
- Broadly two kinds of technical meaning:
 - o (a) *legal* technical words – words having a well-established legal meaning; and
 - o (b) *non-legal* technical words – words having a trade, commercial or other specialised meaning
- Example: *Sales Tax Assessment Act (No 1) 1930* (Cth): whether a sponge cake is a pastry for the act.
 - o Sales tax was imposed upon the sale value of goods manufactured in Australia.
 - o The tax was payable by the manufacturer.
 - o Section 20(h) provided that sales tax was not payable under the Act upon the sale value of the goods specified in the First Schedule.
 - o The First Schedule included the following: ‘Pastry but not including cakes or biscuits.’
- Example: (*Palgo Holdings Pty Ltd v Gowans* (2005) HCA 28)
- *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s 6:
 - o [a] “person must not carry on a business of lending money on the security of pawned goods except in accordance with a licence held by the person”
- Expert evidence is admissible as to a non-legal technical meaning (but cannot be given - not admissible - for legal meaning)

ALWAYS SPEAKING

- If a statute is operative, it is included in the statute book
- Longevity of legislation and the nature of language
- Language
 - o Meanings can change
 - o Changes in technology, medicine, science, and social attitudes
 - o Changes in law
- Statutory language is always speaking (changing with time)
 - o **WA: *Interpretation Act 1984* (WA) s 8**
 - “A written law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent, and meaning.”
 - o Common law approach to interpretation: **Aubrey v the Queen 2017**
 - “if things not known or understood at the time an Act came into force fall, on a fair construction, within its words, those things should be held to be included.”

Lake Macquarie Shire Council v Aberdare County Council (1970): issue is whether liquid petroleum is seen as gas in → power to supply “gas” in interrelated Statutes including the Local Government Act 1919 (NSW)

- Step one: Connotation
 - Essential attributes
 - Fixed at enactment
 - *Eg: an air-like fluid substance which expands freely to fill a space and can be used as fuel*
- Step two: Denotation
 - The class of things that, from time to time, *possess those essential attributes* sufficiently to justify the application of the word or phrase to them.
 - Can change over time
 - *Eg: Is LPG “an air-like fluid substance which expands freely to fill a space and can be used as fuel”? Yes. Act applies*

Commissioner of the Australian Federal Police v Luppino [2021] FCAFC 43, [149]-[170] Crimes Act 1914 (Cth)

- 3LA Person with knowledge of a computer or a computer system to assist access etc.
(1) A constable may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow a constable to do one or more of the following:
 - (a) access data held in, or accessible from, a computer or data storage device that:.....
- Section 3LA introduced into the Crimes Act in 2001.
 - Issue: Is a gold Samsung mobile phone a “computer” under s 3LA? YES (looked into the definition of computer)

Tabcorp Holdings Limited v Victoria (2016) 90 ALJR 376

- S 4.3.12 of the Gambling Regulation Act 2003 (Vic) provided that ‘on the grant of new licences’ the person holding that licence was entitled to a payment.
- Issue: do ‘new licences’ refer to the duopoly of wagering and gaming licences previously granted to Tabcorp, or does it extend to the newly created gaming machine entitlements? YES

Aid/Watch Incorporated v Commissioner of Taxation (Cth) (2010) 241 CLR 539, [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ)

- Income Tax Assessment Act 1997 (Cth) (and other Cth tax Acts) provided that an entity which had been endorsed as a “charitable institution” by the Commissioner was exempt from liability to taxation under those Acts
- “Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.”

- Not a licence to automatically update the legislation (you don’t automatically attribute the updated word form a case to another case). ‘Always speaking’ approach may have an updating *effect*, but it does not update *meaning*: the connotation or essential meaning of a word does not change

Forsyth v Deputy Commissioner of Taxation (2007) 231 CLR 531, 548 [39] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ)

- *BUT...still “an exercise in statutory interpretation which seeks to discern what is called the intention of the legislature in enacting the specific provision, having regard to its context, scope and purpose.”*

AG (Tas) v CL [2018] TASFC 6: person seeking compensation under this act had been subject to economical and emotional abuse not physical.

- *Section 4(1) of the Victims of Crime Assistance Act 1976 (Tas) provided for the award of compensation where a person was killed or suffered injury as a result of the act of another person that constituted an offence. "Offence" was defined as an offence involving "violence". What does violence mean?*
- *"[O]rdinarily or if possible, the words of a statute should be treated as ambulatory, speaking continuously in the present and conveying a contemporary meaning. Whether or not that applies in the particular case depends on text, context and purpose." [45] (Porter AJ)*

HOW TO ANSWER A QUESTION

a) **What is the interpretative issue?**

- Word or phrase in question from the act

b) **What are the constructional choices for this issue?**

- 2 constructional choices
 - o Broad
 - o narrow

c) **Identify the textual and contextual indicators in the extracted Act relevant to the interpretative issue.**

- Textual Analysis: Examining the plain meaning of the words used in the relevant provisions.
- Contextual Consideration: Considering the provisions within the broader context of the Act and its purpose.
- Purpose and Policy: Interpreting the provisions in light of the legislative intent and purpose behind the Act.
- Precedential Authority: Referring to relevant case law and precedents to guide the interpretation.

PURPOSE

– s15AA AIA (Cth):

- 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.

– 18 IA (WA):

- In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.
- Relevance of difference in current wording of AIA and IA purpose provisions?
 - Explanatory memorandum to Acts Interpretation Amendment Act 2011 (Cth) cites **Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249**

What is it?

- ‘intended aim’ or ‘goal’ of the legislature *Unions NSW v NSW* (2019)
- “what the law is designed to achieve in fact” *Work Health Authority v Outback Ballooning* (2019) .
- The “policy” underlying the Act or provision *Certain Lloyds v Cross* (2012)
- the “public interest sought to be protected and enhanced” by the law *Alexander v Minister Home Affairs* (2022)
- A *construct*, not a search for subjectively held purposes of members of parliament (*Unions NSW v NSW* (2019) 264 CLR 595, [169] (Edelman J)).
- “A search for the purposes or intended aims of the legislature involves a construct used to determine the meaning of the words used by that legislature. It is not a search for subjectively held purposes of any or all of the members of the Parliament that passed the law. Rather, it is a construct that accords with our conventions for understanding language, which are the techniques by which we understand words.”
 - *Unions NSW v NSW* (2019) 264 CLR 595, [169] (Edelman J).
- IT IS NOT
 - the means by which the statute attains the purpose
 - the statute’s effect or its foreseeable consequences
 - legislative intent
- IT IS NOT
 - Mischief rule (overtaken): *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J)
 - Mischief: “‘Mischief’ is an old expression...a defect in the law which is now sought to be remedied.” *Queen v A2* (2019) 269 CLR 507, [33] (Kiefel CJ and Keane J).
 - Mischief: might be viewed as the ‘counterpart’ of purpose (*Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 584 [102] (Gageler J)).

How do you find the purpose?

- ‘...identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials...’
 - (*Lacey v Attorney-General of Queensland* (2011) 242 CLR 573, [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, [25] (French CJ and Hayne J).)
- Express statement – purpose or objects provision
 - Starting point – not exhaustive (*Unions NSW v New South Wales* (2019) 264 CLR 595)
- Inference from Act itself: