RECENT TRENDS IN STATUTORY INTERPRETATION

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Executive Summary

This paper examines the principles of statutory interpretation in Australian law. Its central thesis is that statutory interpretation is fundamentally a practical, pragmatic process that arises from the need to give content to broad legislative language and apply it to concrete disputes. While the process of statutory interpretation requires the application of principles, it is not susceptible to the formulation of grand, overarching theories, nor does it tend to reveal new insights or display trends. It is simply an unavoidable task that must be performed in a way that promotes an acceptable degree of consistency in judicial decision-making and avoids the appearance of arbitrariness. The paper concludes with a close examination of three recent cases in which the High Court of Australia has employed substance-, text- and context-based principles of statutory interpretation to resolve disputes requiring the application of ambiguous statutory language.

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Introduction

Writing extra-judicially in 1947, the American law professor and judge Felix Frankfurter said that:

> *Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts.*[1]

In the context of statutory interpretation, these 'intrinsic difficulties of language' may be compounded by the 'the emergence after enactment of situations not anticipated by the most gifted legislative imagination'.[2] Because the need for construction of statutes arises from the practical limitations of language and from the emergence of unforeseen real-world problems, the interpretation of statutes is necessarily an unscientific process – it 'is not an exercise in logic or dialectic: The aids of formal reasoning are not irrelevant; they may simply be inadequate.'[3] For this reason, grand theories of statutory interpretation are inevitably bound to fail. Rather, as Frankfurter J stated:

> *The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone. To speak of it as a practical problem is not to indulge a fashion in words. It must be that, not something else.*[4]

Seventy years later, the same point was made by Gageler J:

> *Difficult though it is, the constructional choice can and must be made in the application of workaday interpretative methodology. Nothing simpler or more*

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[1] Felix Frankfurter, 'Some Reflections on the Meaning of Statutes', 47 *Columbia Law Review* 527 at 528 (1947).
[2] Felix Frankfurter, 'Some Reflections on the Meaning of Statutes', 47 *Columbia Law Review* 527 at 529 (1947).
[3] Felix Frankfurter, 'Some Reflections on the Meaning of Statutes', 47 *Columbia Law Review* 527 at 529 (1947).
[4] Felix Frankfurter, 'Some Reflections on the Meaning of Statutes', 47 *Columbia Law Review* 527 at 529 (1947).

> *sophisticated is involved than attempting sympathetically to determine which construction of the contested statutory text better fits the context of the statutory scheme of which that text forms part. Linguistic indications are important. More important is the "purpose and policy" reasonably attributed to the provision within the statutory scheme.*[5]

The purpose of this paper is to identify when problems of statutory interpretation arise, to describe the techniques that can be used to assist in the interpretation of statutes and to discuss three recent cases in which the High Court of Australia has applied these techniques to interpret ambiguous statutory language.

Why Are Principles of Statutory Interpretation Necessary?

Because the potential for ambiguity arises from the very nature of human communication, it is not just complex modern statutory language that requires interpretation. Indeed, the earliest known statute promulgated by a human government – the Sumerian *Code of Ur-Nammu*, which was published on clay tablets some time between 2100 and 2050 BCE – was replete with ambiguities that must surely have required resolution through some process of interpretation. Thus s 19 of the Code provided that:

> *If a man has cut off another man's foot, he is to pay ten shekels.*

It is easy to imagine a bronze-age ruffian (for ease of reference, we'll call him *Shamash-hazir the Defiler (and Interpreter of Ambiguous Statutory Language)*) reading this part of the Code and asking himself: 'What if I just cut off my enemy's toes and leave the rest of his foot intact? Am I still liable to be punished?' Or 'What if I only partially sever his foot and let nature do the rest?' 'What if I just use a blunt instrument to render his foot useless?' The answers to these questions would have been made no more obvious by s 20 of the Code, which provided that:

> *If a man, in the course of a scuffle, smashed the limb of another man with a club, he shall pay one mina of silver.*

On reading this next provision, the Mesopotamian hooligan might have found himself thinking: 'What if I smash my enemy's foot with a club so badly that it has to be amputated? Do I have to pay the smaller sum of 10 shekels or the larger sum of one mina? Can I argue that the surgeon who amputates the foot is liable instead of me? What if instead of smashing my enemy's foot in a scuffle, I just hide in a really, really devious hiding spot and club him from behind by surprise?' For Shamash-hazir the Defiler (and Interpreter of Ambiguous Statutory Language), the Code of Ur-Nammu would have provided no easy answers.

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[5] *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 350 ALR 404 at 428 [71].

But it is not just complex codes (whether ancient or modern) that can give rise to problems of statutory interpretation. As the law professors H L A Hart and Lon Fuller famously demonstrated in 1958, even a 'statute' as simple as a sign reading 'no vehicles in the park' can give rise to multiple plausible interpretations.[6] Does the sign prohibit bicycles? Electric skateboards? What about baby strollers? A wheelchair? What 'if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the "no vehicle" rule?'[7] Each of these things is, in the most literal sense, a vehicle. But surely they would not all be banned from a public park. What sense could there be in effectively excluding the parents of young children from a public outdoor space? How could a rule that excluded people in wheelchairs from the park be justified in a civilised society based on notions of equality and inherent human dignity? Conversely, most people would agree that the sign prohibits cars and trucks. But what about an ambulance or a police car? For this reason, reasonable minds can reach a variety of different conclusions with respect to the meaning of the sign.[8]

The mental exercises of Shamash-hazir the Defiler (and Interpreter of Ambiguous Statutory Language) and the multiple available interpretations of the 'no vehicles in the park' sign demonstrate that the problems of statutory interpretation fundamentally derive from the need to apply language that is cast in general terms to the resolution of real disputes that arise out of specific, concrete facts. In any system of law that is not a true personal autocracy, these two tasks – the task of making statutory language and the task of applying it – will be performed by different persons. Indeed, in the Anglo-American-Australian system of government, they will necessarily be performed by distinct branches of government: statutes and regulations will made by the legislative and executive branches in the exercise of their constitutional power to 'determine[] the content of a law as a rule of conduct or a declaration as to power, right or duty',[9] while disputes arising under those statutes and regulations will ordinarily be determined by the judicial branch in the exercise of its power to effect 'the binding and authoritative decision of controversies' according to 'existing rights and duties'.[10] It follows that in the Australian legal system, the process of statutory interpretation is an 'expression of the constitutional relationship between the arms of government with respect to the making, interpretation

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[6] H L A Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* 593 at 607 (1957); Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', 71 *Harvard Law Review* 630 at 662 (1958).
[7] Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', 71 *Harvard Law Review* 630 at 663 (1958).
[8] For a discussion of some of the various interpretations of the 'no vehicles in the park sign' that have been proposed by academics and judges, see Pierre Schlag, 'No Vehicles in the Park', 23 *Seattle University Law Review* 381 (1999).
[9] *The Commonwealth v Grunseit* (1943) 67 CLR 59 at 82 (Latham CJ). Because the Australian constitutional system, unlike that of the United States, does not recognise a rigid distinction between legislative and executive power, the executive government may exercise a significant degree of general law-making power pursuant to delegation by the legislature: *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.
[10] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 268 (Deane, Dawson, Gaudron and McHugh JJ).

and application of laws.'[11] What it requires is the application of general statutory language to facts that may never have occurred to the imagination of those responsible for drafting that language in a manner that utilises 'rules of interpretation accepted by all arms of government in the system of representative democracy.'[12]

When Does the Need for Statutory Interpretation Arise?

In a series of cases, the High Court has emphasised that the process of statutory interpretation 'begins, and ends, with the words which Parliament has used.'[13] However, this should not be understood to mean that the task begins in a vacuum in which only the literal meaning of the words of a statutory provision is considered. Thus in *SZTAL v Minister for Immigration and Border Protection*, Kiefel CJ, Nettle and Gordon JJ stated that:

> *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. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*[14]

Similarly, Gageler J stated that '[t]he task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility "if, and in so far as, it assists in fixing the meaning of the statutory text".'[15] It is for this reason that we can confidently assert that, even though a baby stroller is, according to any literal definition, a 'vehicle', its use is probably not prohibited by a sign that says 'no vehicles in the park'.

However, to say that the techniques of statutory interpretation must be employed at all stages of interpretation, and not simply brought to bear in the event that the language of a statutory provision contains some patent ambiguity, raises the question 'what are the techniques of statutory interpretation?' The remainder of this paper discusses the techniques used by Australian courts to

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[11] *Zheng v Cai* (2009) 239 CLR 446 at 455 [28].
[12] *Zheng v Cai* (2009) 239 CLR 446 at 456 [28].
[13] See, for example, *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at 571 [22].
[14] (2017) 347 ALR 405 at 410 [14].
[15] (2017) 347 ALR 405 at 414-5 [37].

interpret statutory provisions and describes three recent cases in which the High Court has used those techniques to interpret difficult statutory language.

What Are the Techniques of Statutory Interpretation?

Overview

Broadly speaking, the techniques of statutory interpretation used by Australian courts can be divided into those that are concerned with substance, those that are concerned with text and those that are concerned with context. Substance-based techniques look to how the competing interpretations of a statutory provision would affect substantive rights and obligations; text-based techniques use a close grammatical analysis to discern the intended meaning of a provision; and context-based techniques look to the circumstances under which a provision was enacted and to how it interacts with other legislative provisions (including provisions of other Acts). It should, however, be noted that this is simply a broad and unscientific taxonomy of statutory interpretation techniques. The different types of techniques I have identified may overlap significantly, particularly in the case of text- and context-based principles.

Substance-based Techniques

Perhaps the most important class of statutory interpretation techniques is the class that emphasises the effect that competing interpretations of a provision would have on the rights and obligations of persons. Examples of this class of interpretative techniques include the following principles:

- Where an available interpretation of a provision would result in the provision's being constitutionally invalid, this interpretation will be rejected on the basis that '[t]here is always a presumption that Parliament did not intend to pass beyond constitutional bounds.'[16] It is uncertain whether there is also a principle that an interpretation should be avoided if it would merely throw the constitutional validity of the provision into doubt. Justice Gageler has strongly stated that Australian law recognises no such principle.[17] However, some older authorities suggest that such a principle may exist in Australia, at least in some form.[18]

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[16] *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180 (Isaacs J). See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ); *Interpretation of Legislation Act 1984* (Vic), s 6(1).
[17] *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 381 [66]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 604 [76].
[18] *Attorney-General (NSW) v Brewery Employees Union (NSW)* (1908) 6 CLR 469 at 590 (Higgins J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-4 [250] (Gummow and Hayne JJ).

- A statutory provision will not be interpreted as creating a criminal offence unless this is done so 'expressly or by clear and certain implication.'[19]

- A statute that does create a criminal offence will not lightly be interpreted as imposing strict or absolute liability. Rather, the presumption is that a statutory offence is only committed if the accused intends to perform the proscribed act. However, this will depend on a range of factors, including whether the provision creates a 'regulatory offence' or a 'truly criminal' offence.[20]

- Any ambiguity or uncertainty in beneficial legislation will be construed in a manner that is favourable to the class of persons who are eligible to benefit from the Act's provisions.[21]

- Finally, and perhaps most importantly, it is as much a part of the Australian tradition of statutory interpretation as it is of the English and American traditions that, as Marshall CJ stated in *United States v Fisher*, '[w]here fundamental principles are overthrown, when the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.'[22] Pursuant to this principle, there must be 'a manifestation of unmistakable legislative intention for a statute to be interpreted as abrogating or curtailing a right or immunity protected by the common law or a principle recognised by the common law to be important within our system of representative and responsible government under the rule of law.'[23] In recent times, it has become common to refer to this principle as the 'principle of legality'. However, the doctrine is much older than its current name. Pursuant to this principle, it has been held that:

    - 'Where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred.'[24]

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[19] *Oakes v Grubb* (1934) 29 Tas LR 2 at 4; *Sinclair v Brown Coal Liquefaction (Victoria) Pty Ltd* [1992] 1 VR 190.
[20] See, for example, *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Chiaou Yaou Fa v Morris* (1987) 46 NTR 1; *Director of Public Prosecutions v Stanojlovic* (2017) 53 VR 90.
[21] See, for example, *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 at 335 (Fullagar J); *Bird v The Commonwealth* (1988) 165 CLR 1 at 9 (Deane and Gaudron JJ); *Dodd v Executive Air Services Pty Ltd* [1975] VR 668 at 682 (Norris J); *Re Applications of Foster* [1982] 2 NSWLR 481 at 484; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th ed), 2014 at 358–363 [9.2]–[9.3].
[22] 6 US 358 at 390 (1805).
[23] *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 381 [66] (Gageler J).
[24] *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-6.

- An interpretation is to be avoided if it would result in the conferral of coercive powers that would 'override basic rights and freedoms on … a sweeping scale'.[25]
- '[A] statute will not be construed to take away … the privilege against self-incrimination, unless a legislative intent to do so clearly emerges, whether by express words or necessary implication.'[26] This may require statutory evidence-gathering powers to be impliedly limited in such a way that they 'do not permit compulsory examination of [an accused] about the subject matter of the offences with which he has been charged.'[27]
- '[W]here a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights.'[28]

Application of these substance-based interpretation techniques will often be of great assistance in resolving ambiguity in a legislative provision. Indeed, where they are relevant, these techniques may well conclusively determine how an otherwise ambiguous provision should be interpreted.

Text-based Techniques

The text-based techniques used by Australian courts to resolve ambiguity use a close grammatical analysis of statutory text to shed light on its meaning. These techniques require attention to such matters as the use of nominal, adjectival and adverbial forms of words; the use of definite and indefinite articles; and the use of tenses (such as the present (she goes), present perfect (she has gone), past perfect (she had gone) and past imperfect (she went)). Many of the rules of textual interpretation are codified in the *Interpretation of Legislation Act 1984* (Vic) (**the ILA**) (and similar Acts in other Australian law areas) or embodied in Latin maxims. Some rules of textual interpretation are:

- It is a cardinal principle of statutory interpretation that each word in a statutory provision must be given some meaning and effect.[29] However, as important as this rule is, it is not an absolute rule. In some cases, 'it may be impossible to give a full and accurate meaning to every word.'[30]

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[25] *Independent Commission Against Corruption v Cuneen* (2015) 256 CLR 1 at 27 [54] (French CJ, Hayne, Kiefel and Nettle JJ).
[26] *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309 (Mason, Wilson and Dawson JJ). See also (1983) 152 CLR 281 at 289-90, 294-5, 300 (Gibbs CJ); *Clayton Utz (a firm) v Dale* (2015) 47 VR 48 at 106 [163] (Tate JA, Ashley JA agreeing).
[27] *X7 v Australian Crime Commissioner* (2013) 248 CLR 92 at 150 [148] (Hayne and Bell JJ). See also (2013) 248 CLR 92 at 152-3 [157] (Kiefel J).
[28] *Fazzolari v Paramatta City Council* (2009) 237 CLR 603 at 619 [43] (French CJ).
[29] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).
[30] *Ajinomoto Company Inc v NutraSweet Australia Pty Ltd* (2008) 166 FCR 530 at 552 [114].

- Where two different words or expressions are used in the same statute, they will be presumed to mean different things. Again, however, this presumption is not an inexorable rule. Rather, 'the presumption that arises from variations in language is of very slight force if the words in themselves are sufficiently clear'.[31] For example, the expressions 'for' and 'in respect of' may by synonymous when used in a statute, or they may mean different things, depending on substantive and contextual matters.[32]

- Conversely, where the same word is used throughout a statute (even if it is not explicitly defined), it will ordinarily be given a consistent meaning, unless there is a sound reason to do otherwise.[33] Further, 'where a word is used to convey a particular meaning, it is to be assumed — absent any contrary indication — that other parts of speech derived from that word will have a corresponding meaning when used in the same context.'[34] Thus a person who 'imports' something will usually be held to be an 'importer' who is engaged in 'importation'. Where a term is explicitly defined in a statute, this presumption is given statutory force by s 39 of the ILA.

- Where a statute refers to one gender, it is presumed to include every other gender; where it uses the plural, it is presumed to include the singular and *vice versa*.[35] Again, however, this presumption may be displaced by contextual or substantive considerations.

- In some cases, the fact that a provision makes explicit reference to a thing may lead to the conclusion that other things are excluded from the operation of the provision (pursuant to the Latin maxims *expressio unius est exclusio alterius* and *expressum facit cessare tacitum*). However, 'those principles are to be applied with caution. They are not to be applied if they would bring about a result which the legislature is unlikely to have intended.'[36]

As can be seen, each of these 'rules' is, at most, a rebuttable presumption. Textual aides to construction will rarely be decisive of meaning in the way that substantive principles may be.

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[31] *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579 at 590 (Higgins J).
[32] See *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412 at 413 (McTiernan ACJ), 416 (Taylor J), 421-2 (Menzies J), 422 (Windeyer J).; *Unsworth v Commissioner for Railways* (1958) 101 CLR 73 at 87-8 (Fullagar); *State of New South Wales v Radford* (2010) 79 NSWLR 327 at 347 [100].
[33] *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J); *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 660 [32] (French CJ, Crennan, Kiefel and Bell JJ).
[34] *Director of Public Prosecutions (Cth) v Larson* (2017) 54 VR 420 at 438 [69] (Maxwell P and Beach JA).
[35] ILA, s 37.
[36] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575 (Mason CJ, Toohey, Dawson and Gaudron JJ).

Context-based Techniques

Finally, ambiguity in a statutory provision may be resolved by examining the provision in the context in which it appears. Context-based principles of construction include the following:

- The text of a provision should be construed in a way that gives rise to a harmonious construction of the statute as a whole, so that the provision is given an operation that 'is consistent with the language and purpose of all the provisions of the statute.'[37] It may also be necessary to consider a provision in light of other, closely related statutes. Thus where two Acts interact in such a way that that they constitute a 'binary system operating closely in tandem', the considerations that inform the making of a decision under one Act may have to be identified by looking at the text of both Acts together.[38]

- The political and social context in which a statute was enacted may inform the meaning of its provisions. Identifying the relevant context may require attention to such matters as Parliamentary debates and the reports of Royal Commissions, Parliamentary Committees and law reform bodies.[39]

- The meaning of a word describing a broad class of things may be limited where the statutory context indicates that it is intended to refer only to a narrow subset of those things. Thus in the context of a statute that deals with the importation of arms, gunpowder and 'other goods', the term 'goods' will not be held to include things that have no relation to weaponry.[40] This is an example of what is sometimes called the *ejusdem generis* rule. Similarly, where a section of a statute deals with the obligations of municipal councils, a sub-section expressed in general terms will be presumed only to impose obligations on municipal councils.[41] This is an example of the rule known as *noscitur a sociis*.

- Similarly, 'when the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it should be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.'[42] If the general provision is enacted after the specific one, this rule is embodied in the Latin maxim *generalia specialibus non derogant*. If the specific provision is enacted after the general one,

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[37] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).
[38] *Minister for Immigration and Border Protection v Egan* [2018] FCAFC 169.
[39] ILA, s 35(b).
[40] *Attorney-General v Brown* [1920] 1 KB 773.
[41] *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 25.
[42] *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J).

> the same result may still follow on the basis that '[t]he general statute may be repealed *pro tanto* by the special statute.'[43]

Like textual considerations, contextual considerations are unlikely to be decisive of a provision's meaning in the same way as substantive considerations.

Examples

The remainder of this paper deals with three recent cases in which the High Court has employed substance-, text- and context-based techniques to interpret difficult or ambiguous statutory language. The cases are *SZTAL v Minister for Immigration and Border Protection*,[44] *Esso Australia Pty Ltd v Australian Workers' Union*[45] and *Minogue v Victoria*.[46] Each case is considered in turn below.

SZTAL v Minister for Immigration and Border Protection

In *SZTAL*, the appellant was a Sri Lankan national. He applied for a protection visa, claiming *inter alia* that if he were required to return to Sri Lanka, he would be imprisoned under that country's *Immigrants and Emigrants Act 1949* for departing Sri Lanka unlawfully. He claimed that conditions in Sri Lanka's detention facilities were such that there were substantial grounds for believing that if he were removed from Australia to Sri Lanka and imprisoned there, even for a brief period, he would suffer 'significant harm' for the purposes of s 36(2)(aa) of the *Migration Act 1958* (Cth) (**the Migration Act**). Section 36(2A) of the Migration Act provides that:

> *A non-citizen will suffer* **significant harm** *if:*
>
> *(a) the non-citizen will be arbitrarily deprived of his or her life; or*
>
> *(b) the death penalty will be carried out on the non-citizen; or*
>
> *(c) the non-citizen will be subjected to torture; or*
>
> *(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or*
>
> *(e) the non-citizen will be subjected to degrading treatment or punishment.*

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[43] D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th Edition) at 271; *Deputy Commissioner of Taxation v Dick* (2007) 242 ALR 152 at 173 (Santow JA, Basten JA agreeing).
[44] (2017) 347 ALR 405.
[45] (2017) 350 ALR 404.
[46] (2018) 356 ALR 363.

Each of the terms 'torture', 'cruel or inhuman treatment of punishment' (**CITP**) and 'degrading treatment of punishment' (**DTP**) is in turn defined in s 5 of the Migration Act:

> **cruel or inhuman treatment or punishment** *means an act or omission by which:*
>
> *(a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or*
>
> *(b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;*
>
> *…*
>
> **degrading treatment or punishment** *means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable ...*
>
> *…*
>
> **torture** *means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:*
>
> *(a) for the purpose of obtaining from the person or from a third person information or a confession; or*
>
> *(b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or*
>
> *(c) for the purpose of intimidating or coercing the person or a third person; or*
>
> *(d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or*
>
> *(e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;*

In rejecting the appellant's claim, the former Refugee Review Tribunal found that while it was likely that the appellant would be detained for some time as a result of his having illegally departed Sri Lanka and that conditions in Sri Lanka's detention facilities were marked by overcrowding, poor sanitation and lack of food, this was 'the result of a lack of resources … rather than an intention to inflict cruel or inhuman treatment or punishment or to cause extreme humiliation.'[47] This raised the

[47] (2017) 347 ALR 405 at 408 [7] (Kiefel CJ, Nettle and Gordon JJ).

question whether the Tribunal had erred by construing the 'intention' to which the definitions of CITP and DTP refer as being limited to an actual desire to bring about a particular result, rather than as extending to an imputed or oblique intention that arises when a person does something knowing (but not desiring) that it will bring about that result.

A majority of the Court held that for the purpose of the definitions of DTP and CITP, the requisite intention will only be found to exist if a person 'means to produce [the proscribed] result', in a sense that involves 'the directing of the mind, having a purpose or design.'[48] Applying a range of statutory interpretation techniques, Kiefel CJ, Nettle and Gordon JJ concluded that:

- The 'natural and ordinary meaning of the word "intends"' involves an 'actual, subjective, intent' pursuant to which 'a person intends a result when they have the result in question as their purpose.'[49]

- While the concept of 'intention' is defined in the *Commonwealth Criminal Code* to include oblique or imputed intention, the *Code* and the Migration Act are concerned with different matters, and are in no sense *in pari materia*. For this reason, their Honours concluded that the *Code* did not form part of the context in which the Migration Act fell to be interpreted and that its expanded definition of 'intention' did not assist in interpreting the concept's meaning in the definitions of CITP and DTP.[50]

- The international instruments to which effect was given by s 36(2)(aa) of the Migration Act – the *International Covenant on Civil and Political Rights* (**the ICCPR**) and the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**the CAT**) – *did* form part of the context in which the Migration Act fell to be interpreted. In this regard, their Honours accepted that 'words taken from an international treaty may have another, different, meaning in international law. In such a case their importation into an Australian statute may suggest that that meaning was also intended to be imported.'[51] However, there was no settled meaning of the concept of 'intention' in international law that could assist in interpreting the provisions of the Migration Act.

Thus Kiefel CJ, Nettle and Gordon JJ reached their preferred interpretation of the Migration act by first considering the 'ordinary' meaning of the concept of 'intention' and then holding that there were no contextual factors that militated against applying this ordinary meaning in the context of the Migration Act.

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[48] (2017) 347 ALR 405 at 410 [15], 413 [28].
[49] (2017) 347 ALR 405 at 412 [26].
[50] (2017) 347 ALR 405 at 412 [24]-[25].
[51] (2017) 347 ALR 405 at 419 [18].

In dissent, Gageler J considered that '[t]he requisite intention will exist in either of two scenarios. One is where the perpetrator means to engage in the conduct and means to bring about infliction of severe physical or mental pain or suffering on the victim. The other is where the perpetrator means to engage in the conduct and is aware that infliction of severe physical or mental pain or suffering on the victim "will occur in the ordinary course of events".'[52] In support of this interpretation, his Honour noted the following matters:

- The concept of 'intention' is inherently ambiguous and is 'insufficiently precise to allow its content in a particular statutory context always to be determined by reference merely to ordinary or grammatical meaning.'[53]

- The *Code* implements the ICCPR and the CAT by creating an offence of torture in Australian law. The mental element of that offence is capable of being satisfied by an oblique or imputed intention. It would be 'strangely inconsistent' for the Commonwealth Parliament to 'take a narrower view of torture for the purpose of protecting the victim than the view of torture it has expressly spelt out for the purpose of punishing the perpetrator.'[54] Because the concept of intention must be construed consistently throughout the Migration Act, '[t]he underlying notion of intention in each of the three definitions [of torture, CITP and DTP] must be the same.'[55]

- The use of the concept of 'intention' in the language of the Migration Act introduced a limitation on the right to be free from torture, CITP and DTP that was not present in the text of Art 7 of the ICCPR. The fact that a narrow reading of the concept of intention would further limit the protection conferred by Art 7 was 'no reason for treating the particular notion of intention that is incorporated into the definitions as a narrow one. To the contrary, it confirms the appropriateness of understanding the sense in which intention has been invoked to be a wide one.'[56]

Thus, unlike the majority, Gageler J proceeded from the proposition that 'intention' has no single 'ordinary' meaning in human speech. Because of this, his Honour considered that it was necessary to identify contextual and substantive matters that shed light on the particular sense in which the concept was employed in the Migration Act.

Justice Edelman delivered a separate judgment agreeing with the majority.

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[52] (2017) 347 ALR 405 at 417 [47].
[53] (2017) 347 ALR 405 at 415 [41].
[54] (2017) 347 ALR 405 at 418 [49].
[55] (2017) 347 ALR 405 at 418 [50].
[56] (2017) 347 ALR 405 at 419 [53].

Esso Australia Pty Ltd v Australian Workers' Union

In *Esso*, members of the respondent union engaged in a range of industrial action that was calculated to disrupt the appellant company's business. The respondent contended that these activities constituted 'protected industrial action' for the purposes of the *Fair Work Act 2009* (Cth) (**the FWA**). Section 413 of the FWA prescribes a range of requirements that must be met before action will qualify as protected industrial action. In particular, s 413(5) provides that:

> *The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:*
>
> *(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement – the bargaining representative;*
>
> *(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement – the employee and the bargaining representative of the employee.*

The respondent had breached an order made by the Fair Work Commission. However, the order had ceased to apply to it by the time its members began engaging in industrial action. This raised the question whether the respondent was a person who had 'not … contravened any orders that apply' to it.

Chief Justice Kiefel, Keane, Nettle and Edelman JJ held that the respondent did not satisfy the requirements of s 413(5). As their Honours noted, the ambiguity in the drafting of s 413(5) is patent; it becomes apparent as soon as one attempts to make sense of the provision's terms:

> *Section 413(5) is poorly drafted. The way it combines the present perfect tense "not have contravened" with the present tense "apply" is potentially ambiguous. Standing alone, the combination could be taken to mean either that a person must not have contravened an order which applied to the person at the time of contravention or, alternatively, that a person must not have contravened an order which continues to apply to the person. The ambiguity could have been avoided by the addition of a couple of extra words. But, since that was not done, it is*

necessary to look to the history and context of the provision and to relevant extrinsic indicators of its purpose.[57]

In concluding that the use of the present tense 'apply' was not determinative of the meaning of s 413(5), and that the operation of the section extended to non-compliance with orders that had ceased to have effect, the majority noted that:

- Predecessor provisions had provided that for action to be protected industrial action, the person engaging in it must 'have complied' with any orders that applied to it. According to their Honours, 'the change from "has complied with the order or direction so far as it applies to the organisation" … to "have [not] contravened any orders that apply to them" … bespeaks an explicit change in emphasis from a state of compliance with orders to a state of absence of past contravention of orders. And, so far as can be seen, the only reason for the change is to make clear, or possibly clearer, that the provision applies to past contraventions of orders.'[58]

- Taken together, the other provisions of s 413 revealed a 'statutory pattern' such that 'where a sub-section of s 413 is directed to events that are occurring at present, the sub-section is drafted in the present tense and, where a sub-section is directed to events that have occurred in the past, the sub-section is drafted in the present perfect tense.'[59] Thus notwithstanding its use of the present perfect and present tenses, s 413(5) extended to events occurring entirely in the past.

- Section 413(5) had to be interpreted in light of the Fair Work Commission's power under s 603 of the FWA to retrospectively revoke or vary its orders. This power could be used to ensure that minor or trivial breaches of an order that had lapsed and could no longer be complied with would not prevent persons from engaging in protected industrial action.[60]

- Their preferred construction of s 413(5) promoted the apparent purpose of s 413, which 'is to ensure that persons who have shown that they cannot be trusted to comply with orders

[57] (2017) 350 ALR 404 at 414 [29] (citations omitted).
[58] (2017) 350 ALR 404 at 417 [35].
[59] (2017) 350 ALR 404 at 417 [37].
[60] (2017) 350 ALR 404 at 419-20 [49]-[50].

relating to the agreement or matters arising from bargaining for the agreement are not to be trusted with the immunity afforded in relation to protected industrial action.'[61]

As in *SZTAL*, Gageler J dissented, holding that 'the focus of s 413(5) is on "whether there is, at the relevant point of time, an existing or current order with which it is not complying, rather than whether at some time in the past it has failed to comply with an order".'[62] Thus his Honour noted that:

- On the majority's favoured construction of s 413(5), '[w]ithin a section otherwise conspicuous in using the present tense to refer to the present, the present tense is stripped of temporal significance. And within the one sub-section, determinative temporal significance is attributed to some words and none to others.'[63]

- As a matter of substance, the effect of the majority's interpretation was that '[o]nce having in any way contravened any bargaining order or any stop order at any time in the process, the bargaining representative is attainted. The bargaining representative, be it an employee organisation or an employer, thereby becomes an industrial cripple and an industrial outlaw — prevented from backing its negotiating stance with protected industrial action and prevented from organising or engaging in any protected industrial action for the enterprise agreement whether that action is employee claim action, employee response action or employer response action.'[64] According to his Honour, 'such a sweeping denial to an employee organisation or an employer of the capacity to take protected industrial action [was not] consonant with a statutory scheme which is concerned to create an environment for collective bargaining that is fair and flexible and efficient.'[65]

Thus where the majority emphasised context-based interpretation techniques, Gageler J considered that text- and substance-based techniques were of more use in attributing meaning to the terms of s 413(5).

Minogue v Victoria

Finally, in *Minogue* the plaintiff was convicted of the 1986 bombing of the Russell Street Police Complex, which caused the death of a police constable. He became eligible for parole in 2016 and applied for parole on 3 October 2016. On 14 December 2016, a new s 74AAA was inserted into the

[61] (2017) 350 ALR 404 at 423 [53]
[62] (2017) 350 ALR 404 at 436 [106].
[63] (2017) 350 ALR 404 at 434 [100].
[64] (2017) 350 ALR 404 at 435 [103].
[65] (2017) 350 ALR 404 at 435 [104].

Corrections Act 1986 (Vic) (**the Corrections Act**). Until it was replaced with a new provision by s 4 of the *Corrections Amendment (Parole) Act 2018* (Vic), s 74AAA provided that:

> *(1) The [Adult Parole] Board must not make a parole order under section 74 or 78 in respect of a prisoner convicted and sentenced (whether before, on or after this section comes into operation) to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer, unless an application for the parole order is made to the Board by or on behalf of the prisoner.*
>
> *(2) The application must be lodged with the secretary of the Board.*
>
> *(3) In considering the application, the Board must have regard to the record of the court in relation to the offending, including the judgment and the reasons for sentence.*
>
> *(4) After considering the application, the Board must not make a parole order under section 74 or 78 (as the case may be) in respect of the prisoner unless the Board—*
>
> *(a) is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner —*
>
> *(i) is in imminent danger of dying, or is seriously incapacitated and, as a result, the prisoner no longer has the physical ability to do harm to any person; and*
>
> *(ii) has demonstrated that the prisoner does not pose a risk to the community; and*
>
> *(b) is further satisfied that, because of those circumstances, the making of the parole order is justified.*

On 20 December 2017, a new s 127A was inserted into the Corrections Act. It provided that s 74AAA applied to a prisoner whether or not he or she had become eligible parole and/or had made an application for parole before s 74AAA came into effect.

The plaintiff commenced proceedings in the High Court seeking a declaration that s 74AAA of the Corrections Act did not apply to him. Alternatively, he sought a declaration that the section was

constitutionally invalid. The parties filed a special case stating a number of questions for the Court. However, as the case transpired, the only questions that had to be resolved by the Court were:

1. Was section 74AAA capable of applying to the plaintiff only if he was sentenced on the basis that he knew that, or was reckless as to whether, the murdered person was a police officer?

2. If so, did s 74AAA apply to the plaintiff?

As Gageler J noted, the questions posed in the special case raised the following five possible interpretations of s 74AAA:

- On the first interpretation, s 74AAA only came into operation if a prisoner had been convicted of an offence defined by the elements of intentionally killing a person whom he or she knew to be a police officer, or whom he or she knew might be a police officer.

- On the second interpretation, s 74AAA only applied to a prisoner who had been sentenced for murder under s 3(2)(a) of the *Crimes Act 1958* (Vic) (**the Crimes Act**) (which was introduced in 2014) on the basis that he or she had known or been reckless as to the fact that the victim was 'a custodial officer on duty or an emergency worker on duty'.

- On the third interpretation, s 74AAA applied if a prisoner had been convicted of murder and sentenced on the basis that he or she had known, or been reckless as to whether, the victim was a police officer.

- On the fourth interpretation, s 74AAA applied if the Adult Parole Board itself formed the view that the prisoner had been convicted of murder and had known, or been reckless as to whether, the victim was a police officer.

- On the final interpretation, s 74AAA applied if the prisoner had been convicted of murder and, as an objective fact, had known that the victim was a police officer or had been reckless as to whether that was the case.[66]

For slightly different reasons, all seven members of the Court considered that the third available interpretation of s 74AAA was the correct one. Each of the following matters was said to support this conclusion:

- There has never been an offence in Victoria comprising the elements of murdering a person while knowing or being reckless as to the fact that he or she is a police officer.[67] For this

[66] (2018) 356 ALR 363 at 381 [82]-[83].
[67] (2018) 356 ALR 363 at 371 [28] (Kiefel CJ, Bell, Keane and Nettle JJ), 381 [82] (Gageler J).

reason, the first interpretation of s 74AAA would have given the provision no work to do and could not be accepted.

- The 'respective areas of operation' of s 74AAA and s 3(2)(a) of the Crimes Act were very different and each provision employed different statutory language in describing the class of victims in respect of whose murders it applied.[68] For this reason, the second interpretation of s 74AAA was not open.

- The Corrections Act made no explicit provision for any way in which the Adult Parole Board might form its own view as to whether a prisoner had known or been reckless as to whether his or her victim was a police officer. Rather, s 74AAA(1) directed attention to the circumstances under which the prisoner was 'convicted and sentenced'. These matters indicated that s 74AAA was not concerned with the formation by the Board of a view as to the prisoner's state of knowledge or recklessness at the time of the relevant offence, but with the view of the sentencing court. This militated against adopting the fourth interpretation set out above.[69]

- Substance-based principles also pointed against the fourth interpretation. While Kiefel CJ, Bell, Keane, Nettle and Edelman JJ placed limited reliance on these principles, their Honours nevertheless stated that:

> *Consistently with a strict approach to construction, regard may be had to the consequences of a prisoner's state of mind being left as a matter for the Board. It is to be recalled that when sentencing a court will not take into account facts which are adverse to the interests of the accused unless they are established beyond reasonable doubt. This may be contrasted with the position of the Board, which is not required to make findings to any particular standard. It is not bound by the rules of evidence or any practice or procedure applying to courts in the performance of its powers, functions or duties. It is not obliged to accord natural justice. It may also be borne in mind that on the defendant's construction, the*

[68] (2018) 356 ALR 363 at 372 [34]-[35] (Kiefel CJ, Bell, Keane and Nettle JJ), 381 [82] (Gageler J).
[69] (2018) 356 ALR 363 at 373-4 [42]-[46] (Kiefel CJ, Bell, Keane and Nettle JJ), 381 [83] (Gageler J).

> *Board will be making an enquiry into the state of mind of a prisoner with respect to events which occurred many years, probably decades, ago.*[70]

Implicitly applying the interpretive principle enunciated by Marshall CJ in *United States v Fisher* (see above) – and placing greater reliance than the other members of the Court on substance-based principles – Gageler J stated that:

> *The third interpretation is, in my opinion, to be preferred because it involves no supplementation of the established system of criminal justice by which questions of fact as to a prisoner's state of mind at the time of committing an offence are ordinarily determined once and for all at the criminal trial for that offence and because it avoids entirely the spectre of inconsistent findings in criminal and civil proceedings. Against the background that "a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication", my opinion is that the third interpretation is also to be preferred because, by producing the narrower class of prisoners to which s 74AAA(4) has the potential to apply in comparison with the only textually available alternative interpretation of s 74AAA(1), it affords the greater prospect of a prisoner in the position of Mr Minogue, through demonstrated rehabilitation and subject to appropriate safeguards, experiencing some measure of the common law right to liberty.*[71]

Each member of the Court agreed that on the facts of the plaintiff's case, it could not be said that the sentencing court had made any finding as to whether he had known that any victim of the bombing in which he had been involved would be a police officer, nor had the court found that he was reckless as to that fact.[72] It followed that s 74AAA did not apply to him.

Conclusion

Fundamentally, the three most significant statutory interpretation cases decided by the High Court in the last year or so fail to reveal any trend. This should not be surprising. The need to interpret ambiguous statutory language is an unavoidable requirement of the nature of language and of the practical and, in the case of the Anglo-American-Australian legal tradition, constitutional need for statutory provisions drafted in general terms by one branch of government to be applied to concrete disputes that fall to be resolved by another branch. The principles of statutory interpretation are thus necessarily a practical, unscientific response to an unavoidable problem. As such, it should not be

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[70] (2018) 356 ALR 363 at 375 [48].
[71] (2018) 356 ALR 363 at 382 [88].
[72] (2018) 356 ALR 363 at 377-8 [63]-[65] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 383 [94] (Gageler J), 384-5 [102] (Gordon J).

surprising that they do not always produce a result on which all minds can agree and that their application does not reveal trends or enable the formulation of grand, overarching theories. However, to the extent that recent cases reveal anything, it is that where they are applicable, substance-based techniques of statutory interpretation are more likely to produce a 'definitive' reading of a statutory provision on which most minds can agree than text- based and context-based techniques.

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