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**STATUTORY INTERPRETATION:
MOSTLY COMMON SENSE?**

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Various aspects of statutory interpretation, including how the principles have been adopted and applied by the courts to interpret legislation have developed over many years, though not always consistently. Legislation should always strive to be drafted with precision and clarity; for after all, there may be serious consequences for failing to adhere to a legislative instrument. The principles of statutory construction should not become too prescriptive, and in the main, common sense should prevail in interpreting any statute. Four recent High Court decisions are used to illustrate this common sense approach to interpretation.

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I INTRODUCTION

I have chosen the title for this lecture to be ‘Statutory Interpretation: Mostly Common Sense?’ I emphasise the word ‘mostly’, as there do exist some ‘rules’ of construction introduced by legislation itself (although it could be argued these too are based on common sense). Further, the common sense that is to be applied, is to be applied with a background knowledge of the rudiments of English expression and a knowledge of the generally accepted approach taken in the consideration of legislative interpretation or construction. As stated by D C Pearce and R S Geddes in their book on statutory interpretation:

Legislation is, at its heart, an instrument of communication. For this reason, many of the so-called rules or principles of interpretation are no more than common-sense and grammatical aids that are applicable to any document by which one person endeavours to convey a message to another. Any inquiry into the meaning of an Act should therefore start with the question: ‘What message is the legislature trying to convey in this communication?’¹

At the previous lecture given by the Hon Justice Stephen McLeish (when he was Solicitor-General for Victoria) there was concentration on the challenges to the future of the common law. Mr McLeish SC (as he then was) addressed issues concerning the interaction between statutory and common law.² My emphasis is upon statutory law, although we both recognise the symbiotic relationship with both common law and statute as applied by the courts being the subject of the same inherently dynamic legal process.³ As Gleeson CJ pointed out in 2001: ‘Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship.’⁴ As put by Justice Susan Kenny in 2013:

the common law rule, confirmed by statutory provisions in the Commonwealth, the States and Territories, requires that, so far as possible, we give effect to the purpose of the provision in question. Further, in the words of *Project Blue Sky*, a provision must not only be interpreted by reference to the statute viewed as a whole but so as to give effect to ‘harmonious goals’. The assumption

¹ D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 146 [4.1].

² Stephen McLeish, ‘Challenges to the Survival of the Common Law’ (2014) 38 *Melbourne University Law Review* 818.

³ *Ibid* 829.

⁴ *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31].

is that the legislature, being a rational body, can be taken to have intended to give effect to a rational purpose in enacting the provision.⁵

Thus, the assumption is that:

the legislature acts reasonably, having regard to its purpose in making a law, its constitutional role and those of the other branches of government, and the rights, freedoms and immunities that the common law protects because they are seen as key in a liberal, representative democracy.⁶

The principles governing the interpretation of a statute by a court in a common law setting are, by definition, common law principles and will evolve over time. The principle of legality can be seen as an example of the application of common law principles, and fundamental rights as defined may change over time. Take, for example, the current acceptance that legal professional privilege is a fundamental common law right, whereas in a former time, it did not have such an elevated position.⁷

Further, the common law will develop by the courts even after the time of the enactment of a statute. Therefore, it may well be that statutes will be interpreted by courts ‘in the light of common law principles of interpretation as those principles exist, not simply at the time of enactment, but also at the time of application.’⁸ I do not want to enter the debate of whether this involves the process of judicial legislation. Undoubtedly, just as judges develop a body of law through the common law approach, it may be also contended that in interpreting legislation, it is the court’s interpretation that ultimately establishes the law. However, at least in the area outside constitutional discourse, Parliament has the ability to change that law if the court establishes a precedent that Parliament does not desire to continue to be adopted.

The role of the courts is to interpret, not make law, and to apply and interpret Acts of Parliament in the resolution of controversies. Contemporary Parliaments frequently legislate on a host of matters previously left to the

⁵ Justice Susan Kenny, ‘Constitutional Role of the Judge: Statutory Interpretation’ (2014) 1 *Judicial College of Victoria Online Journal* 4, 11, quoting *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [70] (McHugh, Gummow, Kirby and Hayne JJ).

⁶ Kenny, ‘Constitutional Role of the Judge’, above n 5, 10, citing *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27.

⁷ Stephen Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37 *Monash University Law Review* 1, 12.

⁸ *Ibid* 14.

common law. There is a tremendous output of federal, state and territory legislation. There has been a noticeable shift in the expression of law from court judgments to expositions in legislation.⁹ Unfortunately, in some cases, the construing of legislation (whilst theoretically only capable of having one accurate meaning) often involves a long search to find that meaning.

However, the interpretation of legislation is not susceptible to being a mechanical or scientific task. In dealing with a legal problem, a lawyer does not reason from absolute to absolute; each consideration in the process depends upon a complex number of factors. And there is a multitude of forces to be found in solving a legal problem other than logic; such as tradition, history, sociology and morality. In the same way, a lawyer or court cannot determine the meaning of words by any strict logical or scientific approach; if for no other reason than that the lawyer speaks in a language that has all the uncertainties of English expression. At least a scientist is able to communicate through symbols and expressions of precision. In contrast, language is not always a perfect medium of precise expression. Those formulating laws do not have perfect prescience to make their laws cover every contingency.

II THE DRAFTING OF LEGISLATION

This leads me to consider the role of Parliamentary Counsel. Parliamentary Counsel in drafting legislation must deal with the joys and constraints of plain English expression. The joys are usually found in poetic works (usually drafted not by Parliamentary Counsel) and the constraints are found in the drafting of legislation. As described by Megarry:

the courts do not invariably display a deep reverence for every product of Parliamentary Counsel. In a sense, the scales are heavily weighted against the draftsman: if he has made himself plain, there is likely to be no litigation and so none to praise him, whereas if he has fallen into confusion or obscurity, the reports will probably record the results of the fierce and critical intellects of both Bar and Bench being brought to bear on his work. Yet the debt owed to him by the legal profession is incalculable. He has been pictured as happily singing to himself —

I'm the Parliamentary Draftsman,
I compose the country's laws,

⁹ See Murray Gleeson, 'Statutory Interpretation' (Speech delivered at the Taxation Institute of Australia 24th National Convention, Sydney, 11 March 2009) <<http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesonj/gleeson11mar09.pdf>>.

And of half the litigation
I'm undoubtedly the cause.¹⁰

Often when one is confronted by a sentence or phrase that one does not understand, one of the simplest things would be to go to the writer and ask him or her what was intended. Obviously with the interpretation of legislation this is not possible; in any event, the relevant enquiry is what the words mean irrespective of the actual intent of the writer. I am mindful of the comments of Lord Halsbury LC in *Hilder v Dexter*:

My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done. For that reason I abstain from giving any judgment in this case myself; but at the same time I desire to say, having read the judgments proposed to be delivered by my noble and learned friends, that I entirely concur with every word of them. I believe that the construction at which they have arrived was the intention of the statute. I do not say my intention, but the intention of the [l]egislature. I was largely responsible for the language in which the enactment is conveyed, and for that reason, and for that reason only, I have not written a judgment myself, but I heartily concur in the judgment which my noble and learned friends have arrived at.¹¹

Nevertheless, if one puts one's self in the position of Parliamentary Counsel who drafted the legislation, this may be a useful exercise. Parliamentary Counsel, in drafting legislation, have regard to their knowledge of grammar and the basic principles of construction, and obviously any statutory dictates of construction.

Parliamentary Counsel's lot is not easy (putting aside the issues of the absence of clear instructions and time pressures) because 'a considerable degree of precision is required'.¹² Precision, described by Stephen J years ago:

¹⁰ R E Megarry, *Miscellany-At-Law: A Diversion for Lawyers and Others* (Stevens & Sons, 1955) 349, quoting J P C, *Poetic Justice* (Stevens & Sons, 1947) 31.

¹¹ [1902] AC 474, 477-8.

¹² Megarry, above n 10, 349.

is essential to everyone who has ever had ... to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.¹³

Sadly though, no Parliamentary Counsel can entirely cut away the penumbra of meaning each word potentially possesses.

Further, no lawyer should pretend that he or she is the master of his or her words; try as we may, there will always be times when words defy the drafters' will. Unlike Humpty Dumpty, the dominance of words in the law so impressed Pollock and Maitland, historians of English law, as to make them say, 'language is no mere instrument which we can control at will; it controls us.'¹⁴ This may be one reason we so often encounter those 'nice sharpe Quillets of the Law'¹⁵ which have brought the law into disfavour since Shakespeare's day. Cohen describes the issue as follows:

it is impossible to formulate regulations that shall be so unequivocal in all situations as to render unnecessary judicial selection from possible meanings. ... Questions of interpretation arise not so much because of the obscurities of language, but rather because the *courts have to apply a general law to a situation that could not have been foreseen by the legislature.*¹⁶

Of course, the judge's task, essentially filling out the legislative will to apply to a particular situation, is absolutely necessary to make statutes workable. As we all know, in many cases:

Statutes must be expressed in general and more or less abstract terms. *To make a detailed description of specific human actions forbidden or allowed and their consequences would be an endless and impossible task.*¹⁷

¹³ Ibid 349–50, quoting *Re Castioni* [1891] 1 QB 149, 167–8 (Stephen J).

¹⁴ Sir Frederick Pollock and Frederic William Maitland, *The History of English Law: Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol 1, 87.

¹⁵ William Shakespeare, *Henry VI* (1st Folio, 1623) Part I Act II Scene 4.

¹⁶ M R Cohen, 'The Process of Judicial Legislation' in Morris R Cohen and Felix S Cohen (eds), *Readings in Jurisprudence and Legal Philosophy* (Prentice-Hall, 1951) 503, 507 (emphasis in original).

¹⁷ Ibid 508 (emphasis in original).

Therefore, it is important to remember that the words and concepts in the law are often replete with history. A distinguished judge, Frankfurter J in *Rochin v California* said as follows:

Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. ... When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges.¹⁸

So, with all these problems with words, their meaning and application, where do we go?

III PRINCIPLES OF INTERPRETATION

Undoubtedly, there is a need for readily understandable and consistent principles to guide the interpretation of legislation. These principles should basically be guided by common sense and we should not be blinded by too many rules or over-analysis, or mechanical or scientific analysis. Trawling for rules and canons of interpretation is not the correct starting point. The starting point should always be to look at the words, their context, and the purpose of the legislation, then applying that to produce a result that is both fair and workable in the particular fact situation you have before you. In addition, a judge should also recall, having regard to the common law principles of precedent, to be mindful of the application of the interpretation of the statute to other cases.

In many situations, the search for context will not be laborious. In others, it may involve considerable work and investigation. This may be inevitable — involving an examination of the state of the law at the time of the enactment, historical development of the statute, international agreements (if relevant), extrinsic materials and enactment history. In some cases this may involve obtaining knowledge (even detailed knowledge) of substantive common law or equitable principles, and a common sense approach by the judge remembering the rule of law.

Whilst talking of extrinsic materials, in principle one should not automatically and deliberately turn a blind eye to this source of information. A number of times the courts have said to be careful of using explanatory materials. In *Re Bolton; Ex parte Beane* it was said: ‘The words of a Minister must not be

¹⁸ 342 US 165, 169–70 (1952).

substituted for the text of the law.¹⁹ In *Catlow v Accident Compensation Commission* it was said: ‘it would be erroneous to look to the extrinsic material before exhausting the application of the ordinary rules of statutory construction.’²⁰ In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* it was said: ‘Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text.’²¹ Then one can recall the words of Heydon J in *Lacey v Attorney-General (Qld)* (*‘Lacey’*) about second reading speeches:

A third consideration arises out of what the Minister for Justice said in 1975. Excessive recourse to [s]econd [r]eading [s]peeches is one of the blights of modern litigation. Modern legislation permits it, or is often assumed to permit it, to a much greater extent than the common law rules of statutory construction did. Experience is tending to raise grave doubts about the good sense of that legislation. It may be accepted that what Ministers say about what they intended the enactment to provide is no substitute for an examination of what the enactment actually provides, only an aid to it. It may be accepted that that proposition is particularly salutary when the enactment is said to derogate from fundamental rights or damage fundamental interests. But the fact remains that the courts can investigate what Ministers say. There are rare occasions when that investigation has value. This is one of the rare occasions.²²

Whilst it would be foolish to regard all statutes as being able to be read and understood by the lay uninitiated citizen, this should at least be an aim in drafting legislation with precision and clarity. Of course, many statutes are interpreted every day by ordinary citizens, public administrators and non-legal advisers, probably without difficulty. This is important so that the daily affairs of people can be readily guided by the statute, and the expectations of those people are not thwarted by an interpretation of a statute beyond lay comprehension. However, in many areas of human endeavour this may not be the case; take, for example, many aspects covered by corporation law, revenue law and competition law. In this respect, Mr Moshinsky SC (as he then was) has emphasised the following principles in the interpretive task:

¹⁹ (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).

²⁰ (1989) 167 CLR 543, 550 (Brennan and Gaudron JJ).

²¹ (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

²² (2011) 242 CLR 573, 605 [86].

in *International Finance*, Chief Justice French cautioned against straining the language of a provision simply to preserve its constitutional validity. Among the reasons he gave were that:

those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen.²³

Moshinsky further noted that, as in *Alcan Pty Ltd v Commissioner of Territory Revenue (NT)*:²⁴

After stating that the starting point in considering the question of construction was ‘the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and [the] legislative purpose’, [French CJ] said:

That proposition accords with the approach to construction characterised by Gaudron J in *Corporate Affairs Commission (NSW) v Yuill* as: ‘dictated by elementary considerations of fairness, for, after all, those who are subject to the law’s commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.’²⁵

Before going further, I just want to say something about ‘purpose’. Legislation often involves compromise.²⁶ As summarised by the Hon Murray Gleeson:

[A statute’s] general purpose may be clear enough, but the dispute may be as to the extent to which it has pursued that purpose. ... [T]o identify the general purpose may not be of assistance in finding the point at which a balance has been struck or a political compromise reached. ... [In addition], some legislation ... pursues inconsistent purposes. In the case of a complex statute that has been amended many times ... this is highly likely. ...

²³ Mark Moshinsky, ‘Current Issues in the Interpretation of Federal Legislation’ (Speech delivered at the National Commercial Law Seminar Series, Melbourne, 3 September 2013) <https://www.monash.edu/__data/assets/pdf_file/0003/142086/m-moshinsky-current-issues-in-the-interpretation-of-federal-legislation.pdf>, quoting *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 349 [42].

²⁴ (2009) 239 CLR 27.

²⁵ Moshinsky, above n 23, citing *ibid* 31 [4] (French CJ), quoting *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340 (Gaudron J).

²⁶ See W M C Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) 26–7.

In order that the purpose of a legislative provision may be used rationally to elucidate the meaning of the provision, it may be necessary to identify a purpose accurately and at an appropriate level of specificity. At one level, it may be correct to say that the purpose of an income tax Act is to raise revenue for the government. Such an observation would not advance an understanding of a particular provision because, in truth, the purpose is more precise. It is to raise revenue for the government ... in accordance with a detailed and complex plan of fiscal policy. If a dispute arises as to the meaning of a section of the Act ... the relevant purpose, if there is one to be found, will be the purpose of the particular aspect of the fiscal plan in which the provision is to be found.²⁷

There are many examples of difficulties arising in determining 'purpose', and its application. For instance, in dealing with the *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW), in *Palgo Holdings Pty Ltd v Gowans*, McHugh, Gummow, Hayne and Heydon JJ said:

No doubt the 1996 *Pawnbrokers Act* is to be given a purposive construction. But that purpose is not to be identified by making an a priori assumption that the 1996 *Pawnbrokers Act* was intended to reach all of the transactions just identified. Nothing in the text of the Act, its history, or what (little) was said about its purpose in the [s]econd [r]eading [s]peech warrants the conclusion that the purpose of the Act was so wide. On the contrary, considering the text of the Act, the indications of purpose provided by such matters as the headings in ss 5 and 30, and the legislative framework into which the 1996 *Pawnbrokers Act* fitted, reveals that the Act's purposes were more limited. It follows that consideration of legislative purpose reveals no foundation for reading the relevant provisions of the Act otherwise than according to their terms. In particular, there is no basis for reading the definition of pawnbrokers as extending to a business embracing all kinds of transaction in which a lender of money takes possession or custody of goods. Yet unless that is done, the course of business proved against the lender fell outside the statutory definition.²⁸

So we come back to the ultimate quest to determine what the statute means, and then to apply that meaning to the facts.

The principles that have been developed for interpreting statutes have attempted to give guidance to the courts in that quest and to those who come before the courts in predicting the outcome. Thus, lawyers have been more and more engaged in this process as the statutory laws become more complex.

²⁷ Gleeson, above n 9 (citations omitted).

²⁸ (2005) 221 CLR 249, 262 [28].

This does not mean we need to over-complicate the process of statutory interpretation. In a speech delivered recently, the Hon Justice Susan Kenny has referred to the following well-known passage in *Federal Commissioner of Taxation v Munro*, where Isaacs J wrote that '[c]onstruction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them'.²⁹ The sentence of Isaacs J refers us to the words, the text and the purpose of legislation.

Discarded now is the fiction that there is a search for legislative intent in 'seeking to ascertain the collective mental state of the members of the Parliament at the relevant time'.³⁰ As stated by her Honour:

in *Zheng v Cai*, in 2009, five members of the [High] Court [French CJ, Gummow, Crennan, Kiefel and Bell JJ] rejected the idea that 'legislative intent' involved 'the attribution of a collective mental state to legislators'. Rather, so their Honours said, 'judicial findings as to legislative intention' were 'an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.³¹

Recent statements in High Court cases such as *Lacey*³² in 2011 and *Zheng v Cai*³³ indicate the reliance on the approach taken by Parliamentary Counsel.³⁴ In particular, Justice Kenny refers to the joint judgment in *Lacey*, which stated that:

[a]scertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.³⁵

²⁹ (1926) 38 CLR 153, 180, quoted in Justice Susan Kenny, 'Current Issues in the Interpretation of Federal Legislation' (Speech delivered at the National Commercial Law Seminar Series, Melbourne, 3 September 2013) <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-kenny/kenny-j-20130903>>.

³⁰ Kenny, 'Current Issues in the Interpretation of Federal Legislation', above n 29.

³¹ *Ibid*, quoting *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

³² (2011) 242 CLR 573.

³³ (2009) 239 CLR 446.

³⁴ See Kenny, 'Current Issues in the Interpretation of Federal Legislation', above n 29.

³⁵ *Ibid*, quoting *Lacey* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Her Honour further suggests:

A statute is not said to have the meaning that the reader gives it but that which the legislature is taken to have intended it to have (accepting that the legislative intent is *not* the collectivity of parliamentarians' minds). A statute is not to be read as one would another document. Rather, a statute is read according to its own rules. Giving meaning to a statutory provision is therefore a highly controlled task. When the judge says that the goal of statutory interpretation is to ascertain what the legislature intended, the judge is acknowledging her constitutional relationship with the legislature. So far as a judge is concerned, the concept of legislative intent provides the correct constitutional orientation. The effect of the recent redefinition of legislative intent is to draw attention to the function of the concept of legislative intent, rather than to undermine it.

Has redefinition of legislative intent a consequence for the interpretive process? The answer is clearly yes. The emphasis on the common law source of the legislative intent concept focuses attention on the significance of the statutory construction rules. This is because the common law provides that legislative intent can *only* be arrived at by the application of these rules. Legislative intent is moreover arrived at not only by reference to the *rules* of construction, but also consistently with the *assumptions* on which the rules are based.³⁶

There are many assumptions on which the rules of construction are based. In the main they are based upon common sense, and our constitutional values (which will and have varied over time).

This is not the place to discuss the application of the principle of legality (one of the assumptions) by various current members of the High Court of Australia — there would appear to be a difference in at least emphasis as to when clearly identified legislative purposes result in affecting certain rights and freedoms.³⁷ Undoubtedly, what is necessary to displace an assumption will depend upon the legislation itself and its context. This will include the nature of the right or freedom in question. It may be that the more 'fundamental' the right is, common sense would indicate that in our current environment 'clear words', 'necessary application', 'plain intendment' or whatever other formulation is adopted, will be harder to find to displace that right.

³⁶ Kenny, 'Current Issues in the Interpretation of Federal Legislation', above n 29 (emphasis in original).

³⁷ See *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313], 312–13 [317] (Gageler and Keane JJ).

However, it is important to recognise that by its very function and place in the *Constitution*, the Parliament necessarily interferes with fundamental common law rights and freedoms. One only needs a reminder of the extent to which Parliament does encroach upon such rights and freedoms by glancing at the recent Australian Law Reform Commission ('ALRC') report published in December 2015: *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, known as the 'Freedoms Inquiry'.³⁸

In that report, the ALRC discusses 'the source and rationale of many important rights and freedoms and provides an extensive survey of current Commonwealth laws that limit them.'³⁹ The terms of reference included many traditional rights, freedoms, and privileges, for instance freedom of speech, freedom of religion, freedom of association, freedom of movement, vested property rights, legal rights and obligations, the principle of a fair trial, and client legal privilege.⁴⁰ The ALRC further discusses 'how laws that limit traditional rights and freedoms might be critically tested and justified and whether some of these laws merit further scrutiny.'⁴¹ The starting point is that rights are interfered with by Parliament. The question then is 'how rights should be balanced with other rights and with the public interest, when these interests conflict.'⁴²

For instance, freedom of speech (described as 'the freedom *par excellence*; for without it, no other freedom could survive')⁴³ is not absolute in Australia. As stated in the report, 'legislation prohibits, or renders unlawful, speech or expression in many different contexts'.⁴⁴ In fact, 'many limitations on speech have long been recognised by the common law itself, such as incitement to crime, obscenity and sedition.'⁴⁵

Take another example. National security may require limits to be placed on traditional rights and freedoms introduced by Parliament. National security has long been recognised as a legitimate objective of such limitations even at

³⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 129 (2015).

³⁹ *Ibid* 9 [1.2].

⁴⁰ *Ibid* 5.

⁴¹ *Ibid* 9 [1.2].

⁴² *Ibid* 9–10 [1.2].

⁴³ *Ibid* 77 [4.1], quoting Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

⁴⁴ ALRC, *Traditional Rights and Freedoms*, above n 38, 5 [1.25].

⁴⁵ *Ibid*.

common law and in the international context.⁴⁶ It is for Parliament (putting aside any constitutional restraints) to determine the balance between the freedoms that are accepted as being ingrained in our society and the limitations that may need to be put upon them in any particular year, decade or century.

IV RECENT CASES

It is useful now to go to some examples of the contemporary approach to interpreting legislation. This can be conveniently done by a selection of some of the more recent decisions of the High Court of Australia. I only make reference to those parts of the decisions particularly pertinent to the basic approach taken to statutory interpretation by the various judges. Each case shows a traditional approach to interpretation of legislation by reference to an analysis of the text, context and purpose. Whilst there will often be some inconsistency in emphasis from judge to judge, this is to be expected, as I have alluded to already.

In the following cases, what the High Court justices were endeavouring to do was to interpret the legislation by the use of various indicators — indicators well-recognised as valid and reflecting the constitutional relationship between the Parliament and the judiciary to which I have made reference. No one single principle, or approach, is invariably more useful than another. It is the individual cases that give rise to the problems that need to be answered, which then gives rise to the need to determine the meaning of a statute.

A R v IBAC

The first example is the case of *R v Independent Broad-Based Anti-Corruption Commissioner* (*'R v IBAC'*).⁴⁷ The issues for determination before the High Court were whether:

- 'the power of the Independent Broad-Based Anti-Corruption Commission [*'IBAC'*] to hold an examination under pt 6 of the *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) [*'IBAC Act'*] is exercisable in relation to persons [or 'examinees'] who have not been, but might

⁴⁶ Ibid 21 [1.72], citing *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161 (Williams J).

⁴⁷ (2016) 256 CLR 459.

subsequently be, charged and put on trial for an offence relating to the subject matter of the examination’,⁴⁸ and

- ‘s[ection] 144 of the *IBAC Act* is effective to abrogate such an examinee’s privilege against self-incrimination.’⁴⁹

Part 6 of the *IBAC Act* deals with examinations conducted by IBAC. Falling within this part, s 144 relevantly provides:

144 Privilege against self-incrimination abrogated — witness summons

- (1) A person is not excused from answering a question or giving information or from producing a document or other thing in accordance with a witness summons, on the ground that the answer to the question, the information, or the production of the document or other thing, might tend to incriminate the person or make the person liable to a penalty.
- (2) Any answer, information, document or thing that might tend to incriminate the person or make the person liable to a penalty is not admissible in evidence against the person before any court or person acting judicially, except in proceedings for —
 - (a) perjury or giving false information; or
 - (b) an offence against this Act; or ...
 - (f) a disciplinary process or action.

The appellants in this case were issued with a witness summons requiring them to give evidence in a public examination of their knowledge of matters being investigated by IBAC.⁵⁰ They sought to challenge their summons on the basis that pt 6 should not be interpreted to apply to people in their position, and even if it did, s 144 did not apply to also abrogate their privilege against self-incrimination.⁵¹ The appellants’ sole ground of appeal was that the Court of Appeal erred in failing to hold that pt 6 of the *IBAC Act* did not authorise an examination, where there were reasonable grounds to suspect that the examinee may be guilty of an offence.⁵² The High Court upheld the decisions of the lower courts and dismissed the appellants’ appeal. French CJ, Kiefel,

⁴⁸ Ibid 463 [1] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

⁴⁹ Ibid.

⁵⁰ Ibid 464 [5].

⁵¹ Ibid 469–70 [36]–[38].

⁵² Ibid 463–4 [2], 469–70 [36].

Bell, Keane, Nettle and Gordon JJ provided joint reasons, with Gageler J agreeing in separate reasons with those orders in the joint reasons.

In the joint reasons, French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ employed various methods of interpretation to deal with arguments raised by the appellants. As to the application of pt 6, the appellants sought to invoke the principle of legality on the basis of its illustration in *X7 v Australian Crime Commission* ('X7').⁵³ Their Honours distinguished the application of X7, however, on the basis that 'the decision [in X7] turned on the circumstance that the person to be compulsorily examined under [the relevant Act] had been charged with an offence and was, as a result, [already] subject to the accusatorial judicial process.'⁵⁴ Their Honours observed that in X7, it was held that the accused's defence would be inevitably prejudiced if he were required to undergo such examination and the relevant Act had not intended to effect 'such an alteration to the process of criminal justice'.⁵⁵

The appellants also submitted that the 'companion principle' should be extended to protect those yet to be charged with an offence.⁵⁶ However, their Honours referred to previous High Court decisions⁵⁷ which had emphasised that '[t]he companion principle [was] a "companion" of criminal trials.'⁵⁸ Emphasising the purpose of the *IBAC Act*, their Honours identified several problems with extending the principle. For example, applying the principle in the manner contended for by the appellants would:

- 'extend its operation beyond the rationale identified in the authorities, namely, the protection of the forensic balance between prosecution and accused in the judicial process as it has evolved in the common law';⁵⁹ and
- 'fetter the pursuit and exposure of a lack of probity within the police force, which is the object of the *IBAC Act*.'⁶⁰

⁵³ Ibid 471 [41], citing *X7 v Australian Crime Commission* (2013) 248 CLR 92.

⁵⁴ *R v IBAC* (2016) 256 CLR 459, 471 [41].

⁵⁵ Ibid.

⁵⁶ Ibid 472 [42].

⁵⁷ See ibid 471–3 [41]–[47], citing *X7* (2013) 248 CLR 92; *Lee v The Queen* (2014) 253 CLR 455; *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375.

⁵⁸ *R v IBAC* (2016) 256 CLR 459, 472 [46] quoting *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375, 388 [37] (emphasis in original).

⁵⁹ *R v IBAC* (2016) 256 CLR 459, 473 [48].

⁶⁰ Ibid 473 [51].

The appellants submitted that no distinction should be drawn between persons who have been charged with a criminal offence, and those who are 'of interest' or 'suspected' of being involved in the commission of the offence; both categories of people should be considered to be in the same position to the extent compulsory examination is concerned.⁶¹ As such, the reference to 'a person' in s 120 of the Act (empowering IBAC to issue a witness summons to a person to give evidence) was construed by the appellants to exclude meaning a 'person whom the IBAC suspects of having committed an offence'.⁶² However, the submission was rejected for various reasons, including:

- '[n]o principle of statutory construction warrants the addition of these words to limit the operation of the statutory text';⁶³
- in light of the underlying policy of the Act, such a construction would 'deny the IBAC access to precisely the kind of information about matters of grave public interest that may bear upon the discharge of its functions from the very people who are likely to have that information';⁶⁴ and
- the appellants' interpretation 'would tend to frustrate the statutory objective of identifying and reporting on police misconduct'.⁶⁵

Further, the appellants submitted that the language of s 144 does not 'compel the conclusion' that those not yet charged with a criminal offence are also captured by and subject to that provision.⁶⁶ Their Honours' interpretation of this provision focused on the intention of the legislature, the purpose of pt 6 generally, and the interpretive role of the surrounding provisions to reject the appellants' position. For example, their Honours affirmed the legislature's intention that 'the exercise of the powers conferred by the *IBAC Act* might effect a curtailment of the privilege against self-incrimination',⁶⁷ having particular regard to surrounding provisions. Their Honours also relied upon 'the evident purpose of pt 6 of the *IBAC Act*, which is to obtain material not presently available to it in order to advance the objective of maintaining public confidence in the police force'.⁶⁸

⁶¹ Ibid 470 [37].

⁶² Ibid 474 [52].

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid 470 [38].

⁶⁷ Ibid 474–5 [54].

⁶⁸ Ibid 475 [55].

Gageler J's reasons commenced by drawing attention to the purpose of the Act more broadly, and the legislation's mandate to 'identify, expose and investigate serious corrupt conduct ... [and] police personnel misconduct'.⁶⁹ The statutory purpose was emphasised throughout the reasons.⁷⁰

Gageler J identified the ways in which the Act was specifically designed to address or overcome various common law presumptions or principles which may have otherwise operated against the conclusion that the appellants could be subject to examination under pt 6. In particular, his Honour referred to:

- 'the common law presumption that a statutory power to investigate an offence ends when a prosecution of that offence begins';⁷¹
- 'the common law privilege against self-incrimination';⁷²
- 'the risk that the disclosure of evidence given to the IBAC during an investigation might prejudice the fairness of the trial of a person in an existing or future prosecution';⁷³ and
- 'the risk that the conduct of an investigation might prejudice concurrent criminal proceedings',⁷⁴

all of which are addressed 'expressly' by the Act.⁷⁵

Gageler J referred to extrinsic materials to assist in the interpretative exercise, considering the statement of compatibility of the Bill for the Act as laid before the Houses of the Victorian Parliament, and the light it shed on the way in which the Act balanced protecting or limiting human rights. As his Honour observed:

The statement of compatibility explained the balance struck in the *IBAC Act* to be compatible with that human right [of a person charged with a criminal offence not being compelled to testify against himself or herself] in part by reference to the express abrogation of the privilege against self-incrimination having the purpose 'to assist the IBAC in its function as a truth-seeking body that is able to undertake full and proper investigations', and in part by reference to the inclusion of the provision conferring direct use immunity operating to pre-

⁶⁹ Ibid 475–6 [60], quoting *IBAC Act* s 15(2).

⁷⁰ See, eg, *R v IBAC* (2016) 256 CLR 459, 479–81 [74]–[75], [77].

⁷¹ Ibid 476 [65].

⁷² Ibid 477 [66].

⁷³ Ibid 477 [67].

⁷⁴ Ibid 477 [65].

⁷⁵ Ibid 476–7 [65]–[67], citing *IBAC Act* ss 70(1), 114(1), 42, 70(2) respectively.

vent self-incriminating answers obtained in an examination from becoming evidence in a prosecution for the offence under investigation.⁷⁶

Gageler J also dealt with the appellants' arguments on the 'companion rule', but on different grounds to the joint reasons. In approving the Court of Appeal's answer to their arguments, his Honour held that:

whatever the temporal operation of the companion rule might be, the *IBAC Act* manifests an unmistakable legislative intention that a person summoned and examined might be a person whose corrupt conduct or criminal police personnel misconduct is the subject matter of the investigation.⁷⁷

Gageler J also rejected the appellants' submission on the definition of 'a person' in s 120, on both a textual analysis and purposive approach, holding that:

- such an interpretation was 'unjustified by the unqualified statutory language';⁷⁸ and
- it would 'undermine the principal statutory purpose of the *IBAC Act* by compromising the attainment of the express object of providing for the identification, investigation and exposure of serious corrupt conduct and police personnel misconduct.'⁷⁹

Further rejecting the appellants' construction, Gageler J concluded his analysis by commenting on the interaction between common law principles of interpretation and the plain reading of the legislation itself:

Legislation is sometimes harsh. It is rarely incoherent. It should not be reduced to incoherence by judicial construction. ... [A]ny common law principle or presumption of interpretation must surely have reached the limit of its operation where its application to read down legislation plain on its face would frustrate an object of that legislation or render means by which the legislation sets out to achieve that object inoperative or nonsensical.⁸⁰

⁷⁶ *R v IBAC* (2016) 256 CLR 459, 479 [72], quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 19 April 2012, 1783 (Andrew McIntosh); Victoria, *Parliamentary Debates*, Legislative Council, 3 May 2012, 2466 (Gordon Rich-Phillips).

⁷⁷ *R v IBAC* (2016) 256 CLR 459, 479 [73].

⁷⁸ *Ibid* 479 [74].

⁷⁹ *Ibid* 479–80 [74].

⁸⁰ *Ibid* 480–1 [76]–[77].

B *Tabcorp v Victoria*

The second case for consideration is *Tabcorp Holdings Ltd v Victoria* (*Tabcorp v Victoria*).⁸¹ The question for determination was whether the allocation of gaming machine entitlements ('GMEs') in the *Gambling Regulation Act 2003* (Vic) ('2003 Act'), under the new gaming and wagering licensing regime introduced by the Victorian Government, constituted a 'grant of new licences' under s 4.3.12 of the Act, which entitled Tabcorp to payment under that provision, referred to as the 'terminal payment provision'.⁸² Section 4.3.12(1) relevantly provided that:

On the grant of new licences, the person who was the holder of the licences last in force (the former licences) is entitled to be paid an amount equal to the licence value of the former licences or the premium payment paid by the new licensee, whichever is the lesser.⁸³

Tabcorp relevantly contended that the allocation of the GMEs was the 'grant of new licences' within the meaning of s 4.3.12(1) because the GMEs were 'substantially similar' to the licences held by Tabcorp.⁸⁴ The High Court (French CJ, Kiefel, Bell, Keane and Gordon JJ) unanimously dismissed the appeal and held that the phrase 'grant of new licences' in s 4.3.12(1) meant the grant of a new wagering licence and a new gaming licence under pt 3 of ch 4 of the Act, and were distinct from and did not encompass the allocation of GMEs.⁸⁵ The Court's interpretive exercise included a close reading of s 4.3.12, together with an examination of its statutory context and the structure of the Act as a whole. The Court also traced the history of legislative amendments that led to the enactment of the Act, and s 4.3.12 itself. The Court also addressed the relevance of the principle of legality and finally, the commercial context in which the provision operates.

Noting the absence of a definition of 'new licences' or 'licence' more generally, the Court set out the relevant definitions of 'licensee', 'wagering licence' and 'gaming licence', and then imported such definitions, where relevant, into the text of s 4.3.12 as a method of crystallising and emphasising its meaning. Their Honours thus arrived at the following interpretation:

⁸¹ (2016) 328 ALR 375.

⁸² *Ibid* 377–8 [3]–[7].

⁸³ *Gambling Regulation Act 2003* (Vic) s 4.3.12(1).

⁸⁴ *Tabcorp v Victoria* (2016) 328 ALR 375, 377 [6].

⁸⁵ *Ibid* 378 [8].

Accordingly ... s 4.3.12(1) should be read:

On the grant of new licences, the person who was the holder of the licences last in force (the former licences) is entitled to be paid an amount equal to the licence value of the former licences or the premium payment paid by the new [and then the Court inserted] *holder of the wagering licence granted under pt 3 of ch 4 of the 2003 Act and the gaming licence granted under pt 3 of ch 4 of the 2003 Act, whichever is the lesser.*⁸⁶

As such, the Court determined at the outset that the text of s 4.3.12 compels a construction whereby '[t]he phrase "grant of new licences"... could only be a reference' to the licences under pt 3 of ch 4 of the 2003 Act.⁸⁷ Their Honours also observed the interpretative role of the headings both in ch 4 and its parts and divisions which 'reinforced the conclusion that the [p]art was dealing with a sole subject matter — the conjoined wagering licence and gaming licence.'⁸⁸ Such methods of construction led their Honours to the conclusion that there was no reason for a distinction between the meaning of 'licences' in s 4.3.12 and 'licences' throughout the rest of pt 3, which could support an argument that 'licences' in s 4.3.12 extended to mean GMEs.⁸⁹ The Court then closely traced the operation of s 4.3.12; in particular, the way in which the terminal payment provision was triggered and calculated, highlighting specific phrases to discount any argument that the grant of new licences under that section could refer to GMEs.⁹⁰ Each aspect of interpretation closed off any connection between pt 3 of ch 4, in which s 4.3.12 was located, and pt 3A of ch 4 which dealt with the GMEs.

The Court also had regard to the canon of statutory interpretation requiring a 'consistent meaning [to] be given to a particular term wherever it appears in a suite of statutory provisions.'⁹¹ Their Honours relied upon this to reject Tabcorp's argument, which would have required 'licences' to have a 'generic and ambulatory meaning' in a single section of the Act, and a specific meaning in the other provisions.⁹²

⁸⁶ Ibid 386 [52] (emphasis added).

⁸⁷ Ibid 386 [53].

⁸⁸ Ibid 386 [54].

⁸⁹ Ibid 388–9 [65].

⁹⁰ See *ibid* 387–9 [58]–[66].

⁹¹ Ibid 389 [65].

⁹² Ibid 388–9 [65].

Furthermore, the comprehensive description of the structure of the Act more broadly,⁹³ and the outlining of the content of various chapters and parts, served to demonstrate the statutory context in which s 4.3.12 operated, supporting the conclusion that s 4.3.12 was unconnected to the allocation of GMEs.

The Court dismissed Tabcorp's contention that s 4.3.12 engaged the principle of legality, which required 'that clear language be used in legislation if a person is to be deprived of a valuable right.'⁹⁴ It was held that Tabcorp's contention 'failed to address the contingent — as distinct from vested — nature of the right to the terminal payment'; the right would only arise if new licences were issued.⁹⁵ In essence, it was held that 'the "entitlement to payment" was not taken away. The event that was the trigger for it simply did not happen.'⁹⁶

Their Honours had regard to the legislative history as a means of supporting the conclusion that the words 'new licences' in s 4.3.12 meant a wagering licence and gaming licence issued under pt 3 of ch 4 of the *2003 Act*. In relation to s 21 of the previous *Gaming and Betting Act 1994* (Vic) ('*1994 Act*') (being the predecessor to s 4.3.12), their Honours observed that 'there was nothing in the text and context of s 21 of the *1994 Act* to permit the phrase "new licences" to be assigned a different, generic meaning untied to the defined meaning of "licence".'⁹⁷ Licence had been defined in s 3(1) of the *1994 Act* to mean 'the wagering licence or the gaming licence granted under Part 2'.⁹⁸ Similarly, in respect of the *2003 Act*, the Court concluded that '[t]here is nothing to suggest that the legislature determined in the course of an exercise intended to "re-enact and consolidate" the previous legislation to alter the meaning of the term "licences", or the phrase "new licences", when it re-enacted s 21 of the *1994 Act*'.⁹⁹ The Court noted the significance of provisions which had been changed by subsequent amendments (in 2008)¹⁰⁰ to the *2003*

⁹³ Ibid 382–4 [30]–[40].

⁹⁴ Ibid 389 [68].

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid 392 [82].

⁹⁸ Ibid 392 [81].

⁹⁹ Ibid 392 [84].

¹⁰⁰ See especially *Gambling Regulation Act 2003* (Vic) s 4.3.4A, as inserted by *Gambling Regulation Amendment (Licensing) Act 2008* (Vic) s 6; *Gambling Regulation Act 2003* (Vic) s 4.3.33(3) as amended by *Gambling Regulation Amendment (Licensing) Act 2008* (Vic) s 7.

Act as evidence that ‘where Parliament intended there to be a change in meaning where licences were referred to, it expressly provided for it.’¹⁰¹

Significantly, the Court also had regard to the commercial context in which the 2003 *Act* was to be construed, namely the duopoly which pt 3 of ch 4 supported. The Court highlighted that, essentially:

The terminal payment provision in s 21 of the 1994 *Act* and s 4.3.12 of the 2003 *Act* was expressly predicated upon new licences issuing in a context which would mean that they would operate, as instruments of commerce, to authorise the continuation of the duopoly.¹⁰²

As such, ‘new licences’ in s 4.3.12 could not refer to anything other than licences of the characters of those held by Tabcorp.

C Fortress Credit v Fletcher

The next recent case is *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (*Fortress Credit v Fletcher*).¹⁰³ The question for determination was whether an extension of time under s 588FF(3)(b) of the *Corporations Act 2001* (Cth) could be ordered only in relation to a transaction or transactions identified with specificity in the order, or whether it could be ordered in relation to transactions not able to be identified at the time of the order (also referred to as a ‘shelf order’).¹⁰⁴

Section 588FF(1) provides that ‘[w]here, on the application of a company’s liquidator, a court is satisfied that a transaction of the company is voidable because of s 588FE, the court may make any one or more’ of the various orders specified in s 588FF(1).¹⁰⁵ At the time the application for extension was made, s 588FF(3) provided:

An application under subsection (1) may only be made:

- (a) during the period beginning on the relation-back day and ending:
 - (i) 3 years after the relation-back day; or
 - (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;

¹⁰¹ *Tabcorp v Victoria* (2016) 328 ALR 375, 393 [85].

¹⁰² *Ibid* 394 [92].

¹⁰³ (2015) 254 CLR 489.

¹⁰⁴ *Ibid* 495 [1].

¹⁰⁵ *Corporations Act 2001* (Cth) s 588FF(1).

whichever is later; or

- (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

The Court ultimately found that a court can make an order under s 588FF(3)(b) to extend the time within which a company's liquidator may apply for orders in relation to voidable transactions entered into by the company, in circumstances where those transactions cannot be identified at the time of the order.¹⁰⁶ In its unanimous decision (French CJ, Hayne, Kiefel, Gageler and Keane JJ), the Court engaged in a traditional statutory interpretation exercise, considering the legislative history of the provision and its text and context, and the provision's purpose and relevant policy considerations contained in extrinsic material.

The Court noted that s 588FF(3) was enacted to guard against transactions of insolvent companies arising 'in circumstances that are unfair to the general body of unsecured creditors.'¹⁰⁷ The Court also noted that, as the provision was the subject of an amendment in 2007, the 're-enactment presumption' was enlivened, which operates as a 'proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already "judicially attributed to them"'.¹⁰⁸ In considering this principle of statutory interpretation, the Court then held:

In this case a substantive amendment [to s 588FF] is involved, an amendment which followed upon an expert review of the law and presumably the case law. The Report of the Corporations and Markets Advisory Committee did not discuss shelf orders. Nevertheless, it is difficult to imagine that the judgments at first instance and on appeal in *Brown* [which had previously considered this provision] were not known to those involved in the field as interpretive decisions of considerable significance and likely to be applied nationally.¹⁰⁹

In concluding its discussion of the legislative history of the provision, the Court reaffirmed the primacy of textual analysis in interpreting statutes:

¹⁰⁶ *Fortress Credit v Fletcher* (2015) 254 CLR 489, 495–6 [1]–[3].

¹⁰⁷ *Ibid* 500 [11], quoting Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) vol 1, 266 [629] ('*Harmer Report*').

¹⁰⁸ *Fortress Credit v Fletcher* (2015) 254 CLR 489, 502 [15], quoting *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106.

¹⁰⁹ *Fortress Credit v Fletcher* (2015) 254 CLR 489, 502–3 [15]–[16] (citations omitted).

The legislative history is a factor which may support a construction of s 588FF(3) which authorises shelf orders, if such a construction is reasonably open from the text.¹¹⁰

The Court began the textual and contextual analysis with the definition of ‘transaction’, and noting that as the statutory definition in s 9 of the Act is non-exhaustive, ‘the definition extends to the ordinary meaning of “transaction”, which includes having dealings or doing business with another.’¹¹¹

The Court considered the statutory context in which s 588FF is located and its relationship with s 588FE. The Court observed the way in which the concept of ‘voidable transaction’ in s 588FE informs the powers of the Court to make an order under s 588FF.¹¹²

The Court engaged in a close reading of the text of s 588FF(3), and made the following findings:

- ‘The text of para (b) [of s 588FF(3)], read with the opening words of s 588FF(3), leaves open the construction that the “longer period” may be ordered only for a prospective application relating to a particular transaction or transactions. The text also leaves open the construction that a “longer period” may be ordered for any application under sub-s (1);’¹¹³
- the appellants’ submissions that ‘under s 588FF(3)(b) the court makes an order that a stated longer period is the period within which an application may be made by a liquidator for orders under s 588F(1), in relation to *the* transaction’ is incorrect; such a submission was found to be ‘conclusionary in character ... [and] identified the constructional choice, but did not assist in its resolution’;¹¹⁴ and
- the appellants’ submissions that ‘the words “may only be made” in s 588FF(3) as indicating a limited scope for the power under para (b)’ is incorrect, and rather it was held that the only operation of those words was to ‘impose a requirement as to time as an essential condition of the right conferred by s 588F(1) to bring proceedings for orders with respect to voidable transactions.’¹¹⁵

¹¹⁰ Ibid 503 [16].

¹¹¹ Ibid 503 [18].

¹¹² Ibid 504 [20].

¹¹³ Ibid 504 [21].

¹¹⁴ Ibid 505 [22] (emphasis in original).

¹¹⁵ Ibid 505 [23].

It was ultimately held that the text on its own did not provide conclusive support for one construction over the other. The Court therefore directed its attention to ‘the purposive and consequentialist arguments which tended to dominate the debate about construction.’¹¹⁶

The Court identified that the ‘function’, and therefore ‘immediate purpose’ of the provision was to ‘confer a discretion on the court to mitigate, in an appropriate case, the rigours of the time limits imposed by para (a).’¹¹⁷ Such a discretion was ‘to be exercised having regard to the scope and purposes of pt 5.7B, characterised in the Harmer Report as the continuing “policy” which underpinned its recommendations.’¹¹⁸ The Court went on to explain the competing aspects of that policy.¹¹⁹

Noting that the availability of shelf orders was a construction that even the appellants accepted as being open on the text,¹²⁰ the Court ultimately concluded:

There is ... no independent basis for the assertion that any extension of time which does not identify a particular transaction or transactions must be an unreasonable prolongation of uncertainty militating against a construction which would allow such an order to be made. The section provides for the exercise of discretion by the court. Questions of what is a reasonable or an unreasonable prolongation of uncertainty and the scope of such uncertainty are more appropriately considered case-by-case in the exercise of judicial discretion than globally in judicial interpretation of the provision.¹²¹

D ACMA v Today FM

Finally, I come to the case of *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (*ACMA v Today FM*).¹²² The issue for determination was whether, prior to adjudication by a competent court, the

¹¹⁶ Ibid.

¹¹⁷ Ibid 505 [24].

¹¹⁸ Ibid. See Law Reform Commission, *Harmer Report*, above n 107.

¹¹⁹ Ibid. These competing aspects were ‘the avoidance of transactions by which an insolvent company has disposed of property in circumstances that are regarded by the legislature as unfair to the general body of unsecured creditors’, and ‘the requirement that liquidators be placed under a reasonable time limitation for taking action under the voidable transaction provisions.’

¹²⁰ Ibid 506 [27].

¹²¹ Ibid 505–6 [24].

¹²² (2015) 255 CLR 352.

Australian Communications and Media Authority (‘ACMA’) was authorised to make an administrative finding or express an opinion that commercial radio station Today FM had committed a criminal offence, for the purpose of determining whether cl 8(1)(g) of sch 2 of the *Broadcasting Services Act 1992* (Cth) (‘BSA’) had been breached.¹²³

Clause 8(1)(g) prohibits, as a condition of a broadcasting services licence, the use of a broadcasting service in the commission of an offence. The ACMA made a preliminary finding that Today FM had committed an offence under the *Surveillance Devices Act 2007* (NSW) (‘SDA’) by recording and broadcasting a private conversation without the consent of the parties to the conversation.¹²⁴ Today FM commenced proceedings in the Federal Court of Australia seeking declaratory and injunctive relief, contending that the ACMA was not authorised to make such a finding until a competent court adjudicated that it had committed the SDA offence. Today FM was unsuccessful at trial, but succeeded in an appeal to the Full Court. The High Court allowed the appeal by the ACMA.¹²⁵ French CJ, Hayne, Kiefel, Bell and Keane JJ delivered a joint judgment. Gageler J delivered a separate judgment with concurring reasons.

The majority of the plurality’s reasons focused on common approaches to statutory interpretation — a focus on the text and context of the clause itself, together with the purpose of the relevant provisions.

Their Honours had regard to the ordinary English meaning of ‘*commission* of an offence’, to distinguish it from ‘*conviction* for an offence’, determining that the former referred to ‘the fact of the commission of the offence and the latter to the finding of the criminal court.’¹²⁶

Their Honours also had regard to the text of the provision to shed light on the extent of the powers of the ACMA, and therefore the breadth of cl 8(1)(g). Their Honours determined that the ACMA’s enforcement powers would be significantly confined if cl 8(1)(g) was construed as requiring a finding by a criminal court before the condition could be said to have been breached, holding that ‘[t]here is nothing in the text of cl 8(1)(g) to support that confinement. Nor do the objects of the BSA or the contextual matters identified by the Full Court support that confinement.’¹²⁷

¹²³ Ibid 362 [2] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹²⁴ Ibid 365–6 [14].

¹²⁵ Ibid 366–8 [16]–[22].

¹²⁶ Ibid 372 [37] (emphasis in original).

¹²⁷ Ibid 375 [45].

Their Honours had regard to the operation and purpose of various provisions in the statute to inform the interpretation of cl 8(1)(g). For example, if Today FM's interpretation was accepted, their Honours reasoned that the ACMA would also be precluded from taking action against a broadcaster who had breached cl 8(1)(a) by advertising tobacco because such conduct also constituted an offence under the *Tobacco Advertising Prohibition Act 1992* (Cth). The ACMA would therefore have to wait until the broadcaster had been convicted under that Act.¹²⁸

Similarly, their Honours also observed that the meaning of cl 8(1)(g) could not vary depending on the type of enforcement mechanism selected by the ACMA.¹²⁹ However, if Today FM's construction was to be accepted, 'in the case of a prosecution for the offence created by s 139(3) [of the *BSA*], particularised as a breach of the cl 8(1)(g) licence condition, the prosecution must prove the earlier conviction of a person for the relevant offence'.¹³⁰ The same reasoning would apply to an application under s 140A(3), where a conviction would have to be proved prior to a civil penalty order being made.¹³¹

Their Honours also considered the surrounding provisions of s 178(2) of the *BSA* (which allows the ACMA to provide a copy of their reports to the Director of Public Prosecutions where it becomes aware of conduct which may constitute an offence) and s 179(3) of the *BSA* (which allows ACMA not to publish a report if it would prejudice the fair trial of a person), and looked to the purpose of those provisions to inform the way in which cl 8(1)(g) should be interpreted.¹³² Their Honours rejected the Full Court's conclusions that the purposes of ss 178(2) and 179(3) indicate that findings on criminal liability should not be left to the ACMA.¹³³ It was concluded in respect of both provisions that their purposes were not confined to operating in respect of only cl 8(1)(g), and as such these provisions should not be taken to curtail the ACMA's power to determine the administrative enforcement measure appropriate to breaches of licence conditions.¹³⁴

¹²⁸ Ibid 373 [39]–[40].

¹²⁹ See ibid 364–5 [11], 374 [43]. These enforcement mechanisms include prosecution as a criminal offence (*BSA* s 139(3)), civil penalty order (at s 140A(3)), and administrative action in the form of a remedial direction (at s 141(1)) or suspension or cancellation of licence (at s 143(1)).

¹³⁰ *ACMA v Today FM* (2015) 255 CLR 352, 374 [43].

¹³¹ Ibid.

¹³² Ibid 375–6 [46]–[47].

¹³³ Ibid 376 [48].

¹³⁴ Ibid 375–6 [46]–[47].

In concurring with the decision of the plurality, Gageler J made some further comments on statutory interpretation, referring primarily to the purpose and operation of the relevant provisions, and the principle of legality.

Gageler J determined that cl 8(1)(g) was ‘not directed to defining the scope of the functions’ of the ACMA, but rather to ‘prescribing a norm of conduct to which a commercial radio broadcasting licensee must adhere as a condition of its licence.’¹³⁵ In so characterising the clause, his Honour rejected the Full Court’s reliance on the principle of legality as a means of informing its interpretation.¹³⁶

His Honour supported the characterisation of the provision in light of its purpose and necessary operation, reasoning that the ‘norm of conduct’ is applicable at all times during the licence, and if the ACMA could not objectively determine compliance ‘from time to time and at each point in time throughout the period of the licence’, then the provisions of the *BSA* which provided for its enforcement would be deprived of force or unworkable.¹³⁷

His Honour identified ways that the Parliament, through its enactment of the *BSA*, had specifically addressed the concerns of the common law which may have otherwise invoked the application of the principle of legality. For example, protection of reputation and the integrity of the criminal process were identified by his Honour as addressed by ss 175 and 179(3) of the *BSA* respectively.¹³⁸

Gageler J employed a purposive approach to interpretation, considering the practical operation of relevant clauses in light of their purpose. As a preliminary statement of principle, his Honour referred to previous High Court decisions which have held that:

a power of inquiry and determination takes its legal character from the purpose for which it is undertaken, and ... a power of inquiry and determination undertaken for a non-curial purpose ... can encompass formation and expression of an opinion about an existing legal right or obligation.¹³⁹

More specifically, his Honour rejected the notion that ‘the commission of an offence’ connoted a court exercising criminal jurisdiction that had found the

¹³⁵ *Ibid* 382–3 [70].

¹³⁶ *Ibid*. See also Gageler J’s commentary on the scope and operation of the principle of legality more generally: at 381–2 [66]–[69].

¹³⁷ *Ibid* 383–4 [72].

¹³⁸ *Ibid* 384 [74]. His Honour also refers to s 180 (in addition to s 175) of the *BSA* as operating to protect individuals’ reputation.

¹³⁹ *Ibid* 380 [64] (citations omitted).

offence committed.¹⁴⁰ Such an interpretation would require that the ACMA's enforcement against a licence breach always be subject to (a) the appropriate authority choosing to prosecute the offence, and (b) the entry of a subsequent conviction for that offence. As such:

Pending prosecution and conviction for the offence, the [ACMA] could not even direct the licensee to take remedial action to ensure that the conduct constituting the commission of the offence did not continue or recur.¹⁴¹

His Honour similarly referred to the purpose of s 178(2) as an indication that cl 8(1)(g) should be interpreted as allowing the ACMA the authority to report whether or not an offence had been committed.¹⁴²

V CONCLUSION

As can be seen, each case that has been discussed involved looking closely at the statutory provisions themselves, and the various indicators to determine the message the legislature was endeavouring to convey.

My recourse to notions of common sense should not concern any potential author of an article or book on statutory interpretation or any existing author receiving royalties, for fear that all future discourse on statutory interpretation can be reduced to a few sentences of approach. Nor should barristers appearing before the courts feel they do not need to burden judges with at least some guidance as to construction of a statute other than saying it is all a matter of common sense and it is all over to your Honour. Whilst such an invitation may indicate the barrister's degree of confidence in the quality of the judge, burden (though not unnecessary burden) is what judges have come to expect (although not necessarily fully enjoy).

From time to time, different conclusions will be reached by different judges on the interpretation and application of a particular provision. In fact, some of the pronouncements of the High Court over time may appear inconsistent, or at least, involve a difference in emphasis.

Nevertheless, the High Court of Australia by its actual analysis, as shown in the above decisions, has indicated the current approach to statutory interpretation involving the use of text, context and purpose. This approach to

¹⁴⁰ Ibid 384 [73].

¹⁴¹ Ibid.

¹⁴² See *ibid* 385 [76]–[77].

statutory interpretation is based upon various assumptions and a basic common sense approach to interpreting a statute.