Statutory Interpretation – Mostly Common Sense?

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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 DC Pearce and RS 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?'*

At the previous lecture given by the Honourable 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. 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.

As Chief Justice Gleeson 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.*

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

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 significant in a representative democracy.

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.

Further, the common law will be developed by the courts even after the time of the enactment of a statute. Therefore, it may well be that statutes will be interpreted by the courts in 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. 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 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. 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 are 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 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.

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.

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.

The courts do not invariably display a deep reverence for every product of Parliamentary Counsel. The scales are heavily weighted against the drafter, and life is not always fair. If the legislation is plain, there is likely to be no litigation and so no praise for him or her. If there is confusion or obscurity, the reports will probably record the results of the fierce and critical debate between barrister and judge being brought to bear

on the drafter.

Nevertheless, the debt owed to the drafter by the legal profession is incalculable. He or she has been pictured as happily singing—

I'm the Parliamentary Draftsman,

I compose the country's laws,

And of half the litigation

I'm undoubtedly the cause.

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 Legislature. 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.*

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; precision, described by Lord Justice Stephen years ago, 'which 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.'

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'. This may be one reason we so often encounter those 'nice sharp quillets of the law' which has brought the law into disfavour since Shakespeare's day.

It is impossible to formulate rules that should be so unequivocal in all situations to render unnecessary judicial selection from possible meanings. Questions of interpretation arise sometimes not from the obscurities of language, but rather because the court has to apply a general law to the situation that could not have been foreseen by the Legislature. 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, legislation must be expressed in general, and more or less abstract terms. A detailed description of specific human actions forbidden or allowed, and their consequences, would be an impossible task.

Therefore, it is important to remember that the words and concepts in the law are often replete with history. A distinguished judge Justice

Frankfurter in *Rochin v California* said as follows:

> *Words being symbols do not speak without a gloss. On the one hand a 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 a process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges.*

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

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, over-analysis, or mechanical or scientific analysis. Trawling for rules and cannons 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 a knowledge (even a 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 it to be careful of using explanatory materials. In *Re Bolton; Ex Parte Beane* it was said:

> *The words of a Minister must not be substituted for the text of the law.*

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.*

In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* it was said:

> *Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text.*

Then one can recall the words of Heydon J in *Lacey v Attorney-General (QLD)* about second reading speeches:

> *A third consideration arises out of what the Minister for Justice said in 1975. Excessive recourse to second reading speeches 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.*

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 *International Finance Trust Cos Ltd v NSW Crime Commission*, 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.*

Chief Justice French, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*, 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 legislative purpose', said:

> *That proposition accords with the approach to construction characterised by Gaudron J in* Corporate Affairs Commission (NSW) v Yui *(1991) 172 CLR 319 at 340 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.*

Before going further, I just want to say something about 'purpose'.

Legislation often involves compromise. A statute's general purpose may be clear but the dispute may be as to the extent to which it has pursued or achieved that purpose. To identify the general purpose in this instance may not be of assistance in finding the point at which a balance has been struck or a compromise reached. In addition, some legislation pursues inconsistent purposes, and in the case of a complex and enduring statute that has been amended many times, this is likely.

In order that the purpose of a statute may be used rationally to elucidate the meaning of the provision, it is necessary to identify a purpose at an appropriate level of specificity. At one level, it may be correct to say

that the purpose of income tax legislation is to raise revenue for the government. Such an observation would not advance an understanding of a particular provision whose purpose is necessarily more precise, involving the implementation of fiscal policy. If a dispute arises as to the meaning of a particular provision, the relevant purpose will be the purpose of the particular aspect of the fiscal plan in which the provision is to be found.

There are many examples of difficulties arising in determining 'purpose', and its application. For instance, in dealing with the *Pawnbrokers Act 1996*, in *Palgo Holdings Pty Ltd v Gowans*, McHugh CJ, Gummow, Hayne and Heydon JJ said at [28]:

> *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 Second Reading Speech 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.*

So we come back to the ultimate quest to determine what does the statute mean, 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.

This does not mean we need to overcomplicate the process of statutory interpretation.

In a well-known passage in *Federal Commission of Taxation v Munro* in 1926, Isaacs J wrote that:

> *Construction 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.*

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 Parliament of the relevant time. 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 legislatures. Their Honours said:

> *'[J]udicial findings as to legislative intention'* were *'an expression of the constitutional relationship between arms of government with a respect of the making, interpretation and application of laws'.*

Recent statements of the High Court in cases such as *Lacey v Attorney-General (Qld)*(**'Lacey'**) in 2011 and *Zheng v Cai* indicate the reliance on the approach taken by Parliamentary Counsel. Thus, the joint judgment in *Lacey* stated the:

> *[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.*

In a paper delivered recently, the Honourable Justice Susan Kenny of the Federal Court of Australia stated:

> *... 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.

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. 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 that 'clear words', 'necessary application', 'plain intendment', or whatever other formulation is adopted, will be harder to find to displace that right.

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'.

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. 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.

The ALRC discusses how laws that limit traditional rights and freedoms might be critically tested and justified, and whether some of the laws merit further scrutiny. The starting point is that rights are interfered with by Parliament. The question then is how these rights should be balanced with other rights and with the public interest, when these conflict.

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

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

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 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 words, text and context. 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.

The first example is the case of *R v The Independent Broad-based Anti-corruption Commissioner* (2016) 329 ALR 195.

The issues for determination before the High Court were whether:

- the power of the Independent Broad-based Anti-corruption Commissioner ('**IBAC**') to hold an examination under Pt 6 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (the '**Act**') is exercisable in relation to persons (or 'examinees') who have not been, but might subsequently be, charged and put on trial for an offence relating to the subject matter of the examination; and

- section 144 of the Act is effective to abrogate such an examinee's privilege against self-incrimination.

Part 6 of the 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 who makes 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 witness summons requiring them to give evidence in a public examination of their knowledge of matters being investigated by IBAC. 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.

The appellants' sole ground of appeal was that the Court of Appeal erred in failing to hold that Pt 6 of the Act did not authorise an examination, where there were reasonable grounds to suspect that the examinee may be guilty of an offence.

The High Court upheld the decisions of the lower courts and dismissed the appellants' appeal. French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ provided joint reasons, with Gageler J agreeing, in separate reasons, with the 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***'). Their Honours distinguished the application of X7, however, on the basis that the decision in *X7* turned on the circumstances that the person to be compulsorily examined under the relevant Act had been charged with an offence and was already 'subject to the accusatorial judicial process.' 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.

The appellants also submitted that the 'companion rule' should be extended to protect those yet to be charged with an offence. However, their Honours referred to previous High Court decisions which had emphasised that 'the companion principle [was] a 'companion' of criminal trials.' 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 the prosecution and the accused in the judicial process as it has evolved in the common law'; and
- 'fetter the pursuit and exposure of a lack of probity within the police force, which is the object of the IBAC Act.'

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. As such, the reference to 'person' in s 120 of the Act (empowering the 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'. 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';
- 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'; and

- the appellants' interpretation 'would tend to frustrate the statutory objective of identifying and reporting on police misconduct.'

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. 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 Act might effect a curtailment of the privilege against self-incrimination', 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.'

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

Justice Gageler 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;

- the common law privilege against self-incrimination;

- 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; and

- the risk that the conduct of an investigation might prejudice concurrent criminal proceedings,

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

Justice Gageler 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:

> *[t]he 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 prevent self-incriminating answers obtained in an examination from becoming evidence in a prosecution for the offence under investigation.*

Justice Gageler also dealt with the appellants' arguments on the 'companion principle', 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.*

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

- such an interpretation was 'unjustified by unqualified statutory

language'; 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.'

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… any 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.*

The second case for consideration is *Tabcorp Holdings Limited v Victoria* (2016) 328 ALR 375.

The question for determination was whether the allocation of gaming machine entitlements ('**GMEs**') in the *Gambling Regulation Act 2003* (Vic) (the '**2003 Act**'), under the new gaming and wagering licensing regime introduced by the Victorian Government, constituted a 'grant of a new licence' under s 4.3.12 of the 2003 Act which entitled Tabcorp to payment under that provision, referred to as the 'terminal payment provision'.

Section 4.3.12 relevantly provided that '[o]n the grant of the new licences, the person who was the holders 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 lesser.' Tabcorp relevantly contended that the allocation of the GMEs was the 'grant of new licences' within the meaning of s 4.3.12 because the GMEs were 'substantially similar' to the licences held by Tabcorp.

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 meant the grant of a new wagering licence and a new

gaming licence under Pt 3 of Ch 4 of the 2003 Act, and were distinct from, and did not encompass, the allocation of GMEs.

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 2003 Act as a whole. The Court also traced the history of legislative amendments that led to the enactment of the 2003 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 licence' 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 emphasizing its meaning:

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 the 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.'*

As such, the Court determined at the outset that the text of s 4.3.12 compels a construction whereby 'the phrase "grant of new licences"… could only be a reference' to the licences under Pt 3 of Ch 4 of the 2003 Act. Their Honours also observed the interpretative role of the headings both in Ch 4 and its Parts and Division which 'reinforce…the conclusion that the Part was dealing with a sole subject matter – the conjoined wagering licence and gaming licence.' Such methods of construction lead 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. 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. 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 appeared in a suite of statutory provisions. 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.

Furthermore, the comprehensive description of the structure of the 2003 Act more broadly, 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 for a valuable right.' 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. 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.'

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 mean 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 1994 Act (being the predecessor to s 4.3.12), their Honours observed that 'there was nothing in the text or context of s 21 to permit the phrase "new licences" to be assigned a different generic meaning untied to the defined meaning of "licence".' 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.'

Similarly, in respect of the 2003 Act, the Court concluded that '[t]here was 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 s 21 of the 1994 Act was re-enacted.

The Court noted the significance of provisions which had been

changed by subsequent amendments (in 2008 and 2009) to the 2003 Act as evidence that 'where Parliament intended there to be a change in meaning where licences were referred to, it expressly provided for it.'

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

> *[t]he 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.*

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.

The next recent case is *Fortress Credit Corporation Australia II Pty Ltd v Fletcher and Others* (2015) 254 CLR 489.

The question for determination was whether an extension of time under s 588FF(3)(b) *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').

Section 588FF(1) provides that where, on the application of the company's liquidators, a court is satisfied that a transaction of the company was voidable because of s 588FE, the court might make any one or more of the various orders specified in s 588FE(1). 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;*
> *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.

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.' 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 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]'. 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.*

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

> *The legislative history is a factor which may support a construction of s 588FF(3) which authorised shelf orders, if such a construction is*

reasonably open from the text.

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.'

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 transactions' in s 588FE informs the powers of the court to make an order under s 588FF.

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

- while 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)';

- 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'; and

- the appellants' submissions that the words 'may only be made' in s 588FF(3) indicate 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.'

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.'

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).' Such a discretion was 'to be exercised having regard to the scope and purpose of Pt 5.7B, characterised in Harmer Report as the continuing "policy" which underpinned its recommendations'. The Court went on to explain the competing aspects of that policy.

Noting that the availability of shelf orders was a construction that even the appellants accepted as being open on the text, 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 out. The section provides for the exercise of discretion by the court. Questions of what is a reasonable or 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.*

Finally, I come to the case of *Australian Communications and Media Authority v Today FM Sydney Pty Ltd* (2015) 255 CLR 352.

The issue for determination was whether, prior to adjudication by a competent court, the 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' under the *Surveillance Devices Act 2007* (NSW) ('**SDA**'), for the purpose of determining whether cl 8(1)(g) of Sch 2 of the *Broadcasting Services Act 1992* (Cth) ('**BSA**') had been breached.

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 SDA by recording and broadcasting a private conversation without the consent of the parties to the conversation.

Today FM commenced proceedings in the Federal Court of Australia (in which it was successful) seeking declaratory and injunctive relief, contending that the ACMA was not authorised to make such a finding until a competent court had adjudicated that Today FM had committed the SDA

offence.

The Court allowed the appeal by the ACMA. Chief Justice French, Hayne, Kiefel, Bell and Keane JJ delivered a joint judgment. Justice Gageler 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 facts of the commission of the offence' and the latter to the finding of the criminal court.

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.*

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 Products Act 1992* (Cth). The ACMA would therefore have to wait until the broadcaster had been convicted under that Act.

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. 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…'.

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.

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 Department 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.

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. 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.

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.

Justice Gageler determined that clause 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.' 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.

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.

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.

Justice Gageler 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 non-curial purposes… can encompass formation and expression of an opinion about an existing legal right or obligation.*

More specifically, his Honour rejected the notion that 'commission of offence' connoted a court exercising criminal jurisdiction that had found the offence committed. 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, '[p]ending 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.'

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.

As can be seen, each case 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 (not though unnecessary burden) is what judges have come to expect (although not necessarily fully enjoying).

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