

Statutory construction or judicially constructed policy?

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The paper “Statutory construction or judicially constructed policy?” was presented for Legalwise in 2012 as a workshop. A brief lecture was given, and then seminar attendees were invited to read the workshop materials and discuss the statutory construction issues which arose.

The materials which follow are: an outline of the initial paper, the factual scenario for the workshop, the “statute” which governed the facts and a discussion of some of the relevant statutory construction points.

Outline

My starting point today is a sentence from a recent decision of the High Court:

“In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.”

Australian Education Union v Department of Education [2012] HCA 3 [28]
(French CJ, Hayne, Kiefel and Bell JJ)

This is a clear message from the High Court: do not get distracted by the idea of a purposive interpretation. This is consistent with the long-accepted approach to statutory interpretation, which is to start with the words of the statute.

However, *Australian Education Union* does not herald a move away from a purposive approach to statutory interpretation. It is quite clear from that decision that, while the words of the statute are important and the appropriate starting point, they must still be read in the context of the statute as a whole.

This is part of the Court's lesson in *Project Blue Sky*:

"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. ... the process of construction must always begin by examining the context of the provision that is being construed.

*A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. **Only by determining the hierarchy of the provisions** will it be possible in many cases to give each provision the meaning **which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.***

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. ..."

Project Blue Sky v ABA (1998) 194 CLR 355, 381 [69]–[71] (McHugh, Gummow, Kirby and Hayne JJ) (footnotes omitted, emphasis added)

A few pages on, their Honours expanded on the task of statutory interpretation:

*"... the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. **But not always.** The **context** of the words, the **consequences** of a literal or grammatical construction, the **purpose** of the statute or the **canons of construction** may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. ..."*

Project Blue Sky v ABA (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (footnote omitted, emphasis added)

And so, we are given the following approach to statutory interpretation:

1. Start with the words.
2. Consider the context.
3. Consider the purpose of the statute.
4. Consider the canons of construction (the example given by their Honours, at footnote 56 in the paragraph cited above, was “*the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: Coco v The Queen (1994) 179 CLR 427 at 437*”).
5. Consider the consequences of the construction. In my view, it is not only the consequences of a literal or grammatical construction which are important, but the consequences of the construction generally. This is implicit in the requirement to take the context, purpose and canons of construction into account, as those factors cannot be given proper consideration without an appreciation of their consequences as well. However, those consequences should not be given too great a weight.

At this point, you should be approaching a supportable interpretation of the statute.

I am not going to go through the canons of construction, but I recommend *Statutory Interpretation in Australia* (7th ed, DC Pearce and RS Geddes, LexisNexis Butterworths, 2011) if you need a refresher on those.

To give legislative support to the proposition that the purpose or object of the legislation is the touchstone, one must never forget section 15AA of the *Acts Interpretation Act 1901* (Cth) and section 33 of the *Interpretation Act 1987* (NSW) (and cognate provisions in other jurisdictions).

As a reminder, section 15AA(1) (there is no other subsection) of the Commonwealth Act provides:

“In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly

stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.”

Section 33 of the NSW Act is in cognate terms, except that it makes effectively the same provision for statutory instruments (although in the case of a statutory instrument, the relevant purpose or object is that of the Act under which the statutory instrument was made). (For the sake of completeness, section 13 of the *Legislative Instruments Act 2003* (Cth) relevantly ensures that section 15AA of the *Acts Interpretation Act 1901* (Cth) applies to Commonwealth legislative instruments.)

A word must also be said about the importance of “intention” of the legislature, with reference to the duty expressed by the majority in *Project Blue Sky* at [78] as follows: “*the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have.*”

As you are all probably aware, this does **not** mean the subjective intention of the legislature. The New South Wales Court of Appeal in *Harrison v Melhem* put it thusly:

*“The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament. ... The courts must determine what Parliament **meant** by the words it used. The courts do not determine what Parliament intended to say.”*

Harrison v Melhem (2008) 72 NSWLR 380, 384 [16] (Spigelman CJ) (footnotes omitted, emphasis added)

*“However broadly the notion of ‘purpose’ or even ‘intent’ is itself pressed, it does not, in my view, require **or even permit** a court to give any weight to a statement directly addressing the intended meaning of the provision that is in the course of being enacted. It certainly does not do so where, as here, the plain meaning of the enacted text is at variance with the meaning that the minister is giving or appears to be giving to it.”*

Harrison v Melhem (2008) 72 NSWLR 380, 401 [172] (Mason P)

Beazley JA (relevantly) and Giles JA agreed with Mason P.

These quotes highlight the danger of giving too literal a meaning to the concept of the “intention” of the legislature. In my view, the “intention” of the legislature means two things in this context:

1. The meaning of the words of the statute, as enacted. That is, the statement that a court must give effect to the intention of the legislature is just another way of stating that the court must construe the statute as it is.
2. The purpose or objects of the legislation, as per the usual task of statutory construction.

In other words, the idea that the court is looking for the “intention” of the legislature doesn’t add anything to the task of statutory construction as I have already described.

The High Court’s decision in *Australian Education Union* reiterates the importance that the test used be objective, not a search for some subjective intention.

It is also worth bearing in mind what the majority in *Project Blue Sky* had to say about

*“the continued use of the ‘elusive distinction between directory and mandatory requirements’ and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications which have outlived their usefulness because they deflect attention from **the real issue which is whether an act done in breach of the legislative provision is invalid.** The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. ... a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been a substantial compliance with the provision. **A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.**”*

Project Blue Sky v ABA (1998) 194 CLR 355, 390 [93] (McHugh, Gummow, Kirby and Hayne JJ) (footnotes omitted, emphasis added)

The majority in *Project Blue Sky* found that the Australian Broadcasting Authority (ABA) standard, which had been impugned, was unlawful but not invalid (at 393 [100]), due to the fact that the provision with which the standard was inconsistent “regulate[d] the exercise of functions already conferred on the ABA rather than impos[ing] essential preliminaries to the exercise of its functions” (at 391 [94]); the nature of the obligations imposed by the provision with which the standard was

inconsistent (at 391–392 [95]–[96]); and the public inconvenience that would likely result if the standard was held to be invalid (at 392 [97]–[98]).

Finally, a case to watch out for. The High Court has granted special leave to appeal from a decision of the Full Court of the Federal Court in *Kutlu v Director of Professional Services Review* [2011] FCAFC 94; (2011) 197 FCR 177. Among other relevant points, it is likely it will need to give further consideration to the invalid/unlawful distinction drawn in *Project Blue Sky*.

Workshop scenario

You act for Sergeant Alan Moss in two related matters. Both concern the construction of provisions of the *Police Procedures and Discipline Act 1997* (**the Act**).

Civil assault claim

In the first, your client is a respondent (and was a defendant below) in a civil claim for assault. The plaintiff below, and now appellant, is a Mr Gareth Ugg. Your client's co-defendants/respondents are the State and another police officer.

Mr Ugg alleges that he was assaulted by your client and another police officer at the Queens Mile police station on the evening of 17 August 2008. He had attended the station voluntarily, looking for his girlfriend, as he had been told she had gone to the station following a disagreement between them earlier that day.

Not long after his arrival, Mr Ugg was arrested, cautioned and searched. Your client made the arrest and told the appellant that he would be charged with assault and theft. The search of Mr Ugg was conducted in your client's presence.

Mr Ugg was then interviewed by Constable Rosemary Waters. Constable Waters told Mr Ugg that he would be charged with assault and intentionally causing injury. He was requested to provide his fingerprints. He was told that if he refused to provide them voluntarily then a member of the police force might use reasonable force to obtain them. He was told that his fingerprints were required for the purpose of identification and that they may be used as evidence in court. He refused to provide his fingerprints voluntarily, saying that he had no reason to do so.

Your client then took Mr Ugg to a small room – about 3 metres by 2.5 metres in size – where the fingerprint counter for taking “ink style” fingerprints was situated. The counter was close by the entry doorway, fixed to the side wall on the right.

Your client attempted to persuade Mr Ugg to provide his fingerprints. He still refused. Your client decided to use force to obtain the fingerprints. Another policeman, Constable Samuel Wilson (the third defendant/respondent), lent assistance. The two men took Mr Ugg, one by each arm, and tried to pull him from the rear of the room

towards the counter. He resisted. Ultimately, Sergeant Moss and Constable Wilson were able to restrain Mr Ugg and forcibly take his fingerprints.

These are the circumstances in which Mr Ugg alleges that he was assaulted.

At trial, the defendants collectively relied on section 52(4) of the Act as a defence, arguing that the force used by Sergeant Moss and Constable Wilson was authorised by that provision.

The trial judge made the following finding:

While the indiscriminate use of force by the police upon members of the public is not to be condoned, the plain policy behind provisions such as section 52(4) [of the Act] is to permit the police to do their job of investigating offences in the face of a lack of co-operation. That is what happened in the present case.

Accordingly, I find the defendants' defence to the allegation of assault made out, by virtue of their compliance with section 52.

You know that an appeal will be filed but do not yet know the grounds. Advise your client in relation to possible grounds of appeal (on the basis of statutory interpretation).

Disciplinary matters

The appellant is successful on the appeal, and the police force has decided to commence disciplinary proceedings against your client, pursuant to Part 8 of the Act. Up until this point, the police force had been entirely supportive of your client, and no suggestion had ever been made that disciplinary proceedings would be considered in any event.

An application is made to a magistrate, on behalf of the police force, pursuant to section 178(3) of the Act, to extend the time to commence proceedings. Advise your client on this application, on the basis of an interpretation of section 178 of the Act.

Statute for workshop

Extracts from the *Police Procedures and Discipline Act 1997*

Part 3 Investigation of offences

...

Section 52 Taking fingerprints from suspects

(1) A member of the police force may take, or cause to be taken by an authorised person, the fingerprints of a person of or above the age of 15 years who—

- (a) is believed on reasonable grounds to have committed; or
- (b) has been charged with; or
- (c) has been summonsed to answer to a charge for—

an indictable offence or a summary offence referred to in Schedule 7.

(2) A member of the police force intending to fingerprint a person under this section must inform the person in language likely to be understood by him or her—

- (a) of the purpose for which the fingerprints are required; and
- (b) of the offence which the person is believed to have committed or with which the person has been charged or for which the person has been summonsed to answer to a charge; and
- (c) that the fingerprints may be used in evidence in court; and
- (d) that if the person refuses to give his or her fingerprints voluntarily, a member of the police force may use reasonable force to obtain them.

(3) The member of the police force who informs a person of the matters in subsection (2) must record (whether by audio recording or audiovisual recording) the giving of that information and the person's responses, if any.

(4) A member of the police force may use reasonable force to take the fingerprints of a person referred to in subsection (1) who refuses to give them voluntarily if the use

of reasonable force is authorised by a member in charge of a police station at the time of the request or a member of or above the rank of sergeant.

...

Part 8 Disciplinary matters

Section 154A Objects of Part

The object of this Part is to provide for the proper investigation of alleged disciplinary and procedural breaches by members of the police force.

...

Section 160 Service of notice for alleged breach of discipline

(1) Where the Commissioner believes, on reasonable grounds, that a member has committed a breach of discipline and considers that the breach is serious enough to warrant action being taken under this Part, the Commissioner or prescribed member is to serve a notice under subsection (2) on the member.

(2) A notice served under this section must contain:

- (a) details of the action or omission constituting the breach of discipline; and
- (b) a statement that a written response is required from the member within 7 days of receipt of the notice.

...

[Sections 161 and 162 provide for the conduct of a preliminary investigation, with section 162 providing for the Commissioner to make a determination as to whether either no breach of discipline has occurred, or whether some further action has been taken, including the commencement of further proceedings.]

Section 163 Time in which preliminary investigation is to be completed

(1) A determination under section 162 must be made within 3 months of the service of the notice under section 160.

(2) If no determination under section 162 is made within 3 months of the service of the notice under section 160, the Commissioner is taken to have determined that no further action is to be taken.

...

Section 178 Time limits

(1) Proceedings under this Part in relation to a breach of discipline by a member shall be commenced within 6 months after the act or omission constituting the alleged breach of discipline was discovered, or such longer period as a magistrate allows under subsection (5).

(2) At any time before the end of the 6 month period, application may be made for an extension of the time to commence proceedings under this Part in relation to a breach of discipline by a member.

(3) The application must:

- (a) be made by a member of or above the rank of Commander; and
- (b) be made to a magistrate.

(4) An application under subsection (2) may be made in the absence of the member and evidence in support of the application may be given orally or by affidavit.

(5) The magistrate to whom an application is made under subsection (2) may, after considering the evidence in support of the application and the submissions presented by the applicant, extend or refuse to extend the time to commence proceedings under this Part.

(6) In determining whether to extend the time to commence proceedings under this Part, the magistrate must have regard to:

- (a) the complexity of the investigation to determine whether the member should be charged with a breach of discipline;
- (b) any unforeseen delays that may have occurred during the investigation; and
- (c) any delays in the investigation caused by the member.

Workshop discussion

The facts (and statute) in the workshop were developed from a combination of two cases: *Watkins v Victoria* [2010] VSCA 138; (2010) 27 VR 543 and *Holmes v Commissioner of Police* [2011] NTSC 108.

In *Watkins*, and relevant to the workshop scenario, Ashley JA and Beach AJA (with whom Mandie JA agreed) held that the relevant facts constituted an assault because the procedures laid down by statute had not been complied with.

Specifically, the use of force had not been properly authorised: see [53] ff. Their Honours held:

“... it is critically important that authorisation be real and not a matter of indifference. The authorisation of reasonable force has the effect of permitting not merely a technical assault but an assault which may be substantial.”

The evidence (which was summarised at [42]) demonstrated that nobody had properly turned their mind to the question of authorisation. Accordingly, there was no “real” authorisation.

This is consistent with the approach to statutory construction outlined in the paper: it applies a strict approach in circumstances where the legislation authorises what would otherwise be a breach of common law rights.

In the workshop, the trial judge applied a flexible policy approach. That is contrary to what the High Court has said in *Australian Education Union v Department of Education* [2012] HCA 3 [28] (French CJ, Hayne, Kiefel and Bell JJ).

Accordingly, an appellate court in the instant case would be likely to follow reasons similar to those given by the Victorian Court of Appeal in *Watkins*. Whether there had been a breach of the provision might turn on the evidence available as to whether anyone (particularly Sergeant Moss) had turned his or her mind to the question of authorisation.

In *Holmes*, which relates to the disciplinary part of the scenario, Southwood J relevantly held that:

- the limitation period barred the right but did not extinguish the remedy (at [53]);
- the relevant decision-maker had jurisdiction to hear the disciplinary proceedings (at [53]); but
- it was an error of law to hear those proceedings without determining the applications for extension of time (at [46]).

In considering whether an extension of time is appropriate, it would also be necessary to consider the purpose of the legislation as a whole.

One question is whether the objects in section 154A are relevant. The provision appears to have been enacted after the Act generally. Further, disciplinary provisions have competing general purposes – that is, the protection of the community and the interests of the profession or members of the relevant group.

Other considerations might be: does the Act require timeliness generally (see sections 160, 163), the context of the enactment of the legislation (ie after the Wood Royal Commission) and public inconvenience (although this appears to have fallen out of favour, at least in the Federal Court: see *Kutlu v Director of Professional Services Review* [2011] FCAFC 94; (2011) 197 FCR 177, 190 [32] (Rares and Katzmann JJ), 208-209 [97]-[98] (Flick J); *FQM Australia Nickel Pty Ltd v Bullen* [2011] FCAFC 30; (2011) 191 FCR 261, especially at 271-272 [33]-[34]).

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