

# 'IT'S THE STATUTE, STUPID': THE CENTRALITY OF STATUTORY INTERPRETATION IN JUDICIAL REVIEW<sup>1</sup>

## The Rise and Rise of the Statute

In 2008, the then former Chief Justice of New South Wales, James Spigelman, observed that:<sup>2</sup>

The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification.

Likewise, the former Chief Justice of Australia, Murray Gleeson, described the tsunami of statute based law as “an ‘orgy’ of legislation”.<sup>3</sup>

These are, in my view, understatements.

## Why Statutory Interpretation is Paramount to Judicial Review

From the outset it is important to recall two matters. First, is the proposition that judicial review is generally concerned with the lawfulness of an administrative or executive exercise of power, or decision making. As Brennan J stated in *Church of Scientology v Woodward*<sup>4</sup>:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individuals are protected accordingly.

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<sup>1</sup> Notes of Lecture given to Advanced Administrative Law, UNSW, 2 April 2014.

<sup>2</sup> J J Spigelman, *Statutory Interpretation and Human Rights: the McPerson Lecture Series*, Vol 3, (2008) University of Queensland Press, 62.

<sup>3</sup> M Gleeson, “The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights” (2009) 20 *Public Law Review* 26.

<sup>4</sup> (1982) 154 CLR 25 at 70.

More recently, judicial review may be viewed as the search for jurisdictional error, or error made by a decision maker going to the power of that decision maker to make the decision, rather than a mistake of fact or discretion. It is to be contrasted with merits review, which is concerned with achieving the factually correct result.

The classic statement of the distinction between excess of power and merits review is that of, again, Brennan J in *Attorney-General (NSW) v Quin*, where his Honour said:<sup>5</sup>

The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing the law which determines the limits and governs the exercise of the repository's power... the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

So, with the exception of *Wednesbury* unreasonableness (that is to say, a decision that no reasonable decision maker acting reasonably could make) or perhaps illogicality, the focus of judicial review is on errors of process, rather than errors of substance. The purpose of judicial review in Australia is not necessarily to cure administrative injustice, but to enforce the legal limits of power; to ensure that a decision was not made absent power by reason of some error of process.

Second, is the fact that judicial review in Australia is now, after the decision in *Kirk v Industrial Relations Commission (NSW)*,<sup>6</sup> entrenched at both the Federal and State levels by reason of Ch III of the Constitution. In other words, judicial review for jurisdictional error is constitutionally protected at every level of government and the only question that remains is the extent to which legislatures can stipulate that certain errors are not jurisdictional.

Two questions usually arise when a court is called upon to rule on the legality of an act or omission of a government entity or public institution. The first is, does the court

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<sup>5</sup> (1990) 170 CLR 1 at 35-36.

<sup>6</sup> (2010) 239 CLR 531.

have the jurisdiction to determine the matter and/or is it a justiciable matter? The second is, assuming it does have jurisdiction and the subject matter is justiciable, what is the public body's power to make the impugned decision?

### **Court's power to engage in judicial review**

Leaving aside questions of standing, there are several sources of judicial review jurisdiction:

- (a) at a Constitutional level, s 75(v) and 75(iii) of the Constitution and s 39B of the *Judiciary Act 1901* (Cth) provide for common law constitutional remedies in the form of prerogative writs (namely, mandamus, prohibition and injunction, and sometimes certiorari as an ancillary remedy) where relief is sought against the Commonwealth. And s 73(ii) of the Constitution, after *Kirk*, provides for an entrenched minimum provision of judicial review of State decision-makers in State Supreme Courts as part of the supervisory jurisdiction of those courts;
- (b) at a Federal level, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) applies to Commonwealth decisions of an administrative character made under an enactment; and
- (c) at a State level, in addition to the constitutionally conferred common law or State supervisory judicial review jurisdiction, each State has its own statutory source of judicial review jurisdiction.

The courts have also developed the concept of justiciability in order to identify areas of executive action or legislation which are not amenable to judicial review. A non-justiciable decision is one where the court considers that "the decision-making function lies within the province of the executive and that it is inappropriate that the courts should trespass into that preserve."<sup>7</sup> Subject-matter that has been traditionally regarded as falling outside the scope of judicial review in this regard include the

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<sup>7</sup> Sir Anthony Mason, "The importance of judicial review of administrative action as a safeguard of individual rights" (1994) 1 *Australian Journal of Human Rights* 1, 8.

entry into treaties, recognition of the government of a foreign state, declaring war, dissolving Parliament, budgetary decisions,<sup>8</sup> and decisions relating to national security.<sup>9</sup>

A court must be satisfied that a matter is non-justiciable before declining to deal with it.<sup>10</sup> Factors that the court will examine include, the nature and effect of a decision in question; whether it directly affects individual liberties and rights or deprives a person of some benefit or advantage; and whether there are judicially manageable standards by which a particular dispute can be determined in order to render it amenable to judicial scrutiny.

This will, of course, be driven by the particular statute, assuming there is one (sometimes there is not), empowering the decision to be made or the course of action to be taken.

Of course, even if the decision is justiciable, there may be an attempt to oust the jurisdiction to engage in judicial review by Parliament by means of a privative clause. For example, can a provision stating that a decision made under a particular enactment, say the *Migration Act 1958* (Cth), is “final and conclusive; and must not be challenged, appealed against, reviewed, quashed or called into question in any court; and is not subject to prohibition, mandamus, injunction, declaration, or certiorari in any court or on any account”,<sup>11</sup> prevent the Federal Court from reviewing the decision to deport someone?

The answer will turn upon the proper construction of the privative clause. In fact, notwithstanding the considerable breadth of the above clause, the High Court has held that it did not.<sup>12</sup>

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<sup>8</sup> Cf *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

<sup>9</sup> But where these intersect with migration matters, the courts have shown a greater willingness to intrude.

<sup>10</sup> *Ruddock v Vadarlis* (2001) 183 ALR 1.

<sup>11</sup> Section 474 of the *Migration Act 1958* (Cth).

<sup>12</sup> *S157/2002 v Commonwealth* (2003) 211 CLR 476.

However, again, by reason of Ch III of the Constitution, there is now little scope for, in my opinion, the successful operation of privative clauses with respect to judicial review for jurisdictional error.<sup>13</sup>

### **Source of decision-maker's power to make the decision**

As for the second question I referred to above, namely, the source of the decision-maker's power to make the decision under challenge, I cannot now conceive of a public decision that has not been, or will not be, undertaken pursuant to a statutory instrument, whether it be an enactment or a piece of delegated legislation.

### **'It's the statute, stupid'**

Thus as long as judicial review is framed around the concept of jurisdictional error in the exercise of statutory power, the issue becomes an exercise of statutory construction.

In short, and with apologies to Bill Clinton, 'it's the statute, stupid'.

Let me give you some examples from the more common grounds of judicial review and their consequences.

### **(1) Procedural fairness**

Ignoring the bias rule for present purposes, at common law the hearing rule demands that generally a person who may be adversely affected by a decision be given an opportunity to comment prior to the decision being made.<sup>14</sup> That is to say, there exists a duty to accord procedural fairness.

But this duty is subject to the limitation of a clear manifestation of a contrary statutory intention. In other words, it may be excluded by the legislature or the scope of its content may be restricted in some way.

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<sup>13</sup> *S157/2002 v Commonwealth* (2003) 211 CLR 476.

<sup>14</sup> *Kioa v West* (1985) 159 CLR 550 at 584-585.

Hence in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>15</sup> the Court held that it was sufficient if the relevant adverse information was disclosed orally but not in writing. In some instances, access to legal representation may be restricted or procedural limitations may be imposed, such as time limits on the presentation of oral argument.

## **(2) Relevancy grounds**

The relevancy grounds lie at the heart of judicial review and the identification of jurisdictional error. They are two-fold: failing to take into account a mandatory relevant consideration in the exercise of power; and taking into account an irrelevant consideration. There is often considerable overlap between the grounds because there is no clear demarcation between them. Accordingly, if a decision maker has taken into account an irrelevant consideration in the exercise of power, then it is likely that in doing so he or she has also overlooked or failed to take into account a matter that he or she was obliged to consider. Both grounds of review are a reflection of the single concern with the requirement that statutory power is confined by, and to be exercised only in accordance with, the statute.

In *Neat Domestic Trading Pty Ltd v AWB Ltd*, Gleeson CJ summarised the position succinctly when he opined that, “it is to the provisions of the Act that one must look for some warrant for concluding that a particular consideration is obligatory, available, or extraneous”.<sup>16</sup>

### **(a) mandatory relevant considerations**

Overwhelmingly, the most common ground of review in any judicial review proceedings is that a decision maker has failed to take into account a matter which the decision maker was obliged to consider. The circumstances in which a

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<sup>15</sup> (2005) 215 ALR 162.

<sup>16</sup> (2003) 216 CLR 277 at [20].

mandatory consideration arises are well settled. The seminal formulation of principle is by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.<sup>17</sup>

What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.

In order for an applicant to succeed on this ground of review, “the statute must expressly or impliedly oblige the decision-maker to enquire and consider the subject matter at a level of particularity involved in the applicant’s submission.”<sup>18</sup>

Plainly, this will demand careful analysis of the statute conferring power on the decision maker, having regard to the text, subject matter, scope and purpose of the enactment. These are matters to which I shall return later.

### **(b) irrelevant considerations**

Likewise, it is to the statute that one must turn to determine whether or not the conferral of discretionary power creates an obligation on the decision maker not to consider a particular matter or take into account a particular factor.

If a council must take into account “the public interest”<sup>19</sup> in determining, for example, whether or not to grant approval to a brothel, will taking into account the views of the local priest vitiate the decision not to grant development consent? The answer will invariably lie in the proper construction of the planning instruments and relevant Acts governing the proposed development.

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<sup>17</sup> (1986) 162 CLR 24 at 40-41.

<sup>18</sup> *Walsh v Parramatta City Council* (2007) 161 LGERA 118 at [60] per Preston J.

<sup>19</sup> For example, s 79C of the *Environmental Planning and Assessment Act 1979* (NSW).

### **(3) Improper or unauthorised purpose**

An exercise of power for a purpose other than that for which the power is conferred is usually unlawful. To be successful, it must be established that the decision maker acted for a purpose that is unauthorised by the legislative scheme. A statutory power permitting land to be reserved for the purpose of public recreation, does not, therefore, authorise the land to be leased by the government to a private grazier for the purpose of grazing cattle.<sup>20</sup>

The test is whether the purpose is extraneous to the statute. This is a question of statutory interpretation.

### **(4) Unauthorised delegation**

This ground of review ensures that powers that are conferred personally on a decision maker are exercised by that decision maker, and not by some other entity. It prevents decisions that are not authorised by the enactment, and in doing so it facilitates transparency and accountability in decision making.

But regulatory power is routinely delegated by statute. Whether the delegation is authorised will, of course, be governed by the statutory requirements permitting the delegation.

### **(5) Jurisdictional error**

If a decision maker misconstrues a statute or some other legislative instrument giving him or her jurisdiction, this will typically result in jurisdictional error (in the pre *S157* sense) and the decision may be set aside. As was stated in the oft quoted decision of *Craig v State of South Australia*,<sup>21</sup> a decision that is infected by “an error of law which causes it [the decision maker] to identify a wrong issue, to ask itself a wrong

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<sup>20</sup> *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee)* (2012) 84 NSWLR 219.

<sup>21</sup> (1995) 184 CLR 163.



question... or, at least in some circumstances,...to reach a mistaken conclusion” will exceed its jurisdiction.

## **(6) Review of jurisdictional facts**

Along with the no evidence ground, review of jurisdictional facts is an exception to the broad principle that errors of fact are not subject to judicial review.

A jurisdictional fact is “used to identify a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question.”<sup>22</sup> That is, it is fact (often a state of mind or opinion that the decision maker must hold as a precondition to the exercise of discretionary power) that must be found to exist by the decision maker that enlivens the exercise of statutory power. If the fact or criterion does not exist or cannot be satisfied, then the discretion purportedly made in exercise of the power will have been made without the requisite statutory authority.

For example, s 112(1)(a) of the *Environmental Protection and Assessment Act 1979* (NSW) (“the EPAA”) provides as follows (emphasis added):

- (1) *A determining authority shall not carry out an activity, or grant an approval in relation to an activity, being an activity that is a prescribed activity, an activity of a prescribed kind or an activity that is likely to significantly affect the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats, unless:*
  - (a) the determining authority has obtained or been furnished with and has examined and considered an environmental impact statement in respect of the activity:
    - (i) prepared in the prescribed form and manner by or on behalf of the proponent, and
    - (ii) except where the proponent is the determining authority, submitted to the determining authority in the prescribed manner,

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<sup>22</sup> *Gedeon v NSW Crime Commission* (2008) 236 CLR 120 at 139.

Can, therefore, a court review for itself whether or not the activity was “likely to significantly affect the environment”? The answer depends on the interpretation given to s 112 of the EPAA.<sup>23</sup>

Crucially, if a legislated fact or state of satisfaction is characterised as a jurisdictional fact, then a court can substitute its own opinion about whether or not the fact or state of mind exists for that of the decision maker. In other words, the decision maker’s decision is reviewable for correctness. In the case of s 112 of the EPAA, this means that a court can receive expert evidence to assist it in determining whether or not the activity was “likely to significantly affect the environment”, rather than simply reviewing the material that was before the decision maker.

## **(7) Uncertainty**

Particular statutes may give rise to an implication that a degree of certainty in decision making is required. Planning law is replete with illustrations of this principle. Conditions attaching to a development consent or an approval for a mine must be attended with sufficient certainty. Similarly, rules, orders and regulations must not be so vague or uncertain that they fail to give the requisite level of guidance demanded by the legislation empowering their creation.

## **(8) Remedies: Invalidity and partial invalidity**

The proper construction of the statute is also important when considering what remedy may be available should success be enjoyed in challenging the exercise of power by a decision maker.

Statutory interpretation is essential to determining whether, if a ground of judicial review can be established, it will lead to the invalidity of the decision. Not all

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<sup>23</sup> In *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)* [2013] NSWLEC 38, the Land and Environment Court of NSW held that it could because s 112 of the EPAA gave rise to a jurisdictional fact (at [300]). For a useful summary of the principles relevant to any determination of whether statutory provision gives rise to a jurisdictional fact, see the decision of Biscoe J in *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 at [38]-[39] and *Fullerton* at [288].

mistakes in the decision making process will result in the decision being set aside. There are mistakes and there are *mistakes*.

This is what is referred to as ‘the Project Blue Sky question’, after the seminal High Court decision in *Project Blue Sky Inc v Australian Broadcasting Authority*.<sup>24</sup> The question is whether, as a matter of statutory construction, it was the intention of the legislature that an act done in breach of a condition regulating the exercise of a statutory power will be invalid. If it was not, then the decision may be unlawful (in a prospective sense), but not invalid (in a retrospective sense).

Typically in this context a statute is silent on the consequences for decision makers of breach of one of its provisions. Therefore attention turns to the language of the statute, its subject matter and objects, and the consequences of breach for the parties.<sup>25</sup>

There are no precise rules but courts have laid down some general considerations. For example, where the statute is intended to replace or replicate the common law requirements of procedural fairness, breach will more likely result in invalidity. The less prescriptive a requirement is, the less likely breach will result in invalidity. The more people who are likely to be affected and inconvenienced by a finding of invalidity, that is to say, the larger the class, the less likely the decision will be invalid.

Alternatively, where the exercise of power under challenge is in respect of the making of a statutory instrument, such as a piece of delegated legislation, for example, a local environmental plan, or the issuing of an order or notice, a declaration of partial invalidity may result. That is to say, it may be possible, upon careful analysis of the instrument in question, to sever the offending sections or parts, thereby preserving the remainder.

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<sup>24</sup> (1998) 194 CLR 355 at 390.

<sup>25</sup> *Ibid* at 388.

## Understanding the Statute

I'm the Parliamentary Draftsman,<sup>26</sup>  
I compose the country's laws,  
And of half the litigation  
I'm undoubtedly the cause.  
I employ a kind of English  
Which is hard to understand:  
Though the purists do not like it,  
All the lawyers think it's grant.

I'm the Parliamentary Draftsman,  
And my sentences are long:  
They are full of inconsistencies,  
Grammatically wrong.  
I put Parliamentary wishes  
Into language of my own,  
And though no one understands them  
They're expected to be known.

I compose in a tradition  
Which was founded in the past,  
And I'm frankly rather puzzled  
As to how it came to last.  
But the Civil Service use it,  
And they like it at the Bar,  
For it helps to show the laity  
What clever chaps they are.

I'm the Parliamentary Draftsman  
And my meanings are not clear,  
And though words are merely language  
I have made them my career.  
I admit my kind of English

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<sup>26</sup> J P C, "The Parliamentary Draftsman" quoted in C Meiklejohn, *Fitting the Bill: a History of Commonwealth Parliamentary Drafting*, Office of Parliamentary Counsel, 2012, 5.

Is inclined to be involved –  
But I think it's even more so  
When judicially solved. ...

Given the centrality of the task of deciphering legislation in judicial review, it is obviously important to correctly find and understand the statutory underpinning that confers upon a decision maker the power to make his or her decisions.

And, given the ubiquitous nature of statute-made law regulating almost every aspect of our lives, it would not be unreasonable to expect a high degree of clarity in the expression by Parliament of its intention.

After all, evidence of the origins of legislative drafting can be traced back as early as 2380 BC.<sup>27</sup> The art is therefore an ancient one.

But, as the poem above wryly notes, it is fair to say that practice has not necessarily made perfect. In his judgment in *Watson v Lee*,<sup>28</sup> Barwick CJ emphasised the importance of the principle that citizens should not be bound by a law the terms of which they have no means of knowing. Yet, equally, ignorance of the law is no excuse.

From a judicial perspective, this creates tension. An important element of the relationship between Parliament and the courts is the function of courts in interpreting the laws made by the Parliament. Parliament makes the laws, the Executive exercises power and discharges obligations conferred on it by those laws, and the courts hear and determine cases in respect of those laws, including cases on the correct interpretation of the laws.

Often, equally defensible but nevertheless contested interpretations of the law are advanced in litigation and courts must determine which one is 'correct'. The task can

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<sup>27</sup> *Ibid*, 2.

<sup>28</sup> (1979) 144 CLR 374 at 381, cited in Justice W M C Gummow, "Statutes", N Perram and R Pepper (eds), *The Byers Lectures 2000-2012* (The Federation Press, 2012) 91, 93.

be difficult, if for no other reason than because language can often be indeterminate; words can have multiple meanings.

How then does a judge prefer one construction over another? How does a judge resolve what has been described as “the intolerable wrestle” of statutory interpretation?<sup>29</sup>

Ultimately the aim of statutory interpretation is to determine and give effect to the objective intention of Parliament as disclosed by the language used in the statute and having regard to scope, subject matter and purpose of the statute.

### **The modern approach to statutory construction**

Long gone is the ‘literal’ approach to statutory construction, where the literal meaning of the text of a provision was assumed to correlate to the will of the Parliament, irrespective of any inconsistency with the scope and objects of the legislation or of any resulting absurdity in operation.<sup>30</sup>

Unsurprisingly, the literal approach was displaced in favour of the purposive approach, which had its origins in the ‘mischief rule’.<sup>31</sup> The purposive approach is focused upon determining what the purpose of the Act or the particular provision in question is, having regard to context. That is to say, find the purpose or object of enacting the legislation, and adopt an interpretation of the text that is consonant with that purpose. All jurisdictions have in their respective Interpretation Acts legislative provisions mandating an interpretation that gives effect to purpose when construing statutes.<sup>32</sup>

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<sup>29</sup> J J Spigelman, “The Intolerable Wrestle: Developments in Statutory Interpretation” (2010) 84 *ALJ* 822, 822, borrowing a line from T S Elliot.

<sup>30</sup> *Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034 per Tindal CJ.

<sup>31</sup> Stated in *Heydon’s Case* (1584) 3 Co Rep 7a; 76 ER 637.

<sup>32</sup> For example, s 2(1) of the *Acts Interpretation Act 1901* (Cth) and s 5(1) of the *Interpretation Act 1987* (NSW).

In time, the purposive approach was refined into a modern approach to statutory interpretation. An amalgam of the literal rule, the mischief rule and purposive approach, requiring, as it does, the consideration of context in its widest sense.<sup>33</sup>

More recently, however, the courts have returned back to a study of the text first, with the ordinary grammatical meaning of the words of a statutory provision corresponding with its intended legislative meaning. This is consistent with the notion that in a representative democracy “those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says”.<sup>34</sup>

Only if ambiguity exists in the ordinary grammatical meaning of the text is it appropriate to have regard to the ‘mischief’ of the Act. But this is not to mean that purpose is to be ignored, because ‘purpose’ can be found in the text, structure and context of the legislation.

The present aim of the interpretative exercise is to determine and give effect to the intention of Parliament as disclosed from the language used in the statute. Intention should not, however, be equated with purpose or objects. Intention relates to the meaning of the enactment, whereas purpose or object is more synonymous with the mischief to which the legislation is directed.

I recently summarised the principles involved in the modern approach to statutory interpretation in *Environment Protection Authority v Du Pont (Australia) Ltd*.<sup>35</sup>

- 47 First, the fundamental object of statutory construction is to ascertain the objective legislative intention by reference to the language of the statute read as a whole. The modern approach to statutory construction emphasises the centrality of the text as the starting point (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47]; *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [14]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 at [39]; *Certain*

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<sup>33</sup> *CIC Insurance Ltd v Bankstown* (1997) 187 CLR 384.

<sup>34</sup> R French, “The Courts and the Parliament” (2013) 87 *ALJ* 820, 824. See also *Zheng v Cai* (2009) 239 CLR 446 at [28].

<sup>35</sup> [2013] NSWLEC 98 at [47] – [51].

*Lloyd's Underwriters Subscribing to Contract No 1H00AAQS v Cross* [2012] HCA 56; (2012) 87 ALJR 131 at [23], [40], [68] and [88] and *X7 v Australian Crime Commission* [2013] HCA 29 at [25]). In other words, "the process of construction begins with a consideration of the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose" (*Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 86 ALJR 217 at [26]).

- 48 Second, the meaning of the text may require consideration of its context, which includes the general policy and purpose of a provision, and in particular, the mischief it is seeking to remedy (*Alcan* at [47] and *Cross* at [23]). The context and purpose of a provision are important because (*Cross* at [24] per French CJ and Hayne J, footnotes omitted):

...as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, "[t]he 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" (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole", and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".

- 49 It is in this sense that the "modern approach to statutory interpretation" (*CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408 quoted in *Baini* at [42] per Gageler J) must now be understood (footnotes omitted):

"(a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ... one may discern the statute was intended to remedy".

- 50 Third, determination of the purpose of a statute or of a particular provision in a statute may be based upon an express statement of purpose in the statute



itself, may be inferred from its text and structure, and where appropriate, may be assisted by reference to extrinsic materials (*Cross* at [25]).

51 Fourth, historical considerations and extrinsic materials cannot, however, be relied upon to displace the meaning of the text (*Consolidated Media Holdings* at [39]; *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33; (2011) 244 CLR 508 at [50] and *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at [31]). As Kiefel J cautioned in *Cross* (at [89]):

89 It is legitimate to resort to materials outside the statute, but it is necessary to bear in mind the purpose of doing so and the process of construction to which it is directed. That purpose is, generally speaking, to identify the policy of the statute in order to better understand the language and intended operation of the statute. An understanding of legislative policy by these means does not provide a warrant for departing from the process of statutory construction and attributing a wider operation to a statute than its language and evident operation permit.

One word of caution that I give to my tipstaff each year. You cannot interpret a clause, section, division, chapter or part of an Act in isolation. You must construe it in context, that is to say, having regard to the whole statute. It is only then that the purpose, context and, importantly, the intention of Parliament in enacting the legislation will become apparent.

### **The myth of the intention of Parliament**

Plainly the intention of Parliament as divined by the courts is a fictional construct. It is the intention of an abstract body. There is no single author, unlike a work of literature.

As recently as 2011, in *Lacey v Attorney-General (Qld)*, the High Court described the quest as follows:<sup>36</sup>

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<sup>36</sup> (2011) 242 CLR 573 at [43].

The objective of statutory construction was defined in *Project Blue Sky Inc v Australian Broadcasting Authority* as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. ...Such a state is a fiction which serves no useful purpose. Ascertainment 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.

The only thing that can be stated with any certainty about a statute is that Parliament intended to pass it in the form in which it was eventually passed.

Nevertheless it is the objective meaning of the legislature in enacting the provision or statute that must be identified. This meaning may appear from an express statement in the Act itself, by inference from the terms of the enactment, or by appropriate reference to extrinsic material such as second reading speeches, explanatory memoranda, or a report of a Law Reform Commission or other body whose recommendations have led to the enactment of the statute (Royal Commissions or Commissions of Inquiry etc) in question. Reference to such material is authorised by the various State, Territory and Commonwealth Interpretation Acts,<sup>37</sup> but to reiterate, it cannot be used to supplant the text of the legislation.

### **Interpretative rules**

Save for two exceptions, the various canons of construction, including syntactical and grammatical presumptions, can be found in various textbooks (Pearce and Geddes, Bennion, and Hertzfeld, Prince and Tully) and are beyond the scope of this lecture. Suffice it to say that they are essential weapons in any interpreter's armoury, as is a good working knowledge of the Interpretation Acts.

The first exception is conceptual. It is the principle of legality. The principle, derived from the common law, is one that requires a court to favour a construction of a statute which will avoid or mitigate intrusion upon fundamental rights or freedoms by

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<sup>37</sup> For example, s 15AB of the *Acts Interpretation Act 1901* (Cth) and s 34 of the *Interpretation Act 1987* (NSW).

the enactment, save for clear express language or necessary implication to the contrary.<sup>38</sup> Put simply, fundamental rights are not to be abrogated by ambiguous or vague language. The principle is, in essence, a manifestation of the rule of law.

Among the rebuttable presumptions that may be considered to fall within the rubric of the principle of legality are that Parliament did not intend to:

- abrogate or infringe fundamental rights, freedoms and immunities;
- restrict access to the courts;
- abrogate privileges such as legal professional privilege, the right to silence in criminal proceedings, or the right against self-incrimination;
- permit a court to extend the scope of a penal statute;
- deny procedural fairness to a person affected by the exercise of public power;
- confer immunities of wide import on public entities;
- interfere with property rights; and
- take property without compensation.

Yet these presumptions are the subject of regular legislative inclusion, which in turn gives rise to a multiplicity of judicial review proceedings.

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<sup>38</sup> There have been many instances of judicial recognition and adoption of the principle of legality: see, for example, *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19]; *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 at [21] and [23]; and *Lee v New South Wales Crime Commission* [2013] HCA 39 at [312]. Earlier incarnations of the principle may be found in cases such as *Potter v Minahan* (1908) 7 CLR 139 at 150 and *Coco v The Queen* (1994) 179 CLR 427 at 435. See the useful discussion of the principle by J J Spigelman, “Principle of Legality and the Clear Statement of Principle” (2005) 79 *ALJ* 769 and D Meagher, “The Common Law Principle of Legality in the Age of Rights” (2011) 35 *Melb U L Rev* 449.

But it must be stressed that the principle of legality does not permit courts to rewrite statutes to avoid unpalatable (as opposed to absurd) legislative consequences that were clearly intended by Parliament. Courts have a duty to obey legislative text and cannot slavishly adhere to pre-existing common law presumptions in the face of a statute evincing a contrary intention.

The second exception, which is far more technical, is that statutes must be interpreted in a manner that gives them work to do.<sup>39</sup> Too often creative lawyers urge a construction of a statutory instrument that renders words, phrases, or sometime entire provisions, with no work to perform. Save for the relatively rare instances of unintended drafting error, it is unlikely that this was ever Parliament's objective intention.

### **Reasonable minds will differ: the decision in *Al-Kateb v Goodwin***

An excellent illustration of both the centrality and complexity of statutory interpretation in judicial review proceedings is the tragic decision in *Al-Kateb v Goodwin*, a migration decision.<sup>40</sup>

The statutory framework governing the case was straightforward. The legislation stated that:

- (a) first, an officer "must detain" an unlawful non-citizen;
- (b) second, an unlawful non-citizen "must be kept in immigration detention until he or she is...removed from Australia";
- (c) third, "an officer must remove, as soon as reasonably practical, an unlawful non-citizen" after a request for removal.

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<sup>39</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [97] and the authorities cited thereat.

<sup>40</sup> The illustration is taken from Spigelman, above n 38, 781.

The applicant was an unlawful non-citizen in immigration detention. There was, however, no prospect of his country of origin taking him back and thereby enabling “removal”. The question was whether the applicant could be kept in detention indefinitely pending removal. At issue was the proper interpretation of the words “must be kept in immigration detention until he or she is...removed from Australia”.

The majority (four to three) held that the terminology was clear and unambiguous and that the presumption that Parliament did not intend to interfere with individual rights and freedoms (in this case, individual liberty), had been rebutted by statute. Detention could therefore be indefinite.<sup>41</sup>

The minority held that the words “must be kept in immigration detention” were ambiguous and read them down, applying the principle that a statute interfering with human rights and freedoms must direct its attention to the rights or freedoms in question and must demonstrably evince an intention to abrogate or curtail that right or freedom.<sup>42</sup> In particular, Gummow J held that properly construed, the provisions were concerned with removal and if removal could never be effected, as was the case there, then that purpose was no longer relevant and there was no power to detain the applicant.<sup>43</sup>

## **Conclusion**

The above discussion can be summarised in three simple propositions: first, judicial review is concerned with the lawfulness of the exercise of public power; second, the source of the power, and its metes and bounds, are almost exclusively statutory; and third, a proper understanding of the principles of statutory construction is paramount to judicial review.

**2 April 2014**

**Justice Rachel Pepper  
Land and Environment Court of New South Wales**

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<sup>41</sup> *Al-Kateb* at [33] per McHugh J, [241] per Hayne and Heydon JJ and [298] per Callinan J.

<sup>42</sup> At [19] per Gleeson CJ.

<sup>43</sup> At [117] and [122].

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## ANNEXURE 'A' – PROBLEM

1. Section 3 of the *Pepper Planning Act 2014* (NSW) (“the PPA”) states as follows:

The objects of this Act are:

- (a) to encourage:
  - (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
  - (ii) the promotion and co-ordination of the orderly and economic use and development of land,
  - (iii) the protection, provision and co-ordination of communication and utility services,
  - (iv) the provision of land for public purposes,
  - (v) the provision and co-ordination of community services and facilities, and
  - (vi) the protection of the environment, and
  - (vii) ecologically sustainable development, and
  - (viii) the provision and maintenance of affordable housing, and
- (b) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

2. The term “development” is defined in Dictionary to the PPA in s 4 as:

"development" means:

- (a) the use of land, and
- (b) the subdivision of land, and
- (c) the erection of a building, and
- (d) the carrying out of a work, and
- (e) the demolition of a building or work, and
- (f) any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument,

but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

3. The term “land” is also defined in s 4 as “including a building erected on the land”.
4. Section 101 is contained in the recently enacted Div 5 Pt 3 of the PPA which is entitled “Notification of Proposed Development to Affected Land Owners”. It states that:

Prior to the grant of any development consent for development over land, the consent authority must notify any land owner likely to be affected by the development, of the development the subject of the application for consent.

5. Section 102 of the PPA provides that:

Within 14 days of notification of the development the subject of the application for consent referred to in s 101, any land owner who wishes to object to the proposed development must do so in writing to the consent authority.

6. Clause 11 of the *Pepper Planning Regulation 2014* (NSW), states:

For the purpose of section 101 of the *Pepper Planning Act 2014*, notification can be effected by affixing a copy of the development application to the front door of the affected land owner’s dwelling or by sending a copy of the development application by post to the street address of the land owner.

7. Sophie Duxson has inherited a sizable amount of money from a long lost aunt. She buy a modest single storey dwelling described as a ‘renovator’s delight’ by the real estate agent in Waverly. She decides to renovate the hovel, including adding a second storey to the existing house. She lodges a development application (“the DA”) with the local council.



8. Jasmine Geary lives three houses down from Sophie's newly purchased house. The addition of the extra storey on Sophie's house will, if built in accordance with the plans lodged with the DA, be partially visible from Jasmine's back yard.
9. The council notify all of the owners immediately adjacent to Sophie's house of the lodgement of the DA, either by affixing a copy of the DA to their doors or by posting a copy of it to them. The council do not notify Jasmine because the relevant planning officer assessing the DA is of the opinion that, living three houses away, she is not an owner likely to be affected by the development. Nevertheless, knowing her personally, the planning officer emails a copy of the DA to her. Jasmine thinks the email is spam and deletes it.
10. The day after sending the email, the planning officer sees Jasmine in the street and in conversation mentions the proposed development and the lodgement of the DA to her.
11. The council receives no objections to the DA and grants consent to Sophie to proceed with the development.
12. When the second storey is erected Jasmine is unhappy. She complains to the council. The council does not respond.
13. Jasmine therefore commences judicial review proceedings in the Land and Environment Court of New South Wales challenging the validity of the consent. She seeks your advice on the following:
  - (a) what are the possible grounds of review; and
  - (b) will the challenge be successful?