Judicial College of Victoria

STATUTORY INTERPRETATION

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Around the turn of the millennium, there was a controversy that bubbled away for several years between judges and academics as to whether statutory interpretation should be included as a compulsory subject of separate and specific study in the subjects of the primary law degree required by the courts for admission as a legal practitioner in Australia. Jim Spigelman, the then Chief Justice of New South Wales was the most eminent supporter of the view that statute was now the predominant source of the law, and problems of statutory interpretation so ubiquitous, that statutory interpretation was deserving of study as a subject in its own right at the undergraduate level as a necessary preparation for admission to legal practice.

Most judges and practising lawyers – certainly all those I spoke to about the topic – agreed with Jim Spigelman. Academic lawyers tended to be far less enthusiastic. The opposition was broadly put on the footing that the traditional subjects – contract, tort and property law – included consideration of the particular statutory regimes, and it was thought best to study those statutes specifically in the context of the intersection of the statutory regime with the pre-existing common law rules that were being altered or abrogated by statute. There was also, I think, a degree of intellectual snobbery on the part of those who taught these subjects; that the study of statutory interpretation as a standalone subject divorced from a focused consideration of the interesting issues of policy thrown up in the course of the development of the law by judicial decision was just too dry, too abstract and uninteresting to sustain the interest of students or their teachers. And, if there were to be only a limited number of compulsory subjects, such as the 'Priestley XI', then it was best for the education of students as lawyers to stick with the discussion of those areas of substantive law that set academic hearts racing.

Over the decade and a half since Jim Spigelman's retirement from the Supreme Court of New South Wales, the steam has certainly gone out of this debate. And that has, I think, been due in large part because Australian law schools began to offer statutory interpretation in their post-graduate courses. These courses have become more and more popular with practising lawyers keen to add depth to their skills and learning. That this happened tends, I think, to confirm that Jim Spigelman was right in his view of the centrality of statutory interpretation in the day-to-day work of our courts and legal profession. Indeed, it is why we are all here.

I mention this ancient debate because I want to deprecate the notion that the interpretation of statute law is not intellectually challenging. I want to deprecate the notion that it is some sort of mechanical, value-free activity. What I hope to convey is that the art of reading and applying statute is not a mechanistic exercise that proceeds according to the maxims and prescriptions collected in Maxwell, or Craies or Bennion. These prescriptions and maxims

are certainly helpful insofar as they alert us to conventions of written communication, which are useful in the resolution of most cases. But in the difficult cases–the ones that actually matter, so far as the difficulties of judging it are concerned– there is to be found, simmering away, fraught issues about the relationship between the legislature and the courts including, ultimately I suggest, the question whether the obligation of the courts in interpreting statutes is one of grudging fidelity to give effect to what cannot be denied as the intention of the legislature in accordance with conventions as to the deployment of which the court is master, or whether the courts should engage with imaginative sympathy – I think Learned Hand might have been the person who coined that expression – with the purpose of the legislation.

In the most difficult of cases, the lawyers engaged in confronting this simmering issue– including the judges– are not operating in a policy-free zone; rather, they are operating in a no-man's-land, engaged in one of the most challenging of intellectual balancing acts. To study a case of a strongly contested issue of statutory interpretation is to observe a contest about the relationship between the legislature and the judiciary, the resolution of that contest often depends whether the court takes an expansive or a modest view of the role of the judiciary within that relationship. The notion that this exercise is a dry, bloodless application of rules or maxims, as if we were dealing with geometrical theorems, could not be more wrong.

This is, I suggest, exciting stuff. You will say that I should try to get out more, and that life is more interesting in Melbourne, and that things will be better when the wireless comes to Queensland. But I say that these cases do provide the most challenging days in a judge's life.

Preliminary observations

In *SZTAL v Minister for Immigration and Border Protection*,[1] Kiefel CJ, Nettle and Gordon JJ said:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense … Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

Our word 'context' comes, of course, from the Latin '*contextus*'. For the Romans, a *contextus* was originally a single piece of whole cloth woven together from numerous separate pieces. The deployment of the word in the wider signification with which we are familiar is typical of the genius of the deeply practical Romans in using concrete terms to convey, most vividly, abstract ideas.

[1] (2017) 262 CLR 362, 368 [14].

The ultimately extended Roman usage reminds us that a part of a text has significance only within the whole. So, speaking generally, we can say that, in statutory interpretation, or, for that matter, constitutional or contractual interpretation, context is about being able to see the wood for the trees. And context and coherence together are about the rather more difficult task of reaching that right level of height above the issue for decision to enable one to see the proper place of a tree within the forest; that is, how it fits with the whole.

This is a pragmatic, liberal approach to the use of contextual materials as aids to interpretation. It is, I suggest, very much a product of the intellectual milieu characterised by the abandonment by the High Court in *Cole v Whitfield*[2] of its previously restrictive attitude to the use of the Convention Debates as aids to constitutional interpretation which had previously held sway. It is also of a piece with legislative reforms such as those enacted by s 15A of the *Acts Interpretation Act* 1901 (Cth). It accords, more generally, with the view expressed by Gummow J that questions of constitutional construction are not to be answered by 'any particular, all-embracing revelatory theory or doctrine of interpretation'.[3]

In the course of my remarks today, I will refer to a number of recent decisions of the High Court to illustrate two propositions. First, that context is a first order consideration. And secondly, that context should be understood in its widest sense, whether statutory or historical. Hopefully, I will, as well, convey some sense of the intellectual endeavour involved in ascertaining legislative purpose.

Before going to those cases, I need to make some further general observations. First, to emphasise that context is not secondary to the particular text. Indeed, sometimes context actually supplies meaning to text that would otherwise be so impossibly broad as to be almost meaningless. Thus, the practical application of expressions of connection such as 'in relation to' or 'in respect of' necessarily depends upon the statutory context.[4] In *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*,[5] Taylor J said:

> There can be no doubt that the expression 'relating to' is extremely wide but it is also vague and indefinite. Clearly enough it predicates the existence of some kind of relationship but it leaves unspecified the plane upon which the relationship is to be sought and identified. That being so all that a court can do is to endeavour to seek some precision in the context in which the expression is used.

Secondly, context can be essential to coherence. The courts do not expect the legislature to speak with a forked tongue. Context supplies the framework or perspective within which

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[2] (1988) 165 CLR 360, 385–91 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) ('*Cole v Whitfield*').
[3] *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 [41].
[4] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 365–67 (Brennan J), 374 (Toohey and Gaudron JJ), 376 (McHugh J); *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470, 478 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 387 [87] (McHugh, Gummow, Kirby and Hayne JJ).
[5] (1961) 105 CLR 602, 620.

seeming contradictions in a statutory text can be reconciled. In *Project Blue Sky Inc v Australian Broadcasting Authority*[6] McHugh, Gummow, Kirby and Hayne JJ said:

> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals … 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.

A recent illustration of the power of context in this regard is to be found in the decision of the High Court in *Hore v The Queen*.[7] The case concerned the operation of div 5 of the *Sentencing Act 2017* (SA). Within that division, s 57 authorised the Supreme Court to order the detention in custody until further order of a person convicted of certain sexual offences. Section 58 authorised the Court to discharge a detention order, and s 59 authorised the Court to release a detained person on licence, provided that such a person 'cannot be released on licence unless the person satisfies the Supreme Court that … the person is both capable of controlling and willing to control the person's sexual instincts'. The word 'willing' was not defined in the Act, but s 57 provided that a person to whom it applied 'will be regarded as unwilling to control sexual instincts if there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts'. Section 59(2) required that, before determining an application for release on licence, the Court obtain medical reports on 'whether the person is incapable of controlling, or unwilling to control, the person's sexual instincts'. The terms of the conditions governing release on licence were provided by the Act under s 59(7) or by the appropriate board under s 59(8).

Each of the appellants had been detained under s 57, and each had applied for and been refused release on licence pursuant to s 59 of the Act. The Supreme Court of South Australia held at first instance and on appeal that 'willing' in s 59(1) necessarily meant the converse of 'unwilling' as explained by s 57, and further, that the Court was not satisfied that either applicant was willing to control his sexual instincts in that sense, and, most importantly, that under s 59, the Court may consider release on licence only after the person applying for release satisfies the Court that the person is capable of controlling and willing to control his or her sexual instincts without regard to the likely effect of any conditions in the license on the person's willingness to exercise appropriate self-control.

The High Court, in a unanimous judgment, reversed the decision of the Supreme Court of South Australia. The focus of the argument in the High Court shifted somewhat from the 'willing/unwilling' curiosity that had principally engaged the attention of the courts in South Australia. The High Court accepted that, for the purposes of s 59(1)of the Act, a person is 'willing' to control his or her sexual instincts where there is not a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise

[6] (1998) 194 CLR 355, 381–2 [70].
[7] (2022) 273 CLR 153.

appropriate self-control of his or her sexual instincts. More importantly for present purposes, the High Court held that, in determining whether to order release on licence, the Supreme Court is not required to reach the satisfaction required by s 59(1) by excluding from consideration the likely effect of the conditions of the release on licence upon the person's willingness to exercise appropriate self-control of his or her sexual instincts. Concurrently, in this latter regard, the High Court emphasised that s 59(1) contemplates only one determination by the Court, that is, whether the person should be granted release on licence. It does not require a separate and anterior determination of a person's 'willingness' as a condition precedent to the determination of whether to release on licence. Given that a person cannot be released on licence without the conditions required either by s 59 (7) and (8)

> [t]he evaluation of the person's likely response to an occasion calling for the exercise of the person's ability to control his or her sexual instincts must also proceed on the assumption that the conditions of the licence are in place on the hypothetical occasion for the exercise of appropriate control. If this assumption is not made, the evaluation of the person's likely behaviour would proceed by reference to a state of affairs that can never rise under s 59, that is, release on licence without conditions. An intention to enlist the Supreme Court in such an arid exercise cannot be discerned in the legislation.[8]

Often, context and coherence are functionally inseparable. For example, an interpretation that would give the provision in question an operation in a particular area upon a particular subject that is different from that achieved by other more specific provisions dealing with the same area or subject matter is not to be adopted. So, in *BMW Australia Ltd v Brewster*,[9] the plurality in the High Court noted that examination of the context in which a statutory provision operates revealed powerful reasons to prefer one interpretation of a provision over another by demonstrating the incongruity of the other interpretation.

The *Brewster* case concerned the making of common fund orders to encourage litigation funders to sponsor a class action. The issue was whether a general provision that empowered a court to make 'any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'[10] should be read as authorising the making of an order fixing the quantum of remuneration for a litigation funder maintaining a class action payable by members of the class as a proportion of any moneys ultimately recovered in the action at the commencement of the proceeding against the defendant. The incongruity of this interpretation lay in the circumstance that there were specific provisions of the Act apt to authorise or accommodate the making of such orders, but they applied, in express terms, at the conclusion of the proceeding.

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[8] Ibid 172–3 [57] (Keane, Gordon, Edelman, Steward and Gleeson JJ). See also 173–4 [58]–[62].
[9] (2019) 269 CLR 574, 603 [59] (Kiefel CJ, Bell and Keane JJ). See also *Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (Gavan Duffy CJ and Dixon J); *Smith v The Queen* (1994) 181 CLR 338, 348 (Mason CJ, Dawson, Gaudron and McHugh JJ).
[10] *Federal Court of Australia Act 1976* (Cth) s 33ZF.

The institutional setting

So, can I say something now about the institutional setting in which we come to apply these principles.

It will be apparent, even at this relatively early stage of the discussion, that we, the practising lawyers and judges, come to the consideration of the topic of context and coherence in the interpretation of statutes, not with a concern to provide a comprehensive taxonomy of the different kinds of problems that may arise – such as whether an ambiguity is patent or latent or why that should matter, to whether reference to context is permissible to depart from the literal meaning of the particular text.

These matters are all important. And I mean no disrespect to those who write about them. But it is, I think, fair to say that they are not the sort of things that set the heart racing.

My perspective is that of a practising member of a profession which seeks truth in the exercise of judicial power in particular cases, and in each particular case, by advocacy of strong positions on each side of an issue in the dialectical experience of thesis, antithesis and synthesis.

Within that institutional perspective, we are concerned with the relative strength of considerations of context and coherence. Relative strength is rarely susceptible to formal analysis, or statements of abstract principle that are useful beyond a basic level. In the search for the most fitting solution to a knotty problem of interpretation, rules of thumb rarely have decisive significance. An appreciation of the strength of considerations of context in any particular case is inevitably linked with the insights about the values underlying the statutory text. And these insights are provided by the lawyers for the contending parties who are striving to resolve a particular issue that, in the nature of things, has not been decisively resolved before. Within that forensic context, the boundaries of legitimate reference to context tend to be flexible, fixed only by a pragmatic appreciation of the usefulness of the context to the solution of the problem of interpretation presented by the particular text: relevance rules, one might say. If this sounds a bit loose and diffuse, I can only say that this is one of the most exciting aspects of the contest for those who are involved in it because in the end, we are responsible for the outcome – and working out the outcome that best fits is hard.

In this perspective, the appeal to context and coherence to solve problems of interpretation is an aspect of what Sir Owen Dixon famously referred to as the 'high technique of the common law'.[11] This is a technique developed over the last thousand years, not in universities, but in the courts and the Inns of Court that trained the personnel who became

[11] Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 469, reprinted in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses*, ed Judge Woinarski (William S Hein & Co, 2nd ed, 1997).

advocates and judges. Their concern was always focused upon the particular case and the practical business of doing justice in that particular case before them.

The driving concern of academic lawyers is with the production of statements of legal principle. That concern is pursued in a controlled environment of relatively neat, albeit testing, factual assumptions. In contrast, the abiding concern of the practising profession is with hammering out the best solution to the particular messy problem that the Parliament or the parties have made for themselves or for others. And in performing that task those involved inevitably cast about for those aspects of context which are apt to bolster their case rather than by asking first which aspects of context are available in accordance with the formal rules or the canons of interpretation.

A central feature of the technique of the great advocates of the common law tradition is that by which an advocate advances his or her case by an appeal to the broader values to be found, at least arguably, in the context that stands behind the particular text under discussion. The technique can make a particular interpretation more attractive to the audience to whom it is presented than might otherwise be the case. You may perhaps appreciate what I am talking about a little bit better from reading the summaries of arguments in the CLRs by the great advocates, such as Murray Gleeson, Michael McHugh, David Jackson, David Bennett, Brian Shaw and Stephen Charles.

When we speak of context as context 'in the widest sense', we are acknowledging that the art of the lawyers engaged in the case lies in marshalling those bits of background that are apt to allow the court to see where the justice of the case best lies. Within the institutional setting of the adversarial system, those engaged in that process tend now to ask, first, not what are the rules that limit the kinds of contextual indicators to which reference is permissible, but where do we find the strongest indications of the values that underlie and inform the text in question. The skilful and, as Learned Hand said, imaginative deployment of the technique of the common law in sympathy with the legislature in this way renders more likely the desired response from the court.

The limitations on the written word as a vehicle for communication between human beings have long been notorious. Socrates was so sceptical about the power of the written word to illuminate the search for truth that he never wrote anything down. Plato, in his first dialogue *Phaedrus*[12] has Socrates say:

> Writing, Phaedrus, has this strange quality, and it is very like painting, for the creatures of painting stand still like living beings; but if one asks them a question, they preserve a solemn silence. And so it is with written words; you might think they spoke as if they had intelligence, but if you question them, wishing to know about their sayings, they always say only one and the same thing. And every word, when it is written, is bandied about, alike among those who understand and those who have no interest in it, and it knows not to

[12] Plato, *Phaedrus*, tr Harold North Fowler (Harvard University Press, 1914) 275 d–e.

> whom to speak or not to speak; when ill-treated or unjustly reviled it always needs its father to help it; for it has no power to protect or help itself.

Two aspects of this statement are of particular interest. The first is Plato's nod to his old master Socrates acknowledging the difficulty of capturing shades of meaning in a written text. The second is that, to truly understand a statement in a written text, we need to have an idea of the spirit that animates the ideas sought to be captured by the text, that is to say its purpose. And that is most likely to become clearer in the dialectical process of thesis, antithesis and synthesis of skilled argument in court.

There is something immediate and compelling about the working out in court of the dialectical processes in oral argument. In many of the cases in which I have been involved, as an advocate or a judge, there has been a moment in the argument where the best synthesis does emerge from the dialectical process. In that process the 'fitness' of a particular solution to a particular problem asserts a powerful claim on the imagination of the decision maker; certainly a more powerful claim than general statements of principle about statutory interpretation or the canons of construction. The force of the compelling argument is often apparent to the participants and to the court. It may be, of course, that further reflection will lead one or more of the judges to reject that synthesis – and clearly that happens – but that doesn't deny the truth of the point that the ultimate decision is less likely to be guided by the preference for one canon of statutory interpretation over another than by what is useful to point to the justice of the case in terms of the deeper values that can be discerned in the context.

At the same time as we acknowledge the fragility of human attempts to convey meaning by words, it is also necessary to acknowledge that the task of interpreting expressions of the will of the legislature (or in the case of a contract, of the parties) proceeds upon the assumption that the author knew its mind or what it wanted to say, however imperfectly it may have been expressed. That fundamental assumption reflects the irreducible minimum respect that those appointed to exercise of the judicial power owe to those chosen by the people to make their laws.[13]

That said, the experience of those who have been exposed to the drafting process suggests that as a matter of practical reality, the required assumption is distinctly generous to those involved in the legislative process. Laws do not spring fully formed from the mind of a serene and omniscient author. The lawmaking process is much more human and messy. As Bismarck famously said, '[n]o one should have to see how sausages or laws are made'.

It should not be thought that, within the bureaucracy that produces our statutes, legislative proposals percolate upwards towards Royal Assent moved by the force of their own merits. Sometimes, the political leadership driving the adoption of a measure may be divided as to how far it should go; but even where the political masters are agreed on the thrust of a

[13] *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

proposed measure, the devil will still be lurking in the detail. Sometimes in the drafting process, the champions of competing views will accept the best compromise they can achieve has been achieved, leaving it to the courts to resolve a case of studied ambiguity. In cases of drafting by committee, the authors might even be at cross-purposes.

Members of the bureaucracy engaged in the drafting process will bring to bear the views that they, as any member of a pluralist society, may have upon a particular subject. Often competing ideas are not reconciled to the satisfaction of the antagonists; but the political pressure requires that something be produced. In such cases, the courts are left to do their best to interpret a measure the philosophy of which has been compromised in significant respects in the course of the drafting process. And even where the context enables a particular value or purpose to be discerned as immanent in, or underlying, a given text, that insight must always be tempered by the pragmatic recognition that statutes (or contracts) are rarely about just one thing. A legislative package pursuing several objectives must be read as a coherent whole. In *Carr v Western Australia*,[14] Gleeson CJ said:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object … That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

Can I move now to some cases to illustrate the points I have been trying to make as to the importance of context in the widest sense.

Context in the widest sense

A striking recent example of the high technique of the common law in the use of context in its widest sense to resolve an issue of statutory interpretation is the case of *Registrar of Births, Deaths and Marriages (NSW) v Norrie*.[15] In that case, the respondent, Norrie, applied to the Registrar of Births, Deaths and Marriages of New South Wales under the Act for registration of her sex in the register following a sex affirmation procedure within the meaning of the Act. The objects of the Act included 'the recording of changes of sex'. Upon Norrie's application, the Registrar issued a certificate of recognised detail (change of sex) which recorded Norrie's sex as 'nonspecific'. After receiving advice, the Registrar wrote to Norrie advising her that he did not have power under the Act to issue a certificate showing Norrie's sex as 'not specified', because 'a change of sex' meant a change from either male or

[14] (2007) 232 CLR 138, 142–3 [5].
[15] (2014) 250 CLR 490.

female to the other; and so, the certificate of recognised details that the Registrar had issued was invalid.

On Norrie's behalf, Mr David Bennett QC, formerly Solicitor General for the Commonwealth, advanced the compelling argument that the relevant provision provided for 'the registration of the person's sex' and for the registration in a register, which, in the nature of things, exists to record true information. Because the evident 'purpose of the Register is to state the truth about matters recorded in the Register to the greatest possible extent',[16] to classify Norrie as male or female, contrary to the truth, as the Registrar had decided to do, would be to engage in the solemn farce of recording incorrect information in the register.

Another example of the use of context in its widest sense is afforded by *Uelese v Minister for Immigration and Border Protection.*[17] In that case the Administrative Appeals Tribunal had held that s 500(6H) of the *Migration Act 1958* (Cth), which provided that the Tribunal must not have regard to any information presented orally in support of an application for review of a decision of the Minister to cancel a visa unless it has been provided in a written statement to the Minister at least two days before the Tribunal's hearing, meant that the Tribunal was precluded from having regard to the interests of the appellant's youngest children, who had not previously been mentioned to the Minister or to the Tribunal, and whose existence emerged only in cross-examination by the Minister's counsel of the appellant's wife.

Mr Nick Owens now of Senior Counsel, then one of the ablest junior counsel at the Sydney Bar, made the compelling argument on behalf of the appellant that the prohibition in s 500(6H) had to be understood in context as being concerned with the case presented by the applicant, and so, the prohibition was confined to information adduced by the application for review as part of his or her case, this is, the case in chief.[18] The contrary position, whereby the Minister could take advantage of helpful answers extracted in cross examination at the hearing but remain immune against unhelpful answers, would be a travesty of the 'hearing' which the Act contemplated.[19] The High Court accepted Mr Owens' argument. The critical contextual consideration was the simple, but fundamental notion, that a hearing, as the source of the evidence on which a Tribunal is expected to act, involves the presentation by each party of its case. The prohibition in s 500(6H) was to be seen as but a limited carving out from this more fundamental assumption.

Another example of the power of broad contextual considerations to shape the understanding of a particular text is afforded by the High Court's decision in *Forrest & Forrest Pty Ltd v Wilson.*[20] In that case, provisions of the *Mining Act 1978* (WA) conferred power on the Minister, subject to the Act, to grant a mining lease after receiving a recommendation of the mining registrar or warden. The Act required that an application for a mining lease be

[16] Ibid 498 [30].
[17] (2015) 256 CLR 203.
[18] Ibid 205–6.
[19] Ibid 217 [44]–[45], 219–20 [54]–[57] (French CJ, Kiefel, Bell and Keane JJ).
[20] (2017) 262 CLR 510 ('*Forrest & Forrest Pty Ltd*').

accompanied by various pieces of information, including a mineralisation report detailing the results of exploration on the land the subject of the application. The application was to be heard by the warden, who was then required to make a recommendation to the Minister. Two applications were lodged and two months later, the required mineralisation reports were lodged, contrary to the requirements of the Act. The warden proceeded to hear the applications, notwithstanding that the applications has not been accompanied by mineralisation reports as required by the Act. The Court of Appeal of the Supreme Court of Western Australia held that this requirement was not a condition precedent to the warden's jurisdiction. The High Court took a different view.

Unfortunately, and one might also say surprisingly, given the Counsel involved, the Court of Appeal had not been referred to a line of authority which included the decision of the Privy Council in *Cudgen Rutile [No 2] Pty Ltd v Chalk*.[21] That line of authority is to the effect that

> where a statutory regime confers power on the executive government of a State to grant exclusive rights to exploit the resources of the State, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant.[22]

That line of authority draws compelling support from the consideration, drawn from the broad legislative context, that to permit officers of the executive government to excuse noncompliance with the requirements of the regime regulating the exploitation of the state's resources is apt '"to imperil the honest and efficient enforcement of the statutory regime, by allowing scope for dealings between miners and officers of the executive government in relation to the relaxation of the requirements of the legislation'.[23]

One has only to articulate this aspect of the broad context to understand the reluctance of the majority of the High Court to attribute to the legislature the intention that strict compliance with the regime is not mandatory.

A final illustration of the proposition that context in its widest sense may be usefully called in aid to solve the particular problem before the court is afforded by the plurality judgment in *Air New Zealand Ltd v Australian Competition and Consumer Commission*.[24] There the Court was concerned with whether anticompetitive conduct engaged in by various international airlines, organised and operated from places outside Australia, affected competition in a market in Australia. The plurality held that '[a]s a practical matter of business, the rivalrous behaviour in the course of which the matching of supply and demand occurred was in a market which … included Australia' even though it might also have been said to be a market in Singapore, Hong Kong or Indonesia.[25]

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[21] [1975] AC 520, 533 (Lord Wilberforce for the Court).
[22] *Forrest & Forrest Pty Ltd* (n 20) 529 [64] (Kiefel CJ, Bell, Gageler and Keane JJ).
[23] Ibid 529–30 [65].
[24] (2017) 262 CLR 207 ('*Air New Zealand*').
[25] Ibid 228 [33] (Kiefel CJ, Bell and Keane JJ).

The plurality noted that s 4E of the *Trade Practices Act 1974* (Cth) which said that 'market' means a market in Australia, proceeded upon the necessary footing, that 'notwithstanding the abstract nature of the concept of a market, it is possible to locate the market where the competition protected by the [*Trade Practices Act*] occurs in Australia. Reconciling the abstract notion of a market with the concrete notion of location, so that they work coherently' was said to represent 'something of a challenge … because "competition" describes a process rather than a situation'.[26] This challenge was resolved on the footing that 'the task of attributing to the abstract concept of a market a geographical location in Australia' was to be approached 'as a practical matter of business'.[27] That was said to be so because 'any analysis of the competitive processes involved in the supply of a service is not [to be] divorced from the commercial context of the conduct in question'.[28]

This practical business focus of analysis was required because the *Trade Practices Act* operated, just as the *Competition and Consumer Act 2010* (Cth) today operates, upon those engaged in commerce.[29] Because the various airlines were actively engaged in trying to 'capture the demand for services emanating from [customers] in Australia' their deliberate and rivalrous pursuit of orders from Australian customers was 'compelling evidence that they were in competition with each other in a market that was in Australia'.[30]

Legislative history

In the recent case of *Gerner v Victoria*,[31] the challenge to the Victorian lockdown provisions in force during the COVID-19 pandemic. In the course of that challenge, one argument advanced on behalf of the plaintiff was that a freedom for people in Australia to move within the state where they reside free from arbitrary restriction of movement was implicit in s 92 of the *Constitution.* It was argued that intrastate movement is a necessary incident of the freedom of interstate intercourse guaranteed by s 92. In the course of oral argument, there emerged a compelling consideration of context that to accept the plaintiff's contention in this respect would be to read the guarantee of freedom of 'trade, commerce, and intercourse *among the States*' as if it were 'trade, commerce, and intercourse *throughout the Commonwealth*'. It was apparent that at the Constitutional Conventions, the notion that the freedom guaranteed by s 92 might apply throughout the Commonwealth was specifically considered and rejected.[32]

This consideration of context in its widest sense was, in practical terms, decisive of the case, in the sense that, whatever theory of statutory interpretation might justify reference to the

[26] Ibid 222 [14] (Kiefel CJ, Bell and Keane JJ).
[27] Ibid.
[28] Ibid, citing *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203, 228–9 [70] (Kiefel and Gageler JJ).
[29] *Air New Zealand* (n 24) 228 [34] (Kiefel CJ, Bell and Keane JJ); *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, 455–6 [252] (McHugh J).
[30] *Air New Zealand* (n 24) 228 [34].
[31] (2020) 270 CLR 412.
[32] Ibid 428 [30], 429 [34].

constitutional debates, no one could seriously expect the Court to attribute to the constitutional text a meaning that the framers were evidently 'united in rejecting'. That this aspect of the appellant's argument was untenable was, I think, apparent to everyone who attended the argument in court. No one needed to pause to consider the precise basis in principle on which reference to the convention debates is admissible as an aid to interpretation in order to come to that recognition.

The conversational model

I want now to turn for a moment to consider the view of statutory interpretation as a conversation between the legislature and the judiciary, and to consider the concomitant assumption that the courts properly approach the task of the construction of a particular text on the basis of a working hypothesis about legislative intention shared between the two institutions. This can be seen as an aspect of context in its widest sense. So, for example, we are all familiar with the development in the jurisprudence of the High Court that when the Parliament vests a power in an officer of the executive government to make a decision that affects the rights and interest of a person, it is to be taken in the absence of a clear indication to the contrary that the power so conferred is to be exercised fairly to the affected person and reasonably having regard to the interests affected. You will all be familiar with the developments through cases like *Annetts v McCann*[33] and *Ainsworth v Criminal Justice Commission*[34] and *Minister for Immigration and Citizenship v Li.*[35] It is, of course, not difficult to attribute to the Parliament an intention that the powers that it confers on the functionaries of the executive government are not to be exercised unfairly or unreasonably. There may be disputes about whether a power has, in the circumstances of the particular case, been exercised unfairly as a matter of process or unreasonably as a matter of outcome, but no one would now be disposed to dispute the major premise.

Framing the exercise of construction as a conversation between legislature and judiciary proceeds on the basis of assumptions that are taken to be shared in the absence of explicit indications to the contrary. A question that arises at the outset of this construction is whether it matters that one party to the conversation is the legislature. In other words, are the legislature and the judiciary taken to be, for the purpose of this notional conversation, like the Montagues and Capulets, 'alike in dignity'. The question here is whether there is something that might be called 'sympathy' (not deference) due to the legislature. It is the legislature, after all, whose avowed and primary function is to say what the law ought to be, the function of the judiciary being to say what it is.

I can illustrate what I am trying to articulate by reference to the cluster of recent cases in the High Court about whether a procedural error by a decision maker that is immaterial to the outcome of the particular decision is a jurisdictional error, that is to say, a nullity. In *Hossain*

[33] (1990) 170 CLR 596.
[34] (1992) 175 CLR 564.
[35] (2013) 249 CLR 332.

v Minister for Immigration and Border Protection[36] the majority approached this question on the footing that a question as to the consequence of an error in the course of a decision-making process is as much a matter of statutory construction as a question as to whether there has been an error in the course of exercising a statutory authority or an error of such a kind that is beyond the decision-making authority conferred by the statute. The majority refused to attribute to the Parliament the intention that an error in process was such as to take the impugned decision outside decision-making authority where there was an alternative and unimpeached basis on which the decision could be sustained, notwithstanding the procedural error in relation to the other basis. Can one sensibly attribute to the Parliament, as the institution responsible for husbanding the resources of the Commonwealth and the raising and spending of taxes, an intention that a soundly-based decision should be set aside and revisited because an alternative basis on which it might also have stood was affected by an error?

The more expansive view of the role of the judiciary in relation to this conversation starts with the proposition that, while the force of a statutory command derives from the constitutional authority of the legislature, the formal processes which produce the legislative text provide a context that includes rules and principles of interpretation which were originally developed by the judges, such as, for example, the cannon of construction that legislation is presumed not to interfere with vested proprietary rights.[37] In *Coco v The Queen*,[38] the plurality of the High Court said:

> The [judicial] insistence upon express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

This approach gives rise to a number of questions. There is a question about the legitimacy of what seems to be a slide from saying that the requisite intention could have been expressed more clearly to the conclusion that the requisite intention has not been expressed clearly enough. And, of course, there is a question about what rights are 'fundamental' given that legislatures create, alter and abrogate rights every day: what parliament can give, it can take away. Further, it is difficult to see a place for the principle of legality where the effect of its application would be to impute to the legislature an intention not to abrogate

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[36] (2018) 264 CLR 123. See also *Shrestha v Minister for Immigration and Border Protection* (2018) 264 CLR 151; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.

[37] See *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201–2 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ); *Coco v The Queen* (1994) 179 CLR 427 ('*Coco*').

[38] *Coco* (n 38) 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

common law rights in a statute where the immediate context reveals an intention to do just that, and the issue is as to how far the legislature has gone in pursuit of that intention. As my former colleague, Gageler J, said in his dissenting judgment in *Independent Commission Against Corruption v Cunneen*, '[u]nfocussed invocation of … the "principle of legality" can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy'.[39]

So, should the court's concern be with the intention of the legislation being the statutory text as understood through the lens of judicially formulated presumptions, as distinct from a sympathetic view of the intention of the legislature? To the extent that there is a real difference, the former is probably the prevailing view, at least as an abstract proposition. That was the position in *Lacey v A-G (Qld)*.[40] On the other hand, in *R v A2*[41] (where the cutting or nicking with a blade of a young girl's clitoris was held to be mutilation of the clitoris) the majority took a broader view of a statutory proscription of female genital mutilation than might otherwise have been taken of the text of the offence-creating provision because it was unable to attribute to the legislature an intention that female genital mutilation to some extent was permitted. It was not necessary for the prosecution to prove injury or damage that is more than superficial and which irreparably damages the body part in question.

Extrinsic Materials

Extrinsic materials can be useful in helping identify the mischief at which an Act is directed. One serious problem with too heavy reliance on extrinsic materials as an aide to statutory interpretation, however, as highlighted by statutory provisions such as s 15AB of the *Acts Interpretation Act 1901* (Cth) which refers to 'the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act'. It is important that ordinary citizens reading a statute will not usually have recourse to the extrinsic materials, although evidently they can be relied upon to have a lively appreciation of the 'purpose or object underlying the Act'.

One needs to bear in mind that we are interpreting a statute intended to operate in the real world so that its effect can be understood by reasonable people using their ordinary language. As Gageler J said in *Mondelez v AMWU*,[42] '[w]ords of a statute are not a secret code for lawyers'. I might also say in passing that *A2* was one of the very few cases in which I found the explanatory material extraneous to the statute of real assistance to the exercise of statutory construction, because it made it tolerably clear that the target of the legislation was any actual cutting around the genitals.

[39] (2015) 256 CLR 1, 35–6 [88].
[40] (2011) 242 CLR 573.
[41] (2019) 269 CLR 507.
[42] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, 531 [98].

Context and Coherence

Coherence is about the ordering of the hierarchy of values as referred to in *Project Blue Sky*. In 2020, when the High Court was required to decide two cases in which statutory restrictions on movement by way of response to the COVID-19 pandemic were challenged as contrary to s 92 of the *Constitution.* One was the *Gerner* case I have already mentioned. The other was the challenge to Western Australia's border restrictions brought in *Palmer v Western Australia.*[43] The latter brought to mind the famous remark by Justice Robert Jackson of the Supreme Court of the United States that one is dealing with a constitution not a suicide pact. To approach the emphatic statement of s 92 that 'trade, commerce, and intercourse among the States … shall be absolutely free' in a literal way, is to fail to recognise the need to reconcile this statement with the context in which it appears, namely the establishment of an ordered community where trade, commerce and intercourse are regulated by, for example, laws that proscribe dishonesty in business in order to enable these activities to occur.

While considering those cases, I had occasion to look again at some of the earlier cases on s 92 of the *Constitution*. It occurred to me that some of the s 92 cases afford quite stark examples of the deployment of context in a broad sense and the need for coherence as essential aids to best understanding what s 92, a provision infamous for its ambiguity really means.

Context, regarded in its widest sense, encompasses matters of history including the identification of the mischief at which a measure is directed and the legislative history of the formulation of the measure. Early on in the life of the federation it was recognised that the apparently absolute language of s 92 of the *Constitution* in relation to freedom of interstate trade, commerce and intercourse had to be qualified in some way. A major step in this regard was taken as early as 1916 in *Duncan v Queensland,*[44] where Griffith CJ said of s 92: 'But the word "free" does not mean *extra legem* [outside the law], any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to the law'.

In *Gratwick v Johnson,*[45] Latham CJ added to Griffith CJ's insight, saying:[46]

> It is difficult … to hold that the word 'free' in s 92 relates to freedom from all legislative control and regulation. If s 92 were interpreted in this sense, it would be impossible for any Parliament in Australia to make any law which applied to such trade and commerce. It cannot be supposed that any such impossible result was intended. Accordingly, the problem was that of reconciling some degree of legislative control with what was described as absolute freedom.

[43] (2021) 272 CLR 505.
[44] (1916) 22 CLR 556, 573.
[45] (1945) 70 CLR 1.
[46] Ibid 13.

In *Northern Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales*,[47] Barwick CJ, with whom Stephen J agreed, stated that '[t]he concept of freedom and the word "free" carry within themselves their own limitation',[48] so that regulatory 'measures to ensure [the] wholesomeness and [the] freedom from contamination' of products from interstate that are 'reasonable and no more onerous in their impact on interstate trade than may be regarded as reasonably necessary' to achieve the purpose of securing 'the public against an unwholesome and contaminated commodity'[49] are consistent with freedom of trade and commerce.

In *Permewan Wright Consolidated Pty Ltd v Trewhitt*,[50] Stephen J took up the theme, explaining in a further appeal to context and coherence:

> [S]ince true freedom of interstate trade cannot be enjoyed in a state of anarchy, laws which subject the conduct of that trade to reasonable regulation may be seen to promote its freedom of enjoyment rather than to burden it. Rules of the road are, in our community of habitual travellers by road, especially easy to recognize as conforming to this analysis, they are essential to the enjoyment of free use of the roads by all, including those engaged in interstate trade. Other instances abound, their ease of recognition depending upon one's degree of familiarity with the areas of activity to which they apply.

Justice Stephen drew upon a broad view of context to illustrate that the freedom spoken of by s 92 assumes the existence of a legally ordered community. The examples given by Stephen J were not given as a comprehensive catalogue of state laws that are consistent with s 92, but to illustrate that qualifications were imposed by the context in the broadest sense upon the text of the provision. These familiar aspects of the ordinary legal order, as examples of laws which pursue obviously legitimate purposes in circumstances in which their effect upon interstate trade or intercourse is no more than an incidental consequence of the operation of such laws indifferently upon interstate or intrastate movement of goods and persons, have proved to have enduring force.

Considerations of coherence within the legal order require that we recognise that trade and commerce cannot sensibly be said to be other than free because they are subject to legislative regulation which proscribes misleading and deceptive conduct in the course of trade and commerce. A legislative requirement of honesty in trade and commerce is necessarily coherent with freedom of trade[51] because a law that proscribes dishonesty in trade and commerce is apt actually to prevent the disruption of trade and commerce that fraud causes. Such a law can readily be seen as a necessary bulwark of freedom of trade rather than an attack upon it. And just as laws proscribing dishonesty in business do not impair freedom of trade and commerce, so a law that ensures the preservation of public health is not of itself an impairment of the freedom of trade, commerce and intercourse. We

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[47] (1975) 134 CLR 559.
[48] Ibid 581–2.
[49] Ibid 578–9.
[50] (1979) 145 CLR 1, 22.
[51] *James v Commonwealth* (1935) 52 CLR 570, 591–3 (Dixon J), 596, 602 (Evatt and McTiernan JJ); *Cole v Whitfield* (n 2) 395–6 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

have it on the authority of Long John Silver that 'dead men tell no tales'. They also do not engage in trade or commerce. A law that is reasonable and no more onerous than may be regarded as reasonably necessary to achieve the purpose of securing that trade and commerce consists of wholesome and uncontaminated commodities is not inconsistent with freedom of trade and commerce. The same is equally true of the intercourse limb of s 92.

Conclusion

Within our adversarial system of justice, the primary focus of attention of the advocate and the judge is upon the materials that are likely best to lead to the most fitting resolution of the particular problem of which the court is seized.

To revert to the metaphor of the wood and the trees with which I began, it may be that the higher the vantage point of the birds' eye view of the forest, the more contestable becomes the identification of the proper place of the tree within the forest. The search for, and identification of, the broader values said to inform the text under consideration may be more highly contestable the wider the search is cast in terms of context. But that is where the real challenge is for the lawyers who are engaged in the case. It is where the learning of the advocates, and the sympathetic imagination of the judges, can make a real contribution to the doing of justice. This challenge is about judgment and for the judges involved, that can be very exciting.