

GIVING STATUTORY INTERPRETATION ADVICE – IDENTIFYING OPTIONS

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INTRODUCTION



Diamond Model of Statutory Interpretation

Learning Objective 1:
How to identify options



A = Expansive Phase

Step 1

Getting law right!

Step 2

Starting-point reading

Step 3

Discerning purpose of section and Act

B = Generative phase

Step 4

Generate alternate constructions of meaning

C = Contractive phase

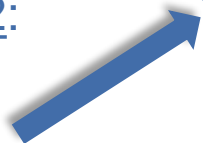
Step 5

Determine preferred meaning

Step 6

Apply meaning to problem

Learning Objective 2:
How to weigh and assess options



The modern approach to statutory interpretation

The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.

R v A2; R v Magennis; R v Vaziri (2019) 265 CLR 507

Modern approach to statutory interpretation

The modern approach to statutory interpretation requires:

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 affirmed in
R v A2; R v Magennis; R v Vaziri (2019) 265 CLR 507

- Regard to the context in every case

Minister for Immigration and Border Protection v WZAPN (2015) 254 CLR 610

- Close examination of the text

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

- Critical examination of the arguments

Mansfield v The Queen (2012) 247 CLR 86

- Multifactorial – rather than an answer-based – process

Berenguel v Minister for Immigration and Citizenship (2010) 87 ALJR 251

- The legal meaning to be based in the text of the Act/Regulations being interpreted

Taylor v The Owners – Strata Plan No 11564 (2014) 253 CLR 531;
R v Getachew (2012) 245 CLR 22

- Sequential approach to the process of interpretation

A sequential approach

Context is layered and should be discretely and sequentially considered:

- Examine the **provision in question**, focusing on the ordinary meaning of the words and their grammatical construction
- Proceed to the **immediate context** of any critical word or phrase in the provision concerned, considering the division or part in which it is situated
- Consider the **broader statutory context**: objects/purpose, guiding principles, definitions, drafting structure, any other relevant provisions, divisions, parts & schedules in the Act
- Consider the **wider context beyond the Act**, including:
 - extrinsic materials such as EMs, second reading speeches, parliamentary debates and the EMs of amending acts etc.
 - Subordinate instruments
 - common law: judicial commentary on the Act or on analogous legislation or provisions
 - international treaty or agreements
 - Commission reports & parliamentary committee & inquiry reports & formal reviews
- Interpretation legislation has codified the permissible uses of extrinsic materials: s 15AB of the *Acts Interpretation Act 1901* & s 35(b) of the *Interpretation of Legislation Act 1984*

STEPS TO APPLY THIS APPROACH IN PRACTICE



STEP 1 – Getting the law right

- Find the relevant Act(s) and Regulation(s)
- Establish the particular point in time that the problem concerns: in the past or future or raises rights and obligations under legislation that may commence in the future
- Determine which version of the legislative provisions apply to your problem
- Does the issue of retrospectivity apply?
- Using the table of contents and the headings, check through the legislation seeking relevant provisions, parts, schedules and clues to the existence of secondary legislation and instruments that may be relevant

STEP 2 – Starting-point reading

- Read the relevant provision(s) carefully, observing any words or phrases that appear significant. Break it down into its components/elements
- Check whether any of those words or phrases are defined within the legislation
- Check the meaning of any key words in a dictionary
- Consider whether any definitions in the relevant interpretation legislation apply
- Check whether any relevant provision has been judicially interpreted
- Interpret the words according to their ordinary/grammatical or technical / legal meaning & apply them to the problem: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389
- If appropriate, refer to statutory definitions in other legislation or to judicial interpretations of that legislation: *Commissioner of Stamp Duties (NSW) v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719

STEP 2 – Starting-point reading *(cont.)*

- Interpret key words in the context of accompanying words by applying common law canons of construction, eg *eiusdem generis*, *noscitur a sociis*
- Ensure grammar and bland or subtle words are not glossed over, eg ‘and/or’, ‘the’, ‘a’, ‘may’, ‘must’, ‘should’
- Interpret words in accordance with their current meaning: *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113
- Broad terms, eg “public interest”, “as soon as practicable”, and “best interests” require a situational definition having regard to the circumstances: *Kahan v Strauss* [2017] VSC 8
- Assume that all words carry meaning
- Check whether any adjacent provisions in the legislation throw light on a relevant provision, remembering that words are normally used consistently
- Check whether certain parts of the legislation (eg headings, examples, notes) are deemed part of the Act by referring to interpretation legislation

STEP 3 – Discerning the purpose of the Act & provisions in question

- Identify the **purpose of the legislation** and the **particular provision** and try to **interpret the words consistently with that purpose**
- This step requires you to consider the **legislative history**:
 - the pre-enactment legislative history (what laws existed before the provision was commenced) and
 - the enacting history (what gave rise to the specific provision or its amendment)
- Purpose may be:
 - **Express** – find the express statement of objects of the Act, Part, Division or provision in question
 - **Inferred from the text of the Act**: *Pileggi v Australian Sports Drug Agency* (2004) 138 FCR 107
 - **Inferred from** appropriate reference to **extrinsic materials**

STEP 4 – Ascertaining potential constructions of meaning

- **Generate options for the legal meaning** of the provision that are reasonably open on the text. These may include:
 - the grammatical/literal meaning
 - expansive and narrow meanings
 - meanings that support or advance the purpose of the legislation
 - meanings derived from the application of interpretation presumptions, relevant case law, interpretation legislation, extrinsic materials
 - meanings that may promote/protect your client's interests
 - meanings advanced by another party or that may be detrimental to your client's situation

STEP 5 – Determining preferred meaning

Where the heavy lifting begins!

- Where more than one construction is apparent on the face of the text you must evaluate all possible constructions and reach a judgment as to the preferred meaning by:
 - **identifying possible sources of doubt for each construction** to clarify the interpretation problem you are dealing with, eg unclear purpose, poor drafting, unforeseen circumstance, terms used inconsistently across the Act
 - **applying relevant interpretative criteria** (syntactical, common law and statute) having regard to the context and circumstances to solve the problem
- Relevant interpretative factors may be signposted as follows:
 - the **provision**
 - the **Act as a whole**
 - the **legislative history**
 - the **wider context**

STEP 5 – Determining the preferred meaning *(cont.)*

- Set out your arguments and interpretative factors under each possible construction:
 - considering the **operational consequences** of each construction
 - considering whether the ordinary meaning produces an **absurd or unreasonable result**
 - assessing the extent to which the various constructions **align with other provisions**
 - evaluating the extent to which the available meanings support the **purpose(s)**
 - Remember the **overarching legislative purpose** is likely to carry **less weight**:
 - than the **purpose** or object of the **provision or division** of provisions
 - in circumstances where an opposing construction **minimises infringement on fundamental common law rights**
 - where a **construction** claimed to promote the purpose of the Act **cannot be reconciled with the text** of the provision in question

STEP 5 (cont.)

- **Weighing and assessing each interpretive factor:**
 - assess the **relevance, factual accuracy, evidence and logic** of each interpretation and its **relative weight**
 - consider whether **an argument is eclipsed by an interpretative factor** in support of an opposing construction or **neutralised by a counter argument**
 - considering the **hierarchy of provisions**: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355
 - give **preference to specific provisions over general** where they give rise to conflicting interpretations
 - consider giving **more weight to the most recent statutory provision**
 - ensure that the interpretation derived from the **text** of the statute **prevails over** interpretations from **extrinsic materials**

STEP 5 (cont.)

- Evaluate **which of the various constructions** that are reasonably open:
 - command the **overall weight** and
 - best achieve the **purpose** or object of the Act
- In case of apparent **drafting error or oversight**, bear in mind these **limitations**:
 - a **non-grammatical interpretation may be permitted**: in *Winkley v Paton* (1943) 60 WN (NSW) 162, the court read the phrase ‘sample or fertilizer’ as ‘sample of fertilizer’ so that the provision made sense
 - in *Taylor v Owners – Strata Plan No 11564* (2014) 306 ALR 547 the HCA set out **when and how such errors may be corrected**: implications permitted, words ‘strained’, ‘read in’ or ‘read down’ to achieve the purpose of a provision, noting that **in general, adding words is not permitted**

STEP 6 – Application to the problem

- Set out your preferred construction in the advice and how it may be accommodated in or with the text of the Act – this is your preferred legal meaning
- Where various interpretations were considered, summarise these and why they were not preferred
- Apply your preferred interpretation to client's problem, facts and circumstances
- Set out any risks/consequences or limitations of your preferred interpretation for the client: likelihood of review / embarrassment / non-compliance – remember you are NOT a court!

APPLYING THE STEPS: *Dolheguy v Becker* [2009] VSC 106

Step 1 – Getting the law right!

- The Court identified the relevant Act as the *Road Safety Act 1986*
- The offence was committed in 2006 but heard in 2009, by which time the Act had been amended multiple times. The Court referred to the version of the Act in force at the time of the offence
- Four relevant provisions were identified:
 - subsections 28(1) and (6): licence suspension powers
 - subsections 66(1) and (6): offences captured by detection devices (speed / red light cameras)

Step 2 – Starting point reading

- Court conducted:
 - a **plain reading** of each **provision**
 - the **statutory context** in which it was located
 - the **interaction of the relevant provisions**, between subsections 28(1) and (6), 28(6) and 66 and finally 28(6) and 66(6)
 - referenced the principle that **all words of a statutory provision must be given effect**

Applying the steps: *Dolheguy v Becker* [2009] VSC 106

28 Power of court to cancel, suspend or vary licences and permits

- (1) If a court convicts a person of, or is satisfied that a person is guilty of, an offence against this Act or of any other offence in connection with the driving of a motor vehicle, the court —
- (a) in the case of an offence of driving a motor vehicle at a speed —
- (i) of 130 kilometres per hour or more; or
 - (ii) of 25 kilometres per hour or more in excess of that permitted, whether generally or in relation to the particular vehicle or circumstances —
- must suspend for such time as the court thinks fit ... all driver licences and permits held by that person; and
- (b) in any case but subject to paragraph (a), may suspend for such time as it thinks fit or cancel all driver licences and permits held by that person ...
- ...
- (6) Sub-section (1) does not apply to an offence to which section 66 applies unless the court is satisfied that the person convicted or found guilty of the offence was the actual driver of the motor vehicle at the time of the offence.

Applying the steps: *Dolheguy v Becker* [2009] VSC 106

66 Offences detected by a photographic detection device

(1) If —

(a) a prescribed offence occurs; and

(b) the offence is detected by a prescribed detection device or by a prescribed process —

the person who at the time of the occurrence of the offence is the owner of the motor vehicle ... involved in the offence is guilty of an offence as if that person were the driver of the motor vehicle ... at the time of the offence unless the court is satisfied that the motor vehicle ... was a stolen motor vehicle ...

...

(6) For the avoidance of doubt, the owner of a motor vehicle ... who, by virtue of subsection (1), is taken to be guilty of an offence is liable to the same penalties and subject to the same consequences to which he or she would have been liable and subject had he or she been the actual driver at the time of the occurrence of the offence.

Applying the steps: *Dolheguy v Becker* [2009] VSC 106

Step 3 – Discerning the purpose of the Act and provisions

- The Court discerned the **purpose** of the Act by considering:
 - **Express** indications: the purpose of the Act and the Part within which the relevant provision were situated
 - the **text of the Act as a whole**: Court considered the context of the provisions and how the various provisions interacted with one another to infer the purposes of the provisions, Part and Act
 - **extrinsic materials**:
 - Court interrogated the history, purpose and effect of all four the provisions by reviewing extrinsic materials of the Act and the Amending Act that inserted s 66(6)
 - This allowed it to understand the **legislative history** relating to the insertion of subsection 66(6) to ascertain the defect that it was intended to remedy: *Roads Corporation v Magistrates Court of Victoria* [2004] VSC 384 (Parsons' Case)

Applying the steps: Dolheguy v Becker [2009] VSC 106

Step 4 – Ascertaining potential constructions of meaning

- The Court **identified possible constructions** based on:
 - the grammatical/literal meaning of the provisions
 - the purpose of the legislation and of the provisions in question
 - all the possible ways in which the relevant provisions may interact, whether one is subject to or overrides another and
 - the meanings advanced by both parties
- The Court thus identified two competing interpretations regarding the interrelationship of ss 28(6) and 66(6):
 - s 66(6) operates according to its terms and *overrides* s 28(6) (first interpretation)
 - s 28(6) operates according to its terms and is an *exception* to s 66(6) (second interpretation)

Applying the steps: Dolheguy v Becker [2009] VSC 106

Step 5 – Determining the preferred meaning

- The Court assessed these opposing interpretations against various common law rules and presumptions, namely:
 - *General provisions are subject to specific provisions*
 - *All the words of the provision must have an effect*
 - *Principle of implied repeal of legislation*
 - *The most recent statutory provision prevails*
 - *Ambiguity in a penal statute should be in favour of the accused*
- In determining the preferred meaning, the Court evaluated the two possible constructions by:
 - considering the **operational consequences** of each construction
 - evaluating the extent to which the constructions were **consistent with the purposes** of the provisions
 - **weighing each interpretive factor**

Applying the steps: *Dolheguy v Becker* [2009] VSC 106

Step 6 – Application to the problem

- Court **articulating the preferred construction**: s 66(6) is *subject* to s 28(6)
- The Court clearly **articulated why the first interpretation was not preferred**: it would render s 28(6) inoperative, which was inconsistent with the objects of the Act and could not have been the intention of Parliament, otherwise it would have repealed this provision when it amended the Act to insert s 66(6)
- Court **applied its preferred interpretation** to issue at hand to uphold the County Court's decision not to suspend the owner's licence

Recap

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