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INTERPRETATION IN PRACTICE: PRACTICAL PROBLEM SOLVING WORKSHOP⁂

[S]tatutory interpretation is often like finding harmony in dissonance and clarity in mud.

There is disconformity between the constitutional ideal and the reality of what passes for legislation. When faced with a seemingly intractable interpretive problem, I have so far followed the advice of Franklin D Roosevelt, "When you come to the end of your rope, tie a knot and hang on."

The Hon Justice Susan Kenny
Federal Court of Australia [1]

1. My task is to lead you through some practical examples of statutory interpretation. I will do that by reference to some less than well known cases. Thus there will be an authoritative answer to each scenario. In some cases I gloss over, or even put aside, what appear to be peripheral facts.

2. I note the majority of delegates here today are employees of the State or its instrumentalities. Accordingly I should at the outset indicate that most of my practical experience with statutory interpretation has been in the Commonwealth sphere; having worked for 2 Commonwealth agencies between 2005 and 2014; that is immediately before my move to the Bar.

3. No doubt on occasion those of you employed by the State are called on to interpret Commonwealth legislation; and for that you have my empathy. I can safely say the principles found in the *Acts Interpretation Act 1901* (Cth) (**AIA**) are not substantially different to those found in the *Interpretation Act 1984* (WA). Like most Commonwealth legislation of any antiquity the AIA is these days replete with section numbers that have been described by Chief Justice French as *"a kind of insidious arteriosclerosis."* In the case of the AIA take for instance s 19BAA. For better or worse it is concerned with machinery of government changes – and does not pertain to matters ovine. Unlike a lot of

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⁂ This paper was initially presented at a Legalwise Seminar on 12 June 2014 at the Parmelia Hilton, Perth.

[1] *"Constitutional Role of the Judge: Statutory Interpretation"* by the Hon Justice Kenny, see footnote 52 below.

Commonwealth legislation the AIA still runs to only 92 printed pages, and one can actually sit down in a single session and read it.

4. Close attention to the provisions of the AIA should occur where the task at hand is the interpretation of a Commonwealth statute or Commonwealth delegated legislation. For instance:

    a. Section 13 of the AIA provides that *"All material from and including the first section of an Act to the end of the last section…is part of the Act."*

    b. Contrast that with s 32 of the *Interpretation Act 1984* (WA) whereby headings form part of the Act but notes do not.

5. The cases we will examine do not universally pay close attention to the relevant interpretation statute. In my view they should.

6. By the conclusion of this paper I expect you will agree with the passage from Kenny J quoted at the outset about finding clarity in mud.

SOME HIGH COURT DECISIONS

7. I will examine the following High Court authorities to varying degrees:

    a. *CIC Insurance*, decided in 1997.[2]

    b. *Project Blue Sky*, decided in 1998.[3]

    c. *Alcan*, decided in 2009.[4]

    d. *AB v State of Western Australia*, decided in 2011.[5]

    e. *Consolidated Media Holdings*, decided in 2012.[6]

8. We will deliberately look at them in the chronological order. *CIC Insurance, Project Blue Sky, Alcan* and *Consolidated Media Holdings* are frequently cited authorities on the principles of statutory interpretation. I shall only touch upon

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[2] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.
[3] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 35.
[4] (2009) 239 CLR 27.
[5] (2011) 244 CLR 390.
[6] [2012] HCA 55.

them and we will not look at the facts. *AB* is included because it is of West Australian origin and provides an example of the application of the principles. We will explore *AB* in more detail.

***CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384**

9. The majority in their joint judgment said:

> *"[T]he modern approach to statutory interpretation (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 such as those just mentioned, one may discern the statute was intended to remedy."* [7]

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

10. The majority in their joint judgment said:

> *"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In Commissioner for Railways (NSW) v Agalianos … Dixon CJ pointed out that "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". Thus, the process of construction must always begin by examining the context of the provision that is being construed."* [8]

***Alcan (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27**

11. The majority stated:

> *"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical*

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[7] *CIC Insurance*, 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey & Gummow JJ.
[8] *Project Blue Sky*, 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ.

considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy." [9]

12. Their Honours went on in subsequent paragraphs to explain that context can only take one so far, and that the general intention of a statute (in this case to raise revenue) could only take the interpreter so far.[10]

***AB v State of Western Australia* (2011) 244 CLR 390 (Gender reassignment case)**

13. The *Gender Reassignment Act 2000* (WA) provides for the issue of a recognition certificate to be issued by the Gender Reassignment Board; which certificate is conclusive evidence of the fact that a person has undergone a reassignment procedure and is of the sex stated in the certificate.[11]

14. The history of the matter:

- AB and AH were as a matter of law female. However they identified as male. Each of the appellants had undergone gender reassignment procedures, in the nature of a bilateral mastectomy and hormone (testosterone) therapy.[12] Each retained some gender characteristics of a female.
- AB and AH applied to the Gender Reassignment Board under s 14 of the *Gender Reassignment Act 2000* for a certificate that they had each undergone a gender reassignment procedure and was "male."
- The Board was satisfied in each case that the appearance of each of the appellants was that of a male person and that all the indications were that they had adopted the lifestyle of a man.

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[9] *Alcan*, 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.
[10] Ibid at [51] to [53].
[11] *AB v State of Western Australia* (2011) 244 CLR 390 at [4].
[12] Ibid at [11].

Nevertheless, the Board refused to grant certificates on the ground that both applicants retained a female reproductive system.[13]

- AB and AH were successful in overturning the Board's decision before the State Administrative Tribunal.
- The State was successful in reinstating the Board's decision before the WA Court of Appeal. Note that Buss JA dissented.
- AB and AH were successful before the High Court. In a single judgment of a 5 bench Court, the decision of the SAT was reinstated. [14] Thus certificates were issued. In the eyes of the law they became male.

15. Of the judgments given in the Court of Appeal, the High Court preferred the general approach of Buss JA.[15] The High Court added that his Honour's approach gave:

> *"…effect to the evident purpose of the legislation and is consistent with its terms. It is an approach that gives proper weight to the central issue with which the legislation grapples: that the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female. As the definition of "reassignment procedure" makes plain, a person's gender characteristics may be ambiguous."*

16. The High Court noted as a starting point s 18 of the *Interpretation Act 1984* (WA):

> *"…a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object."*

[13] Ibid at [12].
[14] Ibid at [13].
[15] Ibid at [23].

17. The Court also noted as a medical fact:

> *"…a male to female transsexual after surgery is no longer a functional male, but a female to male transsexual is in a different situation. Even successful surgery cannot cause him to be a fully functional male."* [16]

18. The Court had no difficulty assuming knowledge of that fact by the Parliament.

19. The case turned upon the proper meaning of the definition of *"reassignment procedure"* found in section 3, which provided:

> *"… a medical **or** surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics."*
>
> (emphasis added)

20. The Court noted the use of the word "or" between medical and surgical. A procedure could be one, but not the other, and still satisfy the definition. The Court found that hormone therapy (which the appellants had undertaken) was a "*medical procedure.*" [17]

21. The High Court concluded:

> *"No point would be served, and the objects of the Act would not be met, by denying the recognition provided by the Act to a person who is identified within society as being of the gender to which they believe they belong and otherwise fulfils the requirements of the Act."* [18]
>
> *"The Act contains no warrant for implying further requirements, such as potential adverse social consequences, to which the Board had regard, or community standards and expectations, to which the majority in the*

[16] Ibid at [31].
[17] Ibid at [32].
[18] Ibid at [36].

> *Court of Appeal referred. Such considerations are quite different from the social perspective…which has regard to the assessment made of the person by members of society in everyday life. They involve matters of policy and value judgments according to which recognition should be given or refused. Considerations of policy and an understanding of the extent to which society is accepting of gender reassignment are matters which may be taken to have been considered when the Act was passed. The Act reflects the policy decisions taken. The objectives of the Act, and their social and legal consequences, are to be met by reference to its stated requirements."* [19]

***Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55**

22. In a unanimous decision of a 5 member bench the Court said:

> *"This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text".* ***So must the task of statutory construction end.*** *The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."* [20]

RECENT WA CASES

23. To give some practical examples we will now explore some WA cases, one from first instance, the other from the Court of Appeal.

24. I should disclose at the outside that I was counsel in the next matter, a decision of Edelman J published earlier this year.

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[19] Ibid at [38].
[20] [2012] HCA 55 at [39].

Commissioner of the Australian Federal Police v Courtenay Investments Limited (No 2) **[2014] WASC 55**

25. The facts were:

    a. The Commissioner had brought civil proceedings under the *Proceeds of Crime Act 2002* (Cth) seeking forfeiture of some shares in a listed company. He alleged the shares had been used in the commission of an offence against the *Corporations Act 2001*.

    b. Mr Corp had previously stood trial in relation to the offence. Although he was convicted by a jury, the conviction was quashed on appeal and a re-trial ordered. The DPP discontinued the prosecution and the re-trial never occurred.

    c. In the forfeiture proceedings, Courtenay Investments Ltd claimed that it was the owner of the shares, and sought to oppose the Commissioner's application.

    d. Mr Corp disclaimed an interest in the shares.

    e. The Commissioner sought to rely on s 64(2) of the *Proceeds of Crime Act 2002* as entitling him to tender the transcripts from the criminal trial at the forfeiture trial.

26. The section was in these terms:

    "64 Procedure on application

    (1) Any person who claims an interest in property covered by an application for a forfeiture order may appear and adduce evidence at the hearing of the application.

    (2) The court may, in determining the application, have regard to:

    (a) the transcript of any proceeding against the person for an offence that constitutes unlawful activity; and

    (b) the evidence given in any such proceeding.

(3) The court may still make a forfeiture order if a person entitled to be given notice of the relevant application fails to appear at the hearing of the application."

27. Courtenay Investments Limited contended that *"the person"* in s 64(2) meant the person referred to in s 64(1) – that is the person who claimed an interest in the property. The only person who claimed an interest in the property was Courtenay and Courtenay had not been the subject of any criminal trial. Thus said Courtenay, s 64(2) had no work to do in the present case. Put another way, Senior Counsel for Courtenay argued that Mr Corp could not be *"the person"* in s 64(2) because he did not claim an interest; that is he did not fall within s 64(1).

28. The Commissioner contended that *"the person"* in s 64(2) meant the person alleged to have committed the offence relied upon in the application for forfeiture.

29. The matter was heard as a preliminary issue. His Honour noted at the outset, citing relevant High Court authority:

> *The key integers in the exercise of determining the effect of Parliament's intention in s 64(2) are statutory text, context, and purpose. The starting point, and the end point, is the text. But, although the statutory text is the "surest guide" to Parliament's intention, the text must be read in the widest sense of context, including the general purpose and policy of the provision.* [21]

30. Primary factors that supported Courtenay's interpretation included:

    a. Subsection 2 followed immediately after subsection 1.

    b. Subsection 1 used the indefinite article *"a person"*. In contrast subsection 2 used the definite article *"the person."* It was reasonable to infer that Parliament was talking of the person referred to above, particularly given that the text did not point to some other definite person.

[21] *Commissioner of the AFP v Courtenay Investments* [2014] WASC 55 at [14].

c. The above are each found in *"the text"* which as noted above is *"the surest guide."*

31. Factors that supported the Commissioner's interpretation included:

a. Section 64(2) was, by its placement in the relevant Part of the Act, concerned with 3 species of forfeiture, those found in ss 47, 48 and 49. Each of those sections required the Commissioner to point to an offence by a person in order to secure forfeiture. Criminal trials are about offences, not property ownership. Thus context favoured a construction of s 64(2) that was directed towards transcripts of trials of people who had been charged with relevant offences.

b. The heading to s 64 ("*Procedure on application"*) and the absence of introductory words suggested that the 3 sub-sections were discrete. The only thing they had in common was that they were each 'procedural.' [22]

c. Forfeiture applications are *in rem* (actions against a thing, not a person). If Courtenay's construction was correct it would *"…make a nonsense of the in rem nature of the proceedings. Section 64(2) would be dependent upon the person who allegedly committed the underlying offence… appearing before the Court… If that person has transferred his or her interest in the property to another, even intentionally, then s 64(2) would not apply."* [23]

d. The legislative history showed that s 64(2) had previously only been available in relation to criminal trial transcripts where a person had been convicted. The definite article ("the" person) was a vestige of the original s 64(2) which was talking about 'the person convicted.' It was permissible to use the legislative history in this fashion as the meaning was ambiguous or obscure.[24]

32. His Honour found that Courtenay's interpretation was *"inconsistent with the text, context and purpose of s 64(2). It is also inconsistent with common sense."*

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[22] Ibid at [21] and [39].
[23] Ibid at [46].
[24] Ibid at [47] and s 15AB(1)(b)(i) of the *Acts Interpretation Act 1901* (Cth) cited therein.

***Commissioner of State Revenue v Oz Minerals Limited* [2013] WASCA 239**

33. An Indonesian subsidiary of an Australian company was entitled under a *"Contract of Work"* executed between the subsidiary and the Government of Indonesia to explore and mine certain territory within Indonesia.

34. The Australian company was taken over by another. This triggered an assessment of stamp duty.

35. At issue between the parties was whether duty was payable on the value of the Contract of Work. That question turned upon whether the Contract of Work fell within the ambit of the *Stamp Act 1921* (WA) (since repealed).

36. At the relevant time, s 76(1) of the *Stamp Act* provided certain definitions which were determinative of liability in this case.[25] In particular:

> *mining tenement* means —
> (a) a mining tenement held under the *Mining Act 1978* being a mining tenement
> within the meaning of that Act or the *Mining Act 1904*;
> (b) a mining tenement or right of occupancy continued in force by section 5 of
> the *Mining Act 1978*; and
> (c) a **tenement, right or interest** that is —
>
> > (i) **similar** to a tenement or right referred to in paragraph (a) or (b); and
> > (ii) held under the law of another State, a Territory, the Commonwealth or another jurisdiction.
>
> (emphasis added)

37. Two of the key[26] interpretation questions were:

    a. Whether the rights or interests granted under the Contract of Work were a *"tenement, right or interest"* within the chapeau of

[25] *Commissioner of State Revenue v Oz Minerals Limited* [2013] WASCA 239 at [12].
[26] Ibid at [69].

para (c) of the definition of *"mining tenement"* in s 76(1) (issue 1); and

b. If so, whether the tenement, right or interest was *"similar"* (within para (c)(i) of the definition) to a mining tenement held under WA Law (issue 2).

38. It has been said of approaching definitions:

> *The function of a definition in a statute is not, except in rare cases, to enact substantive law. Rather, its function is to provide aid in construing the substantive enactment that contains the defined term. The meaning of the definition depends on the context, and the purpose or object, of the substantive enactment.*
>
> *Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment.*
>
> *To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.*[27]

39. The relevant substantive provisions in which these definitions were used have been said to have been introduced:

> *"…to equalise the burden of stamp duty …*
>
> *Prior to the amendment, if land [and pursuant to a legal fiction in the Stamp Act , that includes mining tenements] was owned by a company and if that was the only asset of the company, considerable duty would be saved by transferring to a purchaser the whole of the shares in the company instead of transferring the land."* [28]

40. Turning to the first issue, whether the rights or interests granted under the Contract of Work were a *"tenement, right or interest,"* it is noteworthy that

[27] Ibid at [105].
[28] Ibid at [108].

each of the 3 words has a broad and general connotation. Each is capable of arising outside of a mining context, and indeed outside of the context of land. From their placement in the *Stamp Act* it is clear Parliament intended each to be used in connection with property. In our legal system, a right need not be a tenement or an interest. [29]

41. The Contract of Work in the present case provided mutual enforceable duties or obligations on the Indonesian Government and the Indonesian subsidiary. Equally it provided for mutual benefits to each.[30]

42. A textual analysis of the definition, viewed in its context, shows that the rights under Contract of Work would properly be construed as a *"right"* at least.

43. I turn now to the second issue, whether the right is *"similar"* to a right that could be granted under WA law.

44. It is apparent from its text that paragraph (c)(ii) of the definition, in the context of the relevant substantive parts of the *Stamp Act*, is designed to capture mining activities outside of Australia.

45. It is obvious, and would have been obvious to Parliament, that some countries do not have a common law legal system. There is no reason to read down the word *"similar"* so that the scheme of the Act is more likely to apply to interests in jurisdictions that have more in common with our own.[31]

46. The word *"similar"* is a word of common use. Its ordinary and natural meaning is *"having likeness or resemblance, especially in a general way."* [32]

47. Synonyms of the word *"similar"* include *"alike"*, *"comparable"* and *"analogous"*. *"Same"* and *"identical"* are not a synonyms of *"similar"*. *"Similar"* allows for differences between 2 things.[33]

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[29] Ibid at [117] – [119].
[30] Ibid at [35] and following.
[31] Ibid at [114].
[32] Ibid at [154].
[33] Ibid at [156].

48. I propose to spare you the detailed analysis of:

    a. The nature of the rights established under the Contract of Work; and

    b. The basis under Indonesian law pursuant to which those right could be enforced.

    c. The closest analogue of those rights under WA mining law.

49. Buss JA devotes 97 paragraphs to that admittedly necessary task.[34]

What happened before the Court?

50. The Commissioner of State Revenue had disallowed the objection. Oz Minerals appealed to the SAT. The SAT had held that the rights under the Contract of Work were a *"tenement, right or interest,"* but that they were not *"similar"* to a tenement held under WA law. Accordingly the SAT set the disallowance aside and remitted the matter back to the Commissioner.

51. The Commissioner appealed as of right to the Court of Appeal, which was obliged to rehear the matter and *"to give the judgment which in its opinion ought to have been given in the first instance."* [35]

52. The Court of Appeal found that the SAT was correct to construe the benefits to the subsidiary under the Contract of Work as a *"tenement, right or interest,"* in particular as rights, but wrong to conclude that they were not *"similar"* to a mining tenement under WA Law.[36]

53. On the question of similarity, the Court of Appeal found the 'error' in the SAT's reasoning was engaging in a comparison exercise of rights in Western Australian contrasted to rights in Indonesia *"at an inappropriate level of particularity."* [37] Given the context (namely comparison of laws in different

[34] Ibid at [29] to [68] and [151] to [209].
[35] Ibid at [89].
[36] Ibid at [139] and [209].
[37] Ibid at [203].

countries) the proper approach was to review the features and characteristics of each in a general way.[38]

THE IMPORTANCE OF CONTEXT

54. We have considered the leading High Court authorities which stress the importance of the statutory text as the starting point.[39]

55. Indeed the High Court has said historical considerations and extrinsic material cannot be used to displace the clear meaning of the text.[40] So what if any role do they play?

56. I will now explore another High Court authority.

***The Queen v Lavender* (2005) 222 CLR 67**

57. The facts can be stated briefly.

    a. Mr Lavender was the operator of a front-end loader on a mine site in New South Wales.

    b. 4 young boys trespassed onto the site.

    c. Mr Lavender decided to chase them in the vehicle through sand dunes and thick scrub.

    d. He ran over one of the boys, killing him.

    e. He was convicted by a jury of manslaughter by criminal negligence (a common law offence).

    (No doubt your instinct, even if you know nothing of common law manslaughter says 'rightly so.')

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[38] Ibid at [196] to [201].
[39] See for instance *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].
[40] *Alcan* (supra) at [47]; *Nominal Defendant v GLG Australia* (2006) 228 CLR 529 at [22]; *NT v Collins* (2008) 235 CLR 619 at [99].

f. He appealed to the Court of Criminal Appeal which allowed his appeal on the ground that as a matter of statutory construction the crown had to prove *"malice"* to make out the offence.

g. The Court of Criminal Appeal upheld his appeal.

h. The Crown obtained special leave.

58. A full bench of the High Court heard the appeal. A joint judgment was published by Gleeson CJ, McHugh, Gummow and Hayne JJ. Kirby, Callinan and Heydon JJ each published concurring judgments, the last 2 being relatively short.

59. The High Court was concerned with a narrow argument about a section in the criminal law of NSW that modified common law homicide (without codifying it). The relevant section was in the following terms:

> *(1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.*
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> *(b) Every other punishable homicide shall be taken to be manslaughter.*
>
> ***(2) (a) No act or omission which was not malicious … shall be within this section.*** [41]

60. The distinction at common law between murder and manslaughter had historically been of great importance. Murder was a capital offence. Manslaughter was not.

61. It was well established at common law that manslaughter could be malicious or not malicious. Historically it was well recognised that manslaughter could occur by way of omission (rather than positive act) including in circumstances

[41] *R v Lavender* at [23].

of criminal negligence. Malice had never been an element of manslaughter by criminal negligence.

62. Further, the term 'maliciously' was defined in s 5 of the relevant Act in terms that were applicable to acts only, not to omissions.

63. The clear words of subsection 2(a) are worth re-reading.

64. On a textual approach, it is perfectly clear that an *"act … which was not malicious … (would **not** be) within the section."* That would have had the effect that it was not punishable under the criminal law of NSW.

65. Accepting that any string of words are capable of giving rise to ambiguity in at least some factual context, I suggest the words in the present statute are as close to **unambiguous** as one can get. The concept of 'ambiguity' is important for reasons I shall shortly explain.

66. Was there a warrant to look beyond the text?

67. I shall pause and refer back to *Consolidated Media Holdings*, which we examined earlier. It is worth repeating what the Court said:

> *""This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". **So must the task of statutory construction end.** The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. **Legislative history and extrinsic materials cannot displace the meaning of the statutory text.** Nor is their examination an end in itself."* [42]
>
> (emphasis added, citations removed)

68. Returning to *Lavender* then. The specific interpretation task was governed by s 34 of the *Interpretation Act 1987* (NSW) which provided:

> *(1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of*

[42] [2012] HCA 55 at [39].

assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to ***confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision*** *(taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or*

(b) to determine the meaning of the provision:

(i) if the provision is ***ambiguous*** *or obscure, or*

(ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is ***manifestly absurd or is unreasonable****.*

(3) In determining whether consideration should be given to any [extrinsic] material, or in considering the weight to be given to any material, regard shall be had, in addition to any other relevant matters, to:

(a) 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 or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

69. As an aside, the provision is in the same terms as s 19 of the *Interpretation Act 1984* (WA).

70. Note that s 34(1) of the *Interpretation Act 1987* (NSW) provides 3 situations in which regard may be had to extrinsic material:

    a. To confirm the ordinary meaning of the text; ss (1)(a). Put simply, this subsection provides no basis to conduct a wide ranging review of the extrinsic material in aid of somehow finding the law. The rationale for this rule is that the public must be able to find the law for themselves; see ss(3)(a). Thus primacy is to be given to the words Parliament chooses to use in statute.

    b. To resolve ambiguity; ss (1)(b)(i).

    c. Where the ordinary meaning of the text is absurd; ss (1)(b)(ii).

71. A textual interpretation would have had the effect of fundamentally changing the law of manslaughter, by abolishing the well-recognised category of manslaughter by criminal negligence. The High Court majority noted that that category of offence *"exists because of the importance which the law attached to human life."* [43]

72. The relevant section had an extensive legislative history, spanning a number of different Acts.

73. The legislative debates revealed:

> *"Not a word was said to suggest that it was proposed to alter the law as to involuntary manslaughter."* [44]

74. One thing is clear. The extrinsic material did **not**, to quote s 34(1)(a) of the *Interpretation Act 1987* (NSW), assist in *"confirming the meaning of the provision is the ordinary meaning conveyed by the text of the provision"*.

75. Nevertheless, the High Court concluded:

> *"It is impossible to accept that [relevant amendments that put the section in its current form were] intended to serve the…purpose, not referred to in any Report or parliamentary debate, or by the drafters, or*

[43] *R v Lavender* at [40].
[44] *R v Lavender* at [49].

by any commentator at the time, of altering the law of homicide by making malice an ingredient of involuntary manslaughter." [45]

76. Given that s 18 was not ambiguous, and that the extrinsic material did not confirm the ordinary meaning of the text, there can only be justification under s 34 of the *Interpretation Act* for the High Court's use of the extrinsic material. Namely that the Court found *"the ordinary meaning conveyed by the text of the provision"* led to *"a result that is manifestly absurd or is unreasonable"*. However the Court did not expressly make such a finding. I suggest that implicitly it must have so found.

77. *Lavender* remains good law. It was considered in *Alcan*, although not dealt with in any detail.[46]

CONCLUSION

78. If there is a common thread that runs through the High Court authorities we have examined this morning I suggest it is this:

    The path to solving a practical problem of statutory interpretation must begin with the text itself,[47] and there to must it end,[48] yet it ought all occur through the looking glass of the overall context and purpose of both the statute generally, and the specific provision.[49] Purpose will at times require a consideration of historical considerations; that is 'what was the law before this enactment, and why was the statute and this provision enacted.' [50]

79. My final advice for any practical problem of statutory interpretation:

    Consult the governing interpretation statute. Although it sometimes seems fashionable for Courts to gloss over it, practitioners would be well advised not to do likewise.

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[45] *R v Lavender* at [50].
[46] *Alcan* (supra) by the majority at [55]. Lavender's focus on historical matters was also spoken of with approval by Gummow ACJ and Kirby J in *NT v Collins* (supra) at [16].
[47] *Alcan*.
[48] *Consolidated Media Holdings*.
[49] *CIC Insurance* and *Project Blue Sky*.
[50] *Lavender*. A further example may be found in *Wicks v State Rail Authority of NSW* (2010) 241 CLR 60.

FURTHER READING

80. Although beyond the scope of this paper I mention the following extra-judicial papers on this topic that I think are particularly worthy of consideration.

    a. *"Law — Complexity and Moral Clarity"* by Chief Justice French AC.[51] In a keynote presentation that his Honour presented to a Law Week lunch he explores the challenges presented by different legislative drafting styles:

        i. Those written in complex over-detailed, prescriptive and inaccessible language; and

        ii. Those which set out broadly stated principles leaving it to the courts to determine the detail on a case-by-case basis in the tradition of the common law.

    His Honour's preference for the latter is no doubt apparent from that characterisation.

    b. *"Constitutional Role of the Judge: Statutory Interpretation"* by the Hon Justice Susan Kenny of the Federal Court of Australia.[52] Her Honour reviews a number of High Court authorities (including a number that have not been covered by this morning's presenters). She conducts a particularly interesting analysis of what it means to establish legislative intent, saying (and justifying):

    > *"When the meaning and function of the legislative intent concept is properly appreciated, it is evident that the actual intentions of the legislators are immaterial."*

    c. *"Uncommon Statutory Interpretation"* by the Hon Justice James Edelman of the Supreme Court of WA.[53]

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[51] Available from the High Court website at: http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj19may13.pdf

[52] Available from the Federal Court website at: http://www.fedcourt.gov.au/__data/assets/rtf_file/0019/25093/Kenny-J-20130315.rtf

[53] Available from the Supreme Court website at: http://www.supremecourt.wa.gov.au/_files/Uncommon_Statutory_Interpretation_May_2012.pdf

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