

CURRENT ISSUES IN THE INTERPRETATION OF FEDERAL LEGISLATION

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In *CIC Insurance v Bankstown Football Club*¹, in 1997, Chief Justice Brennan and Justices Dawson, Toohey and Gummow, in a passage that is well known to all of you, said that the “modern approach to interpretation”:

“insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and ... uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ... one may discern the statute was intended to remedy.”²

Not long afterwards, in *Project Blue Sky*³, in 1998, Justices McHugh, Gummow, Kirby and Hayne described the process of statutory construction in terms which emphasised the importance of language, purpose and context.⁴ Their Honours’ description of the principles – which time does not permit me to read out in full – included the sentence:

“Thus, the process of construction must always begin by examining the context of the provision that is being construed.”⁵

In my remarks this evening, I would like **to start** by addressing the question – also considered by her Honour, Justice Kenny, whether the High Court has, in the last few years, moved away from those statements of principle and adopted a more text-focused approach to statutory construction. Having considered whether there may have been a shift in emphasis in recent years, I will **then consider** the question: if there has been a shift in emphasis, what might be behind this change?

The focus of my remarks will be on the balance between **text** and **context** in the process of statutory construction. I do not propose to examine the concept of *legislative intent*, which

¹ *CIC Insurance Ltd v Bankstown Football Club Limited* (1997) 187 CLR 384 (*CIC Insurance*).

² *CIC Insurance* at 408 (footnote omitted).

³ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*).

⁴ *Project Blue Sky* at 381-382 [69], 384 [78].

⁵ *Project Blue Sky* at 381 (footnote omitted).

has been covered by Professor Goldsworthy and Justice Kenny. Nor do I propose to deal with the role of *purpose* in the process of statutory construction – I proceed on the basis that a purposive approach to construction is a given, both because it is mandated by the Commonwealth and State Interpretation Acts⁶ and because it has been consistently reaffirmed by the High Court including in recent cases.⁷

In *Alcan*⁸ in 2009, four members of the High Court – Justices Hayne, Heydon, Crennan and Kiefel – summarised the principles of statutory construction in a passage that has been cited with approval in numerous subsequent judgments in the High Court.⁹ Although that passage has already been quoted by Justice Kenny, I will read it again given its significance for present purposes. Their Honours said:

“This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical 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.”¹⁰

Not only has that passage been cited with approval in numerous subsequent judgments, other recent judgments have expressed the principles in similar terms. In particular, as has been mentioned, there is a joint judgment of five members of the High Court¹¹ in *Consolidated Media*¹² in 2012, the general tenor of which is very similar.

⁶ See, eg, *Acts Interpretation Act* 1901 (Cth), s 15AA. See generally, Herzfeld et al, *Interpretation and Use of Legal Sources – The Laws of Australia* (Lawbook Co, 2013), paras [25.1.800]-[25.1.830].

⁷ See, eg *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 (*Alcan*) at [4]-[5], [47]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 (*Lacey*) at [44]-[46].

⁸ (2009) 239 CLR 27.

⁹ See *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 (*Jemena*) at [50]; *Minister for Home Affairs of the Commonwealth v Zentai* (2012) 246 CLR 213 (*Zentai*) at [65]; *R v Getachew* (2012) 286 ALR 196; [2012] HCA 10 (*Getachew*) at [11]; *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466; [2012] HCA 16 (*Roadshow*) at [22]; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647; [2012] HCA 32 (*Barclay*) at [41]; *Certain Lloyd's Underwriters v Cross* (2012) 293 ALR 412; [2012] HCA 56 (*Certain Lloyd's Underwriters*) at [23].

¹⁰ *Alcan* at [47] (footnotes omitted).

¹¹ French CJ, Hayne, Crennan, Bell and Gageler JJ.

¹² *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257; [2012] HCA 55 (*Consolidated Media*) at [39].

As will be evident, there is, at least, a difference in expression of the principles, between the passage in *Alcan* and the early statements in *CIC Insurance* and *Project Blue Sky*. Whereas the earlier cases said that context must be considered in the first instance, the *Alcan* formulation says that the task of statutory construction must begin with the text. Further, whereas *CIC Insurance* said that the word “context” is used in its “widest sense”, the passage from *Alcan* cautions that historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text.

But the real question is whether this is a mere difference in formulation or whether there has been, in fact, a substantive change. In answer to this question, I would make the following points.

First, I don’t think there can be any doubt that **context** remains an important part of the process of statutory construction. This has been made clear in a number of recent judgments of the High Court which have referred to the role which context has to play¹³ and, indeed, have used context in resolving the particular problem of statutory construction.¹⁴ There is no suggestion, in any of the recent cases, that it is necessary to identify ambiguity before it is permissible to have regard to context.

Secondly, none of the recent cases has disapproved the passages from *CIC Insurance* and *Project Blue Sky* to which I have referred. To the contrary, a number of recent judgments in the High Court – including those of judges who participated in the joint judgments in *Alcan* and *Consolidated Media* - have cited with apparent approval the relevant passages from *CIC Insurance* and *Project Blue Sky*.¹⁵ This may suggest that they do not see any significant difference between the statements of principle in the earlier and more recent cases.

Thirdly, however, I think it is possible to detect a **more limited role** in respect of the use of certain types of contextual material, in particular second reading speeches and explanatory memoranda for bills. For example, in *Consolidated Media*, five judges said:

“Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.”¹⁶

¹³ See, eg, *Roadshow* at [22]; *Consolidated Media* at [39]; *Certain Lloyd’s Underwriters* at [24], [28], [70], [88]; *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 297 ALR 190; [2013] HCA 16 at [47].

¹⁴ Eg, *Roadshow* at [22], [23], [26]; *Consolidated Media* at [42]-[44].

¹⁵ See, eg, *Jemena* at [45], *Zentai* at [65], *Barclay* at [41], *Certain Lloyd’s Underwriters* at [24], [25], [28], [68], [70], [88]; *Commissioner of Police v Eaton* (2013) 294 ALR 608; [2013] HCA 2 at [49].

¹⁶ At [39].

While it is possible to read this and similar statements¹⁷ as not necessarily inconsistent with *CIC Insurance*, the Court does seem to be indicating that certain types of contextual materials will be of limited, if any, utility, at least in some cases.

Fourthly, and finally, while context is still relevant and important, I think the recent cases have, to some extent, **recalibrated the balance** as between text and context, in favour of a more text-focussed approach.¹⁸ As we have already seen, the more recent formulation insists that the task of statutory construction must start with consideration of the text. In addition, on more than one occasion, the Court has emphasised that the task must also *end* with the text.¹⁹ While one may say that the place where one starts, or ends, does not matter too much, so long as context is considered at some point in the journey, it is arguable that where one starts can make a difference. This point was made by Justice McHugh in *Isherwood v Butler Pollnow*²⁰, in a passage cited with approval in *CIC Insurance*. His Honour pointed out that if the apparently plain words of a provision are read in light of the mischief which the statute was designed to overcome and the objects of the legislation, they may wear a very different appearance.

It is difficult to assess how much difference the newer formulations of the principles are likely to make in practice. One suspects that in many, perhaps most, cases, the result would be the same, whether one states the overarching principles in terms of *CIC Insurance* or *Alcan*. In *Momcilovic*, French CJ said: “There are different ways of undertaking the interpretive task and, in a particular case, they may yield different answers to the same questions.”²¹ An indication that there may be a difference in some cases is provided by the decision of the High Court in *Baini v The Queen*.²²

The case concerned the criminal appeal provision contained in the Victorian *Criminal Procedure Act* 2009. The provision replaced the ‘common form criminal appeal statute’,

¹⁷ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (*Saeed*) at [31]-[33], [74]; *Lacey* at [61], [86]; *Jemena* at [50]; *Baini v The Queen* (2012) 246 CLR 469 (*Baini*) at [14], [34]-[35]; *Certain Lloyd’s Underwriters* at [25].

¹⁸ See, eg, *Alcan* at [51], [52]; *Saeed* at [34]; *Lacey* at [56].

¹⁹ See *Getachew* at [11]; *Consolidated Media* at [39]. See also Spigelman, “The intolerable wrestle: Developments in statutory interpretation” (2010) 84 ALJ 822 (*Spigelman*), p 829.

²⁰ *Isherwood v Butler Pollnow Pty Ltd* (1986) 6 NSWLR 363 at 388.

²¹ *Momcilovic v The Queen* (2011) 245 CLR 1 at [39] (footnote omitted).

²² (2012) 246 CLR 469.

which had been in place for close to 100 years, which contained a “proviso” which stated that, notwithstanding that the court of appeal was of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, the court may dismiss the appeal if it “considers that no substantial miscarriage of justice has actually occurred”. The former provision had been the subject of consideration by the High Court in *Weiss*. The new provision was different in terms and structure from the former provision.

Time does not permit me to go into the precise issue in any detail. Suffice to say, the Court divided, with five members of the Court – Chief Justice French and Justices Hayne, Crennan, Kiefel and Bell - adopting one construction and Justice Gageler in dissent adopting a different construction. While both the majority and Justice Gageler paid close attention to the text of the provision, Justice Gageler gave greater emphasis to the wider context. He commenced his judgment by quoting *CIC Insurance* and gave significant attention to the form of the earlier provision and the case law on the former provision. He also relied on the explanatory memorandum and second reading speech to bolster his construction.

On the other hand, the majority gave greater emphasis to the text of the new provision²³, and did not consider there to be utility in considering the terms of the earlier provision or the case law on that provision. In relation to extrinsic materials, the majority said:

“Paraphrases of the statutory language, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation, are apt to mislead if attention strays from the statutory text. These paraphrases do not, and cannot, stand in the place of the words used in the statute.”²⁴

The case may, therefore, provide an example of the difference in approach affecting the outcome. However, it probably needs to be said that it is difficult to identify many examples.²⁵

If and to the extent that there has been a shift in emphasis, what might be behind this change? What policy or other considerations might underpin the shift in emphasis, if one has occurred? I have three suggestions.

²³ See *Baini* at [15], [16], [20], [22].

²⁴ *Baini* at [14]. See also at [34]-[35].

²⁵ Another may be *Lacey*, where the approach of the majority may be contrasted with that of Heydon J in dissent.

First, I think any shift may be explained in part by “**rule of law**” considerations, by which I mean the principle that citizens are entitled to know what the law is, so that they can order their affairs and conduct their lives accordingly. Support for this explanation may be obtained from Chief Justice French’s judgment in *Alcan*. After stating that the starting point in considering the question of construction was “the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and legislative purpose”, his Honour said:

“That proposition accords with the approach to construction characterised by Gaudron J in *Corporate Affairs Commission (NSW) v Yuill*²⁶ as: ‘dictated by elementary considerations of fairness, for, after all, those who are subject to the law’s commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.’”²⁷

Similarly, in *International Finance*²⁸, Chief Justice French cautioned against straining the language of a provision simply to preserve its constitutional validity. Among the reasons he gave were that:

“those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen”.²⁹

Secondly, I think that any shift in emphasis that has occurred is likely to have been motivated by fidelity to the **proper role of the judiciary**, which is to interpret and apply the law, and not to make it. Reference to such considerations is seen in a number of cases to which Justice Kenny has referred, including *Momcilovic*³⁰ and *Zheng v Cai*.³¹ An approach which gives slightly more emphasis to the text may be seen to be more in keeping with the judiciary’s constitutional position.³²

²⁶ (1991) 172 CLR 319 at 340.

²⁷ *Alcan* at [4].

²⁸ *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319.

²⁹ At [42].

³⁰ *Momcilovic v The Queen* (2011) 245 CLR 1 at [50], [146(v), (vi)], [171], [545].

³¹ (2009) 239 CLR 446 at [28].

³² Cf the formalist criticisms in the US of the traditional contextual approach: see Eskridge in Singer, *Statutes and Statutory Construction* (6th ed, West Group, 2000 Revision), vol 2A, pp 681, 686-688. Cf also the references to the legitimacy of the judicial interpretative function in Gleeson, “The meaning of legislation: Context, purpose and respect for fundamental rights” (2009) 20 *Public Law Review* 26, p 28; and Spigelman, p 826.

A third explanation, which is related to the second, is a recognition of the respective roles of **the executive and Parliament**. While the role of the executive is to propose laws, it is the Parliament that is the maker of the law. Too great an emphasis on extrinsic materials such as second reading speeches and explanatory memoranda may blur the distinction between these two arms of government. This is a way, perhaps, of understanding the recent statements which have questioned the utility, in some cases, of resorting to these types of extrinsic materials.

By way of conclusion, I think it is difficult to say with confidence whether the recent cases in the High Court represent a real shift or merely a clarification of existing principles. In any event, there is a wealth of discussion in these judgments that needs to be borne in mind when one is grappling with a problem of statutory construction.

Thank you.