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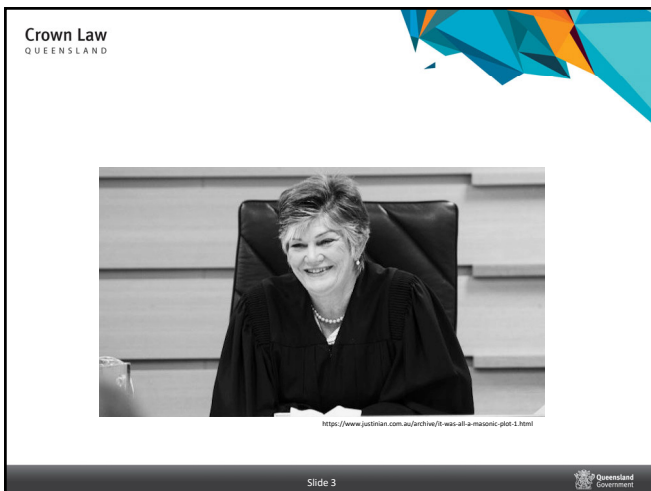
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<https://www.judman.com.au/archives/6-webb-all-a-masonic-plot-1.html>

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**Magistrates Act 1991 s.51:**

"A magistrate has, in the performance or exercise of an administrative function or power conferred on the magistrate under an Act, the same protection and immunity as a magistrate has in a judicial proceeding in a Magistrates Court."

**Criminal Code, s.30:**

"Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by the judicial officer in the exercise of the officer's judicial functions, although the act done is in excess of the officer's judicial authority, or although the officer is bound to do the act omitted to be done."

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**Overview**

- General approach to statutory interpretation
- Parliamentary intention
- Principle of legality
- *Acts Interpretation Act 1954*
- Tools of interpretation
- *Human Rights Act 2019*
- Extrinsic material
- *Statutory Instruments Act 1992*
- Constitutional issues
- Checklist

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## General approach

- Statutory interpretation 'rules' exist both at common law and under statute
- Historical (common law) approaches:
  - literal approach** (ordinary grammatical meaning even if 'inconvenient, impolitic, or improbable') (*Engineers' Case* (1920) 28 CLR 129 at 161-2)
  - golden rule** (apply literal approach unless it leads to absurdity)
  - purposive approach** (find the mischief the law is aimed at).

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## General approach

- Project Blue Sky Inc v ABA* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ:  
  
'The primary object of statutory [interpretation] is to [interpret] the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute ... Thus, the process of [interpretation] must always begin by examining the context of the provision that is being [interpreted].'

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## General approach - what about s 14A AI Act?

- Statutory 'intervention' in statutory interpretation
- Acts Interpretation Act 1954* (AI Act Qld):
  - 'In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation' (AI Act Qld, s. 14A, AIA Cth, s. 15AA)
  - Definition of purpose: 'purpose, for an Act, includes policy objective' (AI Act Qld, s. 36).

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### General approach – HR interpretation clause

- Section 48(1) and (2) of the *Human Rights Act* reads:
  - (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights
  - (2) If a statutory provision can not be interpreted in a way that is *compatible with human rights*, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

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### General approach – HR interpretation clause

- Where a statutory provision can be interpreted more than one way, the courts are required to select the option that is more compatible with human rights.

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### General approach

- Language or text
- Context
- Purpose
- Human Rights

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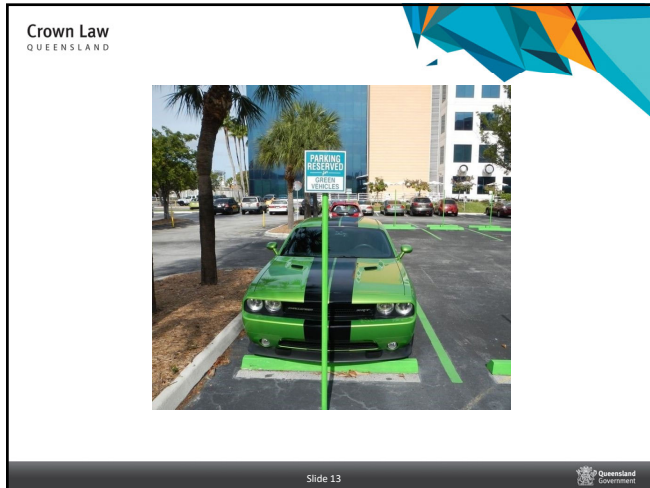
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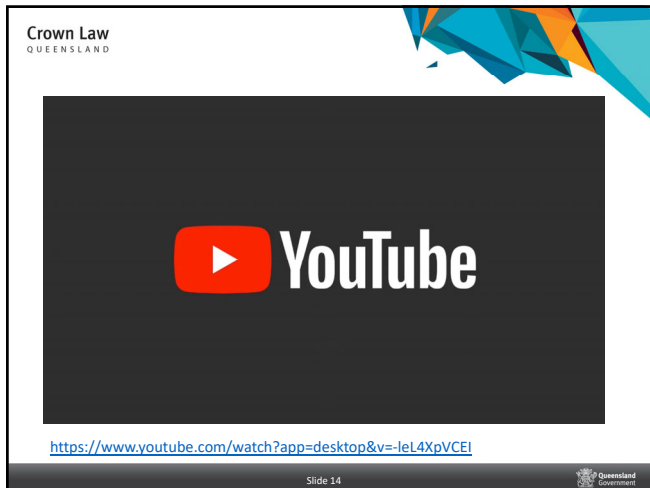
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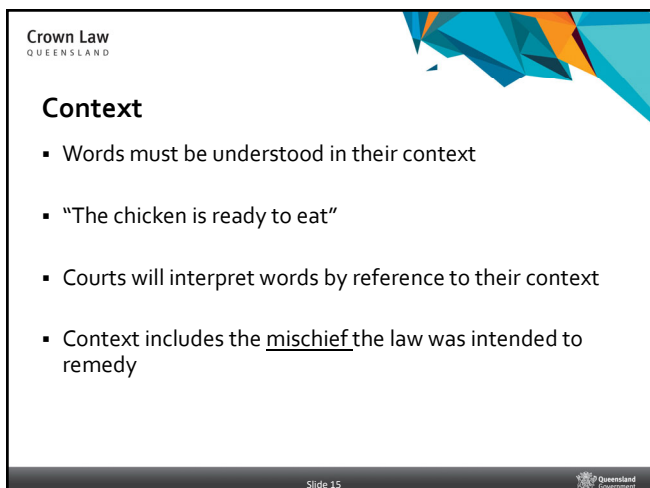
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### Parliamentary intention

- Often said that objective of statutory interpretation is to find the *intention* of Parliament
- High Court recognises artificiality of *intention*.

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### Parliamentary intention

- In *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [43]-[44] the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) said:
- The legislative intention... referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose
- "The task of the court is to interpret the words used by Parliament, not to divine the (subjective) intent of parliamentarians"

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### Parliamentary intention

- Ascertainment of legislative intention is asserted as a statement of compliance with the rules of [interpretation], common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.

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## Parliamentary intention

- ‘The purpose of a statute is not something that exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.’

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## Principle of legality

- An important common law principle of statutory interpretation
- The principle (or assumption) that Parliament does not intend to erode common law rights, freedoms and immunities, unless it has expressed its intent very clearly, was established by the High Court in 1908.
- Courts will look for a clear indication that the Parliament has directed its attention to the rights or freedoms in question and consciously decided to curtail them.

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## Principle of legality

- In *Potter v Minahan* (1908) 7 CLR 277 the High Court quoted from the textbook *Maxwell on Interpretation of Statutes*. The High Court then said at 304:  

‘It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness...’

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## Principle of legality

- What rights are fundamental?
- There is a rebuttable presumption that Parliament does not intend to (for eg):
  - interfere with free speech and free movement
  - infringe personal liberty
  - restrict access to courts
  - deny procedural fairness to person affected by exercise of public power
  - abrogate legal professional privilege or privilege against self-incrimination

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## Principle of Legality

### *Crime and Corruption Act 2001*

192 Refusal to answer question

- A witness at a commission hearing **must answer a question put to the person at the hearing by the presiding officer.**  
Maximum penalty—200 penalty units or 5 years imprisonment.
- The person is **not entitled—**
  - to remain silent; or
  - to refuse to answer the question on the ground of the self-incrimination privilege or the ground of confidentiality.
- (2A) The person is entitled to refuse to answer the question on the following grounds of privilege—
  - legal professional privilege;
  - public interest immunity;
  - parliamentary privilege.

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## Principle of legality

- Fundamental Legislative Principles (FLPs)
- See s. 4 of the *Legislative Standards Act 1992*
- Parliament is presumed to intend to pass laws consistent with FLPs
- FLPs include:
  - Having sufficient regard to the rights and liberties of individuals
  - Having sufficient regard to the institution of parliament
  - Consistency with principles of natural justice

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## Principle of legality

- No reversal of onus of proof without adequate justification
- Appropriate protection against self incrimination
- Unambiguous and drafted clearly and precisely
- Office of Parliamentary Counsel advises Parliament if a particular law is inconsistent with a FLP (s.7(g)&(h))
- Non-compliance with FLP's does not lead to invalidity (s.23(f) and 25)

-continues

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## Summary so far

- General approach: *Acts Interpretation Act 1954* requires us to look at the Act as a whole and adopt an interpretation which is consistent with the language and **purpose** of the Act as a **whole + Human rights**
- Both common law and statutory principles of statutory interpretation **apply**
- 'Parliament's intention' identified by reference to **the text** of the statute and is a product of applying ordinary rules of statutory interpretation.

- continues

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## Summary so far

- Principle of legality: abrogation of fundamental common law rights, freedoms and immunities achieved only with language that is **irresistibly clear** (subject to constitutional limits).

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### Acts Interpretation Act 1954

- Overview of AI Act – See: Contents page
- Note s. 4 – AI Act is all ‘subject to contrary intention’
- Section 14A - interpretation best achieving Act’s purpose
- Section 14B - Use of extrinsic material
- Section 14D – Examples

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### Acts Interpretation Act 1954

- General assistance from the AI Act interpretation – Parts 3 to 11. For example:
  - saving of things prior to amendment or repeal (s. 20)
  - power to make, revoke or vary decisions (s. 23(1) and s. 24AA)
  - appointment to positions under an Act (s. 25)
  - delegation of statutory powers (s. 27A)
  - Terms and references in Acts (Part 8, eg: gender, number, may, must)

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### Acts Interpretation Act 1954

- meaning of Ministers’, departments, and chief executives (s. 33)
- Distance, time & age (Part 9)
- Service of documents (part 10)
- Offences and criminal proceedings (Part 11)
- Compliance with forms (s 48A)

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### Tools of interpretation: overview

- Rules of statutory interpretation
- Syntactical presumptions
- Definitions of words.

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### Rules of statutory interpretation

- Act to be read as a whole
- Words are assumed to be used consistently throughout an Act
- Words to be given their ordinary meaning
- Legislation deemed to be 'always speaking'.

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### Rules of statutory interpretation

- Act to be read as a whole
  - '...to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context...'

*K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309 at 315.*

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### Rules of statutory interpretation

- Words are assumed to be used consistently throughout an Act
  - (*Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452; *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 75)
- Words to be given their ordinary meaning
  - (*Australian Leisure and Hospitality Group Pty Ltd v Director of Liquor Licensing* [2012] WASC 463 at [22].)

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### Rules of statutory interpretation

- Legislation deemed to be 'always speaking' to the present
- For e.g. *The Copyright Act 1912* (Cth) (in the early 1920s, before radios were invented) applied to the 'performance of [copyright protected] music in public places'
- Would a **radio** broadcast conducted in a public place be a 'performance of music' in a public place?  
*Chappell & Co Ltd v Associated Radio Co of Australia Ltd* [1925] VLR 350.

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### Rules of statutory interpretation

- Later Acts repeal earlier inconsistent Acts
  - (*Goodwin v Phillips* (1908) 7 CLR 1 at 14; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, [48])
- General provision in an Act does not repeal specific provision (*Goodwin v Phillips* (1908) 7 CLR 1 at 14; *Commissioner of Police v Eaton* (2013) 252 CLR 1 at 19 [46], 32 [92])
- Principle of Redundancy (must strive to give meaning and effect to every word of a provision)(*Commonwealth v Baume* (1905) 2 CLR 405 at 414; *Project Blue Sky v ABA* (1998) 194 CLR 355 at [71])

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### Rules of statutory interpretation

- Legislation is not intended to have retrospective effect (unless the intention appears with reasonable certainty) (*Maxwell v Murphy* (1957) 96 CLR 261, 267)
- Presumption that legislation does not operate extra-territorially (*Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363)

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### Rules of statutory interpretation

- In the event of ambiguity, penal provisions are to be construed strictly and in favour of the defendant (*Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305, 339 [108])
- Failure to specify time (s 38(4) AI Act: do it 'as soon as possible')

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### Syntactical presumptions

- Noscitur a sociis*: the meaning of a word or phrase is to be derived from its context:
  - In *Prior v Sherwood* (1906) 3 CLR 1054 the court held that a prohibition against bookmaking in a 'house, office, room or place' did **not** extend to a 'public lane'.

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## Syntactical presumptions

- *Ejusdem generis*: general matters are constrained by references to specific matters
- In *Re Latham (dec'd)* [1962] Ch 616, s. 8(4) of the *Finance Act 1894* (UK) dealt with property passing on death. It applied to 'every trustee, guardian, committee, or other person in whom any interest in the property' passing, was vested.
- Would 'other person' include a person who had a beneficial interest in the property?

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## Syntactical presumptions

- *Generalia specialibus non derogant*: where there is a conflict between general and specific provisions, the specific provisions prevail
- In *McLean v Kowald* (1974) 9 SASR 384 it was held that the enactment of a general power to suspend a sentence did not override a specific section already existing in the *Road Traffic Act 1961* (SA) that provided that, where designated, a minimum sentence should not be reduced or mitigated in any way.

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## Definition of words: overview

- Is there a statutory definition?
- Is there an *Acts Interpretation Act 1954* definition?
- Does the word have a legal or technical meaning (case law)?
- What is the word's ordinary and natural meaning?

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### Definition of words

- Is there a statutory definition?
- Dictionary is generally last schedule in Act
- Check for a chapter, part or division definition (should be signposted in Dictionary but may have been omitted)
- Check for a sectional definition (generally at end of section).

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### Definition of words (AI Act)

- Is there an AI Act definition?
- AI Act tells you certain things about statutory definitions:
  - definition in Act applies to entire Act (s. 32AA AI Act)
  - section 36 and Schedule 1 of AI Act defines commonly-used words.

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### Definition of words (AI Act)

- **Person** includes an individual and corporation (see also s. 32D AIA)
- **Individual** means a natural person
- **Corporation** includes a body politic or corporate
- **Entity** includes a person and unincorporated body
- **Document** includes any paper/material on which there is writing, any article/material from which sounds, images, writings etc are capable of being produced.

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### Definition of words (AI Act)

- **Instrument** means any document
- **Record** includes information stored or recorded by means of a computer
- **Writing** includes any mode of representing or reproducing words in a visible form.

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### Definition of words (AI Act)

- **Business day** (not Saturdays, Sundays or public holidays)
- **Calendar month** (starting any day of month, ends immediately before corresponding day of next month)
- **Calendar year** means a period of 12 months beginning 1 January
- **Year**, without specifying the type of year, means calendar year (drafting preference for '12 months').

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### Definition of words (AI Act)

- Meaning of 'may' and 'must' in relation to a power (see s. 32CA of the AI Act)
- Generally:
  - may = discretion
  - must = mandatory.

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### Definition of words (AI Act)

- May or must
- High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 [93] discouraged the use of the terms 'mandatory' and [discretionary]. In their joint judgment McHugh, Gummow, Kirby and Hayne JJ said that:  
  

'In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the 'elusive distinction between [discretionary] and mandatory requirements'.

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### Definition of words

- ...They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid.

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### Definition of words

- The classification of a statutory provision as mandatory or directory... is the end of the inquiry, not the beginning.
- ...A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid...
- In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".

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### Definition of words (AI Act)

- In the context of a manual for how to take and transport blood samples from racing horses provided for under the *Racing Act 2002*
- Manual simply said: "... Place the sealed security pouch [containing the blood sample collected from the horse] inside the plastic bag [provided in the sample collection kit] ... Staple the top of the plastic bag ..."

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### Definition of words (AI Act)

- A sample had been taken by an authorised officer but the bag had not been 'stapled', merely placed in the sealed security pouch and then in the plastic bag
- The test for the blood of the horse came back positive, but the prosecution failed at first instance because the District Court said the 'staple' was mandatory and therefore the test was invalid.

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### Definition of words (AI Act)

- One view would be that the *purpose* of the Act was to ensure the *integrity* of blood testing and, in the absence of express provision, so long as the step did not compromise the integrity of the sample, the manual should not be read as mandating that the bag be stapled, such that failure to do so results in an invalid positive test result.

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### Definition of words

- Does a word have a legal or technical meaning?
- High Court in *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23] said:  

'The generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty was a purpose beneficial to the community and apt to contribute to the public welfare. Accordingly, the objects and activities of Aid/Watch qualified as charitable under the fourth head of charitable purposes recognised in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

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### Definition of words

- 'Where a statute picks up as a criterion for its operation a body of the general law such as the equitable principles respecting charitable trusts, then, in the absence of a contrary intention in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.'

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### Definition of words

- Hence the use of the term 'charitable' in the phrase 'charitable institution' in the legislation is to be understood by reference to its source in the general law as it is developed in Australia from time to time.

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### Definition of words

- What is the ordinary and natural meaning of a word?
- If no definition in Act and no definition in AI Act, word will take its ordinary and natural meaning
- High Court consults Macquarie Dictionary (see e.g. *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 348)
- Office of the Queensland Parliamentary Counsel (OQPC) uses Macquarie Dictionary.

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### Human Rights Act 2019

- The Human Rights Bill was introduced into Parliament on 31 October 2018 and passed on 1 March 2019
- Commenced operation fully on 1 January 2020.

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### Human Rights Act 2019

- For statutory interpretation, key provisions are:
  - objects and how achieved (**ss 3 & 4**)
  - meaning of human rights (**s 7**)
  - meaning of **compatible with human rights** (**s 8**)
  - ‘reasonable limits’ clause (**s 13**)
  - ‘interpretation clause’ (**s 48**)
  - conduct of public entities (**s 58**)

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### Objects & how achieved

- To protect and promote human rights (s 3)
- Achieved by (s 4):
  - (a) stating the *human rights* Parliament specifically seeks to protect and promote
  - (b) requiring public entities to act and make decisions in a way *compatible with human rights*
  - (f) requiring courts and tribunals to interpret statutory provisions, to the extent possible, that is consistent with their purpose, in a way *compatible with human rights*

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### Human rights covered

- s 15 – Recognition and equality before the law
- s 16 – Right to life (but see s 106 re abortion)
- s 17 – Protection from torture and cruel, inhuman or degrading treatment
- s 18 – Freedom from forced work
- s 19 – freedom of movement
- s 20 – Freedom of thought, conscience, religion and belief

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### Human rights covered

- s 21– Freedom of expression
- s 22 – Peaceful assembly and freedom of association
- s 23 – Taking part in public life
- s 24 – Property rights
- s 25 – Privacy and reputation
- s 26 – Protection of families and children
- s 27 – Cultural rights – generally

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### Human rights covered

- s 28 – Cultural rights – Aboriginal peoples and Torres Strait Islander peoples
- s 29 – Right to liberty and security of person
- s 30 – Humane treatment when deprived of liberty
- s 31 – Fair hearing
- s 32 – Rights in criminal proceedings
- s 33 – Children in the criminal process

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### Human rights covered

- s 34 – Right not to be tried or punished more than once
- s 35 – Retrospective criminal laws
- s 36 – Right to education
- s 37 – Right to health services

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### Meaning of *compatible with human rights*

- Section 8
- An Act, decision or statutory provision is ***compatible with human rights*** if it:
  - (a) does not limit a human right; or
  - (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with **section 13**

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## Human rights – limitation clause

- Section 13 of the Human Rights Bill reads:
  - (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom
  - (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—

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## Human rights – limitation clause

- (a) The nature of the human right
- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom [**legitimate purpose**]
- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose [**suitable / rational connection**]

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## Human rights – limitation clause

- d) whether there are any less restrictive and reasonably available ways to achieve the purpose; [**necessary**]
- e) the importance of the purpose of the limitation
- f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right
- g) the balance between the matters mentioned in paragraphs (e) and (f) [**adequate balance**]

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## Human Rights – interpretation clause

- Section 48(1) and (2) of the *Human Rights Act* reads:
  - (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights
  - (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

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## Human Rights – interpretation clause

- Where a statutory provision can be interpreted more than one way, the courts are required to select the option that is more compatible with human rights.

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## Obligations of public entities

### 58 Conduct of public entities

(1) It is unlawful for a public entity—

- (a) to act or make a decision in a way that is not compatible with human rights; or
- (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

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## Obligations of public entities

### 58 Conduct of public entities

(2) Subsection (1) does not apply to a public entity if the entity could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law.

*Example—*  
A public entity is acting to give effect to a statutory provision that is not compatible with human rights.

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## Home straight

- *Statutory Instruments Act 1992*
- Extrinsic materials
- Constitutional issues.

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## Statutory instruments

- *Statutory Instruments Act 1992*
- Principles of interpretation relevant to statutory instruments (SI).

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## Statutory instruments

- *Statutory Instruments Act 1992* (SI Act)
  - can be displaced by contrary intention (s. 4)
  - examples of statutory instruments (s. 7(2) and (3)):
    - includes: instrument made under an Act, Regulation, Order in Council, Rule, Proclamation
- However, subordinate legislation does not include: a local law or statutory instrument made by a local government (s. 9(2)(a))

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## Statutory instruments

- Some key provisions include the following:
  - if a SI exceeds power (i.e. it is beyond the regulation making power) it is valid to the extent that it does not exceed power (i.e. the remainder is valid – but not the entire instrument) (s. 21)
  - if an Act authorises the making of statutory instruments (even if for a particular purpose) that power enables a statutory instrument to be made for any matter that is 'necessary or convenient to be prescribed for carrying out or giving effect' to the Act (s. 22)

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## Statutory instruments

- a SI may '**adopt**' or '**apply**' another document as it is in force from time to time (s. 23)
- SI have **prospective** effect (s. 32)
- a **beneficial** SI (only) may be expressed to be retrospective (s. 34)
- words or expressions used in a statutory instrument have the same meaning as those in the '**parent Act**' at the present time (s. 37)
- SIs made under an Act are **part of** the Act (s. 7 AI Act and s 38 SI Act).

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## Statutory instruments

- The general principles relating to the interpretation of Acts are also applicable to the interpretation of statutory instruments
- However, see specific provisions of the AI Act which do and do not apply to the SI Act (Part 4, Div 1 & 2 of the SI Act).

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## Statutory instruments

- Specific principles relating to statutory instruments:
  - if there are two possible competing interpretations of a SI, and on one it would be within power and the other outside of power, the former construction is adopted (*Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 983)
  - a SI is to be interpreted having regard to its context including the Act under which it is made (*One.Tel Ltd v Australian Communications Authority* (2001) 180 ALR 521 at 537).

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## Extrinsic material

- When can it be used?
- What kind of material is it?

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## Extrinsic materials

### 14B (AI Act) Use of extrinsic material in interpretation

- Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation:
  - if the provision is **ambiguous or obscure** – to provide an interpretation of it
  - if the ordinary meaning of the provision leads to a result that is **manifestly absurd or is unreasonable** – to provide an interpretation that avoids such a result; or

– continues

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## Extrinsic materials

- in any other case – **to confirm** the interpretation conveyed by the ordinary meaning of the provision.

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## Extrinsic materials

- What type of material (see s. 14B(3) e.g. of a sectional definition)
- Report of a royal commission, commission of inquiry laid before the Legislative Assembly
- An Explanatory Note
- Introductory speech (what was the second reading speech)

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### Constitutional issues

- Where possible, an Act should be interpreted in a way which avoids constitutional invalidity (s 9(1)(a) AI Act)
- Consideration should be given to whether a State Act is inconsistent with any Commonwealth Act (s. 109 of the Commonwealth *Constitution*)
- Statutory discretions are constrained by constitutional limits (e.g. implied freedom of political communication).

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### Avoiding constitutional invalidity

- *ACMA v Today FM* (2005) 89 ALJR 382, 396-7 [66]
- In Australia, ...the “fundamental rule of construction [is] that the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid”. Here also interpretation provisions enacted by each Australian legislature provide for legislation to be read down if, and to the extent that, the legislation would exceed constitutional power (ref s 9 AI Act).

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
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### Constitutional issues

- Section 109 of the Constitution provides:  
  
When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

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### Constitutional issues

- Direct inconsistency:
  - where it is **not possible** to **obey** both the Commonwealth and State law; or
  - where the State law, if valid, would **'alter, impair or detract'** from the operation of the Commonwealth law

*Victoria v The Commonwealth* (1937) 58 CLR 618 at 630  
*Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76.

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### Constitutional issues

- Indirect inconsistency:
  - where the Commonwealth law expresses an intention to **'cover the field'** of its operation, and completely, exhaustively or exclusively governs the relevant conduct or matters

*Ex parte McLean* (1930) 43 CLR 472  
*McWaters v Day* (1989) 168 CLR 289 at 296

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### Constitutional issues

- Statutory discretions constrained by constitutional limits:
  - 'while the exercise of legislative power may involve the conferral of authority upon an administrative body..., the conferral by statute of a power or discretion upon such a body will be constrained by the constitutional restrictions upon the legislative power, with the result that in this particular respect the administrative body must not act *ultra vires*.'

*Wotton* (2012) 246 CLR 1 at 13-14 [21].

– continues

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### Constitutional issues

- ‘When exercising statutory powers, decision-makers are bound to have regard to constitutional restraints upon legislative power, including the implied freedom of political communication.’  
*Wotton (2012) 246 CLR 1 at 16 [31]-[32]*

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### Constitutional issues

- The implied freedom of political communication operates as a limit on Federal, State and Territory legislative power
- It is an ‘indispensable incident’ of the system of representative government established by the Commonwealth *Constitution*
- Essentially, laws which unduly burden the implied freedom of political communication will be invalid  
– *McCloy v New South Wales (2015) 257 CLR 178*

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### Checklist:

1. Identify the provision and the question	
Then, going from the BIG picture to the SPECIFIC:	
2. Purpose	
Conduct an overview of the Act	
Identify the Act’s purpose/s (objects, Act as a whole)	

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Checklist

3. Context:	
Identify the part and division your provision is in	
Look at the phrases used	
Identify any constitutional limits which apply	



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Checklist

3. Context:	
The following may assist (not binding)	
Identify any common law presumptions that apply (such as the Principle of Legality) but these are subject to a contrary intention in your Act	
Identify any syntactical presumptions (subject to a contrary intention in your Act)	

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Checklist

4. Text:	
Read every word	
Is there a statutory definition?	
Is there an <i>Acts Interpretation Act</i> definition?	
Is there a legal or technical meaning (has the word been judicially considered)?	
What is the word's ordinary meaning (dictionary)?	

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Checklist

5. Extrinsic material	
Introductory speech, commission reports tabled in Parliament	
6. Other considerations which may assist	
History of amendments of your provision	
Similar legislation in other jurisdictions that has been judicially considered	

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Questions?

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Scenario 1

Section 317 of the *Criminal Code* provides that:  
'Any person who, with intent to maim, disfigure or disable any person ... unlawfully strikes ... any person with any kind of projectile or anything else capable of achieving the intention ... is guilty of a crime.'

Red Sox wannabe defendant struck a person with a baseball bat. His lawyer argues s. 317 cannot apply to him since a baseball bat is not a 'projectile'.

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## Workshop Scenario 1

**Question 1**  
From your general knowledge of the *Criminal Code*, what do you think is the purpose of the *Criminal Code*?

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## Workshop Scenario 1

**Question 2**  
What do you think is the purpose of s. 317?

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## Workshop Scenario 1

**Question 3**  
What might a 'literal' interpretation of s. 317 be? Under such an interpretation would the defendant be guilty?

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## Workshop Scenario 1

### Question 4

Do you think s. 317 applies to the defendant's action? Why or why not?

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## Workshop Scenario 1

- (Syntactical presumptions, purpose of Act)
  - Criminal Code, s. 317
 

'Any person who, with intent to maim, disfigure or disable any person ... unlawfully strikes ... any person with any kind of projectile or **anything else** capable of achieving the intention ... is guilty of a crime.'
- Does this apply to the defendant who struck a person with a baseball bat?
- *R v Brannigan; R v Green* [2009] QCA 271.

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## Workshop Scenario 1

- Keane JA (Muir JA and White J agreeing) at [52]-[55]:
 

'The argument put here on behalf of Green ... is that he could not be guilty of the contravention of s. 317(a) and (f) with which he was charged because he did not strike Williams with a projectile, his baseball bat not being a projectile.'

– continues

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## Workshop Scenario 1

'This argument can succeed only if the reference to 'anything else' in s. 317(f) is read *ejusdem generis* with 'projectile'... 'anything else' must be taken to refer to some 'thing else' in the nature of a projectile.'

– continues

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## Workshop Scenario 1

'This is a particularly unattractive argument: the striking proscribed by s. 317(a) and (f) is a striking with 'any kind of projectile' or 'anything else' capable of achieving the intention of doing those things mentioned in paragraphs (a) to (d). The ordinary and natural reading of these words is that a proscribed striking might occur with some kind of projectile or something which is not a kind of projectile...'

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## Workshop Scenario 2

Although this example also comes from a criminal law context, the question asked does not require any special knowledge of criminal law.

- Mr Morrell was sentenced to 10 years' imprisonment in 1988 in Queensland. In 1994, he absconded and committed a series of offences in New South Wales where he was detained for 329 days. He then escaped from custody in New South Wales and was arrested in Queensland.
- Section 95 of the *Corrective Services Act 1988* (Qld) provides as follows:

**Period while unlawfully at large not to count as part of term of imprisonment**

Where a prisoner escapes from lawful custody or is otherwise unlawfully at large no part of the period during which the prisoner is unlawfully at large shall count as part of the term of imprisonment or period of detention being served by the prisoner when the prisoner escaped or otherwise became unlawfully at large.

For the purposes of subsection (1) a person remains unlawfully at large until the person is admitted to and detained in a prison or police gaol.

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## Scenario 2

**Question**

- Should the time Mr Morrell was detained in NSW be counted as part of his imprisonment in Qld? Why or why not? Clue: consider s. 35(1b) of the *Acts Interpretation Act*.

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## Workshop Scenario 2

- Morrell v Director-General, Dept of Community Safety* [2015] QSC 46**

**Facts:**

- Mr Morrell was sentenced to 10 years' imprisonment in 1988. In 1994 he absconded and committed a series of offences in New South Wales where he was detained for 329 days. He then escaped from custody in New South Wales and was arrested in Queensland.

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## Workshop Scenario 2

- Section 95 of the *Corrective Services Act* 1988 (Qld)
- Period while unlawfully at large not to count as part of term of imprisonment**
- Where a prisoner escapes from lawful custody or is otherwise unlawfully at large no part of the period during which the prisoner is unlawfully at large shall count as part of the term of imprisonment or period of detention being served by the prisoner when the prisoner escaped or otherwise became unlawfully at large.

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### Workshop Scenario 2

- For the purposes of subsection (1) a person remains unlawfully at large until the person is admitted to and detained in a prison or police gaol.

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### Workshop Scenario 2

- Section 35(1)(b) of the AI Act stated:
- In an Act —
  - a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of Queensland.

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### Workshop Scenario 2

- Held:**
- Ann Lyons J held (at [14]) 'I consider, therefore, that by operation of s 35(1)(b) of the AIA, the words "police gaol" and "prison" in s 95(2) of the CSA refer only to a police gaol and/or prison in Queensland.'

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## Workshop Scenario 3

- For present purposes, the 'Planning Scheme' (under the then *Planning Act 2016*) ('the PA') provides for persons to apply for development permits to build and operate 'Service Stations' as well as 'Food and Drink Outlets'. If a proposed development contains both the sale of *fuel* and food, and the sale of food is 'ancillary to' the sale of fuel, no separate permit is required to operate as a Food and Drink Outlet. Where it is not, separate applications must be made and permits obtained.
- An applicant for a development (applicant Petrol Head) has applied for a development permit for a business that involves both the sale of fuel and food. He has applied for a Service Station permit only stating that the sale of food will be 'ancillary to' the sale of fuel.
- You are the Local Council and must decide whether Petrol Head needs to apply for a Food and Drink Outlet permit also, on the basis that the sale of food and drink in the proposed development is not 'ancillary to' the sale of fuel.

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## Workshop Scenario 3

**Purpose of the PA**

- Consider the objects of the PA (provided) and then consider the definitions of Service Station and Food and Drink Outlet that apply under the Planning Scheme, below.

**Definition of Service Station and Food and Drink Outlet**

- The Planning Scheme contains the following relevant definitions of 'Service Station' and 'Food and Drink Outlet'.
  - Service Station:** Premises used for the sale of fuel including petrol, liquid petroleum, gas, automotive distillate and alternative fuels.
  - The use may include, where ancillary, a shop, food and drink outlet, maintenance, repair, service and washing of vehicles, hire of trailers and supply of compressed air.
  - Food and Drink Outlet:** Premises used for preparation and sale of food and drink to the public for consumption on or off the site. The use may include the ancillary sale of liquor for consumption on site.

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## Workshop Scenario 3

**Definition of ancillary**

- The term 'where ancillary' is not defined in the PA, the Planning Scheme, the relevant Regulations or the *AI Act*.
- The Macquarie Dictionary defines 'ancillary', and related terms – 'accessory' and 'auxiliary' as:
  - ancillary** ... adjective 1. Accessory; auxiliary. – noun (plural ancillaries) 2. An accessory, subsidiary or helping thing or person...
  - accessory** ... noun ... 1. A subordinate part or object; something added or attached for convenience, attractiveness, etc., such as a spotlight, heater, driving mirror, etc., for a vehicle. ...
  - In *Cameron v Berg*
  - "Accordingly I conclude that for something to be ancillary to something else the former must have some association or relationship with the latter. That construction of the word 'ancillary' is consistent with the primary meaning of the word which is recorded in the Oxford English Dictionary 2nd Ed. 1989 'subservient, subordinate, ministering (to).'"

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## Workshop Scenario 3

- **auxiliary** ... adjective 1. Giving support; helping; aiding; assisting. 2. Subsidiary; additional. .... 4. A group or organisation which assists or is supplementary to a larger one. ...
- The courts have applied the ordinary meaning of the term, in similar planning cases (but not considering this very piece of legislation) and have said it involves questions of fact and degree in determining whether or not something is ancillary to another.
- In *Drouyn v Rose* 'ancillary' was defined as follows:  
*"Ancillary" by definition means incidental and subordinate. Apart from the definition in the Plan it would be difficult to ascribe any other meaning to it, in my view."*

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## Workshop Scenario 3

- In *Toner Design Pty Ltd v Newcastle City Council* [2013] NSWCA 410 per Basten JA said at [10]:  
*"...[it] requires more than interdependence; it requires a dominant and subservient relationship. Thus, for a development to be 'ancillary to' another development, it must not merely coexist with, but must serve the purposes of, the other development. If a sewerage treatment plant were proposed for land involving a residential development, it might well be ancillary to that development if it took and processed sewerage emanating from the use of the residential development. On the other hand, if the plant were designed to assist in meeting the needs of other buildings in the area, although its construction might be subservient to the dominant purpose of residential development, its wider function might mean it was not ancillary to that particular development. It might not qualify as ancillary if it had a not insignificant extraneous purpose."*

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## Workshop Scenario 3

**Consider the evidence**

- You have been provided with the following evidence about the development:
  - *'The primary use of the proposed development is of a significantly large scale in terms of its fuel storage, supply and service capacity. This is demonstrated by the variety of fuel types, total number of bowzers and dedicated areas for refuelling and parking for typical vehicle types. The scale of the use is also consistent with the locational attributes of the land and likely custom.'*
- But there was also evidence that:
  - *"Based upon review of the traffic engineering matters relevant to the application, it is my view that the proposed fast food style food/drink outlet proposed as part of the subject development has the potential to be the significant traffic generating component of the development and could generate the majority of that traffic demand independent of the service station function."*

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## Workshop Scenario 3

### Question 1

What are some of the key objectives of the overall purpose of the Act?

- Efficient, transparent, integrated, accountable planning and assessment
- Ecological sustainability
- S.5 factors for advancing purpose of Act

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## Workshop Scenario 3

### Question 2

I. Is the decision maker a 'public entity'?

- yes

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## Workshop Scenario 3

### Question 3

I. What were the two key definitions that were relevant in this scenario?

- 'service station' and 'food and drink outlet'

II. What word in the definition of Service Station was central to this case?

- 'ancillary'

III. What did that word mean?

- Incidental, subordinate, subservient

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## Workshop Scenario 3

### Question 4

How do the Act's objectives or purpose inform your decision about whether Petrol Head should be required to apply for a separate Food and Drink Outlet Permit?

- transparency
- accountability
- ecological sustainability e.g. traffic
- encouraging investment.

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## Workshop Scenario 3

- Should Petrol Head be required to apply for a Food and Drink Outlet Permit also or not? Why or why not?

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
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## Workshop Scenario 3

- *Witmack Industrial Pty Ltd v Toowoomba Regional Council* [2015] QPEC 7
- It is clear that the proposed Fast Food Outlet was inspired by, and compatible with, the primary use of the Service Station. However, having regard to the characteristics of the proposed development, I am unable to discern sufficient indicia that the fast food tenancy is dependent, subservient, or subordinate to the primary use.

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### Workshop Scenario 3

- In my view, the weight of evidence is that the proposed fast food tenancy use will co-exist in an independent and dominant way, and not ancillary to the primary use, in terms of its physical attributes, occupation, custom, operations, traffic generation and the ratio of space occupied in relation to the whole.

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### Workshop Scenario 3

- I am therefore bound to conclude that the Applicant has not demonstrated that the proposed Food and Drink Outlet, being the fast food tenancy use, is ancillary to the primary use of the Service Station; and it is therefore not part of the Service Station use as defined in the QPP and the planning scheme.

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### Workshop Scenario 4

The *Workers Compensation and Rehabilitation Act 2003* ('the WCRA') provides for workers who are injured at work to apply for compensation to an Insurer. If the application is rejected by the Insurer (for present purposes, WorkCover), the injured worker may apply for review of WorkCover's decision to the 'Regulator'.

At the relevant time, s 542 of the WCRA provided for applying for review before the Regulator as follows:

**542 Applying for review**

- (1) An application for review must be made within 3 months after the person applying for review (the applicant) receives written notice of the decision or the failure to make a decision and the reasons for the decision or failure...
- (2) For subsection (1), the applicant may, within the 3 months mentioned in the subsection, ask the Regulator to allow further time to apply for review.
- (3) The Regulator may grant the extension if it is satisfied that special circumstances exist.

- A worker was injured and applied to WorkCover for compensation. WorkCover rejected the application and the worker received notice of the decision (as anticipated under s. 542(1)).
- However, within days of receiving the notice, and before applying for review of the decision to the Regulator, the worker fell into a coma and was unable to apply for review or for an extension of time under s. 542 until discharged from hospital seven months later.

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## Workshop Scenario 4

**Question 1**  
What are the objects of the WCRA (ss. 4 and 5)

- insurance scheme that balances fair and appropriate benefits while keeping costs for employers reasonable
- fair treatment for workers and dependants
- protection of employers' interests re damages
- RTW programs
- no prejudice from injury
- flexibility re industry.

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## Workshop Scenario 4

**Question 2**  
What are the objects of Ch 13 of the WCRA which generally relates to the Regulator's review of decisions? (s. 539)

- Non-adversarial system for prompt resolution of disputes

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## Workshop Scenario 4

**Question 3**  
What is the purpose of s 542?

- avenue for independent review
- certainty for decision-makers and employers.

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## Workshop Scenario 4

### Question 4

Assume the Regulator is a public entity. Which human right(s) might be affected by the decision whether or not to accept an application outside the three month period?

- 31. Fair hearing

'A party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing...'

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## Workshop Scenario 4

### Question 5

i. Is there more than one way of interpreting/applying s 542 that is still consistent with its purpose? Do either or both of those interpretations limit (or impact) on somebody's human rights?

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## Workshop Scenario 4

ii. Test each interpretation for compatibility with the human right you identified as follows:

- a) What is the nature of the human right that is limited (ie what is the essence of it?)(s 13(2)(a))
- b) What is the purpose of the limitation on the right (is there a legitimate policy objective? What is it? (s 13(2)(b))

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### Workshop Scenario 4

c) What is the relationship between the limitation and its purpose? (ie is the limit imposed on the right rationally connected with the purpose of the provision – ie does the provision achieve what it sets out to do or does it just heavily impinge on a human right)?

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### Workshop Scenario 4

d) Is there any less restrictive and reasonably available way to achieve s 542's purpose (which impinges on the human right less)?

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### Workshop Scenario 4

e) Consider/weigh the importance of the purpose of the limitation – why is it important to impose such a limit on the person's human right/s?

f) Consider/weigh the importance of preserving the human right, taking into the nature and extent of the limit on the human right

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### Workshop Scenario 4

g) What is the balance between the matters set out in (e) & (f) above? (i.e. which one outweighs the other?)

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
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### Workshop Scenario 4

h) If (e) outweighs (f) the limit (interpretation/application of s 542) is reasonable and justifiable; if (f) outweighs (e) then the limit (interpretation/application of s 542) is not reasonable and justifiable.

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### Workshop Scenario 4

#### Question 6

Do you think the worker can apply for review to the Regulator seven months after receiving notice of WorkCover's decision? Why or why not?

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### Workshop Scenario 4

- Time limits under s. 542 of the *Workers' Compensation and Rehabilitation Act 2003*
- Does the Regulator have jurisdiction to consider an application for review filed more than three months after the applicant received notice of a decision, where no request for an extension of time has been made under s. 542(2)?

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### Workshop Scenario 4

- Kyrou J in *Ryan v The Grange at Wodonga Pty Ltd* [2014] VSC 135 at [72]–[75] in the following terms:  
*'In Project Blue Sky Inc v Australian Broadcasting Authority, the High Court held that an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Non-compliance will not invalidate an exercise of power unless a legislative purpose can be discerned to invalidate any act that fails to comply with the condition...'*

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...The existence of such a purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition...

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### Workshop Scenario 4

- ...The better test for determining the issue of validity is to ask 'whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.' In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute...
- ...The High Court also noted that courts have 'always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act.'

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### Workshop Scenario 4

- *Cloncurry Shire Council v Workers' Compensation Regulatory Authority & Anor* [2006] QSC 362
- "[27] I agree with the submissions of the first and second respondent that **s. 542 of the WCRA should be interpreted to give effect to a beneficial purpose** particularly when there is no inherent conflict between the object of prompt resolution of disputes and the object which recognises the right to seek a review of a decision refusing compensation.

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### Workshop Scenario 4

- *Cloncurry Shire Council v Workers' Compensation Regulatory Authority & Anor* [2006] QSC 362
- "[28] I am not satisfied that non-compliance with the method of applying for a review was intended by the legislature to affect the ambit of the power such that non-compliance is fatal to the existence of the power."

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## Workshop Scenario 4

- *Blackwood v Pearce* [2015] ICQ 012:
  - [40] There is a discretion given to the Regulator to accept an application out of time but “the actual language employed” shows it is clearly confined. There must have been a request under s. 542(2) and there must be special circumstances. The Regulator is given a confined power to extend the time in which an application may be made but the construction adopted in *Cloncurry* ignores the restrictions on that power.

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## Workshop Scenario 4

- *Blackwood v Pearce* [2015] ICQ 012:
  - [43] It follows, then, that the Regulator has no power to extend time except in accordance with s. 542.

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## Workshop Scenario 4

### 542 Applying for review

(1) An application for review must be made within 3 months after the person applying for review (the **applicant**) receives written notice of the decision or the failure to make a decision and the reasons for the decision or failure, unless subsection (4) applies.

(2) For subsection (1), the applicant may, at any time but not more than once, ask the Regulator to allow further time to apply for review.

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Questions?

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
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