

Chapter 6

Statutory Construction: A Method

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Statutory construction is where many, and in some fields most, cases are won or lost, and where many successful appeals turn. But for all that is written on the subject,¹ little guidance is given to law students, practitioners or judicial officers about method, technique or system. Our purpose is to put forward a structured approach to statutory construction problems that, if followed, will answer the major questions that arise, and in an order that should minimise error and reduce the possibility of missing something important, or over-emphasising the unimportant. We then consider the maze of recent High Court authority in the field.

What is ‘statutory construction’? It has been described as involving the ‘attribution of meaning to statutory text’: *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22].² ‘Meaning’ here is legal meaning, as opposed to purely grammatical meaning: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); see also *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 556 [65] (‘Statutory construction involves attribution of legal meaning to statutory text, read in context’).

This ‘area’ of law is littered with so-called ‘rules’ and case law. There is so much case law precisely because there is often more than one available interpretation of a provision of a statute, with courts being called on as arbiters in their function as the third arm of government to adjudicate on which is the ‘correct’ interpretation – at least in relation to the facts of the case before them. ‘It is trite to say that most of what lawyers advise, counsel argue, and courts decide, is the construction and application of statutes.’³

In an effort to maintain some consistency in interpretation and to provide assistance to lower courts tasked with the same function, common law rules of statutory

* Based on a paper presented to the New South Wales Bar Association on 28 February 2017.

1 The major sources are: DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Lexis Nexis, 8th ed, 2014); P Herzfeld, T Prince and S Tully, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013); D Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis, 4th ed, 2012); S Corcoran and S Bottomley, *Interpreting Statutes* (Federation Press, 2005); and the McPherson lecture series, *Statutory Interpretation and Human Rights*, by James Spigelman.

2 See also S Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’, 37(2) *Monash University Law Review* 1 at 1.

3 M Leeming, ‘Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36(3) *University of New South Wales Law Journal* 1002 at 1005.

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