

Interpretation of Delegated Legislation

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Introduction

1. It is trite to remark upon the seemingly endless reach of legislation, and for decades it has been observed that in the law “almost every case has a statute at its heart or close to it”.¹ In short, there is a lot of legislation in Australia and there is perhaps even more delegated legislation. Once all that delegated legislation is written, it feels like an immutable law of nature that somebody has to read it.
2. Working out just what it is that delegated legislation means is not always an easy task. What looks like an invalid piece of “nonsense” to one Judge,² might appear to be a “practical and pragmatic criterion” to others.³ Reasonable minds might very much differ.
3. This paper is structured around three broad topics:
 - (a) General principles of interpretation.
 - (b) Dealing with uncertainty.
 - (c) Construing technical terms and the role of expert evidence.
4. The purpose of this paper is not to offer any brilliant solutions to interpretive difficulties, but simply to discuss some approaches to interpreting delegated legislation and some issues that arise during that process.

¹ Todd, E., “Statutory Interpretation and the Influence of Standards” (1953) 2(3) *University of Western Australia Law Review* 526, 527.

² *Lilley v Comcare* [2013] FCA 26, [34].

³ *Comcare v Lilley* [2013] FCAFC 121, [80].

Principles of interpretation

5. The starting point when interpreting delegated legislation is, of course, other legislation. For those in Queensland, that might include:
 - (a) The *Legislation Act 2003* (Cth) and the *Acts Interpretation Act 1901* (Cth) in respect of Commonwealth legislation.
 - (b) The *Statutory Instruments Act 1991* (Qld) and the *Interpretation Act 1954* (Qld) in respect of State legislation.
6. For ease of reference, the following outline is drawn from the Queensland legislation. The Commonwealth approach is largely, but not precisely, the same.
7. One of the first steps will be to ascertain whether the document in question is indeed a piece of delegated legislation. Both Commonwealth and Queensland legislation addresses that question.⁴
8. Another important consideration when interpreting delegated legislation is whether or not it is actually valid, including whether it is within the scope of the power under which it was made and whether it is consistent with the enabling Act.
9. The guiding principle is that delegated legislation is to be construed as operating “to the full extent of, but not to exceed, the power conferred by the law under which it is made”.⁵ That is, if any part of the delegated legislation exceeds the power granted by the enabling Act, then it is to be read down so as not to exceed that power.⁶
10. The next proposition is that many, but not all, of the provisions of the *Interpretation Act 1954* (Qld) will also apply to delegated legislation as if that delegated legislation were an Act of Parliament.⁷ For example:

⁴ *Legislation Act 2003* (Cth), ss 8-10; *Statutory Instruments Act 1991* (Qld), ss 6-9.

⁵ *Statutory Instruments Act 1991* (Qld), s 21(1); *Kelsall v State of Queensland* [2011] QSC 321, [24].

⁶ *Queensland Law Society Incorporated v Sande (No 2)* [1998] 1 Qd R 273, 291. The power to “read down” legislation has been described as “extraordinary”, and it has been suggested that “perhaps a different approach is warranted when consideration is being given to attempting to preserve the validity of legislation as opposed to attempting to preserve the validity of a legislative instrument”: *Comcare v Broadhurst* [2011] FCAFC 39, [63].

⁷ *Statutory Instruments Act 1991* (Qld), s 14 and Sch 1 (and compare s 19 and Sch 2). Compare *Legislation Act 2003*

- (a) Headings, examples, notes (but not footnotes), schedules, appendices and punctuation are all deemed to be part of the delegated legislation.⁸
- (b) Any examples used in the delegated legislation are “not exhaustive” and, whilst they cannot limit the meaning of a provision they “may extend” the meaning (although, in the case of inconsistency, the provision prevails over the example).⁹
- (c) When interpreting a provision of delegated legislation, the interpretation that will best achieve the purpose of the legislation is to be preferred to any other interpretation.¹⁰
- (d) When interpreting a provision of delegated legislation, consideration may be given to “extrinsic material” so as to interpret an “ambiguous or obscure” provision; to provide an interpretation that avoids a “manifestly absurd” or unreasonable result obtained from the “ordinary meaning” of the provision; or to confirm the interpretation conveyed by the ordinary meaning.¹¹
- (e) If the delegated legislation requires a person making a decision to “give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used)”, then the person “must also ... set out the findings on material questions of fact; and ... refer to the evidence or other material on which those findings were based”.¹²
- (f) Part 8 of the *Interpretation Act 1954* (Qld), which deals with various terms and references, also governs the interpretation of delegated legislation. This includes the principles that “words in the singular include the plural” (and vice versa),¹³ reference to a person generally includes reference to a corporation,¹⁴ references to an office or jurisdiction is impliedly a reference to that office or jurisdiction in Queensland,¹⁵ and (in relation to powers) “may” means a discretion and “must” means the “power is required to be exercised”.¹⁶

(Cth), s 13.

8 *Interpretation Act 1954* (Qld), s 14 and *Statutory Instruments Act 1991* (Qld), s 14B. As to headings, see also *Interpretation Act 1954* (Qld), s 35C(1).

9 *Interpretation Act 1954* (Qld), s 14D.

10 *Interpretation Act 1954* (Qld), s 14A.

11 *Interpretation Act 1954* (Qld), s 14B and *Statutory Instruments Act 1991* (Qld), s 15.

12 *Interpretation Act 1954* (Qld), s 27B.

13 *Interpretation Act 1954* (Qld), s 32C.

14 *Interpretation Act 1954* (Qld), s 32C.

15 *Interpretation Act 1954* (Qld), s 35.

16 *Interpretation Act 1954* (Qld), s 32CA.

- (g) The *Interpretation Act 1954* (Qld) concepts of distance, time and age are applicable to delegated legislation.¹⁷
 - (h) If a form is prescribed or approved under delegated legislation, strict compliance with the form is not necessary and substantial compliance is sufficient.¹⁸
11. One important difference between the Queensland and Commonwealth jurisdictions relates to the incorporation into delegated legislation, by reference, of other documents. Under the Commonwealth law, delegated legislation is generally prohibited from applying or incorporating the provisions of non-legislative documents “as in force or existing from time to time”.¹⁹ Thus, a provision of delegated Commonwealth legislation that purported to incorporate the *American Medical Association Guides* as were “current at the time of assessment” was found invalid and was “read down” to instead incorporate the version of the *Guides* in force at the time the delegated legislation was made.²⁰
12. In contrast, the Queensland law allows delegated legislation to apply or incorporate any type of document “as in force at a particular time or from time to time”.²¹ Further, unless it expressly provides otherwise, when Queensland delegated legislation applies or incorporates the provisions of another document, it applies or incorporates those provisions as in force from time to time.²²

Dealing with uncertainty

13. Uncertainty in delegated legislation can, but does not necessarily, lead to invalidity. The question of uncertainty might arise in several ways, including the following:
- (a) Applying a provision of the delegated legislation might produce an uncertain result, calling for the exercise of some discretion or evaluation.
 - (b) A fair reading of a provision of the delegated legislation might indicate uncertainty over whether the terms have one meaning or another.

¹⁷ *Interpretation Act 1954* (Qld), Part 9.

¹⁸ *Interpretation Act 1954* (Qld), s 48A.

¹⁹ *Acts Interpretation Act 1901* (Cth), s 14(2).

²⁰ *Comcare v Broadhurst* [2011] FCAFC 39, [71]-[73].

²¹ *Statutory Instruments Act 1991* (Qld), s 23(1).

²² *Statutory Instruments Act 1991* (Qld), s 23(2).

(c) A fair reading of a provision of the delegated legislation might produce complete uncertainty, in the sense of it being unintelligible.

14. Each different type of uncertainty is dealt with differently.
15. Where the delegated legislation is reasonably clear but produces an uncertain result, the real question is whether the enabling Act permits the delegated legislation to operate in that way. For example, in *King Gee Clothing Company Pty Ltd v Commonwealth* (1945) 71 CLR 184, a statutory instrument sought to fix certain maximum prices at which goods could be sold. The instrument required “intricate calculations” which would produce “not ... an exact but an approximate result”, and required assessment of matters “upon which opinions may well differ” (at 192). The High Court held that the instrument was invalid.
16. The reason for the invalidity in *King Gee* was not the mere fact that the instrument produced an uncertain outcome, but that the enabling power was limited to making an order to “fix and declare the maximum price” (at 188). The relevant instrument was invalid for the narrower reason that, by leading to an uncertain result (or a result requiring the exercise of discretion or opinion), it did not actually “fix and declare” a price.
17. In contrast to *King Gee*, the decision in *Comcare v Lilley* [2013] FCAFC 121 is an example where the enabling Act permitted the delegated legislation to allow for uncertain or discretionary results. In that case, the statutory instrument (a guide to assessing permanent impairment) required the decision-maker to evaluate a person's physical abilities by reference to broad concepts and with a focus on what the person could do when “going about her or his activities of daily living” (at [78]). The instrument involved uncertainty because it lacked precision (at [87]), but that was within the enabling power because “[r]equiring too much precision could defeat the breadth of the assessment” (at [82]).
18. The Court in *Comcare v Lilley* [2013] FCAFC 121 applied Dixon J's reasoning from *King Gee*, particularly where his Honour rejected any general proposition that mere uncertainty in delegated legislation is not a separate ground of invalidity. In *King Gee*, Dixon J said (at 194):

I am not prepared to subscribe to the doctrine that certainty is a separate requirement which all forms of subordinate legislation must fulfil, so that an instrument made under a statutory power of a legislative nature, though it is directed to the objects of the power, deals only with the subject of the power and observes its limitations, will yet be invalid unless it is certain.

19. This issue was touched upon in the recent Constitutional case of *Brown v Tasmania* [2017] HCA 43. There, Gordon J stated as a basic proposition that “Australia knows no doctrine of statutory uncertainty” (at [306]). Her Honour referred to Dixon J's judgment in *King Gee* and went on to emphasise the well-established propositions that “the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have” and that this “duty remains constant, regardless of whether the words of a statutory provision are uncertain or unclear” (at [452]).²³
20. So, provisions of delegated legislation which are of uncertain or ambiguous meaning are not invalid on that ground alone. Rather, the Court must resolve the uncertainty as best it can. And, in that regard, it can be noted that in *Hall v Jones* (1942) 42 SR (NSW) 203 it was said (at 208) that “a Court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense”. Presumably, a similar “compliment” might be paid to those who draft delegated legislation.
21. Sometimes, of course, the Court must depart from the literal or grammatical meaning of words in order to give them the meaning they were intended to have.²⁴ However, even Judges have limits in their ability to ascribe meaning to words that truly are unintelligible. There “are limits to the court's interpretative powers”; it may construe, but not rewrite, a piece of legislation.²⁵
22. In *Cann's Pty Ltd v Commonwealth* (1946) 71 CLR 210, Dixon J restated the proposition that uncertainty alone does not invalidate a provision of delegated legislation. However, his Honour added that (at 227):

If in some respects its meaning is unascertainable, then, no doubt, it fails to that extent to

²³ See *Comcare v Lilley* [2013] FCAFC 121, [86].

²⁴ *Project Blue Sky Inc v Australian Broadcasting Association* (1998) 194 CLR 355, [78].

²⁵ *Whittaker v Comcare* (1998) 86 FCR 532, 543.

prescribe effectively rights or liabilities, but that is because no particular act or thing can be brought within the scope of what is expressed unintelligibly.

23. That passage was cited by Gordon J in *Brown v Tasmania* (at [451]). In short, there “will not be a valid exercise of the relevant statutory power if the [statutory] instrument is, in some critical respect, unintelligible or meaningless”.²⁶
24. Thus, the basic rules around uncertainty in delegated legislation would seem to be:
 - (a) If an enabling Act only empowers the delegated legislation to fix or produce some certain result, but the delegated legislation creates an uncertain or discretionary result, then there may be invalidity.
 - (b) If a provision of delegated legislation is within the scope of the enabling power, mere uncertainty (ie, ambiguity) as to its meaning will not invalidate it. In that scenario, the Court's duty is instead to ascertain and declare its meaning.
 - (c) If the meaning of a provision of delegated legislation is simply unascertainable, then it will be invalid because it will fail to do whatever the enabling power permitted.

Technical terms and expert evidence

25. It is often the case that delegated legislation deals with detailed technical matters. For example, the litigation in the oft-cited case of *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 dealt in excruciating detail with the phrase “silver dye bleach reversal process”.
26. In the field of personal injuries and workers' compensation, extensive delegated legislation is used to govern the assessment of injuries and impairments.²⁷ That often involves specialist medical language. Sometimes, aspects of the highly technical *American Medical Association Guides* are incorporated, by reference, as delegated legislation.²⁸

27. Where a word or phrase is used in delegated legislation of that nature, it will often be the case

²⁶ *West Tamar Council v Tasmanian Planning Commission* [2011] TASSC 15, [15].

²⁷ *Comcare v Lilley* [2013] FCAFC 121 is an example.

²⁸ Eg, *Guppy v Australian Postal Corporation* (2013) 212 FCR 380.

that the word or phrase is used in some technical or “trade” sense. The question of whether a word or phrase is used in that way is generally a question of law, involving the usual approaches to statutory interpretation.²⁹ However, once it is determined that the word or phrase has been used in its technical sense, its meaning involves questions of fact and the interpretation process might involve recourse to expert evidence about the meaning of that word or phrase.

28. In *Woodward v Repatriation Commission* (2003) 131 FCR 473, the Full Federal Court held that when determining the meaning of specialist medical language in delegated legislation a tribunal was entitled to “refer to authoritative medical texts” and “also receive expert evidence” (at [113]). That proposition seems to be well-established, but it can lead to difficulty.
29. In *Vic WorkCover Authority v Elsdon* [2013] VSCA 235, the Victorian Court of Appeal was concerned with the phrase “multilevel spine segment structural compromise, as with fractures or dislocations” (at [38]). The trial Judge, on a judicial review application, refused to allow expert evidence to be given in relation to the meaning of that phrase. The Court of Appeal was divided as to whether the expert evidence should have been allowed.
30. The majority (Bongiorno JA and Dixon AJA) accepted the general principle “that a court may receive expert evidence in determining whether there is any specialised meaning of words or phrases and, if so, what that meaning is” (at [84]). However, their Honours held that the true “issue of construction” in that case “was a question of law that did not raise any issue of a medical definition of ‘fractures’ with a specialised meaning” (at [85]). Accordingly, they held that the expert evidence was irrelevant and inadmissible.
31. On the other hand, the minority Judge (Maxwell P) held that the phrase in question – “multilevel spine segment structural compromise, as with fractures or dislocations” – had to be “construed as a whole” and that it involved “technical, medical language” (at [41]). On that basis, his Honour would have allowed the expert evidence to be admitted.
32. In short, those who are called upon to interpret delegated legislation will not uncommonly

²⁹ *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389.

need to work out whether its words have a technical meaning and, if they do, what the technical meaning of those words is. In that process, authoritative textbooks and conferences with expert witnesses might be required simply to understand the meaning of the law.

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