CHAPTER

13

Statutory Obligations and Discretions

Purposive interpretation is what we do now. In constitutional, statutory and contractual interpretation, there does appear to have been a shift from text to context.[1]

1 James J Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (Address to the Risky Business Conference, Sydney, 21 March 2007).

Introduction

13.1 It may be important to know whether, under legislation, an office-holder is obliged, or has a duty, to do something or whether the office-holder has a **discretion**, or a choice, to do or not to do it. Another way of putting this is to ask whether a legislative provision is obligatory or discretionary. If it has been concluded that an office-holder has an unfettered discretion as to whether to do something, failure to do the thing can hardly be the subject of legitimate complaint. On the other hand, if there has been a failure to perform an **obligation** imposed by legislation, quite apart from possible consequences for the office-holder, there may be an issue as to the consequences of that breach of the law for others. In relation to statutory obligations and discretions, two principal questions arise:

- how to determine whether a legislative provision imposes an obligation or confers a discretion; and
- how to determine whether breach of a legislative provision imposing an obligation produces invalidity.

The answers to these questions are arrived at by applying the principles of interpretation discussed in the previous four chapters.

discretion: something that involves choice, or something that may be done or performed or not

obligation: something that must be done or performed

How to determine whether a provision is obligatory or discretionary

13.2 In the process of determining whether a provision contained in legislation imposes an obligation or confers a discretion, courts and tribunals must strive for an interpretation that would promote the purpose or object underlying the provision. In carrying out this responsibility, they must not look at the provision in isolation, but must consider it in its context. Consistently with this, the issue may be resolved by interpreting the words according to their plain and ordinary meaning.

Section 33 of the *Acts Interpretation Act 1901* (Cth) contains these provisions:

> (1) Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires.
>
> (2A) Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word may is used, the act or thing may be done at the discretion of the person, court or body.

Section 33(2A) is more helpful than the somewhat circular provision contained in s 9 of the *Interpretation Act 1987* (NSW), which provides:

> (1) In any Act or instrument, the word 'may', if used to confer a power, indicates that the power may be exercised or not, at discretion.
>
> (2) In any Act or instrument, the word 'shall', if used to impose a duty, indicates that the duty must be performed.

Compare the provisions in the interpretation legislation of other jurisdictions: *Legislation Act 2001* (ACT) s 146; *Acts Interpretation Act 1954* (Qld) s 32CA; *Acts*

Interpretation Act 1915 (SA) s 34; *Acts Interpretation Act 1931* (Tas) s 10A; *Interpretation of Legislation Act 1984* (Vic) s 45; *Interpretation Act 1954* (WA) s 56. As Pearce and Geddes have shown, however, the courts have not always treated the use of 'shall' or 'may' as conclusive: see 'Further reading' in **Chapter 9**. Instead, the courts have sought to go beyond those words and have attempted, by considering the possible effects of alternative interpretations, to reach a conclusion that is in accordance with the purpose or object underlying the provision.

The influence of modern techniques of interpretation in the resolution of the obligation/discretion issue is evident in the case that is extracted below.

Samad v District Court of New South Wales **(2002) 209 CLR 140**
High Court of Australia

[In this case, the High Court had to interpret cl 149(f) of the *Poisons and Therapeutic Goods Regulation 1994* (NSW). Clause 149 provided that:

> The Director-General may suspend or cancel a licence or authority on any one or more of the following grounds:
>
> (a) the holder of the licence or authority requests or agrees in writing to the suspension or cancellation of the licence or authority,
>
> (b) the holder of the licence or authority contravenes any condition of the licence or authority,
>
> (c) the holder of the licence or authority is convicted of an offence against the Act or this regulation, or of an offence against the *Drug Misuse and Trafficking Act 1985* or any regulation in force under that Act, or an order is made under section 556A(1) of the *Crimes Act 1900* in respect of such an offence,
>
> (d) the holder of the licence or authority is, in the opinion of the Director-General, no longer a fit and proper person to hold the licence or authority,
>
> (e) the annual fee for the licence is not duly paid,
>
> (f) in the case of a licence or authority to supply methadone, the supply of methadone is causing disruption to the amenity of the area in which the premises from which it is being supplied are situated.

The case concerned a licence to supply methadone. The Director-General of the New South Wales Department of Health concluded that the appellants' methadone clinic was causing disruption to the area in which the clinic was situated. The issue was whether, if grounds had been established under cl 149(f), the Director-General was obliged to either suspend or cancel the licence or whether the Director-General could exercise a discretion to neither suspend nor cancel the licence. The Court of Appeal preferred the first interpretation. Beazley JA, with whom Stein and Heydon JJA agreed, said of cl 149: 'The word "may" is directed, not to a discretionary exercise of the power as such but to its manner of exercise. It empowers the Director-General to engage one of two alternative sanctions: suspension or cancellation'. However, in the High Court Gleeson CJ,

Gaudron, McHugh, Gummow and Callinan JJ unanimously concluded that the second interpretation was the correct one.]

Gleeson CJ and McHugh J [at 152–3]: When a statutory power is conferred by the use of words of permission, there may arise a question whether the effect is to impose an obligation, or, at least, an obligation that must be performed in certain circumstances. Even where it is plain that the intention of the legislature was permissive, questions may arise as to the nature of the considerations that the person in whom the power is confided may be entitled or bound to take into account in the exercise of the discretion conferred. Issues of this kind are to be resolved as a matter of statutory interpretation, having regard to the language of the statute, the context of the relevant provision, and the general scope and objects of the legislation: *Ward v Williams* (1955) 92 CLR 496, 505 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).

As was pointed out in *Ward v Williams* (at 506) there is a long history of legislative intervention in New South Wales 'to restrain the development of the notion that permissive words may have a compulsive effect'. The current provision is s 9 of the *Interpretation Act 1987* (NSW) which, except in so far as the contrary intention appears in an Act or instrument (s 5), provides that the word 'may', if used to confer a power, indicates that the power may be exercised or not, at discretion.

An example of a statutory provision in which a contrary intention appeared may be seen in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106. Section 46(3) of the *Income Tax Assessment Act 1936* (Cth) provided that, if the Commissioner was satisfied that certain conditions as to non-payment of dividends were fulfilled, the Commissioner 'may allow' a private company a rebate in its assessment. This Court held that, if the Commissioner was satisfied of the specified condition, then he was obliged to allow the rebate. The taxpayer had a right or entitlement. The context indicated that it was not intended that the Commissioner should have a discretionary power to defeat that right or entitlement. The word 'may' conferred a power; and the statutory intention was that the power be exercised if the condition was fulfilled … If the Court of Appeal is right, then the same conclusion (ie that the only choice available to the Director-General is either to suspend or cancel a licence) must follow whichever of the grounds set out in the clause applies. The opening words of the clause must have the same meaning in their application to each ground. Consider paras (b) and (e). A contravention of a licence condition, or a failure to make due payment of a licence fee, could occur in circumstances that are technical, or trivial, or accidental, or readily excusable. What legislative purpose would be served by depriving the Director-General of the capacity to excuse such a contravention or failure, or to seek to deal with it by some means short of suspension or cancellation?

Gaudron, Gummow and Callinan JJ [at 162]: In submissions to this Court, the Director-General appeared to concede that, whilst there may be no duty in respect of some of the grounds specified in cl 149, that was not the case with respect to para (f). It may, for present purposes, be accepted that, as a matter of construction, the opening words of cl 149 may have such a distributive operation upon the various grounds then spelled out. That however does not mean that the submission with respect to para (f) is made good.

The paragraph uses the continuous present 'is causing disruption'. It should be accepted that, in many cases, the very grant of a licence will from the time of the grant be productive of some disruption to the amenity of the area in which the premises from which the methadone is to be supplied are situated. With the passage of time and the change of circumstances, that disruption may diminish or be exacerbated. It would be an odd construction of para (f) to require [suspension or] cancellation wherever there was an exacerbation to any degree.

How to determine whether breach produces invalidity

13.3 Assume that legislation clearly imposes an obligation or lays down a condition. Now assume that there has been a failure to perform that obligation or to comply with that condition. In such circumstances there may be an issue as to the consequences of that breach of obligation or lack of compliance. This issue is a particularly difficult one because the court must produce a result in circumstances that are necessarily outside the contemplation of Parliament. The courts, applying ordinary principles of interpretation, must in effect impute an intention to Parliament as to the consequences of a failure to comply. Some guidelines for carrying out this task were laid down in the following case.

***Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355**
High Court of Australia

[The Australian Broadcasting Authority (ABA) had made a 'program standard', known as the Australian Content Standard, which provided that in 1997 at least 50 per cent of television programs broadcast between 6 am and midnight must be Australian, rising to 55 per cent from 1 January 1998. The Australian Content Standard had been made pursuant to the *Broadcasting Services Act 1992* (Cth). Section 160 of that Act provided:

> The ABA is to perform its functions in a manner consistent with:
>
> (a) the objects of this Act and the regulatory policy described in section 4; and
>
> (b) any general policies of the Government notified by the Minister under section 161; and
>
> (c) any directions given by the Minister in accordance with this Act; and
>
> (d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

The High Court decided that cl 9 of the Standard breached para (d) of s 160 because it gave preference to Australian television programs, contrary to obligations arising

under a trade agreement and protocol between Australia and New Zealand. The justices who delivered a joint judgment allowing the appeal from the decision of the Full Court of the Federal Court considered whether, as a consequence of that breach, cl 9 of the Standard was invalid and of no effect. They held that it was not. Brennan CJ, who also allowed the appeal, took an approach that made it unnecessary for him to consider this issue.]

McHugh, Gummow, Kirby and Hayne JJ [at 388]: An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the 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. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied: *Howard v Bodington* (1877) 2 PD 203, 211 (Lord Penzance); there is not even a ranking of relevant factors or categories to give guidance on the issue.

Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory … if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity …

In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* [1978] 1 NSWLR 20, 23–4; see also *Victoria v Commonwealth and Connor* (1975) 7 ALR 1 (Gibbs J) in criticising the continued use of the 'elusive distinction between directory and mandatory requirements': *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119, 146 (Gummow J) … The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning: *McRae v Coulton* (1986) 7 NSWLR 644, 661; *Australian Capital Television* (1989) 86 ALR 119, 147. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory … 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. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. 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': *Tasker v Fullwood* [1978] 1 NSWLR 20, 24 …

The fact that s 160 regulates the exercise of functions already conferred on the ABA rather than imposes essential preliminaries to the exercise of its functions

strongly indicates that it was not a purpose of the Act that a breach of s 160 was intended to invalidate any act done in breach of that section.

That indication is reinforced by the nature of the obligations imposed by s 160. Not every obligation imposed by the section has a rule-like quality which can be easily identified and applied. Thus, s 160 requires the functions of the ABA to be performed in a manner consistent with:

- the objects of the Act and the regulatory policy described in s 4;
- any general policies of the Government notified by the Minister under s 161;
- any directions … given by the Minister in accordance with the Act.

In particular situations, it is almost certain that there will be room for widely differing opinions as to whether or not a particular function has been carried out in accordance with these policies or general directions. When a legislative provision directs that a power or function be carried out in accordance with matters of policy, ordinarily the better conclusion is that the direction goes to the administration of a power or function rather than to its validity: compare *Broadbridge v Stammers* (1987) 16 FCR 296, 300.

Furthermore, while the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language, as the result of compromises made between the contracting State parties: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 255–6. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed. The problems that might arise if the performance of any function of the ABA carried out in breach of Australia's international obligations was invalid are compounded by Australia being a party to about 900 treaties: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 316.

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: *Montreal Street Railway Co v Normandin* [1917] AC 170, 175; *Clayton v Heffron* (1960) 105 CLR 214, 247; *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93, 104–5. Having regard to the obligations imposed on the ABA by s 160, the likelihood of that body breaching its obligations under s 160 is far from fanciful, and, if acts done in breach of s 160 are invalid, it is likely to result in much inconvenience to those members of the public who have acted in reliance on the conduct of the ABA.

Among the functions of the ABA, for example, are the allocation and renewal of licences (s 158(c)) and the design and administration of price-based systems for the allocation of commercial television and radio broadcasting licences (s 158(e)). It is hardly to be supposed that it was a purpose of the legislature that the validity of a licence allocated by the ABA should depend on whether or not a court ultimately ruled that the allocation of the licence was consistent with a general direction, policy or treaty obligation falling within the terms of s 160. This is particularly so, given that the 'general policies of the Government notified by the Minister under section 161' unlike the 'directions given by the Minister in accordance with this Act' (see s 162(2)) are not required to be publicly recorded and that even those with experience in public international law sometimes find it difficult to ascertain the extent of Australia's

obligations under agreements with other countries. In many cases, licensees would have great difficulty in ascertaining whether the ABA was acting consistently with the obligations imposed by s 160. Expense, inconvenience and loss of investor confidence must be regarded as real possibilities if acts done in breach of s 160 are invalid.

Because that is so, the best interpretation of s 160 is that, while it imposes a legal duty on the ABA, an act done in breach of its provisions is not invalid.

As to Tasmanian legislation, see the *Acts Interpretation Act 1931* s 10A.

EXERCISE 13 ▸ Statutory obligations and discretions

13.4

1. Section 151 of the *Electoral Act 1902* provided:

> In elections for members of the House of Representatives the voter shall mark his ballot-paper by making a cross in the square opposite the name of the candidate for whom he votes.

Section 132 of the Act provided:

> Ballot-papers to be used in the election of members of the House of Representatives may be in the form P in the Schedule.

A ballot-paper, in the form set out in the schedule (that is to say, containing rectangles instead of squares), was marked as follows:

Blackwood	
Chanter X	

Is a vote in the form above valid?

Suggested Answer

The issue is whether under s 151 a voter may only cast a valid vote by placing a cross in a square opposite the name of the preferred candidate. At first glance, the presence of the word 'shall' in s 151 may appear to resolve the issue, since 'shall' suggests an obligation to place a cross in a square opposite the name of the candidate. However, if a contextual approach is adopted, a different solution emerges. The ballot paper had rectangles, not squares, opposite the candidates' names; and under s 132 ballot papers did not have to be in the form P set out in the schedule. The reason is that s 132 provides that ballot-papers 'may' be in the form P in the schedule.

Therefore, to give both sections operative effect, it can be concluded that to cast a valid vote it is obligatory to make a cross opposite the name of the preferred candidate, and discretionary to place the cross in a square. So the answer to the question posed would be: Yes.

2. Section 7(4) of the *Courts Act 1971* provided:

> The trial of a person committed by a magistrates' court shall, unless the Court has otherwise ordered, begin not later than the expiration of the prescribed period beginning with the date of his committal.

Rules prescribed a period of 56 days. By an administrative oversight, the trial of a defendant did not begin until 50 days after the end of the period prescribed by the rules. Twenty-one days after the expiry of the 56-day period, the court ordered an extension of time of 28 days from the end of the period prescribed by the rules. The defendant was convicted and sentenced to two years' imprisonment. What could you argue for him on his appeal? Would the argument be successful?

3. Section 7 of the *Civil Proceedings (Felons) Act 1995* provided:

> A person who is in custody as a result of having been convicted of a felony may not institute any civil proceedings in any court except by the leave of that court.

Section 8 of the Act provided:

> A court shall not, under section 7, grant leave to a person to institute proceedings unless the court is satisfied that the proceedings are not an abuse of process.

Tao was serving a sentence of imprisonment for a felony. One day he was attacked by another prisoner, sustaining serious injuries. He instituted civil proceedings against the prison authority, alleging negligence on the part of its employees. At the trial the prison authority applied for Tao's action to be struck out, although it conceded that the proceedings were not an abuse of process. At that stage Tao sought leave to institute proceedings under s 7. How should the court resolve these applications?

4. Section 70 of the *Australian Broadcasting Corporation Act 1988* provided:

> The Corporation shall not, without the approval of the Minister, enter into a contract under which the Corporation is to pay or receive an amount exceeding $500,000.

Section 71 of the Act provided:

> The moneys of the Corporation shall not be expended otherwise than in accordance with the estimates of expenditure approved by the Minister.

The Australian Broadcasting Corporation made a contract with Bruce to purchase from him, for $750 000, land for the construction of a television studio. The approved estimates made provision for an expenditure of up to $800 000 for such a purpose. Due to an oversight, the Minister had not approved the contract. Now the corporation argues that it is not under any obligation to Bruce. Advise Bruce.

Applying legislation to complex problems

13.5 This part of the chapter deals with how to apply legislation to a given set of facts. Of course, a substantial part of the task is to identify and locate relevant legislation. Those matters are dealt with in **Chapter 17**. Here, legislation that is relevant to a problem has been identified. The task of students attempting Exercises 11 and 12 below is to locate certain legislation and then to apply it to the facts. To assist in this task, a checklist is set out below, together with an example of a problem based on a short Act, accompanied by a suggested answer to the questions asked.

Practical guide to interpretation of legislation

13.6

Here is a checklist to use when dealing with complex problems of interpretation. Not all of these steps are necessary in every case.

1. Establish whether the legislation was in force at the relevant date. If it later commenced operation, check whether it applies retrospectively to the problem.
2. Using the table of contents and the headings, check through the legislation seeking relevant provisions.
3. When a relevant provision has been found, read it carefully, observing any words or phrases that appear significant.
4. Check whether any of those words or phrases are defined in the legislation.
5. If necessary, check the meaning of any key words in a dictionary.
6. Consider whether any provisions of the relevant interpretation legislation are in point.
7. Check whether any of the adjacent provisions in the legislation throw light on a relevant provision, remembering that words are normally used consistently.
8. If appropriate, check whether any relevant provision has been judicially interpreted.
9. Attempt to interpret the words according to their ordinary meaning or, where appropriate, their technical or legal meaning, and try to apply them to the problem.
10. Attempt to identify the purpose of the legislation, or of a particular provision, and try to interpret the words consistently with that purpose.
11. If a provision is ambiguous or obscure or, taking account of its context and underlying purpose or object, its ordinary meaning leads to an absurd or unreasonable result, reference may be made to parliamentary, executive and related materials to determine the meaning of the provision.
12. If the preconditions referred to in (11) are not present, reference may be made to relevant extrinsic materials to discover the mischief or defect addressed.
13. Interpret a provision against a background of any relevant common law presumptions.

Interpreting the *Wild Dog Destruction Act:* question and answer

13.7

Sam Keen is a law student doing voluntary work at the Broken Hill Legal Advice Centre in New South Wales. The duty solicitor has asked him for a report on the following matter.

Last year Bill Blake purchased a small Crown pastoral lease a few kilometres out of Broken Hill. Several months ago he found a dingo pup on his property. Bill took it home and telephoned the Wild Dog Destruction Board, asking for permission to keep it. A few days later he received a letter from the Board, authorising him to keep the dingo, but advising him to ensure that it was tied up. A month ago it got off the chain and since then Bill has been unable to catch it.

Bill's neighbours saw the dingo wandering around on Bill's property. They complained about it to the Wild Dog Destruction Board. Last week Arch Huggins, a Board member (the nominee of the Broken Hill Rural Lands Protection Board), went out to take a look. The dingo walked over and licked Arch's hand, but Bill's blue healer dog viciously attacked Arch, knocking him to the ground and biting his leg. Later that day the neighbours told Arch that the dingo was quiet and friendly but that recently the blue healer had attacked them several times and was now very dangerous.

The following day, Arch gave a full report on the visit at a meeting of the Board, as a result of which the Board prepared a notice addressed to Bill, requiring him to arrange for both the dingo and the blue healer dog to be destroyed. The notice specified that this was to be done within 24 hours of receipt of the notice. Arch drove out to Bill's property later that day and gave the notice to him. That evening, Bill telephoned Vince Dunn, a veterinary surgeon, asking him to come out and destroy the animals. Vince said that he was very busy, but that he would get out there as soon as he could.

Yesterday, two days after his last visit, Arch called in again at Bill's place and saw both the dingo and the blue healer. Bill explained to Arch what Vince had said. This morning, after receiving a report of these events from Arch, the Board resolved that, in the exercise of authority granted by s 8 of the *Wild Dog Destruction Act 1921* (NSW), Bill would be required to pay a fine of $500 unless he informed the Board in writing forthwith after receiving written notice of the Board's resolution that he had complied with the Board's original notice. When Arch delivered the notice of this resolution to Bill, Bill told Arch that Vince had just destroyed the animals. When Arch reported this back to the Board it decided that Bill should be fined because he had not shown in writing that he had complied with the notice.

Consult the *Wild Dog Destruction Act 1921* (NSW) and, if necessary, any Act that is referred to in that Act. I do not wish you to consult any other legislation (apart from the *Interpretation Act 1987* (NSW)). Nor do you need to refer to any cases which interpret the Act.

Write me some notes, dealing with the following issues, taking care to set out each step of your reasoning and to include references to relevant provisions of both the *Wild Dog Destruction Act 1921* and the *Interpretation Act 1987*:

(a) Does the Act apply to properties in the Broken Hill area?

(b) Bill has been told that the Board's notices are invalid because they were not sent by registered letter (as to which see s 23). Is this correct?

(c) What is the underlying purpose or object of s 6?

(d) Is the dingo pup (as to which see s 26) or the blue healer a 'wild dog' within s 6, and does the section apply if only one of them is a 'wild dog'?

(e) Has there been a breach of s 7?

(f) Assuming that there has been a breach of s 7, did the Board have the authority to impose the $500 fine under s 8?

Here are Sam's notes, written early in 2011:

(a) Does the Act apply to properties in the Broken Hill area?

Yes. Section 2 provides that the *Wild Dog Destruction Act 1921* applies only to the 'Western Division' and that term is defined in s 3 by reference to the meaning of that

term in the *Crown Lands Act 1989*. Section 4(2) of the 1989 Act in turn refers to the *Crown Lands Consolidation Act 1913*, as to which see s 7 and the Second Schedule.

Note that students without access to a *New South Wales Statutes Reprint 1924–1957* would not be able to locate the 1913 Act. However, the reference in s 3A(5)(a) to the RLPB for the Broken Hill RLPD may be sufficient for the purpose of the question.

(b) Bill has been told that the Board's notices are invalid because they were not sent by registered letter (as to which see s 23). Is this correct?

No. Section 23 provides that service of notice may be served by registered letter. Section 9(1) of the *Interpretation Act 1987* suggests that such a provision is discretionary. It would seem that service could be achieved in the usual way, but that service by registered letter was also available, in recognition of the difficulty of finding people in the vast area of the Western Division.

(c) What is the underlying purpose or object of s 6?

Section 33 of the *Interpretation Act 1987* provides that an interpretation of a provision that would promote its underlying purpose or object is to be preferred to one that would not. It seems clear from the long title and the other provisions of the Act that it contains a series of measures designed to promote the 'control or eradication' (see s 20(e)) of wild dogs in the Western Division. The Act itself does not indicate the reasons for promoting the control or eradication of wild dogs, but it is generally known that it is to reduce the threat to grazing animals which is posed by these animals. The reduction of the threat to humans may be an incidental purpose of the Act.

The purpose of s 6 appears to be to require individual owners or occupiers to take measures which are likely to result in the destruction of wild dogs suspected of being on the owners' or occupiers' land. There are several ways in which this could be done, including shooting, trapping and the laying of poison baits. It appears from s 4 that measures taken shall be at the cost of the owner or occupier.

(d) Is the dingo pup (as to which see s 26) or the blue healer a 'wild dog' within s 6, and does the section apply if only one of them is a 'wild dog'?

The term 'wild dog' is defined in s 3. The dingo pup appears to be covered by the part of the definition which provides that 'wild dog includes any dingo'. If the dingo pup was the only 'wild dog' that the Board had reason to believe was on Bill's land, s 6 would be applicable, because s 8 of the *Interpretation Act 1987* provides that a reference to a word in the plural form includes the singular form. It may be argued on Bill's behalf that, because he has the Board's written authorisation to keep the dingo, s 6 is inapplicable. The better view would be that any protection afforded by this authorisation against a successful prosecution under s 26 has been negated by the Board's notice to Bill. In any case, it might be concluded that the authorisation no longer protects Bill because he no longer has possession of the dingo.

Is the blue healer a 'wild dog' within the definitions of that term in s 3? The only possibility is that it is a 'dog which was become wild'. When this term is considered in the context of the other definitions of 'wild dog' it appears to mean a domestic

dog that has ceased to have the characteristics that make it domestic. This has not occurred in the case of the blue healer, which appears merely to have undergone a change of temperament. However, a broader interpretation, which takes account of the underlying purpose or object of the section, would be that the term covers a dog that has developed the characteristics of the dingos and other dogs referred to in the definition. On this interpretation, the term would apply to the blue healer. An intermediate interpretation would be to limit the relevant characteristic to the capacity or inclination to kill or injure grazing animals. In the absence of evidence of a tendency of the blue healer to engage in such behaviour, the definition would not apply.

Whatever the conclusion in relation to the blue healer, however, the requirements of s 6 appear to be satisfied. Therefore, the Board acted within its authority in giving Bill a notice in the terms described.

(e) Has there been a breach of s 7?

Section 7 is a deeming provision. The first question is whether Bill commenced to comply with the notice forthwith: see s 7(a). As he contacted Vince within a few hours of being given the notice and as the notice allowed for 24 hours within which to comply with the instruction, it may be concluded that this does not represent a failure to comply. But Bill let 24 hours lapse at the end of which the animals still had not been destroyed, without taking additional steps to ensure compliance with the notice. As to this, the question is whether that amounts to a deemed failure to comply. Perhaps it should be concluded that as Bill may have been able to summon another veterinary surgeon, or devise another method for destroying the animals or having them destroyed, there has been a failure to comply with s 7.

(f) Assuming that there has been a breach of s 7, did the Board have the authority to impose the $500 fine under s 8?

No. Section 8(1) confers the right to impose a penalty and so should be considered a penal provision and strictly construed: see, for example, *Chew v The Queen* (1992) 173 CLR 626, 632 (Mason CJ, Brennan, Gaudron and McHugh JJ). Before exercising the authority conferred by s 8, to give notice requiring Bill to pay to the Wild Dog Destruction Fund the amount determined by the Board, the Board was obliged to give Bill the opportunity of showing that he had complied with the original notice. This was not done.

Section 8(1) provides that the owner or occupier is to be given the opportunity of showing 'by writing or otherwise' that he or she has complied with the notice. This provision might be considered ambiguous, as it does not indicate who is entitled to choose the means of communication. As the provision is penal in nature, it should be concluded that the choice of the means of communication lies with the owner or occupier. Therefore, the Board was not entitled to reject the verbal notice that the animals had been destroyed. As the section does not expressly require the notice is to be given directly to the Board, notice to Arch as an agent of the Board should be sufficient.

But did Bill's statement to Arch amount to a statement that he had complied with the original notice? As to this, see the answer to (e). Perhaps the Board should decide

that, although there has not been strict compliance with the original notice, as the animals have been destroyed the matter should not proceed further.

In any case, s 8 does not give the Board authority to fine in the strict sense. It may only require the payment of a predetermined amount to the Wild Life Destruction Fund.

EXERCISE 14 ▸ Interpreting the *Graffiti Control Act*

13.8

After reading 'Interpreting the *Wild Dog Destruction Act*: Question and Answer' above, read and carry out the instructions below.

You are a solicitor employed by Town and Country Solicitors, Tenterden, New South Wales. Michelle Cho, General Manager of the Tenterden Council, comes to see you early in 2011. She tells you the following stories, which you should assume are correct.

A proposal to establish a new coal mine in the district has been the subject of fierce debate. A few days ago council workers discovered that a sloping grassy area in the public gardens controlled by the council, which are bounded on all sides by streets, had been interfered with. An examination of the area disclosed that a shed at a nearby sports ground had been broken into and a line marker had been taken and used to write 'NO MINE' in lime on the freshly mown grass. The words can be seen from the street. When, a few days later, the council workers hosed the lime off they discovered that the words had been burnt into the grass. Tests have revealed that 'Windup', a poison used to kill grass and weeds, had been mixed with the lime. The grass will grow back, but this will take a few weeks. In the meantime Selina Smart, an opponent of the mine, admitted to the local newspaper that she was responsible and the newspaper published Selina's story.

Michelle also tells you that last Saturday she sent her 15-year-old son, Walter, down to her brother's place to borrow a can of red spray paint. She wanted to paint her wheelbarrow. She explains that on his way home Walter stopped off at the local public swimming pool to see some friends. Constable Starling, who knew that Walter was 15 years old, was on duty and happened to be at the pool. He asked Walter what he was doing with the paint can. Walter replied: 'I don't have to answer your dumb questions', whereupon Constable Starling took the can from Walter and threw it in a rubbish bin. Walter went home and told Michelle what had happened.

Michelle wishes to know whether Selina has committed offences under the *Graffiti Control Act 2008* (NSW). Michelle also wants to know whether Constable Starling was entitled to take the can and throw it in the bin. Walter said the can was nearly empty anyway.

Prepare written responses to Michelle's questions below. Identify any issues of interpretation and set out each step of your reasoning. Include references to relevant provisions of the *Graffiti Control Act 2008* (NSW) and the *Graffiti Control Regulation 2009* (NSW). You may also wish to refer to the second reading speech of the Honourable Penny Sharpe, Parliamentary Secretary, who introduced the Graffiti Control Bill into the Legislative Council on 26 November 2008.

(a) Did Selina commit an offence under s 4 of the Act?

(b) Did Selina commit an offence under s 6 of the Act? Michelle is familiar with the definition of 'public place' in the *Local Government Act 1993* (NSW). Does 'public place' in s 6 have the same meaning as in that Act?

(c) Has Constable Starling acted in accordance with s 9 of the Act and regs 4 and 5 of the *Graffiti Control Regulation 2009*?

EXERCISE 15 ▸ Interpreting the *Impounding Act*

13.9 After reading 'Interpreting the *Wild Dog Destruction Act*: Question and Answer' above, read and carry out the instructions below.

You are a solicitor employed by Friendly Solicitors, Coonabarabran, New South Wales. Early in 2011 Phil Friendly, one of the partners in the firm, hands you some notes that he made following a meeting with a client, Sally Galvin. These notes appear below. Phil has asked you to assume that the information contained in the notes is accurate.

Sally Galvin owns a hobby farm within the Coonabarabran Council area 3 kms out of town, on which she grazes cows. She lives there with her elderly mother and her son. Sally's neighbour on one side is David Huang, who also runs cattle. David has leased a bull from another neighbour, Terry Thomas, whose place is 25 kms further out. On five occasions in the last four weeks Sally has discovered that the bull has jumped the dividing fence, which is in good condition, and got in with her cows. Each time Sally has notified David, who has come around in his truck and collected the bull. Early this morning, after Sally once again found the bull in with her cows she rang David and explained that she had put it in her cattle yards, adding: 'This time you're not getting it back. Ring Terry Thomas and tell him I've impounded his bull and he can come and get it. And tell him to take it back to his place. I don't want to see it in my place again'. The bull had cut one of its hind legs, probably when getting over the fence. Sally has given it a penicillin injection and she says it will be OK. But she will not hand the bull back until David or Terry pays her $15, which is the cost of the penicillin. Before driving into Coonabarabran this morning to do her shopping, Sally filled the water trough at the yards and tossed the bull some hay.

While Sally was in Coonabarabran her mother saw David Huang drive down the road, open Sally's front gate, hunt one of Sally's cows through the gate onto the busy road, close the gate and drive away. (David Huang has since apologised to Sally for his behaviour.) Soon after, Errol Schute, the impounding officer of the Coonabarabran Council, arrived in a council vehicle. Errol attempted to hunt the cow down the road towards town, intending to put it in the council's pound which was 2 kms away, but it kept turning back towards Sally's place. (Errol has since discovered that the cow had a small calf back in the paddock.) The cow got madder and madder and Errol became apprehensive that it might run out and hit a vehicle travelling along the road. So he took out a gun and shot it, killing it instantly.

A few days ago, Sally's son Ivan parked his old Ford Falcon (with registration label still attached) outside the front gate of his mother's property. He placed on it a sign 'Free to good home'. Various parts of the car were soon removed but the chassis and body remained. Yesterday, Constable Brenda Nevin of the local police arrived and stopped by the car. Unknown to Sally and Ivan and without making any checks as to ownership, she arranged for the vehicle to be taken to the council's recycling depot, where it was quickly reduced to scrap.

Please consult the *Impounding Act 1993* (NSW). It is available on the web. You will need to read the whole Act carefully. There is no need to consult any other legislation

(apart from the *Interpretation Act 1987* (NSW)). Do not consult reports of parliamentary debates or explanatory memoranda as these are unlikely to be of assistance. Nor need you refer to any cases interpreting the 1993 Act.

Write some notes, addressing the following matters. Take care to set out each step of your reasoning and to include references to relevant provisions of the Act:

(a) Advise Sally of her rights and responsibilities with respect to the bull under pt 2 divs 1 and 3 of the *Impounding Act 1993*).

(b) Was Errol permitted by pt 2 divs 1 and 2 of the *Impounding Act 1993* to act as he did?

(c) Was Constable Nevin permitted by pt 2 divs 1 and 4 of the *Impounding Act 1993* to act as she did?

Further reading

For a comprehensive and consolidated list of further reading sources on statutory interpretation, see **Chapter 9**.

You will find useful study resources, including quizzes for each chapter, when you visit <http://www.lexisnexis.com.au/laying-down-law-8ed>. The quiz is a great tool to help you self-test your knowledge.