

# 2020 CPD CONFERENCE

13 MARCH



# Session 3A: Professional skills for advisors

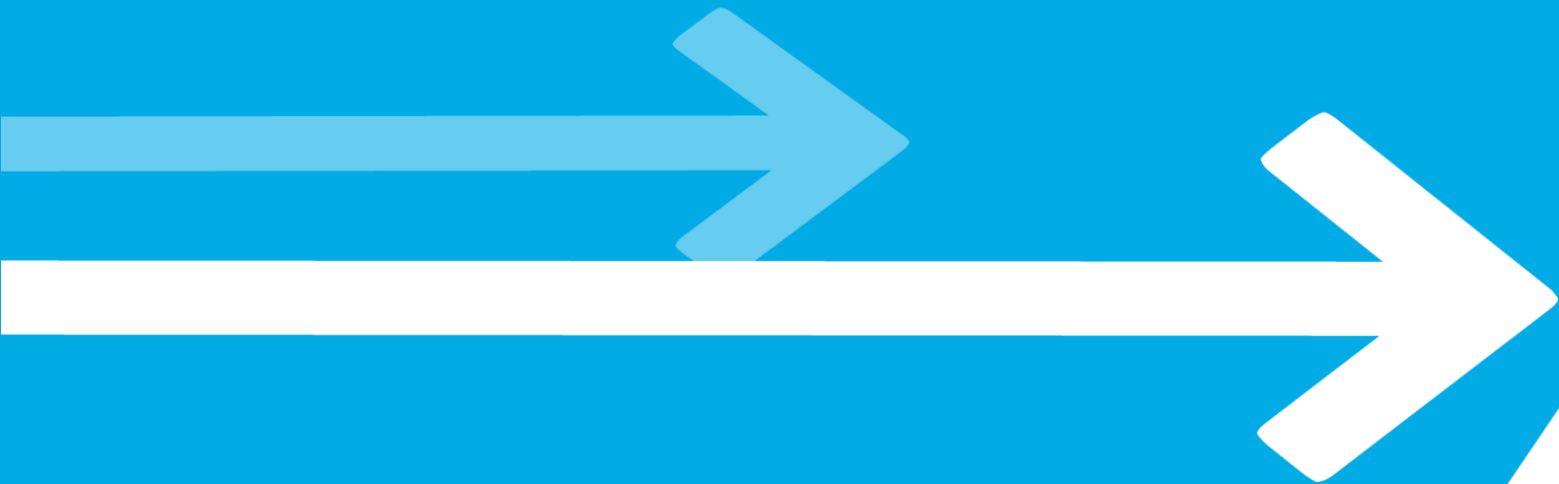
Chair: Felicity Shaw, Assistant Crown Solicitor

Drafting for government agencies

Amalia Stanizzo, Special Counsel

Practical tips for statutory interpretation

Michael Granziera, Director

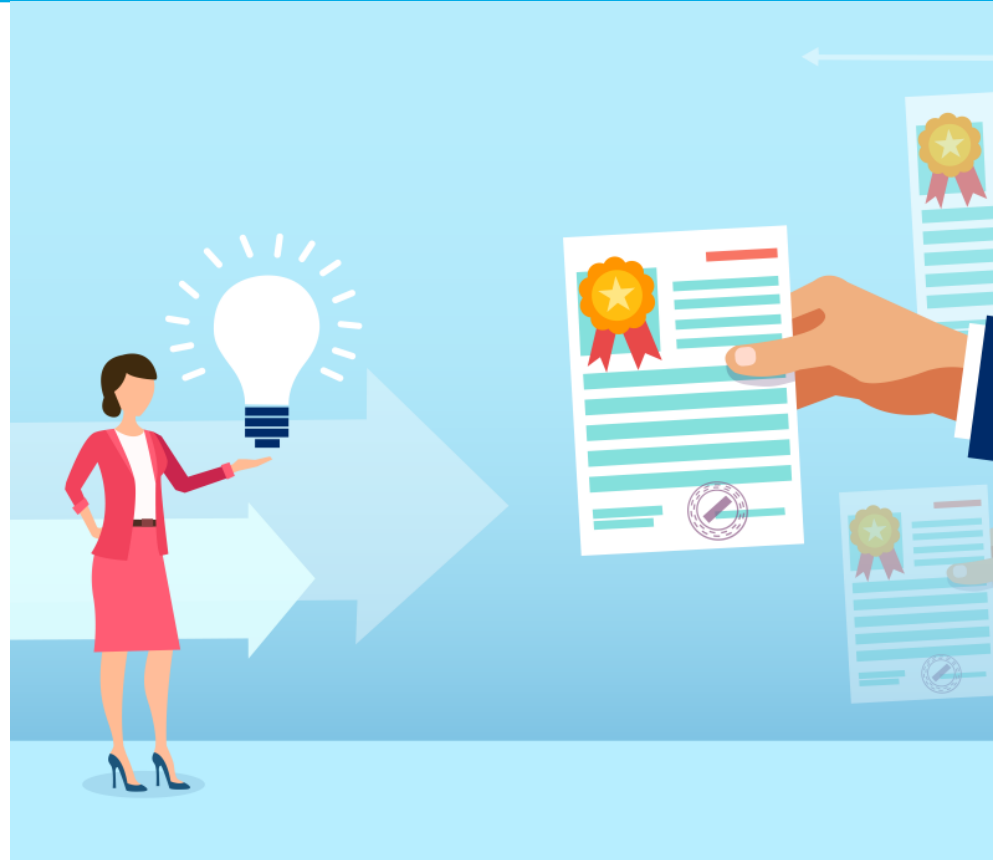


## Drafting for government agencies

Amalia Stanizzo, Special Counsel

# Key tips

- **Tip 1:**  
Identify the source of power or authority
- **Tip 2:**  
Understand the context in which the document is being created





# Drafting agreements

## Clauses and other things to keep in mind

- **Timeframes** – consider these carefully and be realistic
- **Confidentiality clause** – does the clause:
  - cover all State confidential information
  - allow disclosure to all State entities (e.g. Ministers and Ministerial staff)



# Drafting agreements

- **Termination** – consider whether:
  - provisions are appropriate
  - context of arrangement – does agency need to reserve special rights to terminate
  - termination for convenience clauses – payment of unavoidable costs as a result
- **Insurance** - remember Treasury Managed Fund



# Drafting agreements

- **Intellectual property** – ensure any licence is:
  - in favour of the State, if party is Crown
  - broad enough to cover other departments and government statutory bodies and/or third parties (e.g. service providers)
  - broad enough to cover the State's intended uses
- **Indemnities** – does the indemnity in favour of the State need to cover more than the government party?

# Drafting agreements

- **If agency is outsourcing services** consider:
  - privacy obligations
  - s. 121, *Government Information (Public Access) Act*
  - State records
  - Government information sharing
- **Acknowledgments, publicity and media announcements**







# Drafting agreements

- **Assignment/novation** –
  - machinery of government changes
  - where administrative responsibility changes from one department to another during term of agreement this should be documented by way of variation to the agreement not an assignment/novation
- **Prohibition on fettering of government power**
- **Memorandum of understanding** - use:
  - when the parties are the Crown, OR
  - essentially an administrative arrangement

# Drafting other legal instruments



- **TIP 1:**

If the source of authority is legislation – look to the language of the provision

- **TIP 2:**

What is the instrument intended to achieve?

- **TIP 3:**

If preparing an Executive Council Minute – refer to Guidelines for Executive Council Minutes available at: <https://www.dpc.nsw.gov.au/tools-and-resources/cabinet-practice-manual/templates-and-resources/>

- **TIP 4:**

Look at samples e.g. Government Gazette

# Drafting other legal instruments

- **Example 1: Executive Council Minute – authorising execution of a contract on behalf of Crown in reliance on Crown executive power**
  - **Instrument required:**  
Executive Council Minute



# Minute Paper for the Executive Council



## *Minute Paper for the Executive Council*

*Subject.* - Authority for the Secretary of the Department of [insert] to contract with [insert name of contractor] for [insert services]

Department of [insert]

**Document Number:** [insert # - Palatino 10]

*Approved by the  
Executive Council,*

*Clerk of the Council.*

*Minute No.*

*Date*

*Approved,*

*Governor*

I RECOMMEND for the approval of Her Excellency the Governor, with the advice of the Executive Council, that she grant authority to the Secretary, Department of [insert] to enter into negotiations with [insert name of contractor] for [insert services and/or goods] and to bind the Crown in right of the State of New South Wales through the execution of a contract, and such other documents as may be required, for such services on such terms and conditions as the Secretary considers appropriate.

The Hon. [insert]  
**Minister for [insert]**

*Her Excellency the Governor  
and The Executive Council*



# Minute Paper for the Executive Council

- Extract – omitting formal parts

I RECOMMEND for the approval of Her Excellency the Governor, with the advice of the Executive Council, that she grant authority to the Secretary, Department of [*insert*] to enter into negotiations with [*insert name of contractor*] for [*insert services and/or goods*] and to bind the Crown in right of the State of New South Wales through the execution of a contract, and such other documents as may be required, for such [*services and/or goods*] on such terms and conditions as the Secretary considers appropriate.



# Drafting other legal instruments

- **Example 2: Treasurer's approval - joint venture under s. 6.23(1), *Government Sector Finance Act 2018 Act***

## **"6.23 Financial arrangement approvals**

- (1) The Treasurer may give **written approval** (a *financial arrangement approval*) for **a GSF agency to enter into a financial arrangement.**
- ...
- (4) A **financial arrangement approval**:
  - (a) **may** do any one or more of the following:
    - (i) **apply to a specified financial arrangement** or arrangements of a specified kind,
    - (ii) apply generally or be limited in its application by reference to one or more specified circumstances, factors or exceptions,
    - (iii) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body, and
  - (b) **is subject to any terms and conditions specified** in the approval.

..."

# Drafting other legal instruments



- **Instruments required:**
  - Treasurer's financial arrangement approval



# Treasurer's financial arrangement approval

## APPROVAL FOR [GSF AGENCY] TO ENTER A JOINT VENTURE ARRANGEMENT UNDER THE GOVERNMENT SECTOR FINANCE ACT 2018

I, the Hon Dominic Perrottet MP, Treasurer of the State of New South Wales, pursuant to section 6.23(1) of the *Government Sector Finance Act 2018*, approve the [GSF agency] entering into the joint venture arrangement specified in Schedule 1 to this instrument (the **Arrangement**), subject to the conditions set out in Schedule 2 to this instrument.

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**The Hon Dominic Perrottet MP**

Treasurer

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 2020





# Treasurer's financial arrangement approval (cont)

## **Schedule 1 – Approved Joint Venture Arrangement**

The joint venture arrangement proposed to be conducted substantially in accordance with the document “Terms Sheet – *[insert name of terms sheet]*” annexed to this instrument and marked “Annexure 1” with *[insert name of the other party]* (the Terms Sheet).

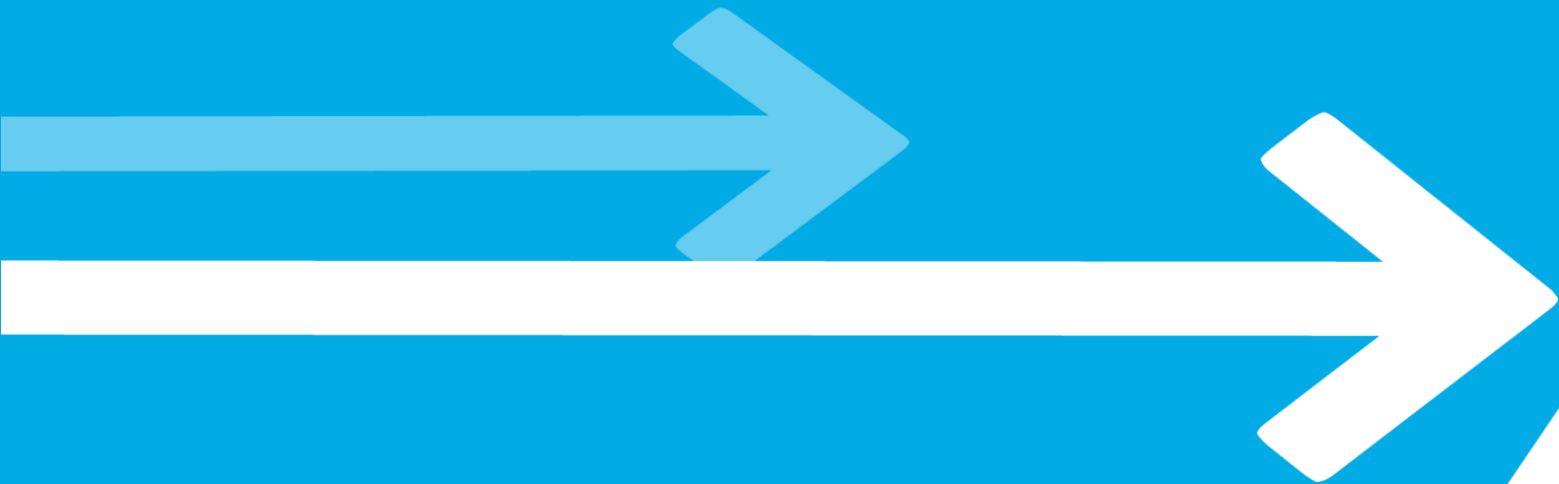
## **Schedule 2 – Conditions**

1. The *[GSF agency]* must execute a contract with *[insert name of other contracting party]* on or before *[insert date]* the terms of which are substantially in accordance with the terms set out in the Terms Sheet including such other terms and conditions as the *[GSF agency]* considers acceptable provided that these additional terms and conditions are not inconsistent with the terms set out in the Terms Sheet.
2. This approval lapses if the *[GSF agency]* and *[insert name of other contracting party]* do not execute the contract referred to in clause 1 of this Schedule 2 on or before *[insert date referred to in clause 1]*.

# DON'T FORGET



- **Tip 1:**  
Identify the source of power or authority
  
- **Tip 2:**  
Understand the context in which the document is being created



## Practical tips for statutory interpretation

Michael Granziera, Director



# Finding meaning

- Working out the meaning of words in legislation - some specific, commonly-encountered issues:
  - Use of definitional sections and the *Interpretation Act 1987* – when they apply and how to construe
  - Second reading speeches
  - Dictionaries (the bad kind)



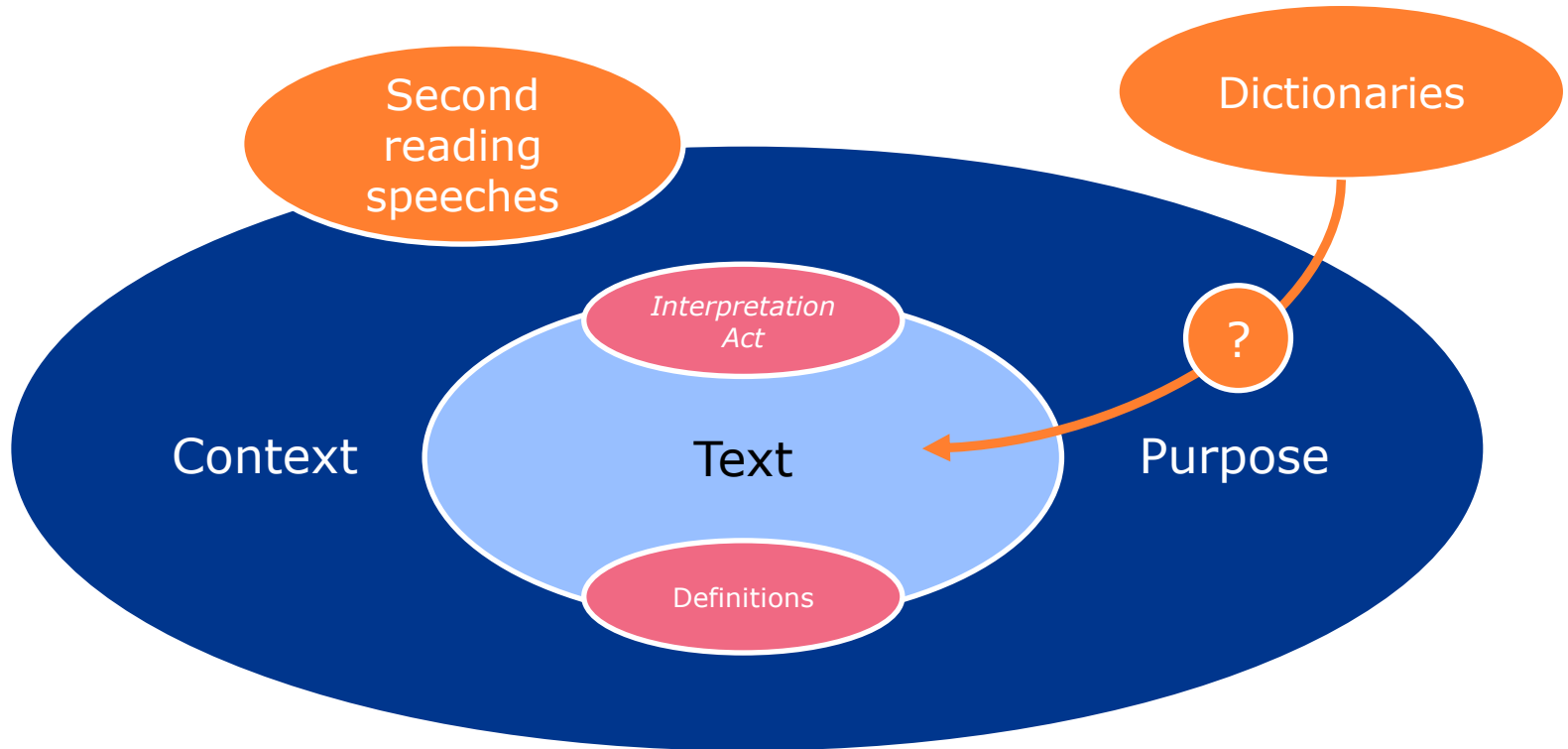
# Some ground rules

- *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ:

“This Court has stated on many occasions that the task of statutory interpretation must begin with a consideration of the text itself.. Historical considerations and extrinsic materials cannot be relied upon to displace the clear meaning of the text... The language which has actually been employed in the text of legislation is the surest guide to legislative intention... The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision... in particular the mischief.. it is seeking to remedy.”
- *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ:

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

# Some ground rules





# Definitional provisions

- Definitional provisions in an Act should always be the first point of reference – check for a defined meaning for each operative word in a provision
- But don't forget the *Interpretation Act 1987* – in particular, s. 21
  - A form of drafter's shorthand, which avoids the need to repeatedly define common terms in each enactment (useful explanation of purpose and significance of interpretation legislation in *Attorney-General (Qld) v Australian Industrial Relations* (2002) 213 CLR 485 at [7]-[8] per Gleeson CJ)
- Application of (i) definitional provision or (ii) presumption created by the *Interpretation Act* is subject to contrary intention (*Interpretation Act*, ss. 5(2) and 6)
- "Contrary intention" – no straightforward formula, but can include where context of the Act as a whole indicates the definition should not apply, where application of definition would lead to confusion, and where provision would not work appropriately if definition applied (see *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104 at 108 per Mahoney JA)
  - See also, *ADCO Constructions v Goudappel* (2014) 254 CLR 1, *Bobolas v Waverley City Council* (2016) 92 NSWLR 406, and *Waterfront Place Pty Ltd v Minister for Planning* [2019] VSCA 156 concerning contrary intention in the context of applying interpretation legislation



# Definitional provisions

- *Mutton*:
  - Section 209 of the *Income Tax Assessment Act 1936* (Cth) provided that if “tax” was unpaid, “it [could] be sued for and recovered in any court of competent jurisdiction...”
  - “Tax” defined exhaustively in s. 6(1) – did not encompass an “additional tax” which applied as a penalty for non-payment of tax
  - A question arose as to whether “additional tax” was a “tax” which could be sued for in reliance on s. 209.
  - Per Mahoney JA – “no plausible reason” in the administrative scheme created by the Act for additional tax not to be subject to recovery procedure in s. 209 – broader reading of word “tax” in s. 209 appropriate





# Definitional provisions

- Definitions are not substantive provisions of an Act, and should not be construed in isolation – generally, not appropriate to ascertain the meaning of the defined term, and *then* “read the definition in” to an operative provision to determine that provision’s effect
- *Kelly v The Queen* (2004) 218 CLR 216 at 254 (per McHugh J):

“Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose a substantive enactment... **Once it is clear that the definition applies, the better – I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome.** To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.”



# Definitional provisions

- But intermediate appellate decisions suggest that there might need to be qualifications to this approach:
  - “Where a term is used in various contexts within a statute, it may be of assistance to consider the definition separately, as well as when incorporated into a particular operative provision. That approach would promote consistency of interpretation” (*Hastings Cooperative Ltd v Port Macquarie Hastings Council* (2009) 171 LGERA 152 at 157 (per Basten JA))
- Orthodox approach is that the ordinary meaning of an exhaustively defined term not relevant to construing words used in the definition (*Owners of the Ship Shin Kobe Maru v Empire Shipping Company* (1994) 181 CLR 404 at 419)
  - Although note some divergent approaches (for example, *Manly Council v Malouf* (2004) 61 NSWLR 394 at [8]-[9] per Handley JA)



# Second reading speeches

- Common law approach
  - Second reading speeches may be of use in understanding the mischief to which the Act as a whole is directed; part of the context which informs the interpretive exercise (*CIC Insurance Pty Ltd* at 634-5)
- Section 34 of the *Interpretation Act*
  - Sets out circumstances in which extrinsic materials (including second reading speeches) may be used



# Second reading speeches

## Section 34:

“(1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule **is capable of assisting in the ascertainment of the meaning of the provision**, consideration **may** be given to that material:

(a) to **confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision** (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or

(b) to determine the meaning of the provision:

(i) **if the provision is ambiguous or obscure**, or

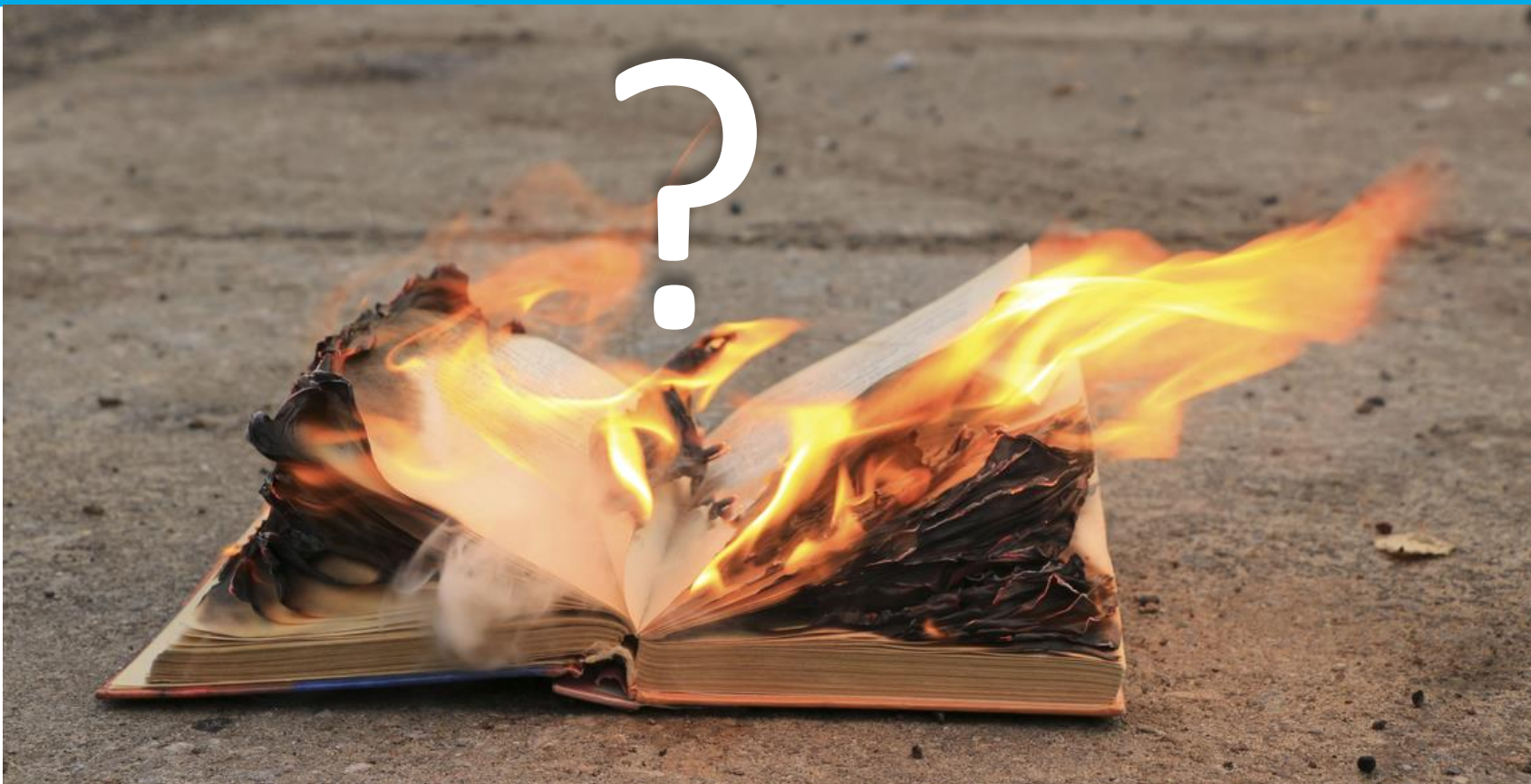
(ii) **if the ordinary meaning conveyed by the text of the provision** (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) **leads to a result that is manifestly absurd or is unreasonable.**”



# Second reading speeches

- Second reading speech will not always be “capable of assisting in the ascertainment of the meaning of a provision” (*Harrison v Melhem* (2008) 72 NSWLR 380)
  - If s. 34 relied upon, Section 34(3) requires consideration of (i) whether appropriate to use extrinsic material and, if so (ii) the weight afforded to it
- Text (as understood, having regard to context and purpose) is the beginning and end point for the interpretive exercise – second reading speech cannot displace clear meaning of the text
  - Never *dictates* meaning of a provision on either approach
- Practically, will often be the basis for asking a question, rather than its solution

# Dictionaries



# Dictionaries

- While courts frequently have recourse to dictionaries, there is also a litany of judicial warnings about making a “fortress out of the dictionary” (*Cabell v Markham* 148 F 2d 737 at 739 (1945); *Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325 at [49]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [27]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at [23])
- Read *Western Sydney LHD v Gould* [2018] NSWCA 69 at [78]-[81] (Leeming JA) – useful summary of cases, and purposes to which a dictionary can and can’t be put







# Dictionaries

- May indicate the range of meanings that a word appearing in an Act or instrument can bear (*Thiess v Collector of Customs* (2014) 250 CLR 664)
- But not appropriate to choose one of several meanings provided by dictionary, decide it fits, and apply that meaning rigidly – context and purpose are paramount
  - Dictionary meanings may support **a usage** of a word in **a context**, but never, by themselves, dictate **the usage** of the word in **the particular statutory context** (see, for example, *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498)
  - “Dictionary definitions are unhelpful, and say little, if anything, about how that term is to be understood in any particular situation” (*Vanstone v Clark* (2005) 147 FCR 299 at [163], endorsed in *Cheryala v Minister for Immigration & Order Protection* [2018] FCAFC 43 at [31] and [44])