Supreme Court
New South Wales
Common Law Division

Case Title:	Director of Public Prosecutions v Priestley
Medium Neutral Citation:	[2013] NSWSC 407
Hearing Date(s):	9 November 2012
Decision Date:	24 April 2013
Jurisdiction:	Common Law
Before:	Adams J
Decision:	1. Summons dismissed. 2. The plaintiff to pay the defendant's costs.
Catchwords:	Appeal from Local Court. Statutory interpretation – meaning of staying overnight – whether void for uncertainty – question of law alone – construction of penal provisions. Local government – power to erect notices prohibiting conduct in public places.
Legislation Cited:	Crimes Act 1900 Crimes (Appeal and Review) Act 2001 Local Government Act 1993 National Security Act 1939–1943 World Youth Day Act 2006 State Electricity Commission Act 1928 (Vic)
Cases Cited:	Anchorage Butchers Limited v Law (1939) 42 WALR 40 Beckwith v The Queen (1976) 135 CLR 569 City of Brunswick Corporation v Stewart (1941) 65 CLR 88 Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 322 Evans v State of New South Wales (2008) 250 ALR 33 Ex parte Zietsch; Re Craig (1944) 44 SR (NSW) 360 Foster v Aloni [1951] VLR 481

	King Gee Clothing Co Pty Ltd v The Commonwealth (1945) 71 CLR 184 Kruse v Johnson (1898) 2 QB 91 Merrell v Roberts (1909) 26 WN (NSW) 73 R v Parr [2009] VSC 166 R v Goreng-Goreng [2008] ACTSC 74
Texts Cited:	Geddes and Pearce, Statutory Interpretation in Australia, 7th ed (2011)
Category:	Principal judgment
Parties:	Director of Public Prosecutions (plaintiff) Lance Priestley (defendant)
Representation	
	Counsel: M W Anderson (plaintiff) J Donnelly (defendant) Solicitors: S C Kavanagh, Solicitor for the Director of Public Prosecutions (plaintiff)
File number(s):	2012/243969
Decision Under Appeal	
- Court / Tribunal:	Local Court, Downing Centre
- Before:	Barkell LCM
- Date of Decision:	17 May 2012
- Citation:	
- Court File Number(s)	LC 2012/16908
Publication Restriction:	

JUDGMENT

Introduction

1 On 2 February 2012 the respondent, Lance Priestley, was charged by court attendance notice with an offence under s 632(1) of the *Local Government Act* 1993 of failing to comply with the terms of a notice erected by the City of Sydney Council in a public place, namely Martin Place in Sydney. On the following day he was charged with a further similar offence, alleged to have occurred between 9.50pm on 2 February 2012 and 7.15am on 3 February 2012. (He was also charged with and acquitted of intimidating a police officer who was acting in the execution of his duty under s 60(1) of the *Crimes Act* 1900 but this matter is not in issue in these proceedings.) The notice prohibited a number of activities, including "Camping or staying overnight". As it happened, the particulars of the offence were specified as "staying overnight" but nothing turns on this.

2 On 17 May 2012, the learned Magistrate dismissed the charges, concluding that the defendant's various departures from Martin Place during the night meant that he had not "stayed overnight" within the meaning of the notice.

3 On 6 August 2012 the Director of Public Prosecutions, having taken over the matter, appealed to this Court under s 56(1)(c) of the *Crimes (Appeal and Review) Act* 2001. That provision permits a prosecutor to appeal to this Court from an order made by the Local Court dismissing a matter the subject of any summary proceedings "but only on a ground that involves a question of law alone".

4 Section 632 of the *Local Government Act* 1993 provides –

> (1) A person who, in a public place within the area of a council, fails to comply with the terms of a notice erected by the council is guilty of an offence.

Maximum penalty: 10 penalty units.

(2) The terms of any such notice may relate to any one or more of the following:

(a) the payment of a fee for entry to or the use of the place,

(b) the taking of a vehicle into the place,

(b1) the driving, parking or use of a vehicle in the place,

(c) the taking of any animal or thing into the place,

(d) the use of any animal or thing in the place,

(e) the doing of any thing in the place,

(f) the use of the place or any part of the place.

(2A) ...

(2B) ...

(3) The terms of a notice referred to in this section may:

(a) apply generally or be limited in their application by reference to specified exceptions or factors, or

(b) apply differently according to different factors of a specified kind,

or may do any combination of those things.

5 Martin Place is a pedestrian area extending from George Street on one end to Macquarie Street at the other, intersected by four roadways. It is undoubtedly both a "public place" and within "the area of" the Sydney City Council and comprehends the entire thoroughfare.

The Local Court judgment

6 The learned Magistrate commenced with pointing out that the defendant was homeless, having been living or sleeping on the streets of Sydney since 1992. At the relevant time, he was part of the organised "Occupy Sydney" protest or demonstration and, on the nights reflected in the

charges, that protest was involved and he was involved in an "occupation" of Martin Place. The following is a summary of Her Honour's findings –

> 1. The defendant was from time to time during the nights in question occupying at a sleeping bag, at times appearing to be asleep and at other times either sitting up or standing close to it or getting into it.
>
> 2. On the night of 2–3 February, at about 3.00am he was underneath an awning outside a commercial building which was on the other side of Martin Place from where he was originally seen with his sleeping bag. The defendant's evidence was that the area is patrolled by private security guards and hence was not council land. The presence of the awning "gives some support for this contention".
>
> 3. At other times the defendant would have left the area to go to Wynyard to take blankets, to a food van, and to get a cup of coffee from an all night store in Hunter Street.
>
> 4. The stills of CCTV recordings taken on the night of 1–2 February show the defendant at 9.00pm, 9.45pm, 10.00pm, 10.43pm, 11.06pm, 11.50pm, 12.23am, (from 1.00am to 2.00am no footage) and then from 2.00am to 3.24am with no movement of the defendant within the sleeping bag. When the police arrived, the defendant sat up and then there was no movement of him in the sleeping bag until 6.00am when he sat up again.

7 It appears (although it is not altogether clear) that the Magistrate concluded that, in relation to the night of 2–3 February, except for the periods referred to in respect of the preceding night, the defendant was in Martin Place although for some of that time, again, he was under the awning as to which, it seems, the Magistrate entertained a doubt that this formed part of the Council land. (Though, as it seems to me, this was unjustified since the presence of an awning over a CBD thoroughfare in no way suggests private land.)

8 The Magistrate concluded as follows –

> I have had, as I have said... some difficulty with this prohibition on "staying overnight" and it is not just the vagueness of the evidence about the area and the sign. I accept that the sign is close to wherever the defendant was and it appears to be accepted that the area encompasses where the defendant was, though where it starts and stops I do not know. But what "stay overnight" means has caused me some difficulty.

> It is quite true the defendant was using, in the relevant time, the place as a base. I gather when he went on his excursions he left his sleeping bag where it was and left his belongings where they were. He certainly does not appear to have them with him, not immediately with him in any event... Undoubtedly he was using that as a base, but what to make of the phrase "stay overnight" has caused me some problems.
>
> The dictionary definitions that I have already read out to the Sergeant mean and seem to make it clear that they indicate that you remain in one place, because "stay" means "remain in one place" but the ordinary meaning of the words "stay overnight", certainly of those two is one where you intend to sleep but you do not necessarily intend to be there for the entire evening. As I have said, you could stay at a hotel and go out to dinner and go out to the theatre and still be staying overnight at the hotel. Indeed you could stay overnight at the hotel if you did not return until the early hours of the morning and it would not be inconsistent with the ordinary usage to say that. But it is not consistent, as I said, with the dictionary definition, which merely implies that you remain in one place.
>
> It seems to me that, if I find an ambiguity in a regulation which prescribes a criminal offence, then I must construe it in favour of the accused, and I do.
>
> I dismiss the charges because in my view there is at least a reasonable doubt as to whether, certainly on the second [occasion] he stayed in the place and I think also on the first [occasioned], given his evidence.

Submissions on appeal

9 The plaintiff submits that the Magistrate did not construe the phrase "staying overnight" according to the ordinary meaning of the words and the legislative purpose of the *Local Government Act* and failed to properly apply the relevant principles of statutory interpretation. It is submitted that the phrase is not to be correctly understood by reference to the dictionary definitions of each word (its "restricted meaning") but by its ordinary, vernacular meaning as a phrase (its "broad meaning"). The exact limits of the term are uncertain but it should simply be applied to the particular set of facts. The question is whether, in any particular case, the conduct is proved beyond reasonable doubt to fall within the description. It is also submitted that the principle as to the restrictive interpretation of penal provisions does not apply since the power given to the Council is

"beneficial". The clear purpose of the *Local Government Act* and the notice is to ensure that the amenity to the public of a public area is not adversely affected. The broad meaning is consistent with this purpose whilst the restricted meaning would render it largely ineffectual and easily avoided by the simple expedient of spending a little time each night outside Martin Place.

10 It is submitted on the defendant's behalf that, since both interpretations of the notice are reasonably available, the fact that contraventions attract a criminal penalty should lead to the restricted meaning. Moreover, the broad meaning is not possible to define once it is not accepted that it requires actually remaining in Martin Place during the night time, which is to say from dusk to dawn. The subject is entitled to know whether his or her actions will amount to a breach of the law. Once the restricted meaning is rejected, the possible range of circumstances which might be held to be prohibited is so wide and uncertain that whether he or she has committed an offence if there has been a departure for some unspecified and unpredictable period will only be known when the Magistrate has made a decision on the charge. Thus the broad meaning should be rejected for the further reason that it is so uncertain as to be an unreasonable alternative interpretation. In this respect, it is also argued that the broad meaning is so uncertain as to be *ultra vires* s 632 or, alternatively, that a notice of such uncertainty is not a notice within the section for the purpose of carrying a penalty for its breach.

Is the restricted meaning open?

11 The appeal has proceeded upon the basis, correctly, that the phrase in question has no technical meaning but is to be construed in accordance with its ordinary meaning. Its ordinary meaning, however, is a question of fact: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 322 at [23]. "And the question whether a set of facts to which those words are capable of applying do fall within their range is also a question of fact" (ibid at [28]). However, where the statutory language, though utilising

ordinary language, is ambiguous, so that it can be interpreted as having two (or more) possible constructions, and it is necessary to choose between them that must be, as I understand it, a question of law alone, to be determined by application of the usual rules of construction.

12 It seems to me to be clear that the notice in this case was not directed only to prohibit remaining in Martin Place between dusk and dawn. The fact that this then gives rise to considerable uncertainty as to the period during which remaining there is prohibited does not, to my mind, gainsay this conclusion. It cannot have been intended that, for example, if persons were to commence their stay at dusk and then move out for some short period or periods, ultimately returning to stay until dawn they would be able to avoid prosecution. Thus, the restricted meaning cannot be right. At all events, "staying overnight" is a vernacular composite phrase which is by no means limited to the sum of the individual meanings of "staying" and "overnight". I have no doubt that it was used, and intended to apply, in the vernacular sense and not intended to be restricted as is contended by the defendant. It should be noted also that the notice in issue in this case is the particular notice erected in Martin Place, Sydney, which is part of and within a busy commercial precinct. A notice erected in, say, a park or beach reserve might be differently interpreted.

13 The penal consequence of disobedience is not immaterial. But it cannot erect into effectiveness a meaning that is not open on the usual canons of construction. The relevance of the penal character of an enactment has been the subject of many statements in the cases. It seems to me that, for present purposes, the applicable rule is adequately summed up in Geddes and Pearce, *Statutory Interpretation in Australia*, 7th ed (2011) at 298 –

> ... [The] task of the court is neither to be too ready to convict nor to acquit. The mere discovery of an ambiguity in a penal statute should not automatically mean that a defendant must be acquitted. The court must go further in its inquiry. It must ascertain the legislature's wishes as best it can and then carry out those wishes. Should there be any ambiguity in the statute, the court must endeavour to resolve that ambiguity by the application of the various aids to construction that are applicable to all statutes.

> Then, and only then, if a doubt still remains as to the meaning of the penal provision should the issue be resolved in favour of the defendant.

Thus, the rule comes into play after the general rules of interpretation have left an unresolved ambiguity: it is a rule of "last resort" (*Beckwith v The Queen* (1976) 135 CLR 569 per Gibbs J (as his Honour then was) at 576). This is not to doubt that an ambiguity must be resolved in favour of a defendant but the statutory language must genuinely present the necessity to choose between competing interpretations (*R v Parr* [2009] VSC 166, Whelan J at [16]).

14 The restricted meaning is not, to my mind, fairly open as an available interpretation of the notice. It is not made available by the uncertainties inherent in the broad meaning. That the notice has penal consequences is immaterial at this point in the interpretative task.

Is the notice invalid for uncertainty?

15 Several things seem to be reasonably clear in respect of the meaning of the vernacular phrase. Firstly, it concerns the use of Martin Place – obviously a part of it – for the purpose of accommodation. It is not confined to sleeping. However, for example, striding up and down even if for the entire night would not, to my mind comprise "staying overnight". This meaning is strengthened by its connexion with the notion of "camping", with which it is allied.

16 However, the difficulty is presented not so much by the requirement that Martin Place is not to be used for the purpose of accommodation, which is a wide term but, I think, sufficiently meaningful to be applied to a person's conduct, remembering that, in the event of a reasonable doubt about whether what has been done amounts to accommodation, the defendant must be acquitted. The real problem is presented by the uncertainty of the period for which Martin Place is used in this way. I have already rejected the notion that this must start at dusk and last until dawn, since the

ordinary meaning of the phrase (as the Magistrate pointed out, although the example of staying in a hotel, where the room is booked for the night, seems, with respect, inapt) does not connote such precision or anything like it. Such possible interpretations as a substantial part of the night do not satisfactorily resolve the uncertainty; I suppose most of the night could yield precision, as the hours of darkness can be calculated and halved, so that any significantly longer period would constitute the offence. This solution, however, does not in my view convey the substance of what is connoted by "overnight" in the phrase. What, say, if the six or so hours (depending on the season) of the defendant's use as accommodation started at dusk and went on until 1am or thereabouts. This would, I think, not satisfy the ordinary meaning of the phrase "staying overnight", although starting at some time before the midpoint and remaining until dawn probably would. Other possible variations can, of course, be posited but, in the end, except as it were for the outer limits, the phrase is inherently uncertain.

17 It will be seen that the terms of any notice, non-compliance of which can be a criminal offence, can be very wide indeed: they need only "relate" to the matters listed in s 632(2); furthermore, those matters themselves, certainly in paragraphs (e) and (f) are of very wide connotation. The terms of a notice within this section must necessarily be limited to some extent. Certainly, the notice would need to aid the purposes of the *Local Government Act* 1993, specified in s 7, although it is difficult to see any apposite purpose there listed. Perhaps the charter provided for in s 8 gives some guidance in this respect, for example, "to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account for, and manage the assets for which it is responsible". In this case, it is accepted that the Council is entitled to regulate the use by the public of Martin Place to ensure that its function as a public thoroughfare is not unreasonably impeded and it is only used as a public thoroughfare. The prohibition of camping or staying overnight appears to be consistent with this entitlement. The problem is, however, that the notice, if given the broad construction for which the plaintiff contends, does not allow persons

to know, with any reasonable certainty, what, or more accurately, when they are prohibited from "staying" (except at the unarguable extreme) and, hence, when their conduct has become criminal. It is submitted for the defendant that the degree of uncertainty is so great that the notice is either *ultra vires* or, at all events, does not come within the provisions of s 632(1) which imposes criminal liability, it is contended, only where the terms of the notice are reasonably certain.

18 The question of the effect of uncertainty on the validity of subordinate legislation generally commences with *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184, where the validity of price control orders which had uncertain effects was considered. Dixon J (as his Honour then was) discussed the question whether certainty is a requirement in subordinate legislation in general terms before considering the particular price order, made pursuant to a regulation promulgated under wartime regulatory legislation. His Honour said (at 194 – 197, omitting some references) –

> "The order is attacked as *ultra vires,* because it does not pursue the authority conferred upon the Prices Commissioner by the regulation, and is void for uncertainty.
>
> Under some parts of reg 23 uncertainty doubtless goes to power, for if some of the precise authorities which it gives are to be well exercised, it will be necessary to name or specify the matters and things intended, including amounts, and to use some exactness. But 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. The doctrine appears to me to be an innovation and to have come from a generalisation from or transfer of a rule, or supposed rule, for determining the validity of bylaws.
>
> The common law, from the time the control of the King's courts over franchise and local or special jurisdictions was established, has allowed to corporations, boroughs and vestries a power to make only reasonable by-laws for the government of the members or inhabitants or parishioners ... In England, the rule was carried over and applied to the statutory powers of the modern municipal corporation, but in Australia, as the result, I think, of early

> decisions of this court, unreasonableness is not treated as an independent ground of invalidity...
>
> In more recent times the necessity for reasonableness has given rise to a requirement that a by-law shall be certain. In his work on *Corporations,* published nearly a century ago, Mr Grant wrote (at 86) —
>
> > "It (the bye-law) ought to be expressed in such a manner as that its meaning may be unambiguous and in such language as may be readily understood by those upon whom it is to operate. Except in the two Universities and the College of Physicians, a bye-law being in Latin would be bad for that reason..."
>
> It is, perhaps, to the foregoing passage that we may trace so much of the well-known statement in the dissenting judgment of Mathew, J, in *Kruse v Johnson,* [1898] 2 QB 91 at p 108, as includes certainty among the conditions of validity of a by-law. It is interesting to notice that in America, too, certainty has come to be required of a municipal by-law or ordinance.
>
> But I cannot see how this history warrants the courts in adopting, as a general rule of law, the proposition that subordinate or delegated legislation is invalid if uncertain... I should have thought that, in this matter [the power conferred by the *National Security Act* 1939-1943 to make regulations] stood on the same ground as an Act of Parliament, and were governed by the same rules of construction. I am unaware of any principle of law or of interpretation which places upon a power of subordinate legislation conferred upon the Governor-General by the Parliament a limitation or condition making either reasonableness or certainty indispensable to its valid exercise...
>
> The Prices Order, however, is made by the Commissioner under a regulation, and not of an Act of Parliament. Let it be assumed that it may be regarded as an administrative order, not as a piece of legislation. But, even so, I should think that uncertainty, as a test of validity, arose from the nature of the power. On this footing, in the end, the question comes back to *ultra vires*, in the present case, the question whether the order is *ultra vires.*

19 A council, no doubt, can erect notices on public places within its area. Whether those notices have any legal effect is a matter that, ultimately, must depend upon the *Local Government Act* or the Regulations made under it. There is no general power in either enactment to erect notices of the kind under consideration here. Section 632 does not authorise the erection of a notice by a council but merely states the effect of failing to comply with it, providing the terms of the notice relate to the matters

specified in s 632(2). Accordingly, a notice is neither statutory nor regulatory nor in any sense made or given under such an instrumental power. Its character as imposing a legal duty or prohibiting specified conduct is simply derived from the penal liability imposed by s 632.

20 It follows, as it seems to me, that no question of *ultra vires* arises. That is not to say, however, that uncertainty is irrelevant. Notices as to which s 632 imposes criminal consequences for breach must be, in my opinion, sufficiently certain to enable the relevant tribunal as well as those brought before it to determine whether the impugned conduct is prohibited. A council might nevertheless erect an uncertain notice. However, s 632 will not permit prosecution for an alleged breach of its terms.

21 Although the question is not one of *ultra vires*, cases which have considered the effect of uncertainty of penal provisions on validity can, by analogy, be informative.

22 In *Evans v State of New South Wales* (2008) 250 ALR 33 the Full Court of the Federal Court of Australia (Branson, French and Stone JJ) considered whether a regulation made under the *World Youth Day Act* 2006, which provided that an authorised person might "direct a person within a World Youth Day declared area to cease engaging in conduct that ... causes annoyance or inconvenience to participants in a World Youth Day event ..." Failure to comply with a direction, without reasonable excuse, gave rise to an offence punishable by fifty penalty units. The applicants planned to demonstrate and otherwise communicate with participants in respect of a number of issues relating to same sex marriage, civil unions, sexism, racism and homophobia. The Court referred to the dictionary definitions of "annoy" which defined the term as "to ruffle, trouble, vex" and "disturb in a way that is displeasing, troubling or slightly irritating" and continued –

> [82] Conduct which may attract a direction under cl 7(1)(b) is conduct which "causes annoyance ... to participants in a World Youth Day event". That is to say it is conduct which actually results in its observers being ruffled, troubled, vexed, disturbed, displeased or slightly irritated. These are responses which depend

> very much on the individuals concerned. Some may find protests of the kind which are proposed by the applicants mildly amusing. Others may be practising Catholics or Christians who agree with some of the protestors' points and are not troubled by them. There may be others who find the protests irritating and who are, in the relevant sense, annoyed by them. Annoyance to "participants" within the meaning of the Regulation may be annoyance to many or a few. There is no objective criterion to assist the judgment of "an authorised person" in deciding whether to issue a direction under cl 7. There may be circumstances in which it would be difficult if not impossible for a person to whom a direction is given to know whether his or her conduct was such as to authorise the giving of the direction. It is little consolation to the person affected by a direction that he or she could argue the point later in a prosecution in a court of law as the state suggested.
>
> [83] In our opinion the conduct regulated by cl 7(1)(b) so far as it relates to "annoyance" may extend to expressions of opinion which neither disrupt nor interfere with the freedoms of others, nor are objectively offensive in the sense traditionally used in state criminal statutes. Breach of this provision as drafted affects freedom of speech in a way that, in our opinion, is not supported by the statutory power conferred by s 58 [of the Act] properly construed. Moreover, there is no intelligible boundary within which the "causes annoyance" limb of s 7 can be read down to save it as a valid expression of the regulating power.

23 It will be seen that this discussion did not look at uncertainty as an independent element of invalidity but, rather, as a question of *ultra vires*. (The reference to freedom of speech concerns the extent of the regulating power and is not of present materiality).

24 Many requirements or prohibitions which are significantly uncertain might nevertheless be valid. Thus, in *Anchorage Butchers Limited v Law* (1939) 42 WALR 40 a requirement that a vehicle used in the transport of meat was to be "properly ventilated" was held to be valid, Dwyer J said (at 43) –

> "... as to ventilation, what is proper is what is considered suitable by the reasonable, prudent and competent man, having regard to the article carried and the circumstance of carriage. That is a standard not unfamiliar, and one which actually exists."

25 Again, in *Merrell v Roberts* (1909) 26 WN (NSW) 73 the regulation prohibited driving "at such a rate of speed... or in a manner as to... frighten or injure any... animal". Sly J applied the test, "if the Court sees

that a bye-law is capable of a sensible construction, that construction should be adopted" and concluded that, since a Court was able to consider whether in the circumstances, the vehicle was being driven at an "improper or excessive" speed, which would frighten a domestic animal which is customarily ridden or driven in the street. In *R v Goreng-Goreng* [2008] ACTSC 74 a regulation prohibiting public servants from disclosing information if it is "reasonably foreseeable that the disclosure could be prejudicial to the effective working of government" was submitted to be invalid for uncertainty. Refshauge J referred to *King Gee Clothing* and, in particular, to the passage from the judgment of Dixon J (set out above) in which his Honour declined to describe to the doctrine that certainty is a separate requirement distinct from whether it is authorised by the relevant legislative instrument. Noting that, in *King Gee Clothing* (and other cases) impugned administrative orders were struck down for uncertainty, Refshauge J said –

> [47] In my view, however, this needs to be seen in the light of what the power was that was given to the maker of the subordinate legislation. The power was to fix and declare maximum prices. Such an exercise, it can be seen, needs and can achieve a degree of specification to which "estimate, assessment, discretionary allocation or apportionment" is not appropriate. Thus, the regulation which required such an approach can be seen to be a failure to exercise the power actually given.
>
> [48] That, however, does not mean that in appropriate circumstances, subordinate legislation cannot introduce terms which require some degree of judgment...
>
> ...
>
> [52] I have found this the most difficult ground. It is correct that a person should be able to know clearly what is going to be criminal conduct before one engages in it. It may be, that such an approach is not required where what is at issue is only a matter of discipline, such as an employer is entitled to expect of and exact upon an employee.
>
> [53] On the other hand, there are many examples of criminal laws which depend upon judgment: dangerous driving and manslaughter by negligent conduct come easily to mind.
>
> [54] I have also to consider the context of the provision. We are considering conduct which almost inevitably will not lend itself to

> an exact description which cannot be a matter of judgment. It is not like a price or the description of a place...
>
> [55] The description of the legitimate interests of government ... namely the "effective operations of government" ... is a fair description of what information should not be permitted [to be disclosed] and I am sure that public servants will, by and large, comprehend what is encompassed. It also has to be taken into account that ... [the regulation] has a number of provisions ... which make the obligation of an APS employee much clearer and more precise. Such an employee can be clearly expected to have had an appropriate induction or training about such matters, though I readily concede this was not in evidence before me.
>
> 56. Accordingly, not without considerable hesitation, I have concluded that ... [the regulation] is not invalid as uncertain and that this attack also fails.

26 In *City of Brunswick Corporation v Stewart* (1941) 65 CLR 88 Williams J said (at 99) –

> A by-law must be certain in the sense that it must contain adequate information as to the duties of those who are to obey ...

His Honour cited with approval the point made by Lord Russell of Killowen LCJ in *Kruse v Johnson* (1898) 2 QB 91 at 98–99 "that such by-laws should be benevolently interpreted, and that credit should be given to those who have to administer them that they will be reasonably administered."

27 Terms which are uncertain but susceptible to what might be called "the reasonable person" or "sensible construction" tests may yet be upheld by excluding an extreme meaning that might result from a literal interpretation and giving an uncertain meaning sufficient clarity to enable a practical application of the law to be enforced. As Refshauge J observed in the passage quoted above, even serious criminal offences such as manslaughter or dangerous driving involve matters of judgment; but they apply objective standards that an ordinary person can understand.

28 However, some terms are inherently so uncertain as to prevent such constructions. In *Ex parte Zietsch; Re Craig* (1944) 44 SR (NSW) 360 this Court in Banco considered the validity of a regulation made under the

National Security Act 1939–1943 which, in substance, made it a criminal offence to purchase goods on the black market. Amongst the questions considered was the meaning of the phrase "cost to the buyer" which was used, in effect, to determine whether the goods were purchased at black market prices. In delivering the judgment of the Court, Jordan CJ said (at 365) –

> "In *Tuck & Sons v. Priester* [(1887) 19 QBD 629 at 645], reference was made to "the well settled rule that the Court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it," and it was said [ibid at 638] that "If there are two reasonable constructions we must give the lenient one". The Regulations in question are highly penal, since they subject a persons who disobey their prohibitions to the risk of being imprisoned for an unlimited period and to a fine of unlimited amount. In my opinion, to adopt the words of Barton J. in *Ingham v Hie Lee* (1912) 15 CLR 267 at 271, "It is clear that the phrase in question, namely, 'work for himself or for hire or reward,' is open to more interpretations than one; and in construing a penal provision in such a case we are bound to remember that we ought not to adopt a construction adverse to an accused person unless he is brought clearly within the words of the Act."...
>
> [The regulation is] too uncertain to be enforceable, because the meaning of the word "cost" as used therein, is uncertain. The rule that a statutory regulation or order, to be valid, must be sufficiently certain, that is, clear enough to enable those to whom it is addressed to know the nature and the extent of the legal duty which it imposes, is one that has received a good deal of discussion in several recently decided cases, particularly in relation to the meaning of the word "cost". From these authorities it would appear that, in some of the contexts, the word is born clear, in others it achieves clearness *ex post facto* as the result of judicial decision, in others it is, and remains, obscure. The quesiton is whether it is sufficiently clear in its present context. In approaching such a question, in relation to any word, expression, or nexus of expressions, I think the following general consideration should be kept in mind. (1) By "certain" or "clear" is meant clear enough to serve the practical purpose which the provision is evidently intended to serve. A court should not be astute to pick holes in a regulation or order and hold it to be bad because of possibility of obscurity which are purely theoretical or fanciful. (2) In determining whether a provision is sufficiently certain, regard must be had not only its language but to its immediate and general context and the nature of the subject matter with which it is concerned. (3) If the provision itself is clear, the fact that its application, generally or in particular cases may be difficult or burdensome, is immaterial. (4) The fact that there is some element of uncertainty is not necessarily conclusive. The uncertainty may be one capable of being resolved by the

> application of some rule of construction. Thus, if it is clear enough that one or other of two meanings (each suffciently clear in itself) must have been intended, but which of the two it is not quite clear, there is then no possible doubt whatever that the court should treat the more lenient of the two as being the one intended ... (5) It is only if the provision is *prima facie* uncertain, and is also not reasonably capable of being regarded as sufficiently certain for practical purposes by an application of the considerations to which I have referred, that it is proper to treat it as bad for vagueness.

His Honour then discussed a number of cases which had considered the meaning of "cost" in other price fixing orders and concluded –

> In these circumstances, guiding myself as best I can by the two recent decisions of the High Court [which considered the meaning of the term] and by the general considerations to which I have referred, I find myself quite unable to attribute to the word "cost" as here used a meaning which I can feel reasonably certain must have been intended by the draftsman, and should also have been reasonably plain to the whole class of wholesalers to whom... [the regulation] is addressed. For these reasons I am of the opinion... [the regulation] is void for uncertainty...

29 The problem in *Zietsch* involved a commercial term with some technical aspects but, essentially, using ordinary words. In *Foster v Aloni* [1951] VLR 481, the Full Court of the Supreme Court of Victoria considered the validity of what amounted to an administrative notice, by way of advertisement in the press which was authorised under regulations made under the *State Electricity Commission Act* 1928 (Vic). The notice, in effect, prohibited the use of electricity for heating water during certain hours. The expression that, it was contended, was uncertain, was "which [electric] element is not so wired and fixed as to operate continuously". Lowe ACJ, delivering the judgment of the Full Court said (at 486-7) –

> "... Admittedly, if there is an ambiguity which is reasonably capable of being resolved by the adoption of one of two or more possible meanings, it is legitimate for the Court to prefer and adopt that construction which would in the present case achieved the purpose of rationing electricity in those cases where human forgetfulness or selfishness is most likely to require control lest they lead to a waste of electricity – *vis*, the cases of cisterns manually switched on and off. Much discussion with counsel of the position and effect [of a variety of automatic devices] has led us to the conclusion that the actual type of system intended to be referred to ... "[is an] element [which is not] ... incapable of being switched off by any means, manual or automatic, forming part of

> the wiring and fixing of that element". But even now we feel no confidence that so technical a conception is what is aimed at, and we are quite certain that the language ... cannot fairly be held to convey any such conception, or indeed any inteligible conception, to the public to whom the advertisement is addressed ... Various views were advanced by counsel as to the manner in which these doubts might or should be resolved. But in truth the whole clause requires complete restatement if it is to be definite and intelligible to the public. When it is recalled that the advertisement is addressed to consumers, who disobey at their peril, the fact that the Court after prolonged scruitiny is uncertain of the meaning of the item and its exemptions, emphasizes the necessity that the commission should express in unambiguous language what course of conduct it requires the consumer to pursue ... Whether we say that the present item ... is void for uncertainty or, though a valid exercise of power, fails by lack of definition to operate so as to apply to anyone any sanctions of the regulations, does not perhaps matter. In either view, the defendant was on the occasion in question here not subject to any valid prohibition in respect of his use of electricity.

Although, again the term was somewhat technical, it was constructed of ordinary words. The problem was that no useful interpretation could be given on either basis.

30 In the present case, it is impossible to apply to the broader meaning any words that control its application and notions of reasonableness or sensible construction do not yield an outcome that can be said with any conviction to be the intended purport of the notice. In short, the uncertainty of the phrase cannot be resolved by construction.

31 (It might, perhaps, be worth noting that the notice prohibits, as well, "any other act which may cause inconvenience ... to others" – were it to lose "other" – seems to be sufficiently certain (or objective) to be capable of attracting the sanction of s 632 and arguably might have applied to the defendant. I mention this to show that wide language may yet be certain enough.)

Conclusion

32 Adopting Lowe ACJ's language quoted above, although the Council has the power to erect the notice in question here, the prohibition against

"staying overnight" fails by its uncertainty to apply the sanction of s 632 to any person's conduct in that respect. The error of the approach of the learned Magistrate as to the significance of the penal character of the prohibition and in giving the phrase a restricted meaning does not, therefore, lead to the result that the acquittal of the defendant was unjustified. It follows that the summons should be dismissed with costs.

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I certify that this and the 19 preceding pages are a true copy of the reasons for judgment herein of Justice Adams.

Dated 24 April 2013

Associate: R Ingrey