interpretation NOW!

Episode 9 – 26 February 2016

Australian Government
Australian Taxation Office

The late Justice Antonin Scalia of the US Supreme Court had a massive influence on interpretation[1]. At a 2011 conference, Pagone J said it was a 'daunting privilege' to introduce the American judge[2]. His 'originalist' ideas on how the US constitution should be read[3] – what framers meant *at the time* – now dominates debate. Our High Court, however, generally rejects 'trapped-in-time' approaches to the Australian constitution. Scalia J was also highly influential on statutory interpretation, to which he applied his strict 'textualism'[4]. We have not embraced this in Australia either, where a purposive approach has long been required. **iTip** – as a Scalia J sampler, try his ground-shaking majority opinion in the 2008 gun rights case, *District of Columbia v Heller*[5].

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Legislative scheme

R v Host [2015] WASCA 23

When different statutes of the same legislature form a 'legislative scheme', courts will try to construe them 'to produce a sensible, efficient and just operation'[6]. Driven by the need for a 'rational integration of the legislation', this is exactly what the court did in this sentencing case (at [111]).

As Pearce & Geddes point out (at [3.39]), the principle applies with 'special significance' where the pieces of legislation are introduced the same day, but also to the reciprocal legislation of different states. **iTip** – be careful first to characterise and understand the 'scheme' before applying the principle. How to read intersecting provisions from different Acts in various situations is always tricky[7].

Judgment words

Australian Building Systems [2015] HCA 48

When interpreting statutes, we are to start and finish with the statutory words[8], not to substitute what a minister may say for those words[9]. In the *ABS* case (at [227]), Gordon J observed that judicial decisions 'are not substitutes for the text of legislation' either, something that follows from the separation of powers under our Constitution.

Judicial statements 'must never be allowed to supplant or supersede … proper construction'[10]. Don't read what judges say about provisions in isolation from both their reasoning and from the provisions themselves[11]. **iTip** – you should *always* return to the statutory text in your interpretive journey and anchor your answers in that text!

Delegated legislation

QBE Insurance v Mordue [2015] NSWCA 380

This case (at [92]) makes the point that delegated legislation gives way to the statute under which it is made where the two are 'irreconcilably incompatible or inconsistent'[12]. Delegated legislation includes regulations, rules, by-laws, determinations and instruments made under an Act.

Regulations cannot control what an Act means, but they may be used to ascertain and understand a 'legislative scheme'. *QBE* notes that delegated legislation inconsistent with the enabling Act is beyond power[13]; not simply that it cannot change what the Act means[14]. **iTip** – when dealing with delegated legislation in any of its forms, remember its status and pay attention to the wider context.

Incurable defects

DPP v Walters [2015] VSCA 303

Legislation in Victoria had introduced 'baseline sentencing' but was 'wholly silent' on the means by which it was to be implemented. The majority said (at [57]) that extrinsic materials could not be used to fill the gap[15], and that any judicial action in this regard 'would be to legislate, not interpret'.

The means by which baselines were to be achieved could not be implied, nor could words be read into the statute despite clear statements of intent. The provisions were held to be 'incapable of being given any practical operation' and were 'incurably defective'. **iTip** – judges themselves are extremely sensitive to suggestions they have usurped the role of parliament … a lesson surely for all of us.

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[1] Biskupic, *American Original* (2009) – biography.
[2] Pagone J, *Introducing Justice Scalia* (2011).
[3] Scalia, *A Matter of Interpretation* (1997).
[4] Scalia & Garner, *Reading Law* (2012).
[5] *District of Columbia v Heller* 554 US 570 (2008).
[6] *Permanent Trustee* (1987) 9 NSWLR 719 (at 722).
[7] *Commissioner v Eaton* [2013] HCA 2 (at [43-48]), illustrates.
[8] *Consolidated Media Holdings* [2012] HCA 55 (at [39]), for example.
[9] *Bolton* (1987) 162 CLR 514 (at 518), *PM* [2008] FCA 1886 (at [47]).
[10] *Ogden* [1968] UKPC 28 (at 5), *Stanley* [2014] FCA 644 (at [74]).
[11] *Comcare v PVYW* [2013] HCA 41 (at [15-16]).
[12] Pearce & Geddes (at [3.41-3.42]).
[13] cf *Toyota v Marmara* [2014] FCAFC 84 (at [94-96]).
[14] *Plaintiff M47* [2012] HCA 46 (at [56]).
[15] *Alcan* [2009] HCA 41 (at [47]), quoted.

Episode 10 – meaning of 'person'; meaning of 'Australia'; from time to time; 'means and includes'