

interpretation NOW!

Episode 24 – 31 May 2017



Australian Government

Australian Taxation Office



iNOW! has aimed at building capacity on interpretation for 2 years – let’s all get better at this! Two disrupting ideas still lurk in the shadows, however. The first is that ‘anything goes’, with every position being equally tenable. This is misconceived. Determining what parliament meant and selecting between constructional choices both involve key interpretation skills¹. Second is the notion that interpretation is a ‘fashion industry’ – that is, in constant flux driven by judicial whim. Yes, the principles are flexible, judges may express them in different ways, and there are sometimes small breaks with the past. But, nearly 4 decades ago, the courts then parliament entrenched the purposive approach. It remains coherent, robust and ‘established’².

Gordon Brysland Tax Counsel Network

←→ Status of tax laws

[Commissioner v CLP Power HK \[2017\] HKCFA 18](#)

It’s not every day that a Hong Kong case says something about our tax laws³. This court (at [35]) says that the principles of interpretation apply just as much to tax laws as to other statutes. Kirby J in our High Court is quoted for 2 propositions. First, it is ‘hubris on the part of specialised lawyers’ to think that their statute is special and, second, that tax laws are to be construed ‘like any other federal statute’⁴.

Episode 14 made this point via what the High Court told us back in 2009 – ‘tax statutes do not form a class of their own’⁵. **iTip** – read tax laws without bias one way or the other – that’s the message from HK.

👤 Judicial comity

[Re Amerind Pty Ltd \[2017\] VSC 127](#)

Precedent compels consistency between courts in the same system. Courts in different systems (and co-ordinate courts in the same system) are not strictly bound by decisions of the other. But they are expected to be consistent unless convinced the other is ‘plainly wrong’⁶. This case (at [293]) underlines the public interest⁷ in ‘judicial comity’⁸.

Precedent is a ‘must’ rule, while comity is a ‘should’ convention⁹. Comity arises when state courts exercise federal jurisdiction (or interpret uniform legislation) and between single judges (including in tax cases¹⁰). Single judges often follow each other.

🔗 Use of regulations

[Ryde v PIA \(No 4\) \[2017\] NSWSC 436](#)

This case (at [93]) re-works themes in Episode 4. Regs usually cannot ‘be taken into account’ when interpreting the Act, but an exception is where the regs and statute ‘form part of a legislative scheme’ (as here). Ticking the ‘scheme’ box, however, provokes further questions – (A) how are the regs to ‘be taken into account’? and (B) what legitimate impact may they have on what the statute means?

Regulations are available ‘to ascertain or identify the scheme’, but cannot be leveraged to expand, read down or rewrite the Act unless there is some ‘clear stipulation’ in this respect¹¹ – for example, where the Act is expressly made subject to the regs¹².

👉 Practical consequences

[Lockwood v Ecoliv Buildings \[2017\] VSC 109](#)

Episodes 1 & 7 deal with when practical outcomes support one construction over another. This case (at [96-97]) quotes *Project Blue Sky*, then observes that courts ‘frequently [refer] to the consequences of competing statutory interpretations to determine which ... best suits the purpose of an Act’.

Zammit J said that ‘interpretation by reference to consequences’ is now a ‘reasoning technique that is an aspect of the purposive approach’¹³. This is positive comfort that reasoning from consequences is a valid way for resolving contested issues in the interpretation space. **iTip** – always make sure first that your view is reasonably open on the text.

■ Writer – Gordon Brysland, Producer – Michelle Janczarski.

¹ Episode 2, *Momcilovic* [2011] HCA 34 (at [50]).

² *Talacko v Bennett* [2017] HCA 15 (at [82]).

³ Thanks to Robert Olding for spotting this one.

⁴ *ECT v Ryan* [2000] HCA 4 (at [84]) dissenting.

⁵ *Alcan* [2009] HCA 41 (at [57]).

⁶ *Hicks* [2003] FCA 757 (at [75-76]), *Undershaft* [2009] FCA 41 (at [68-74]).

⁷ *Batterham* [2006] HCA 23 (at [73-74]).

⁸ *Mustac* [2007] WASCA 128 (at [37-46]), *BHP* [2007] FCAFC 157 (at [88-89]).

⁹ Generally, Pearce & Geddes (at [1.9-1.13]).

¹⁰ *Rabinov* 82 ATC 4517 (at 4523), *La Macchia* (1992) 110 ALR 201 (at 204).

¹¹ *Lundbeck* [2017] FCA 56 (at [87]), *Master* [2008] HCA 38 (at [19]).

¹² *O’Connell* [2007] VSCA 131 (at [28]), *CCM* [2013] NSWSC 1072 (at [120-123]).

¹³ Quoting from *Geddes* (2005) 2 UNELJ 5 (at 47).