

# interpretation NOW!

Episode 25 – 30 June 2017



Australian Government

Australian Taxation Office



It's tax time again! As a result, there is more focus on ATO public guidance and the need to make calls on tax issues and outcomes. Sometimes, this will raise the need for interpretation. Where this occurs, remember to apply ordinary purposive principles. Start and finish with the statutory text – this is fundamental. In between, consult context in the widest sense – you don't need to first find ambiguity or some other problem. Look at legislative history, extrinsic materials, policy and the mischief. Be careful, however, not to substitute what the explanatory memorandum says for the Act. And don't decide the policy first, then read the statutory words through that lens. Past **iNOW!** episodes will help you sort out most interpretational issues at tax time.

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## Purpose and text

### [Justice Susan Glazebrook \(2015\) article](#)

'Purpose is king (or is it?)' – this is the question posed by Glazebrook J of New Zealand in a recent article<sup>1</sup>. After referring to the 'modern purposive approach'<sup>2</sup>, the judge says that (A) 'purpose is there to help ascertain the meaning of text and not to override or dominate it', and (B) the 'text is the starting point with purpose as a cross-check'.

The judge concludes that 'text should be the starting point (and thus is king)'. The same is true in Australia where the correct approach is 'text > context > text'<sup>3</sup>. If you start with purpose, there is a 'risk of distorting the meaning'. **iTip** – this is key.

## Ejusdem generis

### [Greater Shepparton CC v Clarke \[2017\] VSCA 107](#)

Ejusdem generis<sup>4</sup> ('of the same kind') is an old rule limiting general words, like 'other', by reference to some common feature (genus) – for example, 'railway, road, pipeline or other facility' is confined to facilities on or through which goods move<sup>5</sup>.

*Clarke* (at [67-69]) notes some limitations however – (A) the rule doesn't displace ordinary principles, (B) it conflicts with a trend against reading down general words<sup>6</sup>, (C) it is not to be applied in an abstract or mechanical way<sup>7</sup>, and (D) it's 'rarely justified'. There is also the problem of correctly identifying the genus (if one exists)<sup>8</sup>. **iTip** – always consider this rule, but with an eye to caution.

## Penal provisions

### [Aubrey v R \[2017\] HCA 18](#)

The traditional rule says that doubt in penal provisions is resolved in favour of the accused. However, Pearce & Geddes (at [9.8]) call this a 'somewhat naive approach' and, as far back as 1976, it was described as 'one of last resort'<sup>9</sup>.

The true position is more nuanced, with penal consequences being part of the context to which regard must be had<sup>10</sup>. In *Aubrey* (at [39]), the majority said penal statutes 'are to be construed in accordance with ordinary rules of construction'. This continues a consistent message from the High Court that all statutes are to be approached in the same general way for interpretation purposes.

## Retrospective replacement

### [LM Investment Management v EY \[2017\] QSC 73](#)

This case (at [118]) refers to a common law rule that, where a repeal is followed by a re-enactment in substantially the same terms, the new provision 'may be construed to apply retrospectively'<sup>11</sup>.

This rule is essentially remedial in nature. It protects the validity of things done under repealed provisions – an important thing in practice. Legislation in most jurisdictions nowadays deals with the problem directly – for example, s 7 of the *Acts Interpretation Act 1901*, which applies since 2011 to both repeals and amendments<sup>12</sup>. However, the common law rule can still be relevant in some state contexts.

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■ Special thanks – Ivica Bolonja & Jeremy Geale.

<sup>1</sup> [Glazebrook J \(2015\) 14 Otago Law Review 61](#).

<sup>2</sup> s 5(1) of the [Interpretation Act 1999 \(NZ\)](#).

<sup>3</sup> Episodes 2, 4 and 7.

<sup>4</sup> Apologies for the use of Latin in 2017.

<sup>5</sup> *Canwan Coals* (1974) 4 ALR 223 (at 228).

<sup>6</sup> *Mattinson* [1977] 1 NSWLR 368 (at 373), *Gas & Fuel* [1964] VR 617 (at 620).

<sup>7</sup> *Clark* [2003] NSWCA 91 (at [127]), *Vella* [2015] FCAFC 53 (at [63]).

<sup>8</sup> Pearce & Geddes (at [4.28]), Episode 18.

<sup>9</sup> *Beckwith* (1976) 135 CLR 569 (at 576).

<sup>10</sup> *Alcan* [2009] HCA 41 (at [57]), *R v A2 (No 24)* [2016] NSWSC 737 (at [32]).

<sup>11</sup> [SEQACLs](#) [2005] QSC 88 (at [58]), [Marquet](#) [2003] HCA 67 (at [126]).

<sup>12</sup> Pearce & Geddes (at [6.9]).