



interpretation NOW!

Episode 33 – 28 February 2018



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Justice Pagone of the Federal Court has given a paper on the continuing need for tax academics to provide assistance to judges¹. After discussing core interpretation principles, the judge said that academics can assist courts in ‘resolving ambiguities in legislation’, and are most useful in ‘exploring and explaining context’. The knowledge of a judge unaided in this regard is ‘likely to be less fully informed than that of the academic’, the judge said. While litigation provides a more intense focus in the search for statutory purpose, it is sound practice always to see what academics have had to say about provisions. Be careful, however, that the methodology applied is the same as for a judge, and that purpose is derived at the correct level of specificity. **iTip** – a general or political purpose of raising revenue will not help much when reading specific tax provisions².

+ Adding words

[Hunter Quarries v Mexon \[2017\] NSWSC 1587](#)

Adding words to fix minor glitches in legislation is part of purposive interpretation³, though it seldom succeeds in practice. The argument was that ‘permanent impairment’ excluded situations where death followed ‘shortly after injury⁴’. Schmidt J (at [89-101]) declined to ‘read in’ allegedly missing words of limitation, as preconditions were not met⁵.

Also, the proposed words to be added were inconsistent with legislative intent, and would create uncertainty. Had parliament wanted the outcome suggested, it ‘would have expressly provided for that result’. **iTip** – courts are cautious in applying this technique and you should be too!

Statutory definitions

[Law Society of NSW v Bouzanis \[2017\] NSWCA 330](#)

Are client payments to solicitors on account of disbursements ‘trust money’ for legal practice purposes⁶? Yes, said the majority, despite the difficult terms of the statutory definition involved.

While definitions ‘should not readily be put aside’, this might be done ‘where context suggests that a different meaning should be adopted to give effect to the apparent purpose of a specific provision’. A literal reading of the provision with the definition incorporated would have frustrated the apparent purpose. **iTip** – a range of issues need to be kept in mind when dealing with statutory definitions⁷.

De minimis principle

[Riverstone v Blacktown CC \[2015\] NSWLEC 137](#)

We all know *de minimis*⁸, but how does it apply in practice? First, it is a principle of construction, not a rule of law. Second, its application always depends on text, purpose and context⁹. Third, it inevitably involves a substantial element of value judgment¹⁰.

In this case, development consent for works was refused as the council was not satisfied the works would ‘not increase flood levels on adjoining properties ...’ The fact that floods may be ‘very small to very large’ went against *de minimis* applying. It was not self-evident, said the court (at [23]), that the flood increase requirement should be read as qualified by a ‘trivial or minor’ breach.

‘in connection with’

[R v PJ \[2017\] NSWCCA 290](#)

It’s no secret that phrases like ‘in connection with’¹¹ routinely raise interpretation problems because of their general nature and variability of operation¹². They may cover a wide spectrum of relationships. The court in this case, like many others before it, exercised caution in approaching the phrase.

However, it went a step further saying (at [31]) that ‘greater care’ should be exercised when these terms appear in criminal statutes¹³. Relational phrases are like chameleons – they take their colour from their surroundings¹⁴. **iTip** – relational phrases must always be ‘appropriately confined to accord with the object and purpose’ of the provision in which they appear.

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¹ Pagone J *Brambles, hedgehogs and foxes* [2018] FedJSchol.

² *Carr* [2007] HCA 47 (at [6]), *Esso* [2017] HCA 54 (at [69]), Episodes 6 & 22.

³ *Lumb & Christensen* (2014) 88 ALJ 661 (at 665), *Pearce & Geddes* (at [2.32]).

⁴ ss 65 and 66 of the *Workers Compensation Act 1987*.

⁵ See *Taylor* [2014] HCA 9 & Episode 5 for applicable conditions.

⁶ s 246(4) of the *Legal Profession Act 2004*.

⁷ See Episodes 1, 11, 23 and 27.

⁸ Minor variations from a legal requirement are to be disregarded.

⁹ *Earnell* (1996) 142 ALR 322 (at 324-327), *Unisys* [1997] FCA 777.

¹⁰ *Pearce & Geddes* (at [4.22]), *Samuels* (1985) 6 *Statute Law Review* 167.

¹¹ See Episodes 19 & 26, *Pearce & Geddes* (at [12.7-12.8]).

¹² cf *Goyal* [2018] FCA 129 (at [34-36]), *Our Town FM* [1987] FCA 301 (at [37]).

¹³ In this case, s 73(2)(c) of the *Crimes Act 1900*.

¹⁴ *Technical Products* [1989] HCA 24 (at [5]), *Morris* [2017] FCAFC 97 (at [41]).