

interpretation NOW!

Episode 37 – 29 June 2018



Australian Government

Australian Taxation Office



The *Possum Case* is a classic application of constructional choice principles in a practical setting¹. At issue was the scope of an exemption² from prohibitions on forestry operations found detrimental to the ‘critically endangered’ marsupial. Mortimer J (at [44-51]) quotes the High Court³ on constructional choice, emphasising that ‘evaluation of the relative coherence of the alternatives with identified statutory objects or policies’ is the central criterion against which meaning is determined. The judge also points out that the nature of the provision (in this case, an exemption from criminality) is important, and that an interpretation which promotes clarity ‘will generally be preferred’⁴. **iTip** – *Possum Case* is a masterclass on how to do constructional choice.

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Extreme examples

[Minister v Aboriginal Land Council \[2018\] NSWLEC 26](#)

In deciding what a provision means, we invariably test things against hypothetical facts. The rationale is that the outcomes produced will shine a light on which construction best fits the statutory purpose. A natural inclination in this process is to frame our examples at the outer limits of speculation in order to make the choice involved as stark as possible.

This case (at [71]) cautions that ‘construction of legislation is not to be tested by reference to extreme examples or distorting possibilities’⁵. By all means, test your hypothesis against a variety of assumed facts. Be aware, though, that extreme examples may produce false or unreliable results.



Prison decisions

[Bernard-Ross v NSW \[2018\] NSWSC 182](#)

Courts have long been reluctant to interfere ‘in the discipline, administration or management of prisoners’⁶. This case says (at [41]) that, as a matter of statutory interpretation, a judicial officer ‘should be slow to interfere with administrative decisions taken by those tasked with running prisons’⁷.

This policy bias against review applies only to the extent that bad faith, improper purpose or extreme unreasonableness are not shown. Although non-interference with operational decisions belongs more to the zone of administrative law, this case shows how prisons legislation is read down similarly.



Parts of speech

[Territory Resources v Secretary \[2018\] NTSC 12](#)

Interpretation statutes invariably say something like, where a word or phrase is defined, ‘other parts of speech and grammatical forms of that word or phrase have corresponding meanings’⁸ - s 18A of the *Acts Interpretation Act 1901*, for example⁹.

This case (at [56-57]) describes how the Northern Territory provision¹⁰ works in practice. One, it extends to a noun where the verb is defined. Two, it yields to contrary intent. Three, it does not apply where the derivative word ‘is being used in a different sense’¹¹ (three is merely a subset of two).

iTip – it will usually be context and purpose which demonstrates a contrary intent or different usage.



Interpretation 101

[City of Ryde v Haddad \[2018\] NSWCA 35](#)

Sometimes even the most obvious things have to be spelt out. Legislation commonly adopts the format – ‘Any person who – (a) lives in Sydney, or (b) has red hair, must register’. The appeal court in this case (at [20]) pointed out (continuing our simplified example) that someone who lives in Sydney, but who does not have red hair, must still register¹².

The argument was that the obligation to register only bound the ‘closest referent’ - anyone with red hair. Pearce & Geddes describe the basic principle as ‘concluding words qualifying all paragraphs’¹³. This is no more than a common-sense grammatical reading of the provision >>> **interpretation 101**.

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¹ *Friends of Leadbeater’s Possum Inc v VicForests* [2018] FCA 178.

² s 38(1) *Environmental Protection and Biodiversity Conservation Act 1999*.

³ *Esso* [2017] HCA 54 (at [71]), *SZTAL* [2017] HCA 34 (at [14, 37-39]).

⁴ *Powell* [2017] FCAFC 89 (at [15]) quoted.

⁵ *Forge* [2006] HCA 44 (at [46]) cited, *Shaw* [2003] HCA 72 (at [32]).

⁶ *Modica* (1994) 77 A Crim R 82 (at 88), *Fyfe* [2000] SASC 84 (at [18]).

⁷ *McKane* [2015] NSWSC 737 (at [55-56]), *Kelleher* [1999] NSWSC 86 referred to.

⁸ cf *Catterall* [2016] AATA 691 (at [33]).

⁹ Terms like ‘cognate expressions’ and ‘derivatives of definitions’ are used.

¹⁰ s 23 of the *Interpretation Act* (NT).

¹¹ *Treloar* [1992] 1 VR 447 (at 464), Pearce & Geddes (at [6.66]) referred to.

¹² Pearce & Geddes (at [12.3]), *R v Scarlett* (1972) 20 FLR 349 (at 351) cited.

¹³ cf Scalia & Garner *Reading Law* (at 156), discussing *Jama* 543 US 335 (2005).