interpretation NOW!

Episode 39 – 30 August 2018

Sometimes even the most basic things can be overlooked … things like whether purposive interpretation is mandatory. As we know, a daunting range of common law rules and canons may impact statutes. Into this mix, parliament legislated s 15AA of the *Acts Interpretation Act,* first in 1981 to say that a 'construction that would promote the purpose or object … shall be preferred', then in 2011 to say that the 'interpretation that would best achieve the purpose or object … is to be preferred'. Statutes ordinarily shut down inconsistent common law[1], but some saw s 15AA more as useful help than something you <u>must</u> apply[2]. An American academic, however, wrote that s 15AA 'arguably mandates *purposivism uber alles*'[3]. Leaving aside the language, this pretty much sums it up. Section 15AA involves an 'unqualified statutory instruction'[4].

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Legislative Codes

Hayman v Cartwright [2018] WASCA 116

When a common law term appears in a legislative code, do we read the code as if it were the common law merely expressed in a different medium? In this case, a statutory code definition included the term 'assault'[5]. Was common law 'intention' necessary?

The court cautioned against any idea that the statute was simply retelling the common law story[6]. Reference to common law notions is okay of course as part of the context. But, consistent with the language and this context, 'assault' did <u>not</u> require any element of 'intention' to be shown. **iTip** – if a common law term is used in a statute, don't blandly assume that the common law meaning must apply.

Retrospectivity

Minogue v Victoria [2018] HCA 27

Retrospectivity describes a law that changes legal rights linked to past events[7]. Gordon J (at [111]) noted it is 'somewhat distasteful', more so when it takes away accrued rights[8]. It was held, however, that parole rules[9] were <u>not</u> retrospective. Also, parole is a privilege not a right[10]. There was nothing the prisoner could rely on, therefore, nor could those rules 'upset otherwise settled expectations'[11].

This case shows the subtle difference between a law which is retrospective and one which merely takes account of past events as the basis for how a future law applies. **iTip** – in all retrospectivity situations, first refresh your understanding of the concept[12].

Remedial Legislation

L v Commissioner [2018] TASSC 32

Episode 11 explains that the old rule about reading remedial legislation liberally still survives, but it has its limits[13]. Geason J in this case (at [25]) said it is unsound to interpret statutes of this kind 'with meticulous literalism'. On the other hand, no beneficial construction can enlarge the operation of an Act 'beyond the actual words used'. It is the <u>text</u> that controls how far an Act goes in achieving its underlying purpose – remedial or otherwise.

In this victims of crime case[14], the term 'violence' was read as 'always speaking' and extending to 'infliction of harm by coercion and intimidation, emotional abuse and intimidation, and economic abuse'.

'and' &'or' (again)

Oxanda Childcare v MAAG [2018] VSC 370

This case (at [36]) reinforces that 'and' and 'or' are to be given their ordinary meanings unless context indicates otherwise. The defendant argued that the proper construction of a lease termination clause required 'and' to be read as 'or' for the contract to make commercial sense. The court held that the leasing context and consistent use of 'and' and 'or' throughout the lease defeated this argument.

As Episode 15 discusses, the words 'and' and 'or' all but invariably take their ordinary meanings, given the clearly understood distinction between them[15]. **iTip** – 'or' is a form of disjunctive and creates alternatives >>> **interpretation 101**, Episode 37.

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[1] *L* [2017] SASCFC 133, Grantham & Jensen (2016) 42 Monash ULR 360.
[2] Barker [2012] JCA Coll (at [16]), cf Duffy & O'Brien (2017) 40 UNSWLJ 952.
[3] Frickey [2007] JC Mono 159 (at 169), cf Frickey (2006) 80 ALJ 849 (at 856).
[4] SZTAL [2017] HCA 34 (at [39]), *Possum Case* [2018] FCA 178 (at [46]).
[5] s 222 of the *Criminal Code* (WA).
[6] R v LK [2010] HCA 17 (at [96-97]), Boughey [1986] HCA 29 (at [43]).
[7] Episodes 7 & 14, AEU [2015] FCA 1196 (at [237-262]).

[8] Quoting Hill J in *Boral Windows* (1998) 83 FCR 215 (at 221).
[9] ss 74AAA and 127A of the *Corrections Act 1986* (Vic).
[10] Crump [2012] HCA 20 (at [60]), Knight [2017] HCA 29 (at [27]).
[11] Carlton 512 US 26 (at 37) (1994), Connolly 475 US 211 (at 229) (1986) cited.
[12] Pearce & Geddes (at [10.1-10.10]) is the best place to start.
[13] AB [2011] HCA 42 (at [24]), Fagan (1982) 150 CLR 666 (at 675).
[14] s 4 of Victims of Crime Compensation Act 1976 (Tas).
[15] Episodes 20 & 32.

Episode 40 – A2 and Skene; 2 cases with lots about interpretation
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