interpretation NOW!

Episode 41 – 26 October 2018

Australian Government
Australian Taxation Office

Professor Dennis Pearce has published a new book called *Interpretation Acts in Australia*. This invaluable resource fills a gap in the learning on interpretation as a companion volume to his foundational text (with Harry Geddes) *Statutory Interpretation in Australia*. The new book deals in depth with all the 'nuts and bolts' of the interpretation of legislation in this country - things we all may skip over, forget, or be blissfully unaware of. Do you know, for example, what the 'change in style' provisions say or what the courts have made of them?[1] You may also wonder (like me) how you did without this book for so long. *Interpretation Acts in Australia* will be launched by Gageler J of the High Court during the *Public Law Weekend* at ANU. **iTip** – get this book!

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Canons of construction

Hayne & Gordon *course notes*

The authors, one a Royal Commissioner and the other a High Court judge, refer to 'one of the complexities' students face – being that canons of construction 'can be used to justify almost any result that the user wishes to achieve'[2]. This is not a new idea[3] - one observation being that they involve a 'jumble of mutually contradictory directives'[4].

Five points – (1) this 'complexity' confuses argument with interpretation. (2) the latter does not 'wish' for any particular result[5]. (3) s 15AA[6] and courts require a purposive approach. (4) any choice between canons is directed by that approach. (5) s 15AA excludes canons to the extent of any inconsistency[7].

Degree of purpose

Owners – SP No 66375 v King [2018] NSWCA 170

The point from this case (at [290]) is that, in complex legislation like the *Home Building Act 1989*, the level at which statutory purpose is framed 'can be critical to the outcome'. The issue was whether warranties for design defects made developers liable in the absence of a contract with the builder.

The majority said 'yes', Ward JA pointing (at [296]) to comments that legislation 'rarely pursues a single purpose at all costs'[8]. He said that this Act 'was seeking to strike a fair balance between the interests of consumers and home building contractors' and to redress builder bias. **iTip** - purpose these days is more often subtle than brute.

Adding words

Bautista v Minister [2018] FCA 1114

The High Court in 2014 integrated the 'adding words' rules into purposive theory[9], but that does not mean it's easy to do. Experience shows the opposite. In this case, Collier J (at [83-88]) refused to read 'time limit' words into a migration provision because inadvertence was not shown and it was not certain what words would have been inserted.

It is true that 'adding words' is argued far more than before in litigation[10]. The High Court, however, recently set a corrective tone on the issue with its reminder that interpretation 'remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or repair it'[11].

Constructional choice

FCT v Sharpcan Pty Ltd [2018] FCAFC 163

Constructional choice is a hot topic, and one that is truly at the epicentre of interpretation these days[12]. Choice between possible meanings of a provision is driven by the 'unqualified statutory instruction' in s 15AA of the *Acts Interpretation Act 1901*.

Articulation of the principles was undertaken initially by French CJ[13]. More recently, Gageler J has been the chief developer and explainer in cases like *SZTAL*[14] and *Esso Australia*[15]. It is the majority in *Sharpcan* (at [207-216]), however, which best draws together in one place all the threads of constructional choice. **iTip** - there is no substitute for reading these 10 paragraphs and no reason not to >>> CLICK HERE!

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[1] Episode 42 will deal with this next month.
[2] Hayne & Gordon *course notes – Statutes in the 21st Century* (at 6).
[3] Llewelyn (1950) 3 Vanderbilt LR 395 (at 401), for example.
[4] Ekins & Goldsworthy (2014) 36 *Sydney Law Review* 39 (at 43).
[5] cf *AEU v DECS* [2012] HCA 3, Episode 6.
[6] s 15AA of the *Acts Interpretation Act 1901*.
[7] *Plaintiff S10* [2012] HCA 31 (at [97]) illustrates.
[8] *Carr* [2007] HCA 47 (at [5]), Episodes 6, 22, 38.
[9] *Taylor* [2014] HCA 9 (at [35-40]), Episodes 5, 33.
[10] Over-argued sometimes, like 'principle of legality'.
[11] *HFM043 v Republic of Nauru* [2018] HCA 37 (at [24]).
[12] Episodes 2, 8, 34, 37, 38; also (2018) 92 ALJ 81.
[13] *Momcilovic* [2011] HCA 34 (at [50]).
[14] *SZTAL* [2017] HCA 34 (at [38]).
[15] *Esso Australia* [2017] HCA 54 (at [71]).

Episode 42 – changes in style; presumption of consistency; general and specific; calculation of time