



interpretation NOW!

Episode 45 – 28 February 2019



The modern approach to interpretation takes legislation as 'always speaking'. This dynamic method, in considering intervening things and the 'life of the statute', however, may raise issues about parliamentary sovereignty. There is a necessary tension between a requirement to progressively interpret legislation, against one which looks at meaning at the time of enactment. It is true that parliament knows that its statutes are read the new way, can make it clear if this is not to occur, and can change the law in the face of an undesirable decision. The most important thing, however, is that the 'always speaking' protocol is understood and applied properly. **iTip** – revisit Episode 2, and read Pearce & Geddes (at [4.9-4.12]).

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Statutory purpose (again)

Unions NSW v NSW [2019] HCA 1

Episode 44 commented that purpose and context are to be considered 'at the same time' as the text when interpreting provisions. In this electoral funding case (at [169]), Edelman J makes important observations about statutory purpose and context.

The search for purpose, 'involves a construct used to determine the meaning of the words'. This 'accords with our conventions for understanding language'. It requires 'concurrent consideration of the meaning of words used in their context together with the purpose for which the words are used'. Purpose must also be identified by the 'same context' and materials as determine meaning.

Legislative instruments

Bupa HI v Andrew Chang Services [2018] FCA 2033

The same principles as apply in the interpretation of statutes apply to legislative instruments – in this case, the *Medicare Benefits Schedule*. Because the MBS 'prescribes technical matters', it is to be construed 'in light of practical considerations to achieve the most reasonably practicable result'².

The court also referred to the perception that delegated legislation often has a range of minor wrinkles, the inference being that some latitude is to be granted at the point of interpretation³. Not all courts see it this way, however⁴. **iTip** – start with the ordinary principles and deal with any drafting glitches in instruments if and when they arise.

Superiority of s 15AA

Mulpha Australia v CSPC [2018] NSWLEC 179

This case, about an old Sydney building, raised the meaning of 'land' in heritage legislation⁵. The NSW interpretation provision required 'a construction that would promote the purpose or object underlying the Act ... '⁶. Section 15AA was in this form until amended in 2011 to require a construction 'that would best achieve the purpose or object'⁷.

Does it matter? Yes - the NSW provision allows only 'limited choice', where 15AA recognises a range of meanings may emerge. In *Mulpha*, both views promoted purpose in different ways, and the NSW provision was 'not called upon'. The 'unqualified statutory instruction' in 15AA would have fixed this⁸.

Food glorious food

Comptroller v Pharm-A-Care [2018] FCAFC 237

Food classification cases are arid forensic exercises⁹. Question – are vitamin gummies (1) 'medicaments' (free from duty) or (2) 'food supplements' (subject to duty) for customs tariff purposes?¹⁰ Answer – (1).

The following points are important - (A) the meaning of ordinary words (like 'food') is a question of law¹¹, (B) local knowledge and common sense should be the guide (not 'intensive analysis')¹², (C) the 'essential character' of the goods considered objectively will be decisive¹³, and (D) having no absolute definition, the meaning of 'food'¹⁴ starts with statutory purpose and context, not the dictionary¹⁵. **iTip** – not everything you eat is food.

▪ Writers – John Milburn & Gordon Brysland. Producer – Joseph Tranzillo.

¹ Hoffman (2018) 134 LQR 553 (at 558-560) cited.

² Gill [1963] 1 WLR 929 (at 934-935), *Sevdalis* [2017] FCAFC 9 (at [26]) cited.

³ *Heatscape* [2016] NSWLEC 45 (at [151]), Condon [2014] NSWCA 149 (at [44]).

⁴ *4nature* [2017] NSWCA 191 (at [45]), Episodes 13 & 28.

⁵ s 57(1)(e) of the *Heritage Act 1977* (NSW).

⁶ s 33 of the *Interpretation Act 1987* (NSW).

⁷ s 15AA of the *Acts Interpretation Act 1901*.

⁸ *SZTAL* [2017] HCA 34 at [39], Brysland & Rizalar (2018) 92 ALJ 81.

⁹ cf Proctor [2009] EWCA Civ 407, *Perram J* [2013] FedJSchol 30 (at [12]).

¹⁰ Schedule 3 to the *Customs Tariff Act 1995*.

¹¹ *May* [2015] FCAFC 93 (at [183-193]), *Norrie* [2013] NSWCA 145 (at [62]).

¹² *Lansell* [2010] FCA 329 (at [57]), Seay [1976] 1 WLR 1117 (at 1121) cited.

¹³ *Air* [2001] FCA 1386 (at [25]), *Primaplas* [2016] FCAFC 40 (at [55]) cited.

¹⁴ As well as different kinds of food and various related issues.

¹⁵ *Cooling* [1990] FCA 204 (at [113]), *Thiess* [2014] HCA 12 (at [23]) cited.