

# interpretation NOW!

Episode 48 – 31 May 2019



Australian Government

Australian Taxation Office



Under the ‘modern approach’, objective discernment of statutory purpose is not only integral<sup>1</sup> but also a requirement of the ‘unqualified statutory instruction’ in s 15AA<sup>2</sup>. For constitutional reasons<sup>3</sup>, however, the starting point in all cases must be the text of the statute. Context in the ‘widest sense’ is to be consulted as part of this process. Whether this is expressed as ‘text-context-text’<sup>4</sup> or ‘text-context-purpose’, the method involves repeated reconsideration of the text in light of what context, purpose, extrinsic materials or legislative history may reveal. Calls to ‘begin with a consideration of the text itself’<sup>5</sup> are not to be seen as some reversion to literalistic methods of the past. **iTip** - As Edmonds J has said, those methods have passed into history<sup>6</sup>.

*Philip Borrell* Law Interpretation



## Judicial powers

### [Brewster v BMW Australia Ltd \[2019\] NSWCA 35](#)

In a class action for faulty airbags in BMWs, a ‘common fund’ order was made that 25% of any proceeds be paid in priority to the litigation funder. Section 183 said that the court may ‘make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings’<sup>7</sup>.

BMW said the order was beyond power for principle of legality<sup>8</sup> and other reasons. In rejecting all these arguments, the court (at [56-57]) emphasised the principle that judicial powers are not to be read narrowly ‘nor confined by fine distinctions’<sup>9</sup>. The ‘common fund’ order made was also consistent with the legislative scheme in question.



## Statutory definitions

### [Tjungarrayi v WA \[2019\] HCA 12](#)

This case (at [89]) reminds us that the operation of all statutory definitions yield to contrary intention<sup>10</sup>. The Act said that a native title claim could not be made over unallocated Crown land covered by a lease. While some parts of the Act said ‘lease’ included mining leases<sup>11</sup>, there was no consistency.

The court held that a native title claim could be pursued because what mattered here was the context in which the ‘non-extinguishment principle’<sup>12</sup> applied. As noted (at [91]), provisions giving effect to that principle showed that ‘lease’ extended to mining leases. **iTip** – statutory definitions do not always determine the answer.



## Retrospective legislation

### [Ketjan v Assistant Minister \[2019\] FCA 516](#)

Ketjan’s visa was cancelled under a migration provision requiring cancellation where someone has a substantial criminal record and is currently imprisoned. The decision-maker took into account a custodial sentence completed *before* the provision came into force. Was this prevented by the presumption against retrospective laws?<sup>13</sup>

The court held (at [40]) that the provision didn’t affect rights that existed in the past. It simply used past events ‘as a basis for what it prescribes for the future’<sup>14</sup>. **iTip** – legislation is not retrospective simply because it refers to events that happened before commencement of the law in question.



## Purpose and objects

### [Cappello v RMS \[2019\] NSWSC 439](#)

RMS could ‘acquire land for any of the purposes of this Act’. Affected owners resisted acquisition because the ‘objects’ clause in the Act did not extend to acquiring land for road tunnelling work. Campbell J (at [40-46]) rejected the argument on the basis that the ‘purposes of this Act’ are to be found in ‘all the provisions of the statute’<sup>16</sup>.

Although the word ‘purposes’ is a synonym of ‘objects’, the latter was ‘pitched at a high level of abstraction’. The objects clause did not control operative provisions, and it was necessary to see how parliament had ‘implemented those objects’<sup>17</sup>. The Act as a whole confirmed the power to acquire.

■ Writers – Philip, Gordon, Oliver & Sarah. Producer – Suna.

<sup>1</sup> *Thiess* [2014] HCA 12 (at [22-23]).

<sup>2</sup> *SZTAL* [2017] HCA 34 (at [38-39]).

<sup>3</sup> *Dossett* [2003] HCA 69 (at [57]).

<sup>4</sup> Episode 2.

<sup>5</sup> *Alcan* [2009] HCA 41 (at [47]).

<sup>6</sup> Edmonds J (2012) 12 AGSTJ 79 (at 79).

<sup>7</sup> s 183 of the *Civil Procedure Act 2005 (NSW)*.

<sup>8</sup> cf *Lee* [2013] HCA 39 (at [314]), Basten JA in Meagher & Groves (eds) 74 (at 91).

<sup>9</sup> *Shin Kobe Maru* [1994] HCA 54 (at [29]), *Hall* [2009] NSWCA 64 (at [54]).

<sup>10</sup> *Treloar* [1992] 1 VR 447 (at 449), *Buresti* (1998) 88 FCR 399 (at 401).

<sup>11</sup> s 242(1) of the *Native Title Act 1993*, *Ward* [2002] HCA 28 (at [299]).

<sup>12</sup> s 238 of the *Native Title Act 1993*.

<sup>13</sup> *Maxwell* [1957] HCA 7 (at [7]), Episodes 2 & 39.

<sup>14</sup> *Robertson* [1973] VR 819 (at 824).

<sup>15</sup> *Project Blue Sky* [1998] HCA 28 (at [69]) quoted.

<sup>16</sup> *James* (1930) 43 CLR 386 (at 410-411), *Wilkinson* (1882) 20 Ch D 323 (at 335).

<sup>17</sup> *Lancaster* (1981) 54 FLR 129 (at 152) quoted.