interpretation NOW!

Episode 121 – 30 June 2025

Australian Government
Australian Taxation Office

The 'modern approach' to statutory interpretation was first articulated in this country by Mason J in 1985[1]. Courts now tell us week-by-week that the principles are 'well established'. Indeed, they are so well established that often little more is said than that the method involved follows the familiar 'text > context > purpose' protocol. Earlier this month, in a case about 'improvements', five High Court judges described this approach as the 'required approach'[2]. Even if this was already obvious, the remark is important in the same way confirmation that s 15AA of the *Acts Interpretation Act 1901* is mandatory was important. To the extent it has not been appreciated there is only one approach to the interpretation of our statutes, the position is now made explicit. We do not have a range of possible approaches each vying for attention. **iTip** – and that's a good thing.

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Taxing statutes

Detector Inspector v CoInvest Ltd [2025] VSC 135

Given long service leave charges paid to a fund were a 'tax'[3], it was argued (A) that related rules should be read narrowly, and (B) that, where two meanings are reasonably open after applying the ordinary rules of interpretation, the issue should be resolved in favour of the taxpayer[4]. Watson J rejected this. Tax statutes form no special class, the judge said, but their tax character is part of the context to be considered[5].

Comment – that a taxpayer wins if ambiguity remains 'after applying the ordinary rules' is an idea that harks to the past and is yet to be squared with modern authority. In any event, it will be rare in practice, but might occur where no purpose can be identified[6].

Anthony Hordern principle

Charlie [2025] FCAFC 55, *KP* [2025] NSWCA 69

These cases illustrate the caution necessary when applying the *Anthony Hordern* principle – that an express power subject to conditions excludes reliance on a general power over the same subject matter[7]. *Charlie* (at [52-55]) says that the ambit of the express power must be wholly within or subsumed by the general power[8]. The statute must be seen to confer only one power to take the action in question.

KP (at [63-67]) says the principle must be weighed with other interpretation principles[9]. In particular, it must be consistent with application of the normal 'text > context > purpose' protocol. **iTip** – *Anthony Hordern* is more nuanced than it may first appear.

Drafting assumptions

Harris v Military Rehabilitation [2025] FCA 381

In this case, McEvoy J (at [26]) quotes as follows[10] – **'The current approach to statutory interpretation involves courts assuming that those drafting legislation, and parliaments which enact it, are familiar with the general principles of statutory construction, and that courts will take statutory language as they find it, read with the purpose and context in which it appears'**[11].

One writer describes this as 'drafting presumed competent'[12]. Another refers to the 'age-old confrontation between judges and drafters'[13]. Pearce talks about a 'potentially unsympathetic audience'. Drafters, parliament and judges work in a system of shared understandings and respect.

Impact of practice

Gamage v Riashi [2025] NSWCA 84

At issue was whether ICAC could itself launch prosecutions against persons it had investigated. Basten AJA answered 'no'. There was no express or incidental power permitting ICAC to launch prosecutions[14]. This was despite the fact later parliamentary debates on amendments had referred to the 'practice' of ICAC commencing prosecutions which were later to be taken over by the DPP.

The judge said (at [39]) that the extent of the alleged practice was unknown. In any case, however, a mere practice 'cannot affect the proper construction of legislation'. This outcome aligns with courts not deferring to an administrator's view of the law[15].

▪ **Thanks** – Oliver Hood, Agnes Liu, Jacinta Dharmananda & Patrick Boyd.

[1] *K & S Lake* (1985) 157 CLR 309 (315), cf *Prince Earnest* [1957] AC 436 (461).
[2] *Valuer-General v WSTI Properties 490 SKR Pty Ltd* [2025] HCA 23 [34].
[3] s 4 of the *Construction Industry Long Service Leave Act 1997* (Vic).
[4] *Redland* [2024] HCA 7 [177], Herzfeld & Prince [10.150], Pearce [9.50-9.53].
[5] *Alcan* [2009] HCA 41 [57], cf *Sunlite* [2023] FCAFC 43 [6].
[6] cf *Ravbar* [2025] HCA 25 [238] Edelman J.
[7] Pearce 10th ed [4.66-4.72], BDM (275-277), Herzfeld & Prince [6.150-6.160].
[8] *Nystrom* [2006] HCA 50 [59] quoted, cf *Leon Fink* (1979) 141 CLR 672 (678).
[9] *Stradford* [2025] HCA 3 [64] quoted, cf *Plaintiff M70* [2011] HCA 32 [50].
[10] *MJD Foundation* [2017] FCAFC 37 [125] Perram J.
[11] *Taylor* [2014] HCA 9 [35-40], *Marshall* (1972) 124 CLR 640 (649) cited.
[12] Bennion (413), cf *Ealing London* [1972] AC 342 (360).
[13] Greenberg in Barnes (ed) *Coherence of Statutory Interpretation* (71).
[14] *Shanahan* (1957) 96 CLR 245 (250), *Balog* (1990) 169 CLR 625 (635) quoted.
[15] *AEU* [2012] HCA 3 [33], *City of Enfield* [2000] HCA 5 [43], BDW [33.5].

Episode 122 – legislative purpose and *Ravbar v Commonwealth* [2025] HCA 25

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