

interpretation NOW!

Episode 55 – 18 December 2019



Australian Government

Australian Taxation Office



What interpretational themes attracted the attention of the High Court in 2019? The first one is that nothing in the last decade or so suggests any 'return to a literal approach to construction'¹. The central importance of the 'twin pillars' – *Project Blue Sky* and *CIC Insurance* – continued to be stressed², along with the instruction to consider purpose and context 'at the same time'³ as the text³. Problems with preconceived policy and the limited utility of extrinsic materials in determining meaning also featured⁴. These factors all confirm a certain stability of the law, something also underwritten by s 15AA. To be clear, there were no seismic shifts or fashion adjustments on the interpretation landscape during 2019. Finally, Professor Dennis Pearce published the 9th edition of *Statutory Interpretation in Australia*, a majestic text which only grows in importance and authority.

Gordon Brysland Tax Counsel Network



Statutory scheme

[Caltex Australia v FCT \[2019\] FCA 1849](#)

Instruments forming part of a legislative scheme are generally read together for interpretational purposes⁵. For 2 or more Acts to form a scheme, they must be interdependent in a meaningful way⁶. It is not enough that they merely have some wider common purpose or some incidental connection.

Davies J (at [37]) said the Acts in question 'do not have co-extensive fields of operation and do not deal with the same subject matter'. This was despite their passage as a 'package of legislation'⁷. They 'have different purposes and operate independently of each other', said the judge. **iTip** – interdependence of operation is necessary for there to be a scheme.



Approved forms

[Le v Minister \[2019\] FCAFC 178](#)

A visa applicant who fails to give correct answers in an approved form may have their visa cancelled¹¹. The applicant answered 'no' to whether he was 'related by blood' to his partner. She was a first cousin, and the minister duly cancelled the visa.

Le argued that, even if forms are not legislative instruments¹², the ordinary rules of interpretation apply when reading them. This was rejected. The court said (at [31]) there was no basis for applying those rules. Forms are not read with formality or complexity, but with a practical bent and without the need for legal research or advice. An incorrect answer was given and the visa was validly cancelled.

■ Writers – Gordon, Cameron, Philip & Sarah. Producer – Cameron.

¹ [A2](#) [2019] HCA 35 (at [37]), cf [CCJ](#) [2019] QSC 267 (at [33]).

² [Masson](#) [2019] HCA 21 (at [42]), [BMW](#) [2019] HCA 45 (at [43]), Episode [49](#).

³ [Unions NSW](#) [2019] HCA 1 (at [169]), Episode [45](#).

⁴ [Williams](#) [2019] HCA 4 (at [79]), [Taylor](#) [2019] HCA 30 (at [87]).

⁵ Episodes [9](#) & [24](#), Pearce 9th ed (at [3.45-3.46], 452).

⁶ [Certain Lloyd's](#) [2012] HCA 56 (at [97-98]).

⁷ cf [Mailes](#) [2001] NSWCCA 155 (at [108]), [Evans](#) [2018] TASFC 3 (at [50]).



Meaning and effect

[Owners v Ternes \[2019\] NSWSC 1579](#)

As an interpretational baseline, applied by the High Court from the very start⁸, all words in legislation are to be given meaning and effect whenever possible⁹. Arguments based on redundancy, however, have a utopian flavour and are rarely decisive in isolation.

In this case, it was argued (at [29-31]) that general provisions be read down to avoid the redundancy of specific ones¹⁰. Parker J's approach seeks to preserve a sensible operation for all provisions in question. In practical terms, the case illustrates a classic *Project Blue Sky* application to situations where different provisions overlap or they are textually inconsistent in some respect – see Episode [43](#) under 'harmony'.



Headings

[Cavanagh v Wollondilly \(No 2\) \[2019\] NSWLEC 181](#)

Our **iTip** in Episode [23](#) was 'be careful with headings'. This case involved the impact of clause headings in an environmental planning instrument¹³. The first thing to look at is whether headings of this kind form part of the instrument in question – here they were not. Second, the general interpretation provision which would otherwise allow recourse to headings did not apply to these instruments¹⁴.

Robson J held (at [43]) that the clause heading had no role to play and, anyway, could not displace the 'clear and ordinary meaning'. Pearce explains the provisions and principles which apply in this often confusing area¹⁵. **iTip** – be careful with headings.

⁸ [Baume](#) (1905) 2 CLR 405 (at 414), [Project Blue Sky](#) [1998] HCA 28 (at [71]).

⁹ Pearce 9th ed (at [2.43], 443), Episodes [16](#) & [23](#).

¹⁰ Dixon J quoted in [Teale](#) (1940) 63 CLR 201 (at 207).

¹¹ s 101 of the Migration Act 1958.

¹² [ALU17](#) [2019] FCA 520 (at [32-33]).

¹³ [Wollondilly Local Environmental Plan 2011](#).

¹⁴ ss 35(2)(a) & 34(1) of the Interpretation Act 1987 (NSW).

¹⁵ *Interpretation Acts* (at [3.1-3.15]), Pearce 9th ed (at [4.65-4.67], 457).

Episode 56 – ejusdem generis; constructional choice; coherence; always speaking

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