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Episode 56 – 30 January 2020



Australian Government

Australian Taxation Office



As noted in Episode 55, the High Court in *The Queen v A2* states that no recent cases ‘suggest a return to a literal approach to construction’¹. That approach ‘has long been eschewed by this Court’, it was said. Judges and tribunals around the land rushed to quote these words². What is interesting is why the High Court felt the need to spell this out. Part of the problem has been an inclination to read judgments as if they were legislation, often reading too much into chance or subtle phraseology³. The overthrow of literalism in Australia dates from 1981⁴, the last 2 decades only confirming the triumph of purpose/context. That approach will often produce a literal answer, just as parliament intends. However, we are not to pre-confine the process by seeking only the literal outcome. That is the fundamental point of which we are now reminded.

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Ejusdem generis

[R v Hicks \[2019\] ACTSC 331](#)

This case (at [15-29]) sets out the law on *ejusdem generis* (‘of the same kind’)⁵. Hicks argued that words he wrote in an exercise book were not ‘child exploitation material’⁶ as they did not ‘represent’ the sexual content in question. ‘Represent’ was defined to mean ‘depict or otherwise represent on or in a film, photograph, drawing, audiotape, videotape, computer game, the internet or anything else’.

Elkaim J rejected that ‘or anything else’ be read *ejusdem generis*. There was no class or genus of things established by the definition – it was a ‘smorgasbord’. **iTip** – as the judge said (at [18]), *ejusdem generis* ‘is to be applied with caution’.

Constructional choice

[DBE17 v Commonwealth \[2019\] HCA 47](#)

A major theme in interpretation over the past decade has been the development of constructional choice theory. Consider the text in its widest context and select the alternative which best achieves the legislative purpose. Nettle J in this case shows how to do it. Did reference to ‘all proceedings’ extend to proceedings of any kind, or was it confined to judicial review proceedings?⁷

Having regard to the history, purpose and consequences of the alternative, Nettle J (at [34]) held only judicial review proceedings were caught. Two other recent High Court cases also provide more expansive tutorials on constructional choice⁸.

Coherence

[Herbert v NSW \[2019\] NSWSC 1703](#)

Coherence is an emerging buzzword⁹. This case (at [69]) says the modern approach to interpretation ‘permits regard to be had to how a related statute deals with a particular topic to arrive at a coherent view of the body of law’. Coherence of this kind is at a level above coherence merely within a statute¹⁰.

The more usual role of coherence lies in the choice between alternate meanings within a statute¹¹. Coherence is neither new nor unanticipated in the world of statutes. It captures the idea of systemic consistency but is suggestive of something more. **iTip** – always try to harmonise provisions coherently as a whole in line with context and purpose.

Always speaking

[BMW Australia Ltd v Brewster \[2019\] HCA 45](#)

Can a court make a ‘common fund order’ in class actions under the general power to make any order it ‘thinks appropriate or necessary to ensure that justice is done’?¹² – ‘no’ said the majority.

Edelman J (at [171]) restates the principle about open-textured words ‘always speaking’¹³ so the essential meaning is applied ‘taking into account changes in our understanding of the natural world, technological changes, changes in social standards and ... changes in social attitudes’¹⁴, and ‘changes in the law since the legislation was enacted’¹⁵. This dynamic principle is central in determining what parliament meant by the words it used in an Act.

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¹ *A2* [2019] HCA 35 (at [37]), noted in Episode 55.

² *CCJ* [2019] QSC 267 (at [33]), *Ribbon* [2019] SASFC 130 (at [128]).

³ cf *Gayle* [2019] NSWCA 172 (at [238]), *Lazarus* [2017] NSWCA 37 (at [87]).

⁴ *Cooper Brookes* (1981) 147 CLR 297 (at 319-321), s 15AA of the AIA 1901.

⁵ *Tasty* [2012] NSWCA 181 (at [54]), Episodes 18 & 25, Pearce 9th ed (at [4.34 on]).

⁶ ss 64 & 65 of the Crimes Act 1900 (ACT).

⁷ s 486B(1) of the Migration Act 1958 (CTH).

⁸ *A2* [2019] HCA 35 (at [35-37]), *BMW* [2019] HCA 45 (at [49-94]).

⁹ Barnes (ed) *Coherence of Statutory Interpretation* illustrates.

¹⁰ Episode 43 (case 10), *SAS Trustee* [2018] HCA 55 (at [20]).

¹¹ cf *Melbourne Apartment* [2019] FCA 2118 (at [90-92]).

¹² s 33ZF of the *Federal Court of Australia Act 1976* (CTH).

¹³ cf (at [44]), Episodes 2, 45 & 47, Pearce 9th ed (at [4.14-4.20]).

¹⁴ *Owens* [2017] 4 WLR 74 (at [39]), *Aubrey* [2017] HCA 18 (at [29-30]).

¹⁵ *Burrows* [2018] *Hamlyn Lectures* (at 29), cf (2011) 37/2 MULR 1.

Episode 57 – statutory scheme; principle of legality; meaning of ‘Australia’; statutory powers

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