

interpretation NOW!

Episode 58 – 27 March 2020



Australian Government

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Is big data coming to statutory interpretation? In a recent US case, judges considered corpus linguistics as an aid to determining the ordinary meaning of statutory words¹. Corpus linguistics involves analysis of vast databases of language to identify common usage. One judge argued it ‘will yield a broader and more empirically-based understanding of the ordinary meaning of a word or phrase by giving us different situations in which the word or phrase was used ...’². Another judge called for caution, raising practical issues and deeper legal concerns³. At the very least, this US case shows that interpretation is not immune from technology. In a world where we all turn to the internet for answers, this issue will surely arise in Australia too.

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Tariff classifications

[Comptroller-General v Pharm-a-Care \[2020\] HCA 2](#)

Tariff classification under treaty items copied into domestic law can be complicated⁴. Were vita-gummies free of duty as ‘medicaments ... containing vitamins’?⁵ The English version of the treaty (our law) contains within Note 1(a) a general exclusion for ‘foods or beverages’ (absent in the French version).

Both texts are ‘equally authoritative’, however, and each treaty term is presumed to have the same meaning in each text. A meaning should be sought which gives effect to all treaty terms as used in each text⁶. Comparison of the texts meant reading down the general exclusion in Note 1(a)⁷. Vita-gummies were not excluded and were therefore free of duty.

Project Blue Sky

[Woods v Newman \[2020\] QSC 10](#)

Decided in 1998, *Project Blue Sky* is one of the rocks on which modern interpretation in Australia stands¹⁰. In *Woods* (at [35]), Applegarth J said the ‘words of any provision must be interpreted in their context and, so far as possible, enable a harmonious operation between different provisions’¹¹. ‘These principles are not in contest’, the judge added.

We start with the text, considering at the same time context in the widest sense, seeking harmony and coherence as a baseline requirement. Where some constructional choice is to be made, it is resolved by statutory purpose – s 15AA. We then return to the text for quality control and constitutional reasons.

■ Credits – Jacinta Dharmananda, Jeffrey Barnes, Gordon, Phillip & Oliver.

¹ *Wilson v Safelite Group Inc* 930 F 3d 429 (2019).

² Thapar J (at 440), cf *Lee & Mouritsen* (2018) 127 *Yale LJ* 788.

³ Stranch J (at 445-448), cf *Ehrett* (2019) 108 *Georgetown LJ* 50.

⁴ *Harmonized System Convention* [1988] ATS 30.

⁵ Item 3004.50.00 in Ch 30 of Section VI in S3 to the *Customs Tariff Act 1995*.

⁶ *Eiser* [2020] FCA 157 (at [137]), cf Art 33 of the *Vienna Convention*.

⁷ This interpretive technique dates back at least to the time of Augustine.

Statutory labels

[Attorney General v WB \[2020\] NSWCA 7](#)

WB was unfit to stand trial for sexual offences and committed to a facility for 3 years. He became a ‘forensic patient’ by statutory definition⁸, something which could be extended on an interim or final basis. If his status as a ‘forensic patient’ lapsed for any reason (including timing issues), could a final order be made to extend that status? Answer – ‘no’.

Basten JA said that, though ‘forensic patient’ is a statutory label⁹, it has a purpose – ‘to identify the status of a person who could be the subject of an order’. Text and context supported expiry of status preventing any final order. Otherwise, people could be in perpetual jeopardy of their liberty being taken.

Common sense

Basten JA (2019) 93 *Australian Law Journal* 367

In 1981, 2 judges said the principles of interpretation ‘are no more than rules of common sense’¹². Basten JA says the days have passed since interpretation was to be seen as some exercise in common sense¹³. Is there inconsistency between these 2 statements?

Rhetorical ‘common sense’, as unanalysed dogmatic truth, has no role in legal work¹⁴. It is evasive & may conceal political choices - Basten JA. Interpretation principles, however, reflect a plain and practical ‘common sense’. They relate back to ordinary usage, shared understandings, language conventions and experience. Common sense of this practical kind is always important in statutory interpretation¹⁵.

⁸ s 42 *Mental Health (Forensic Provisions) Act 1990*, cf Eps 33, 46, 48.

⁹ cf *Starr* [2007] FCA 23 (at [30]), Bension (at 571-572).

¹⁰ Episode 43 under sidebar theme #3 – ‘harmony’.

¹¹ *PBS* [1998] HCA 28 (at [70-71]), cf *Browne* [2020] WASCA 16 (at [61]).

¹² *Cooper Brookes* (1981) 147 CLR 297 (at 320), Pearce 9th ed (at [4.1]).

¹³ cf *Middleton* (2016) 40 MULR 626 (at 632), Episodes 22 & 51.

¹⁴ *McHugh* (1999) 73 ALJ 37 (at 45), cf *Burton* (2005) 1/3 JATTA 1.

¹⁵ cf *Sullivan Statutory Interpretation* (at 36-37), *Maher* 8 MULR 587.

Episode 59 – text/context/purpose; principle of legality; compulsory acquisition; ‘subject to’

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