

interpretation NOW!

Episode 60 – 29 May 2020



Australian Government

Australian Taxation Office



In *R v A2*¹, the High Court articulated an overall method of statutory interpretation. Although judges and academics have approached this topic before², *A2* is notable for its extended discussion by the majority. Under the heading, ‘Construction – method’, the court outlines a method to be followed. First, the judges reaffirm that the task is ‘to ascertain the intended meaning of the words used’. Second, the court is not going to return to any narrow literalism – cf Episode 56. Third, ‘mischief’ in the 21st century means some state of affairs the law is yet to address. Fourth, there is a balanced discussion on the role of purpose as an aid to interpretation. Last of all, but most importantly, do not lose sight of the words of the statutory text.

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⋮ Punctuation

[Lawson v Minister \[2020\] NSWSC 186](#)

This case, dealt with in Episode 59, also contains a punctuation issue³ – that being, whether a semicolon separated 2 discrete things within a schedule; or required them to be read together. Ward CJ (at [80]) observed that semicolons may replace ‘and’ as a ‘hierarchically superior punctuation mark if the reader is not to be momentarily puzzled or misled’⁴.

It was held (at [127]) that context and purpose confirmed that the semicolon indicated separate things rather than a singular description⁵. Past times were marked by a distinct hostility to punctuation. The modern position is – don’t ignore it, but make sure it is ‘used consciously and not haphazardly’⁶.

☰ Deeming provisions

[Holdsworth v Police \[2020\] NSWSC 228](#)

Deeming provisions are always read against the statutory purpose they serve¹⁰. Did transitional rules in the 1996 Act deem a firearms prohibition order to continue in force¹¹? The rule preserves orders ‘made under’ the 1989 Act ‘and in force immediately before’ repeal of that Act. The original order was made under the repealed 1973 Act, even though it continued in force under the 1989 Act.

Beech-Jones J observed (at [41]) that deeming provisions frequently involve ‘artificial assumptions’ the precise limit of which is often ‘difficult or unrealistic’ to predict¹². A purposive approach confirmed the 1973 order was preserved here.

🌐 COVID-19 and Magna Carta

[R v IB \(No 3\) \[2020\] ACTSC 103](#)

How might a 1215 UK statute affect territory COVID-19 laws?⁷ *IB* sought a jury trial on sexual offences, but ‘trial by judge alone’ was ordered under those laws. *IB* said clause 29 of Magna Carta, always part of ACT law, guaranteed trial by jury – ‘No freeman shall be taken or imprisoned ... but by lawful judgment of his peers or by the law of the land’.

Murrell CJ said (at [118]) that Magna Carta ‘as an ancient statement on the importance of the rule of law ... is entirely consistent with the emergency provisions’. COVID-19 laws are a ‘necessary but proportionate’ alteration to normal practice⁸; the justice system ‘must continue’ despite the crisis⁹.

🔗 Extrinsic materials

[A-G v Melco Resorts \[2020\] NSWCA 40](#)

Extrinsic materials cannot displace the clear meaning of the text – this is fundamental¹³. Was legal professional privilege abrogated for witnesses before a casino inquiry having royal commission ‘powers, authorities, protections and immunities’?¹⁴

The Second Reading Speech said the same ‘protection’ was preserved as for witnesses before the Supreme Court. The Act, however, was clear in its abrogation of the privilege and ‘does not depend on, and is not influenced by, any extrinsic materials’. The Second Reading Speech ‘only illustrates the dangers & potential pitfalls that resort to extrinsic materials may have’, it was said¹⁵. **iTip** – so true.

■ Credits – Jeffrey Barnes, Gordon, Amy, Philip & Oliver.

¹ [\[2019\] HCA 35](#) (at [31-37]), cf [BDI \[2020\] QCA 22](#) (at [24]).

² Discussed - Barnes (ed) *The Coherence of Statutory Interpretation* (at 78).

³ cf Episode 13, Pearce 9th ed (at [4.76-4.78]).

⁴ [Savin \[2000\] FCA 478](#) (at [83]), Quirk *Comprehensive Grammar* (at 1623).

⁵ cf Scalia & Garner (at 164), discussing [Hill v Conway](#) 463 A 2d 232 (1983).

⁶ [Mainteck \[2014\] NSWCA 184](#) (at [105]), [Zhang \[2016\] NSWCA 370](#) (at [73]).

⁷ [COVID-19 Emergency Response Act 2020](#), s 68BA [Supreme Court Act 1933](#).

⁸ [JKC \[2020\] WASCA 38](#) (at [8]), [Capic \[2020\] FCA 486](#) (at [25]) quoted.

⁹ [UD \[2020\] ACTSC 90](#) (at [54]), removal revoked - [UD \[2020\] HCATrans 61](#).

¹⁰ Pearce 9th ed (at [4.57-4.58]), Episodes 4, 35 & 52.

¹¹ Clause 11 in Sch 3 to the [Firearms Act 1996](#) (NSW).

¹² [Jenks \[1997\] STC 853](#) (at 878), [Newcastle \[2014\] NSWSC 1501](#) (at [56]).

¹³ Episodes 15, 27, 29, 30 & 34, [Power \[2017\] NSWCA 8](#) (at [83-91]).

¹⁴ s 143A [Casino Control Act 1992](#), Div 1 of Part 2 [Royal Commissions Act 1923](#).

¹⁵ cf [Harrison \[2008\] NSWCA 67](#) [12], [Lottoland \[2019\] NSWSC 1041](#) [110].