

Entwhistle (E), Bartholomew (B) and Mariella (M) have each been served notices for alleged offences under the *Cake Act 2011* (Cth) (*Cake*). The offences relate to their requirement as ‘nominated cake providers’ to ‘produce’ cakes on the ‘date of cake obligation’<sup>1</sup> by the Minister for Cake. The date of obligation was the 22 March 2011 and each had been designated on 15 March 2011. All three have sought my advice in relation to appealing their charges. I will now consider the arguments that will be raised in each of the appeals.

E has been served a notice under s 8(2) of *Cake* for ‘Wilful and repeated cake failure’ due to his decision to bring in a confection of his own creation on the designated date when designated by the Minister for Cake as a cake ‘provider’ under s 6(1) & (2). E is guilty of s 8(2) if he satisfies all of the elements of the offence. Namely, that he did both wilfully and repeatedly fail to produce a cake in the cake zone. Therefore, the question is whether E’s pistachio squares are cakes or approved substitutes as outlined in s 4(1), if not he is guilty of wilfully failing to produce a cake. The question then becomes whether he ‘repeatedly’ failed to produce a cake.

Under the definitions section, s 3, of *Cake*, a cake is defined as

‘a sweet, unleavened bread with chocolate, carrot, cream cheese, spices, eggs, sugar, or other ingredients, baked in a thick disk or ornamental shape and served with or without cream as the Minister for Cake may approve from time to time, or an approved substitute.’

The definition contains an ambiguity with the phrase ‘or other ingredients’. When looking at ‘other ingredients’, ejusdem generis can be applied as the words are general. From the particular words in the sentence, it can be determined the genus of the words are of food, yet the interpretation is still very broad. Applying *noscitur a sociis*, the meaning can be narrowed further by looking at the words ‘unleavened bread’ indicating the items of food have to be of

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<sup>1</sup> Section 6(2) *Cake*.

the kind that could be used to bake a cake. It is common to find things like pistachio used in this fashion. The issue is that the bread must be unleavened and the pistachio squares are yeasted and thus are leavened. Therefore the squares are not cakes for the purpose of *Cake*.

According to s 4, approved substitutes must either reasonably resemble cake in aroma or be approved in advance by the Minister for Cake<sup>2</sup>. The squares were not approved in advance and it is made clear from the facts the squares have no odour and thus cannot be classified as approved substitutes. It is therefore clear that there has been a failure to produce cake or an approved substitute.

The question now becomes whether E's failure was 'wilful and repeated'. Wilful is defined as meaning 'willed, voluntary, or intentional'<sup>3</sup>. E's decision to make his squares instead of cake was voluntary, so there is no question as to whether the breach was wilful. A question over 'repeatedly' arises as though E made several trips to the cake zone with the squares, it was all on the same date and within a very short period of time. The penalty for the offence is also very severe, suggesting the offence is intended to apply to someone who has failed to produce a cake on numerous occasions, not just the one occasion of E's. It could thus be argued that for the purposes of the act E did not repeatedly fail to produce cake and therefore could successfully challenge his notice.

B has been served notices under ss 7(1)–8(3) relating to inadvertently failing to 'produce' cake and for 'trafficking' cake in an 'exclusion zone'. B is guilty of an offence under s 7(1) if he inadvertently failed to produce a cake in the cake zone under s 6(3). There is some ambiguity in the word 'produce' and means "to bring into existence; give rise to; cause"<sup>4</sup>.

Under this definition, B would have to have made the cake himself, meaning he deliberately

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<sup>2</sup> Section 4(1)(2), *Cake*.

<sup>3</sup> Macquarie Dictionary Publishers, *Macquarie Dictionary Online*, 12 May 2011, <<http://www.macquariedictionary.com.au/>>.

<sup>4</sup> *Ibid*.

failed to produce the cake and is actually guilty under s 7(2). This meaning however is absurd when you look at the use of the word in other sections of the act, particularly s 6(3) which states ‘Cakes must be produced in the cake zone.’ If the natural meaning of the word was used in the act, the students would have to make the cakes within the classroom. This appears to be against the purpose of the act and a construction which promotes the purpose or object underlying the act is to be preferred<sup>5</sup>. Extrinsic materials are allowed to help resolve ambiguity under s 15AB(1)(b)(ii) of the AIA. The second reading speech of parliament stated ‘Since the time of Marie Antoinette the call has been “Let them eat cake”’. Therefore ‘produce’ can be taken to mean provide cake as this would mean the provision is to have cake made available for consumption. Under this interpretation, B’s failure was inadvertent as he was ready to ‘produce’ the cake but ran into misfortune. It is likely B would not be successful in challenging this notice.

B is guilty of an offence under s 8(3) if he trafficked said cake through an exclusion zone as defined in s 5(1) (b). The library was a declared exclusion zone and B did bring the cake into the library and thus trafficked cake through the zone. The question therefore becomes whether the exclusion zone is valid under the requirements set out in ss 5(3)(4). Under s 5(3) the Minister for Cake must consult with the librarian if any part of the declaration applies to the library. ‘Consult with’ is defined as ‘to consider or deliberate; take counsel; confer.’<sup>6</sup> It is clear from the facts the Minister did chat with the librarian about the act and thus it could be argued the Minister did confer with the librarian, satisfying s 5(3). According to s 5(4), the declaration of cake and exclusion zones must be ‘published in a newspaper circulating generally throughout the state.’ The Minister had the declaration published the *Barossa Valley Rosegrower’s Weekly* (the publication) and it is questionable as to whether this is a

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<sup>5</sup> Section 15AA *Acts Interpretation Act (1901)* (Cth) (‘AIA’).

<sup>6</sup>Macquarie Dictionary Publishers, *Macquarie Dictionary Online*, 13 May 2011, <<http://www.macquariedictionary.com.au/>>.

‘newspaper’ and whether it is circulated generally throughout the ‘state’. As this is a Commonwealth act, it is unclear what the word ‘state’ refers to however as the act strictly refers to the University of Adelaide it is possible ‘state’ refers to the state of South Australia within the Commonwealth of Australia. ‘Newspaper’ is defined as a printed publication issued at regular intervals, usually daily or weekly, and commonly containing news, comment, features, and advertisements.’<sup>7</sup> Based on this meaning, the publication is a newspaper, however it is questionable it is generally circulated at all, let alone throughout the ‘state’ due to the niche topic it covers. More information regarding the publication is required to clarify this. If the publication is found not to be circulated generally throughout the state, both the exclusion and cake zones would be invalid, and therefore it would be absurd to expect any student to produce a cake within the cake zone. This would mean B is not guilty of any offence under the *Cake Act (2011)* and neither would E or M be guilty of their alleged offences.

M has been served a notice under s 7(2) for a deliberate failure to produce cake under s 6(2). There is no question as to whether she failed to produce cake, however it can be argued the scratch and sniff book she brought in satisfies s 4(1) as an approved cake substitute. Section 4(1) states that an approved substitute is ‘a substitute that reasonably resembles cake in aroma;’ This however seems to present a conflict between this provision and the purpose of the act and the use of the word ‘reasonably’ supports the indication of a contradiction. In this case s 4(1) would be found as going against the purpose of the act and therefore should be construed ‘so that it is consistent with the purpose of the other provisions of the act.’<sup>8</sup> Thus the term ‘reasonably’ would be construed to mean that the substitute must still be edible. M would not be successful in challenging the notice.

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<sup>7</sup> Macquarie Dictionary Publishers, *Macquarie Dictionary Online*, 12 May 2011, <<http://www.macquariedictionary.com.au/>>.

<sup>8</sup> *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.