

interpretation NOW!

Episode 51 – 29 August 2019



Australian Government

Australian Taxation Office



The first thing about statutory interpretation is to understand the basic principles. Courts last month reminded us these are ‘well known’ and ‘not overly complex’¹. Middleton J tells us to be guided by common sense, not blinded by ‘over-analysis’². This reflects the general anti-linguistic approach required by the High Court. Context and purpose point the way, not trawling through old canons for something convenient. The common sense we bring to the exercise, however, is not of the ‘local table of knowledge’ kind. Rather, it is the careful application of known principles to the statutory text in detection of what parliament meant by the words it used. **iTip** – just because common-sense is involved, does not mean it is easy or that we can cut corners.

Sarah Locker Tax Counsel Network

→ Purpose in sequence

[Satmell v Blacktown CC \[2019\] NSWLEC 94](#)

Identifying the purpose of provisions at the correct level is ‘integral’ to interpretation³ because purpose drives constructional choice, consistent with s 15AA of the *Acts Interpretation Act 1901*⁴. Even though purpose resides in the text and structure of the statute, it may be derived from external sources.

This case (at 47]) suggests one way to discern purpose ‘may be to read the Act in the sequence in which it was written, that is, from the beginning onwards’. Identifying purpose is usually more complicated than this. But, like the global instruction to start with the text of the law, it is an appropriate and correct way to begin the process.

⚠ Policy and context

[Klemweb Nominees v BHP \[2019\] FCAFC 107](#)

The key quote from this class action case on common fund orders (at [138]) is that policy ‘divorced from law has no voice in the courts’⁹. It was argued that the policy behind another provision in a different statute controlled interpretation of federal class action provisions - rejected.

Policy can be a ‘difficult magic’. The court drew attention to the ‘danger of decontextualising the underlying rationale for a penal provision operating in a quite different area’¹⁰. The point being made is short but important. Policy derived from a different statutory context is false magic and has no voice in interpretation. **iTip** – always be careful with policy.

▪ Writers – Sarah & Gordon. Producer – Joseph.

¹ *Harvey* [2019] WASC 261 (at [10]), *Michos* [2019] VSCA 140 (at [36]).

² Middleton (2016) 40 MULR 626 (at 632), Episodes 22 & 35.

³ *Thiess* [2014] HCA 12 (at [22-23]), Episodes 40, 43 & 48.

⁴ *SZTAL* [2017] HCA 34 (at [38-39]), Brysland & Rizalar (2018) 92 ALJ 81.

⁵ s 44(3) of the *Interpretation of Legislation Act 1984* (VIC).

⁶ *Mitchell* [2016] VSCA 342 (at [64]), *ADCO* [2014] HCA 18 (at [52]).

📖 Interpretation manual

[Waterfront Place v Minister \[2019\] VSCA 156](#)

This appeal from a case in Episode 42 is about the meaning of ‘no later than’ in VCAT notice-giving provisions. Refusing the appeal, the court focussed on the interpretation provision about calculating time⁵, and whether a ‘contrary intention’ excluded its operation. It was argued that the absence of uncertainty amounted to contrary intent.

This was rejected both on the basis of past decisions⁶, and the ‘important consideration’ (at [36]) that all legislation is enacted in the setting of interpretation provisions generally and in the knowledge that they apply⁷. This is stressed by Professor Pearce at the start of his new book⁸.

⚙ Statutes and common law

[Fairfax Media v Gayle \[2019\] NSWCA 172](#)

Chris Gayle the cricketer sued Fairfax for defamation – it was in all the papers. Leeming JA (at [258-259]) commented on the ‘symbiotic relationship’ between statutes and the common law¹¹. They are not separate and independent sources of law, he said.

This is a subtle and difficult area, but with practical impacts. One example from Episode 39 makes the point¹². When a common law term is used in a legislative code, does the full common law meaning go across into the code? The answer given there was ‘no’¹³. **iTip** - at all points of intersection between statutes and the common law, it is important to investigate context and purpose.

⁷ *AIRC* [2002] HCA 42 (at [7-8]) quoted.

⁸ Pearce *Interpretation Acts in Australia* (at [1.1]).

⁹ French CJ *Dolores Umbridge* (2008) 82 ALJ 322 (at 323) quoted.

¹⁰ cf *Zammit* [2014] NSWCA 104 (at [67]), Episode 6.

¹¹ *Brodie* [2001] HCA 29 (at [31]), Middleton J (2016) 40 MULR 626 (at 627).

¹² *Hayman* [2018] WASCA 116.

¹³ cf *R v LK* [2010] HCA 17 (at [96-97]), *Boughey* [1986] HCA 29 (at [43]).

Episode 53 – adding words to composite expressions; deeming provisions; meaning of ‘day’; accrued rights

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