

interpretation NOW!

Episode 71 – 29 April 2021



Australian Government

Australian Taxation Office



iNOW! has many times dealt with extrinsic materials and their uses within the interpretive process. A recent case makes a key point here¹. Thawley J said of an interpretation advanced by one party that it ‘does not give primary effect to the statutory language read in context: rather, it looks to the extrinsic material and presumes that to have been the intended meaning of the statutory text’². It is ‘interpretation 101’ that extrinsic materials cannot be substituted for the text, nor can they determine with authority what the text means – see Episode 68. These materials, as part of the wider context, may be useful in identifying purpose or mischief. However, as Thawley J reminds us, they raise no presumption about what parliament is objectively taken to intend a provision to mean.

iTip – tread carefully whenever something in an explanatory memorandum fails to find its way into the Act.

Gordon Brysland Tax Counsel Network



Beneficial legislation

[Kingdom Towers v Liverpool \[2021\] NSWLEC 1074](#)

The impact of provisions being ‘beneficial’ can be less than straightforward³. It was argued in this case that dispensing with height restrictions under an environmental plan⁴ was ‘beneficial and facultative’, meaning the clause in question should have the ‘widest interpretation that its language will give’⁵.

The court found some beneficial intention, but the selectiveness of the clause told against any ‘widest interpretation’. A recent AAT case says that, just because provisions are beneficial does not mean the ‘most expansive view of them must be taken’⁶.

iTip – the degree of liberality in interpreting beneficial provisions depends on context and purpose.



Penal provisions

[R v Grundy \[2021\] SASCA 4](#)

This case confirms that, even if the old rule about construing offence provisions in favour of the accused is one of last resort and has lost much of its importance⁷, it may apply where ambiguity persists⁸. The defendant had been found guilty of possessing a gun without a licence, for which the maximum penalty was a \$35K fine or imprisonment for 7 years.

The DPP argued that he could not serve his sentence of 9 months as home detention - rejected. While the court conceded that the construction task was ‘not straightforward’, it found that home detention could be ordered for a ‘serious firearms offence’⁹. A hard analysis of the legislation also supported this.



Statutory definitions (again)

[FCT v Auctus Resources \[2021\] FCAFC 39](#)

The term ‘administrative overpayment’ is defined to mean ‘an amount that the Commissioner has paid to a person by mistake, being an amount to which the person is not entitled’¹⁰. Does choice of the adjective ‘administrative’ exert any influence over the meaning of the definition? The natural answer is ‘yes’, but the High Court is against this for circuitry reasons¹¹.

The court pointed to decisions at odds with the High Court¹² and made 3 points – (1) the High Court cases do not ‘lay down an inflexible rule’, (2) circular reasoning here is not illogical or inappropriate, and (3) ‘it will not always be the case that the defined term cannot affect the meaning of the definition’.



Commercial contracts

[Rockment Pty Ltd v AAI Limited \[2020\] FCAFC 228](#)

This contract case looks at the duty to strive for a commercial result and ‘businesslike interpretation’¹³. Notions of commerciality ‘must be confined to their proper place’ (at [54]), and an interpretation ‘is commercial if it is not commercially absurd’¹⁴.

No comparative financial analysis is called for, nor is any external standard of fairness to be applied. Objective purpose may assist, but often the purpose will be unclear and/or highly contested. This case shows the difficulties in seeking to use commerciality to leverage interpretation. Often, as in this case, the enquiry ‘will start, and usually finish, by asking what is the ordinary meaning of the words used’¹⁵.

■ **Credits** – Gordon Brysland, Oliver Hood & Patrick Boyd.

¹ [FCT v Apted \[2021\] FCAFC 45](#) (at [108]), Episodes [15](#), [27](#), [29](#), [30](#), [34](#), [60](#) & [68](#).

² [CMH \[2012\] HCA 55](#) (at [39]), cf [Sandoz \[2020\] FCAFC 133](#) (at [102-103]).

³ Pearce 9th ed (at [9.2-9.6]), cf Episodes [11](#), [39](#) & [67](#).

⁴ clause 7.5A(2) of the [Liverpool Local Environmental Plan 2008](#).

⁵ [Christodoulou \[2017\] NSWLEC 1554](#) (at [21]), [Radray \[2006\] NSWLEC 155](#).

⁶ [Slatter \[2021\] AATA 456](#) (at [44]), citing [NSWALC \[2016\] HCA 50](#) (at [94]).

⁷ Pearce 9th ed (at [9.10-9.13]), cf Episodes [25](#), [35](#) & [50](#).

⁸ (at [42]), [A2 \[2019\] HCA 35](#) (at [52]), [Somerville \[2020\] NSWCCA 93](#).

⁹ s 70(1)(b)(ii)(D) of the [Sentencing Act 2017](#) (SA), cf [Bennett \[2021\] NTCCA 2](#).

¹⁰ s 8AAZN(3) of [Taxation Administration Act 1953](#) (Cth).

¹¹ [Wacal \(1978\) 140 CLR 503](#) (at 507), [Shin \(1994\) 181 CLR 404](#) (at 419).

¹² (at [65-67]), [Barangaroo \[2014\] NSWCA 279](#), [Singh \[2020\] NSWCA 152](#).

¹³ [Woodside \[2014\] HCA 7](#) (at [28]), [Onley \[2018\] FCAFC 119](#) (at [33]).

¹⁴ [Mount Bruce \[2015\] HCA 37](#) (at [50]), [Wonkana \[2020\] NSWCA 296](#).

¹⁵ [Charter \[1997\] AC 313](#) (at 384), cf [Evolution \[2020\] FCA 1690](#) (at [73]).

Episode 72 – importance of certainty; meaning of ‘used’; moral duty; prison decisions

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