

interpretation NOW!

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Australian Government

Australian Taxation Office



James Allsop recently retired as chief justice of the Federal Court. What was his legacy on interpretation? As a committed contextualist, he went behind the ‘widest sense’ mantra to explain why context is ‘indispensible’ – **It gives the place, the wholeness and the relational reality to words; it helps prevent linear thinking and sometimes beguilingly simple and attractive logic with words driving meaning to unrealistic and impractical ends**¹. As a modernist, Allsop CJ insisted that Interpretation is a human-centric pursuit, not a ‘textual game’², and not something we can leave to algorithmic engineers³. For him⁴, the critical role of context is partly explained by recent advances in neuroscience on the respective roles of the two hemispheres⁵. Bringing context to the surface in a disciplined, objective and open-minded way helps protect from the false certainties of literalism.

Gordon Brysland Tax Counsel Network

Legislative guides

[Arik v Vicinity Centres PM Pty Ltd \[2023\] VSC 94](#)

Arik had a ‘slip and fall’ accident. A medical panel later found that she had not suffered a ‘significant injury’ in accordance with AMA guides on what constituted ‘significant injury’ for the purposes of the legislation?⁶

Guides are not statutes but the same general interpretation principles are applied to them (like a range of other documents having statutory force⁷). Guides are not read legalistically, and regard may be had to extrinsic materials⁸ (including ‘previous iterations’ of the guide in question). It had been argued that earlier versions of guides could never be referred to (rejected). The judge held that the panel has misconstrued the guides and remitted the matter.

Contractual interpretation

[Laundy Hotels v Dyco Hotels \[2023\] HCA 6](#)

This recent case on the legal effect of pandemic restrictions in default situation is important because a full bench of the High Court repeats (at [27]) the basic principles of contractual interpretation –

“It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it”⁹.

Objective purpose

[DPP v Whittle \[2023\] ACTSC 64](#)

Was the offence of possessing prohibited firearms one that ‘relates to money or other property’ under s 375(1)(b)(i) of the [Crimes Act 1900](#) (ACT)? The answer was ‘not obvious’. In selecting the interpretation that best achieved the purpose of the provisions, Mossop J (at [18-19]) emphasised 3 key things.

First, purpose is to be worked out by reference to the terms of the legislation ‘read in their total context’. Second, this is wholly an objective exercise carried out in accordance with ‘orthodox principles of statutory interpretation’. Third, it does not involve any subjective analysis of ‘what the legislature did (or more often, did not) think about’¹⁰.

Treaty interpretation

[Kingdom of Spain v ISL SÀRL \[2023\] HCA 11](#)

In this foreign state immunity case, the High Court considers 4 key principles of treaty interpretation.

One, statutory provisions are to be interpreted consistently with international law¹¹. Two, treaties should have the same meaning in all party states¹². The *Vienna Convention* on treaty interpretation applies rather than ‘particular domestic rules’ of interpretation¹³. Three, all language texts of treaties are equally authoritative¹⁴, and the meaning to be adopted is that ‘which best reconciles the texts, having regard to the object and purpose’. Four, any waiver of immunity requires a ‘high level of clarity and necessity ... because it is so unusual’¹⁵.

■ **Thanks** – Amanda Bingham, Annie Huang & Janhavi Bhandari.
¹ [Chevron](#) [2017] FCAFC 62 (at [3]), cf [Allsop](#) [2018] fedcourt.gov.au (at [9]).
² Allsop [Advocacy in tax cases](#) [2022] FedJSchol 6.
³ Allsop [Technology and the Future of the Courts](#) (2019) 38 UQLJ 1
⁴ Allsop – [Thinking about law](#) (2022), [Rules and values in law](#) (2017).
⁵ McGilchrist *The Master and his Emissary* (2009).
⁶ s 28LH of the [Wrongs Act 1958](#) (VIC).
⁷ industrial agreements, planning permits, environmental policies etc.

⁸ (at [46, 89]), s 35(b) of the [Interpretation of Legislation Act 1984](#) (VIC).
⁹ [Ecosse](#) [2017] HCA 12 (at [16]), [Woodside](#) [2014] HCA 7 (at [35]).
¹⁰ [Singh](#) [2004] HCA 43 (at [19]) quoted.
¹¹ (at [16]), [Al-Kateb](#) [2004] HCA 37 (at [63]), cf [DMQ20](#) [2023] FCAFC 84.
¹² (at [38]), [Povey](#) [2005] HCA 33 (at [25]) & other cases cited.
¹³ [Macoun](#) [2015] HCA 44 (at [69]) & other cases cited.
¹⁴ [ICSID Convention](#) (testimony), Art 33(1) of the [Vienna Convention](#).
¹⁵ (at [28]), ALRC Report No 24 [Foreign State Immunity](#) (at [79]) cited.