

# interpretation NOW!

Episode 2 – 17 July 2015



Australian Government

Australian Taxation Office



Thanks for all the positive feedback on Episode 1 – we may have hit a nerve! One point I often make in presentations is that, as we all get better at statutory interpretation, so our technical decision-making will improve also – it's unavoidable. Interpretation, however, almost invariably does not involve some singular bright shining answer just awaiting our discovery<sup>1</sup>. The process is far more subtle, more sophisticated and, most importantly, *more creative!* This is explained more in the box about 'constructional choices' (below). Please enjoy!

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## Importance of the text

### [SZOXP v Minister \[2015\] FCAFC 69](#)

This case (at [17]) repeats the High Court mantra that the task of interpretation must begin and end with the text of the law<sup>2</sup>. Rules of interpretation about context and purpose are 'mediated through the text of the statute'. This means that, although extrinsic materials may be relevant, they 'cannot displace the meaning of the statutory text'.

**iTip ...** step 1 – read the text of the law carefully; step 2 – consider the wider context, policy, legislative history, extrinsic materials and interpretational rules; step 3 – return to the law and see if any of these things have any proper impact on what the words mean. *Voila* – you are doing it the way the High Court says to do it!



## Act 'always speaking'

### [Paciocco v ANZ Banking Group \[2015\] FCAFC 50](#)

The relatively simple idea of an Act 'always speaking' is often over-complicated with obscure Latin maxims and seemingly endless cases. Words have a meaning either fixed at the time of enactment or which may evolve over time and is 'always speaking' in the present<sup>6</sup>. This case is an example of the latter.

The correct question is to always ask what parliament is taken to have intended<sup>7</sup> – see Episode 1. This case gives examples (at [391-396]) of how the principle is applied in practice. **iTip** – tax legislation is usually drafted to be 'always speaking', but check if you are in any doubt. Next, see if the meaning of the word or expression *has* changed post-enactment.

<sup>1</sup> Special thanks to Braden Powell, Julie Coates and John Larocque.

<sup>2</sup> *Hayne J (2006) 32 Monash University Law Review 223* (at 229).

<sup>3</sup> *FCT v Consolidated Media Holdings Ltd [2012] HCA 55* (at [39]).

<sup>4</sup> *Hill J (1999) 2 Journal of Australian Taxation 66* (at 71), for example.

<sup>5</sup> *Momcilovic v B [2011] HCA 34* (at [50]), **iTip** – read this passage!

<sup>6</sup> *May v Military Rehabilitation [2015] FCAFC 93* (at [184-186]).



## Constructional choices

### [Garrett v FCT \[2015\] FCA 665](#)

The great tax judge, Hill J, often stressed the 'considerable room for creative interpretation'<sup>3</sup>, under which more options naturally open up to the diligent reader. It is not some mono-lineal exercise – see above. The description used by the High Court nowadays is 'constructional choices'<sup>4</sup>.

Kenny J in this case (at [12]) said that language is 'characteristically malleable and nuanced; and there are almost always constructional choices to make by reference to text, context and purpose'<sup>5</sup>. Our job is to identify and evaluate those choices in conformity with Chris Jordan's role as an administrator. **iTip** – don't be fooled into thinking your first grab on the text is necessarily the only viable option or choice available – dig deeper!



## Use of dictionaries

### [Merrick Tyler v Main Roads \[2015\] WASCA 82](#)

Despite what many people may think, dictionaries are not decisive on the meaning of statutory words and are to be treated with caution (at [40]). They are a 'reasonably authoritative source' for the range of available meanings, but 'they do not speak with one voice' and they say nothing about context<sup>8</sup>. The High Court regularly tells us not to make a fortress out of a dictionary<sup>9</sup>.

**iTip** – yes, you absolutely should and must consult the dictionaries, but just avoid the trap of thinking that whatever *Macquarie* says must be the tax law answer. The meaning of statutory words is always a question of interpretation.

<sup>6</sup> *Pearce & Geddes* (at [4.9-4.12]).

<sup>7</sup> *Forsyth v FCT [2007] HCA 8* (at [39]).

<sup>8</sup> *House of Peace Pty Ltd v Bankstown City Council [2000] NSWCA 44* (at [28]), *Pearce & Geddes* (at [3.30]).

<sup>9</sup> *Thiess v Collector of Customs [2014] HCA 12* (at [23]), for example.