

# interpretation NOW!

Episode 14 – 29 July 2016



Australian Government

Australian Taxation Office



**iNOW!** began as a way to address the need – recognised by top judges – for those working with legislation to get better at reading it. Yet, stand-alone interpretation courses are still not taught in universities and, of course, reading statutes is not just the playground of the legally trained. Instead, people pick up the skills by osmosis, by default, or not at all. **iNOW!** aims to fill this gap for both lawyers and non-lawyers. We try to avoid focusing on niche issues and complication at the expense of practical guidance. Too easily this can lead to a mindset of ‘nothing is certain’ or ‘anything goes’. Both attitudes tend to distract the fundamental search for what parliament meant by the words it used.

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## ↔ Status of tax laws

Traditionally, there was a view that tax Acts ‘should receive a strict construction’<sup>1</sup>. Hill J said it would be ‘a sad day’ if the rule were abandoned, as this could lead to ‘sloppy drafting’<sup>2</sup>. Kirby J disagreed, famously saying that a tax Act is ‘just another statute’<sup>3</sup>.

Where are we now on this? With little fuss in 2009, the High Court confirmed that ‘tax statutes do not form a class of their own’<sup>4</sup>. It is now uncontroversial that the same rules apply to them<sup>5</sup>. The tax nature of an Act is still part of its context, but this is just one factor to be weighed in the purposive process.

**iTip** – use normal purposive interpretation for tax Acts without automatically favouring the taxpayer or the Commissioner.

## ? Context and ambiguity

### [FCT v Jayasinghe \[2016\] FCAFC 79](#)

In this case, Allsop CJ emphasises (at [3-12]) that statutory words need not be ambiguous on their face before their context may be examined<sup>6</sup>. Words cannot be construed in isolation, and context (in its widest sense) must be considered straight away<sup>7</sup>.

At the same time, Allsop CJ warns against giving ‘false precedence to context’ by searching for purpose or meaning in secondary sources then transporting this into the statute<sup>8</sup>. Context only informs the reading of the actual statutory language to reveal constructional choices that aren’t obvious from the text alone<sup>9</sup>. **iTip** – use the ‘text > context > text’ process in Episode 2.

## ◀ Tax retrospectivity

### [Numo Pty Ltd v CSR \[2016\] VSC 274](#)

Episode 7 said that Acts which change legal rights or liabilities are presumed not to apply retrospectively. This case says further (at [47-51]) that the presumption chiefly applies to Acts that change the law, not the exercise of existing statutory powers<sup>10</sup>.

The Commissioner had exercised a statutory discretion to group and re-assess ‘related corporations’ for the past 5 years. Croft J said this was not retrospective – it just applied then existing law to past circumstances. The taxpayers’ liabilities weren’t retrospectively altered as they were always subject to the potential exercise of the discretion during the assessment process.

## ⚙️ General & special provisions

### [Totten v Secretary \[2016\] AATA 240](#)

If a specific provision conflicts with a more general one in the same or an earlier statute, there is a general rule that the specific provision prevails. However, the conflict must first be completely irreconcilable<sup>11</sup>, as all words of an Act should be given effect where possible<sup>12</sup>.

In this case (at [20-26]), the rule did not apply as the two provisions could coexist – their difference was ‘deliberately provided for in the legislation’. Ultimately, the rule is simply an aid in the broader search for legislative intention<sup>13</sup>. **iTip** – always consider whether the specific provision was intended to override the general one.

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<sup>1</sup> *Scott v Cawsey* (1907) 5 CLR 132 (at 154).

<sup>2</sup> (1998) 72 *Australian Law Journal* 685 (at 689).

<sup>3</sup> *Chant* (1991) 103 ALR 387 (at 391).

<sup>4</sup> *Alcan* [2009] HCA 41 (at [57]).

<sup>5</sup> *De Marco* [2013] NSWCA 86 (at [19]), illustrates.

<sup>6</sup> cf *Acts Interpretation Act 1901* s 15AB(1).

<sup>7</sup> *CLC Insurance* (1997) 187 CLR 384 (at 408); *Cunneen* [2015] HCA 14 (at [57]).

<sup>8</sup> See Episode 6 ‘Preconceived policy’; *Rio Tinto* [2015] FCA 94 (at [30]).

<sup>9</sup> See Episode 2 ‘Constructional choices’.

<sup>10</sup> *Maxwell* (1957) 96 CLR 261 (at 267); *Fisher* (1960) 105 CLR 188 (at 194).

<sup>11</sup> *Purcell* (1985) 60 ALR 652 (at 657); Pearce & Geddes (at [4.40, 7.20]).

<sup>12</sup> See Episode 1 ‘Hierarchy & harmony’.

<sup>13</sup> *Associated Minerals* (1974) 4 ALR 353 (at 359); Pearce & Geddes (at [7.22]).