

interpretation NOW!

Episode 15 – 31 August 2016



Australian Government

Australian Taxation Office



In Episode 6, **inOW!** noted the particular challenges of statutory interpretation for administrators. In Service Delivery, we try to find interpretative solutions that are administratively workable for the broader tax system, not just for an individual client. These solutions need to be creative and practical, and keep up with the rapidly changing digital environment. If you know the rules of interpretation, you will be better equipped to perform this exercise in mental gymnastics. At the same time, we cannot overstep the boundaries of the law – our role is to interpret the words actually used by parliament, not rewrite them. Sometimes, there is simply no interpretative solution available and the better approach is to advocate for a law change.

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Common law & statute

The purposive revolution was actually a parallel shift in both common law and statute. One week before s 15AA of the *Acts Interpretation Act 1901* commenced, the High Court said that '[t]he fundamental object of statutory construction ... is to ascertain the legislative intention by reference to the language of the instrument [and] legitimate aids to construction'.

Since then, courts have continued to explain how purposive interpretation works in frequently cited cases like *CIC Insurance*, *Project Blue Sky* and *Alcan*². Interpretation Acts must be read with these common law principles in mind. For example, the discussion of extrinsic materials in the next box reflects both s 15AB and case law.



Extrinsic materials

[Chapman-Davis v NSW \[2015\] NSWIC 10](#)

Extrinsic materials, such as second reading speeches and explanatory memoranda, can be helpful but should be used with care. This case (at [144-148]) notes that extrinsic materials may help you find the purpose or object of a provision³, although this must also be supported by the words of the statute⁴.

However, extrinsic materials cannot alter the meaning of words in a provision if this is clear on their face⁵. You can only consider extrinsic materials when determining a provision's meaning if it is ambiguous or obscure or would create an obviously absurd result⁶. **iTip** – yes, always consider extrinsic materials, but know their limitations.



'And' & 'or'

[Onebev v Encore Beverages \[2016\] VSC 284](#)

'And' and 'or' usually take their plain meaning. 'And' is conjunctive and combines items in a provision, while 'or' is disjunctive and creates alternatives. However, 'and' is sometimes read as 'or' (and vice versa) if there is a clear drafting or printing error, or if context shows the other meaning was intended⁷.

In this case (at [28-33]), a statutory definition had two limbs connected by 'and'. The judge read 'and' as 'or' to make the limbs alternative requirements, as a conjunctive reading would narrow the definition when its context showed it was intended to be broader. **iTip** – see Pearce & Geddes [2.29-2.30] for more examples of cases considering this issue.



'Must' & 'shall'

[AS v Minister \[2016\] VSC 351](#)

Words like 'must', 'shall' or 'required' normally impose a mandatory duty and remove discretion⁸, but as always, this is subject to contrary intention⁹. While there is no fixed formula, consider whether failing to comply would defeat the Act's purpose. If so, the provision may be compulsory¹⁰.

In this case, a provision said 'Parliament affirms as a principle that a minor shall only be detained as a ... last resort'. The judge (at [28]) said this was simply aspirational. 'Shall' didn't impose an obligation because, when read in context, it was conditioned by the word 'principle'. There were also no consequences for failing to comply.

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■ Thanks to Matt Bambrick and Robert Olding.

¹ *Cooper Brookes* (1981) 147 CLR 297 (at 320).

² *CIC Insurance* (1997) 187 CLR 384 (at 408); *Project Blue Sky* [1998] HCA 28 (at [69-71]); *Alcan* [2009] HCA 41 (at [47]). *Consolidated Media* [2012] HCA 55 (at [39]); *Certain Lloyd's* [2012] HCA 56 (at [23-26]), also.

³ *K-Generation* [2009] HCA 4 (at [53]).

⁴ *Harrison* [2008] NSWCA 67 (at [12-16]).

⁵ *Alcan* [2009] HCA 41 (at [47]); *Intoll* [2012] FCAFC 179 (at [42-43]); *Acts Interpretation Act 1901* s 15AB(1)(a).

⁶ *Acts Interpretation Act 1901* s 15AB(1)(b).

⁷ *Ex Parte Pollock* [2004] WASCA 122 (at [23]).

⁸ *Ozone Manufacturing* [2006] SASC 91 (at [35]).

⁹ Episode 12 discussed the reverse – when 'may' means 'must'.

¹⁰ Pearce & Geddes (at [11.1-11.3]). *Project Blue Sky* [1998] HCA 28 (at [93]), also.