

interpretation NOW!

Episode 27 – 30 August 2017



Australian Government

Australian Taxation Office



Tony Slater QC has retired after decades as a giant of the tax bar. Working both sides of the fiscal divide, he leaves a legacy of excellence few may equal. Long-remembered will be his work on numerous high-profile cases - *MBI Properties* is my favourite¹. In a Tax Institute interview², Tony recommended 3 things all tax professionals should do. The first reflects the most basic requirement of interpretation – **Read the statute, then read it again**. It all must start with the text of the L-A-W itself. Next, he said, ‘identify the right question’, and ‘get the facts’. When it comes to interpretation, Slater QC is a technocrat of unnerving skill and insight. His last case involved delayed refund interest in a GST context³. **iTip** – follow Tony and read the statute first!

Gordon Brysland Tax Counsel Network



Extrinsic materials

[Power Rental v Forge Group \[2017\] NSWCA 8](#)

This case (at [83-91]) tells you almost everything you need to know about the use of extrinsic materials⁴. They may be consulted to reveal legislative purpose. But what about using them to determine meaning? Purpose and meaning are ‘inextricably woven’⁵.

Section 15AB(1) of the Acts Interpretation Act makes the use of extrinsic materials depend on them being ‘capable of assisting in the ascertainment of meaning’ – a frustratingly enigmatic test. Two things are clear in practice, however – (A) extrinsic materials cannot displace clear meaning⁶, and (B) they must not be substituted for the text⁷.

iTip – always take care with extrinsic materials!



Definitions

[DM & Longbow v Willoughby \[2017\] NSWLEC 1358](#)

Judges often say things about statutory definitions. That they are no more than an ‘aid to construction’ is a common observation. This case (at [33]) reinforces the point that the ‘meaning of a definition turns on the context in which it appears, considered as a whole’⁸. This is consistent with the broad theme that parts of statutes (including definitions) are not to be read in isolation – see Episode 26.

It is a rookie error to focus on the linguistics of a definition found at one end of an Act or the other without inserting it into your provision and construing the resulting whole in context. The High Court tells us that to do this only ‘invites error’⁹.



Judgment words

[Lazarus v ICAC \[2017\] NSWCA 37](#)

Special care needs to be taken in stating what a case about statutory interpretation is authority for – see Episode 9. This case (at [87]) says that ‘every word of every judgment’ must be read in its context¹⁰.

The problem in *Lazarus* was that too much had been made of what had been said by judges in an earlier case. Those statements had to be read down to their proper context. Cases are only authority ‘for what they decide’, said the court. There is a tendency to read what judges say as quasi-statutory and in isolation. **iTip** – respect judicial authority > investigate context > revisit the provisions.



Context of words

[FCT v Jayasinghe \[2017\] HCA 26](#)

‘No one has ever made an acontextual statement’¹¹ ... and neither does parliament! Context is always important¹². In this case, the issue was the meaning of ‘holds an office in an international organisation’ in a tax exemption. The word ‘office’ (at [31]) ‘must not be read in isolation; it must be read in context’¹³. This showed permanence was not necessary.

What counted was structure of the organisation, taxpayer status, and terms of engagement. Having neither authority or status as a project manager with a UN body in Sudan, he did not hold any ‘office’. His income, therefore, was not exempt.

■ Writer – Gordon Brysland, Producer – Suna Rizalar.

¹ *MBI Properties* [2014] HCA 49 – Tony raised up our eyes.

² Rowland *A conversation with a legend in tax* 7 July 2017.

³ *Travel Limited v FCT* [2017] FCA (reserved, Wigney J).

⁴ See also Episode 15.

⁵ *Walker* [2008] HCA 5 (at [31]), *Shorten* [2008] NSWCA 134 (at [27]).

⁶ *Alcan* [2009] HCA 41 (at [47]), *GLG Australia* [2006] HCA 11 (at [22]).

⁷ *Beane* [1987] HCA 12 (at [4]), *BGM16* [2017] FCAFC 72 (at [94-95]).

⁸ *Cranbrook* [2006] NSWCA 155 (at [39]), *Bay Simmer* [2017] NSWCA 135.

⁹ *Kelly* [2004] HCA 12 (at [103]), *Telstra* [2017] FCAFC 4 (at [58]).

¹⁰ *Burns* [2017] NSWCA 3 (at [90]), *Bank of NSW* [1949] UKPCHA 1 (at [46]).

¹¹ *Kirin-Amgen* [2004] UKHL 46 (at [64]), *Zhang* [2016] NSWCA 370 (at [68]).

¹² *Mainteck* [2014] NSWCA 184 (at [73]), *Steyn* (2003) 25 Sydney LR 5 (at 5).

¹³ cf *Cunneen* [2015] HCA 14 (at [57]), *Sykes* [1992] HCA 60 (at [17]).