

interpretation NOW!

Episode 28 – 29 September 2017



Australian Government

Australian Taxation Office



If you read only one case on interpretation in 2017, make it this one - *SZTAL v Minister*¹. The majority (at [14]) state the basics, but it is Gageler J (at [34-43]) who digs deeper into the problem-solving². The issue was the meaning of 'intention' in a protection visa context³. Gageler J stressed the need to consult context in the 'widest sense' up-front, and to avoid 'abstract linguistic analysis'. Constructional choice, he said, is usually out of a 'range of potential meanings', not just two. That choice depends on 'evaluation of the relative coherence of the alternatives with identified statutory objects and policies'⁴. What is integral to the exercise is the 'discernment of statutory purpose'⁵. **iTip** – always use purpose to select from among all the possibilities.

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Mere inconvenience

[Oreb v ASIC \(No 2\) \[2017\] FCAFC 49](#)

Mere inconvenience of result is not enough to force interpretation⁶ – this is basic. ASIC can disqualify officers within 12 months of ceasing their duties, if the company 'was wound up'⁷. Does winding up need to be complete? If 'yes', it would prejudice ASIC powers and go beyond mere inconvenience.

The court said (at [32-55]) that 'was wound up' in this context meant only that a winding up process 'had commenced'. This approach was reasonably open on the text, it aligned more closely with legislative intent, and it read consistently with other provisions. 'Once there is [a] choice, the answer to that choice is not grammar', the court said.



Delegated legislation

[Inature v Centennial Springvale \[2017\] NSWCA 191](#)

Episode 13 mentioned court comments that delegated legislation, being 'less carefully drafted', is to be 'less keenly scrutinised'. Not everyone agrees⁸. In *Inature* (at [45]), an appeal judge has now denied that 'there is some general principle requiring laxity or flexibility in construing delegated legislation, or statutory instruments generally'.

The correct approach (at [51]) is that the 'language be read in context and having regard to the objective which it was designed to promote'. The primary focus, however, 'must remain upon the text'. **iTip** – apply the same interpretational rules to delegated legislation and statutes alike.

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Backdated agreements

[CCSR v Smeaton Grange \[2017\] NSWCA 184](#)

In 1952, it was said it was 'beyond the power of the gods ... to alter the past'⁹. This case (at [5-15]) applies that sentiment in the context of disclaimer by the object of a discretionary trust. Private parties may agree that legal relations between them began from some date in the past. Generally, however, that will affect neither third party rights nor the operation of statutes, including tax statutes¹⁰.

Backdating an agreement will fail if it 'undercuts the impact of a taxing act and especially if it undercuts provisions of a taxing act designed to protect the revenue'. **iTip** – private contracts do not generally rule over public statutes, especially tax statutes.



Dictionaries (again)

[Hunter's Hill Council v Minister \[2017\] NSWCA 188](#)

Basten JA in this council amalgamation case (at [76-83]) recalls the limits of using dictionaries. Resort to them is 'rarely favoured'¹¹, he said, though not for 'some dismissive or precious attitude'. It is more because they concern common usage, which may not be reflected in the statutory context. They may help sometimes, but their function is limited.

Instead, 'focus upon the particular statutory context in which the language is used', he said. The legislative history here confirmed that 'contiguous'¹² required a single area without elements of division or separation. Given a river separated the 2 areas in question, they could not be amalgamated.

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■ Special thanks - Ivica Bolonja.

¹ *SZTAL v Minister* [2017] HCA 34.

² The principles involved are unaffected by the dissent.

³ s 36(2)(aa) of the *Migration Act 1958*.

⁴ *Taylor* [2014] HCA 9 (at [66]), cited.

⁵ s 15AA of the *Acts Interpretation Act 1901*.

⁶ *Cooper Brookes* [1981] HCA 26 (at [21]), cf Episodes 1, 7, 11 and 24.

⁷ s 206F of the *Corporations Act 2001*.

⁸ *Argument* (2015) 26 *Public Law Review* 137, for example.

⁹ *Happ* [1952] *Argus* LR 382 (at 384), *Faraday* (1927) 11 TC 565 (at 573).

¹⁰ *Rowe* [1982] FCA 93, *McDonald* [2001] FCA 305 (at [20]).

¹¹ *TAL Life* [2016] NSWCA 68 (at [80]), cited.

¹² s 204(3) of the *Local Government Act 1993*.