

interpretation NOW!

Episode 29 – 27 October 2017



Australian Government

Australian Taxation Office



When does failure to comply with statutory conditions invalidate some formal act? In *Forrest & Forrest*¹, a mineralisation report had not been provided with the application for a mining lease². It was provided later, however, and it was before the minister³. Whether lateness was fatal depended on purpose, language and consequences. No decisive rule applies, nor is there ‘even a ranking of relevant factors’⁴. Relying also on the need for strict compliance with state resource regimes, a majority held the lease invalid. This was despite a wide irregularities power, lessee prosecution risks, and public confidence angles. The result is surprising, with uncertain consequences inside and beyond the mining sector⁵. **iTip** – this is an important case.

Gordon Brysland Tax Counsel Network



Extrinsic material

[Koundouris v Owners Unit Plan \[2017\] ACTCA 36](#)

Planning laws commonly impose warranties for work quality on builders. It was argued that *explanatory statements* with the Act meant a builder had to be party to the sale contract for warranties to apply⁶. Here there was an interposed entity.

The appeal court said (at [41]) the *explanatory statements* were ‘not sufficient to displace the ordinary grammatical meaning’, particularly where the position contended for by the builder would ‘neuter the regime’. This case is an unsurprising example of the basic principle that extrinsic materials cannot leverage otherwise clear statutory words – see Episode 27. **iTip** – remember this!



Legislative intent

[Joseph v Worthington \[2017\] VSC 501](#)

A cardinal rule of interpretation has always been to give effect to legislative intent⁷. This case (at [31]) reminds us that discovering intention is ‘an objective process ascertained by interpreting the statute’.

It is not any subjective intention of the legislature which is relevant, but rather the ‘objective meaning’ of the provisions⁸. Though some commentators disagree⁹, the High Court has settled the issue by stating many times that legislative intent is an outcome ‘arising from the application of accepted rules of construction’¹⁰. **iTip** – the words of the Act itself are the ‘surest guide’ to legislative intent¹¹.



Legislative intervention

[Ghamrawi v R \[2017\] NSWCCA 195](#)

Constructional choice is one thing, but statutory words, even when read in their widest context, only stretch so far. Ghamrawi was convicted of ‘break and enter’ to commit assault¹². He had permission to enter, however, and used no trick or threat.

Law reform elsewhere had extended the meaning of ‘break’, but the position in NSW was governed by general law principles. The court allowed the appeal and ordered a retrial. Extending the meaning of ‘break’, it said (at [64]), ‘should await legislative intervention’. Change to stable law like this is ‘best resolved by legislative processes rather than by any extreme exercise in statutory interpretation’¹³.



Telephone books

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

The court (at [54]) referred to the ‘massive and over complex verbiage’ of the 2500 page *Corporations Act*, where professionals and judges ‘must navigate tortuous, mind-numbingly detailed, cascading provisions’. These ‘telephone books’ enacted ‘at huge cost to the community’¹⁴ raise the need for more principles-based drafting, the court said.

This debate has long raged in tax circles, where telephone books are the norm. The reasons here are many – historical, legal and cultural. The best way to understand these telephone books is by the correct application of interpretive rules. **iTip** – these rules help ensure you don’t get the wrong number.

▪ Writers – Gordon Brysland and Suna Rizalar.

▪ Thanks to Jo Stewart.

¹ *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30.

² s 74(1)(ca)(ii) of the *Mining Act 1978* - these are often filed late.

³ *Forrest & Forrest* (at [34-42]).

⁴ *Project Blue Sky* [1998] HCA 28 (at [91]).

⁵ *Ingram AFR* (17/8/17), *Garvey The Australian* (18/8/17).

⁶ s 58C(1) of the *Building Act 1972*, s 88(1) of the *Building Act 2004*.

⁷ See Episodes 1 and 18.

⁸ *Strano v ACT* [2016] ACTSC 4 (at [39]).

⁹ Ekins & Goldsworthy (2014) 36 *Sydney Law Review* 39.

¹⁰ *Congoo* [2015] HCA 17 (at [36]), *Momcilovic* [2011] HCA 34 (at [60]).

¹¹ *Alcan* [2009] HCA 41 (at [47]).

¹² s 112(1) of the *Crimes Act 1900*.

¹³ *Roadshow Films* [2012] HCA 16 (at [120]), quoted.

¹⁴ cf Rares J [2014] *FedJSch* 10.