



# interpretation NOW!

## Episode 43 – top ten High Court interpretation cases



What did parliament mean by the words it used? – that’s always the question. These cases from the modern era tell us the most important things about how to read statutes. Statutory interpretation, first and foremost, is an objective and flexible process<sup>1</sup> within which constructional choices almost invariably arise<sup>2</sup>. Legislative intention is an output of that process – that is, what parliament is taken to mean<sup>3</sup>. The totality of cases since 1981 overlap, repeat each other and vary in their nuances. Some explore remote territory, and a few appear to face backwards<sup>4</sup>. **iTip** – these cases may not be the full story, but they guide the way on major themes.

*Gordon Brysland* Tax Counsel Network

### 1 Cooper Brookes [1981] 147 CLR 297 (at 319-321)

**consequences** Inconvenience or improbability of result may support a reasonably open non-literal reading where it ‘more closely conforms’ to legislative purpose. If labels like absurd, extraordinary, capricious, irrational and obscure may suggest an alternative reading which is more consistent with fairness and convenience, it ‘must be preferred’.

### 2 CIC Insurance [1997] 187 CLR 384 (at 408)

**context** The ‘modern approach’ insists that context in the widest sense be considered up-front and not merely if ambiguity arises. Context includes the existing state of the law and mischief the provisions were intended to remedy. Plain words ‘may wear a very different appearance’ when read in light of the mischief and objects of the legislation.

### 3 Project Blue Sky [1998] HCA 28 (at [70])

**harmony** Legislation is construed on the basis it is intended to give effect to ‘harmonious goals’<sup>5</sup>. Conflict is to be resolved by ‘adjusting the meaning of competing provisions’ to best give effect to purpose and language while maintaining unity. This may require determining the hierarchy of provisions under which one ‘must give way to the other’.

### 4 Carr [2007] HCA 47 (at [5-7])

**compromise** Legislation often reflects political compromise and ‘rarely pursues a single purpose at all costs’. Where it strikes a balance between interests, stating the underlying purpose ‘is unlikely to solve the problem’. Pursuit of purpose ‘to the fullest possible extent’ is rare in practice. The question is how far the legislation goes in pursuit of purpose<sup>6</sup>.

### 5 Alcan [2009] HCA 41 (at [47])

**text first** Interpretation ‘must begin with a consideration of the text itself’ – and so it must also end with the text<sup>7</sup>. Neither history nor extrinsic materials can displace clear meaning, and the text is the surest guide to legislative intention. The meaning of the text, however, requires consideration of context which includes purpose, policy and mischief.

### 6 Certain Lloyd’s [2012] HCA 56 (at [24-26])

**preconception** Context, purpose, policy, consistency and fairness are surer guides to meaning than the logic with which a provision is constructed<sup>8</sup>. Purpose may be express or implied, but it always resides in the text and structure. Avoid assumptions about purpose, especially personal ideas of some desirable policy then characterised as the statutory purpose<sup>9</sup>.

### 7 Taylor [2014] HCA 9 (at [35-40])

**minor errors** Reading words in or out of legislation is problematic. This case integrates the practice into mainstream purposive theory, subject to strict gateway criteria<sup>10</sup>. It may be justified for simple drafting errors, but not to fill ‘gaps disclosed in legislation’ or where the insertion is ‘too big’ or ‘too far-reaching’ that separation of powers is threatened<sup>11</sup>.

### 8 Thiess [2014] HCA 12 (at [22-23])

**purpose** Objective discernment of purpose is integral. The requirement to prefer the interpretation that ‘would best achieve the purpose or object’ is a ‘general systemic principle’<sup>12</sup>. Don’t make a fortress out of a dictionary. Statutes always have a purpose ‘whose sympathetic and imaginative discovery is the surest guide to their meaning’<sup>13</sup>.

### 9 SZTAL [2017] HCA 34 (at [38-39])

**choice** The text ‘from beginning to end is construed in context’. Provisions commonly have a range of potential meanings (rather than just one or two) none of which is ‘wholly ungrammatical or unnatural’. Choosing between them is driven by ‘discernment of statutory purpose’ consistent with the ‘unqualified statutory instruction’ in s 15AA<sup>14</sup>.

### 10 SAS Trustee [2018] HCA 55 (at [20])

**coherence** Where the statutory text read in context permits more than one meaning, the choice between them may ultimately turn on an evaluation of the relative coherence of each with the scheme of the statute and its identified objects or policies. Coherence reflects an ideal of systemic cohesion, which is a core value in our legal system<sup>15</sup>.

• Writer – Gordon Brysland, Producers – Joseph Tranzillo & Suna Rizalar.

<sup>1</sup> *Taylor* [2014] HCA 9 (at [37]), *Agfa-Gevaert* (1996) 186 CLR 389 (at 401).

<sup>2</sup> Spigelman (1999) 4 Newcastle Law Review 1 (at 2), *Garrett* [2015] FCA 665 (at [12]).

<sup>3</sup> *Lacey* [2011] HCA 10 (at [43]), *Zheng* [2009] HCA 52 (at [28]).

<sup>4</sup> *Saeed* [2010] HCA 23 (at [33]), *Esso Australia* [2017] HCA 54 (at [52]).

<sup>5</sup> *Plaintiff S4* [2014] HCA 34 (at [42]), *Cunneen* [2015] HCA 14 (at [31]).

<sup>6</sup> *Rodriguez* 480 US 522 (at 525-526) (1987), *Mammoet* [2013] HCA 36 (at [40-41]).

<sup>7</sup> *Consolidated Media Holdings* [2012] HCA 55 (at [39]).

<sup>8</sup> *Agalinos* [1955] HCA 27 (at [5]), *Project Blue Sky* [1998] HCA 28 (at [69]).

<sup>9</sup> *AEU* [2012] HCA 3 (at [28]), *Deal* [2016] HCA 31 (at [37]).

<sup>10</sup> *Wentworth* [1980] AC 74 (at 105), *Newcastle* [1997] 191 CLR 85 (at 113).

<sup>11</sup> *Plaintiff S152* [2003] HCA 2 (at [102]), *Zheng* (at [28]).

<sup>12</sup> s 15AA of the Acts Interpretation Act 1901, inserted 1981, amended 2011.

<sup>13</sup> *Cabell* 148 F 2d 737 (at 739) (1945), *Kelly* [2004] HCA 12 (at [98]).

<sup>14</sup> *Sharpcan* [2018] FCAFC 163 (at [207-215]), *Possum Case* [2018] FCA 178 (at [46]).

<sup>15</sup> *Fell* (2018) 41 MULR 1160, *Grantham & Jensen* (2016) 42 Monash ULR 360.