

interpretation NOW!

Episode 46 – 29 March 2019



Australian Government

Australian Taxation Office



What do 🤔👉👎 have in common? This is not the start of a bad joke. It is how you can be found to be acting in bad faith by using ‘greatly optimistic’ emojis in an abandoned transaction¹. Since 2004, there has been an increasing number of cases² where judges have had to interpret communications between parties using emojis. Cases span from criminal to torts. Emoji use is significant. They can set or change the tone of conversation and reveal a state of mind³. Despite the growth in emoji use, there are issues to overcome⁴ – (1) courts and legal databases have no capacity to show or search by them, (2) there are cultural nuances in their use, and (3) the sender and receiver don’t always see the same picture. **iTip** – as always in interpretation, context is king! 🙌

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Object/purpose/intention

[WHA v Outback Ballooning \[2019\] HCA 2](#)

Did NT work safety laws ‘alter, impair or detract’ from federal provisions? In this context, Gageler J commented on the nature of legislative intention. It is what parliament is taken to intend the words to mean after the interpretation process is complete⁵.

The judge referred to ‘emergent scepticism’ about the very existence of legislative intention. He stressed (at [77]) that legislated text is the ‘product of deliberate choice’ by elected representatives⁶. No other judges touched the point, and the comments are confined to inconsistency settings. They also do not change the stable position that legislative intention is something imputed to parliament⁷.

Prisoner rights

[Kheir v Dept of Justice and Regulation \[2019\] VSC 76](#)

Should provisions conferring ‘rights and privileges on a prisoner in return for good behaviour’ be read ‘liberally and beneficially towards the prisoner’? Prisoner rights are interpreted in line with the standard rules of construction – that is, having regard to purpose and context⁸.

Prisoner rights exist in a special context where fundamental human rights are curtailed⁹ during imprisonment. The ordinary approach is also that statutory powers are to be construed broadly and only read down for express words or clear implication¹⁰. See also > Episode [37](#).

Statutory definitions

[SZTVU v Minister of Home Affairs \[2019\] FCAFC 30](#)

In this case, the court considered the *Migration Act* definition of ‘fast track applicant’. It held (at [71]) that the ordinary meaning of ‘applicant’ could not be used as an interpretative aid in construing the definition. To do otherwise would introduce circuitry into the process, as the High Court has ruled¹¹.

Our courts have, from time to time, questioned our approach¹², but this is the law in Australia – as *SZTVU* illustrates. In other places, it may be different¹³.

iTip - Statutory definitions are difficult from several angles, but take special care to avoid allowing the ordinary meaning of the term defined to influence what the statutory term means¹⁴.

Meaning of ‘revoke’

[FCT v Armstrong Scalisi \[2019\] NSWSC 129](#)

Did a notice of tax estimate saying it ‘replaces’ another mean the earlier notice is ‘revoked’ as the act required? Ward CJ (at [151]) said ‘no’. Ordinarily, there is a difference between ‘revoke’ [to take away or cancel] & ‘replace’ [to substitute or refresh].

The former meaning is more consistent with context and purpose, something underlined by use of ‘must’. That the notice be in clear words is in sync with the object and purpose. Using ‘replaces’ led to ambiguity and uncertainty. This case reminds us to always consider text, context and purpose ‘at the same time’¹⁵. **iTip** – it’s safer to just follow the statutory wording when drafting statutory notices!

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¹ *Dahan v Sacharoff*, 30823-08-16, (Israel 2017).

² Eric Goldman has [tracked this in the US](#).

³ *R v Yang* [2016] WASC 410 (at [57]).

⁴ Goldman (2018) 93(3) Washington Law Review 1227.

⁵ *Lacey* [2011] HCA 10 (at [43]), *Zheng* [2009] HCA 52 (at [28]).

⁶ cf *Defence Housing* (1997) 190 CLR 410, *Singh* [2004] HCA 43 (at [19]).

⁷ *Project Blue Sky* [1998] HCA 28 (at 78)], Episodes [1](#), [18](#), [29](#), [36](#) & [43](#).

⁸ *Castles* [2010] VSC 310 (at [127]).

⁹ *Castles* [2010] VSC 310 (at [110]), *Daly* [2001] UKHL 26 (at [5]).

¹⁰ *Roy Morgan* [2001] HCA 49 (at [11]), cf *Shin Kobe Maru* [1994] HCA 54 (at [30]).

¹¹ *Wacal* [1978] HCA 30 (at [3]), *Shin Kobe Maru* [1994] HCA 54 (at [26]).

¹² *Eg – Hu* (1997) 79 FCR 309 (at 324), *Malouf* [2004] NSWCA 299 (at [8-9]).

¹³ *Bennion* (at [18.6]), *MacDonald* [2005] UKHL 47 (at [18]).

¹⁴ Episodes [1](#), [11](#) & [33](#), cf *Pearce & Geddes* (at [6.59]).

¹⁵ *SZTAL* [2017] HCA 34 (at [14]), *SAS Trustee* [2018] HCA 55 (at [64]).