

interpretation NOW!

Episode 49 – 28 June 2019



Australian Government

Australian Taxation Office



In *Masson v Parsons*¹, the recent sperm donor case, the High Court repeated key points about how we are to read statutes. First (at [26]), unless there is a basis in the text, context or purpose for a different meaning, words take their ordinary meaning². Second (at [42]), any conflict between provisions is to be fixed by ‘adjusting the meaning of competing provisions’³. **iTip** – follow this simple strategy: (A) read the provisions (always!), (B) consider context and purpose, (C) if there is conflict, decide which provision is dominant, (D) use context to determine possible meanings for that provision, (E) select the one which best achieves the statutory purpose⁴, (F) adjust the meaning of the other provision, and (G) return to the text.

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⏪ – Severance & exclusion

[Spence v Queensland \[2019\] HCA 15](#)

This case involved the validity of provisions that purport to enable retention of gifts for non-electoral purposes. Section 15A of the *Acts Interpretation Act 1901* requires Acts to be read subject to the Constitution, and any enactment in excess of power ‘shall nevertheless be a valid enactment to the extent to which it is not in excess of that power’.

The High Court held that s 302⁵ was valid in part, but that s 15A could not save what remained. This was because that part was not ‘unchanged’, and it was beyond judicial power to remedy the defect⁶. *Spence* illustrates the preservation policy behind s 15A, but that it operates as no cure-all in practice⁷.

↪ – Cognate expressions

[Bluescope Steel v AWU \[2019\] FCAFC 84](#)

This case (at [54]) reminds us that, where a phrase is given a particular meaning by the court, other grammatical forms of that phrase (often called cognate or derivative expressions) have ‘similar effect’ where repeated in a later statute.

The High Court, in an earlier case, had determined that the phrase ‘ordinary time rate of pay’ picked up the standard or ordinary hours per week as fixed by the applicable award, agreement or contract. A presumption in favour of this construction therefore applied to a later statute adopting the same phraseology. **iTip** – the strength of the presumption depends on circumstances and is rebuttable⁸.

⊕ – Meaning of ‘and’

[Goodacre v Lumbers \[2019\] WASC 184](#)

Simple words sometimes cause unexpected complication. Did a cyber-stalking order prohibiting use of ‘the internet and any social network’ require the use of both for an offence to be committed?⁹ The word ‘and’ is usually read conjunctively according to its ordinary meaning, but not always.

In this case, Derrick J (at [57]) read it disjunctively, as if it meant ‘or’. Both words may be read for the other in cases of drafting error or where context or purpose otherwise compel that course¹⁰. Reading ‘and’ conjunctively in this case would have made reference to ‘the internet’ redundant, so a ‘more sensible interpretation’ was adopted by the court¹¹.

📎 – ‘necessary or convenient’

[Northern Land Council v Quall \[2019\] FCAFC 77](#)

The ability to do all things ‘necessary or convenient’ for performing statutory functions is a common mechanism for ensuring powers are adequate for their intended role¹². The court (at [105-107]) sets out basic principles for giving content to powers of this kind. They are ‘strictly ancillary’, do not extend the scope of provisions, are tied to the specific powers and functions conferred¹³, and are not freestanding.

Having a supplemental character, the correct starting point for determining their content must be the underlying powers and functions. **iTip** – starting with what ‘necessary or convenient’ may mean in other contexts is the wrong way to go.

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¹ *Masson v Parsons* [2019] HCA 21.

² *Cooper Brookes* [1981] HCA 26 (at [6]), *Eso Australia* [2017] HCA 54 (at [52]).

³ *Project Blue Sky* [1998] HCA 28 (at [70]), *CSI Pacific* [2003] HCA 43 (at [28-29]).

⁴ 15AA of the *AIA 1901*, *SZIAL* [2017] HCA 34 (at [38-39]), Episodes 28, 32 & 43.

⁵ *Commonwealth Electoral Act 1918*.

⁶ *Pidoto v Victoria* (1943) 68 CLR 87 (at 108, 111) cited.

⁷ cf Episode 7, *NAAJA* [2015] HCA 41 (at [75-78]).

⁸ cf *Masson v Parsons* [2019] HCA 21 (at [32, 69]).

⁹ 61(1) of the *Restraining Orders Act 1997 (WA)*.

¹⁰ Pearce & Geddes (at [2.29]), *Pollock* [2004] WASC 122 (at [23]).

¹¹ cf Episodes 15, 37 & 39.

¹² *Shanahan* [1957] HCA 4 (at [2]-[4]), Pearce & Argument Ch 14.

¹³ *Anthony Lagoon* (1987) 15 FCR 565 (at 585) cited.