

interpretation NOW!

Episode 99 – 31 August 2023



Australian Government

Australian Taxation Office



Senior judges once said not to read books about interpretation¹. That changed with the explosion of legislation we see in the modern state. Professor Pearce produced our first textbook back in 1974. Two more have now entered the field and all of them are good². Interpretation is a significant body of law in its own right. Each of our textbooks tells you whatever you may want to know, except for one thing ... how to do it! This is generally not an issue with other subjects. It is important here, however, because interpretation involves a process or method. Attempts to explain the techniques have been made³, but concepts like ‘hermeneutic circles’ make little sense to the ordinary reader⁴. It is possible, however, to describe the process in basic terms sufficient to enable the avoidance of simple errors⁵. What we need to supplement textbooks is an interpretation manual.

Gordon Brysland Tax Counsel Network

+ Adding words

[CEO v Waroona Resources \[2023\] WASCA 73](#)

Regulations exempted ‘asbestos containing material’⁶ – defined as ‘manufactured material ... that, as part of its design, contains asbestos’ – from levy calculation. Waroona said this should be read as including a mix of asbestos and soil where separation was impracticable.

Waroona argued that the levy’s purpose of encouraging recycling did not apply to asbestos, and that words should be read into the regulation. This was rejected. The proper emphasis is on statutory purpose, not on assumptions about what may be desirable. The words argued for were not necessary nor was their omission an error⁷. This case illustrates the difficulty in meeting the test for adding words⁸.

🔗 Extrinsic materials

[Doman v Leadenhall Australia \[2023\] SASC 97](#)

This case is about the effect of bankruptcy on judgment debt interest. It is important for two reasons. First is the principle that statutes – in this case, the [Bankruptcy Act 1966](#) – override the common law to the extent of any inconsistency. Second is the discussion by McDonald J (at [50-57]) about when extrinsic materials may be properly consulted under s 15AB of the [Acts Interpretation Act 1901](#).

The judge said these materials can be looked at where there is ambiguity, to confirm ordinary meaning or where absurdity arises. However, they may also be consulted from the start of the process in every case as part of context in the ‘widest sense’⁹.

📝 Statutory definitions

[Azimitabar v Commonwealth \[2023\] FCA 760](#)

Statutory definitions, as mere aids to construction, are usually unable to confer powers¹⁰. In this case, the definition of ‘immigration detention’ seemed to allow the minister to approve ‘another place’ as an immigration detention centre. A delegate purported to use the power to approve the Mantra Hotel as such a centre. This was challenged as unlawful.

Murphy J said (at [106]) the general principle was ‘not absolute’ and that departure from it was permitted where there is a ‘clear, contrary legislative intent’¹¹ – as was the case here. There is also generally a consistent practice to imply into official powers the practical ability to exercise them¹².

➔ Words with a legal meaning

[Host-Plus v Maritime Super \[2023\] NSWSC 725](#)

Did an asset transfer from one superfund to another involve an ‘appointment’ for the purpose of unlawful inducement provisions¹³? The word ‘appointment’ has a well-understood legal meaning in trust situations¹⁴. Words with a legal meaning when used in a statute take that meaning ‘unless a contrary meaning clearly appears from the context’¹⁵.

Nothing in the context indicated any contrary intention here. This was consistent with comparable provisions elsewhere and the legislative history. Stevenson J held that the word ‘appointment’ directed attention to trustee conduct, but nothing in the asset transfer raised anything of this nature.

▪ **Thanks** – Jeremy Francis, Annie Huang, Janhavi Bhandari & Patrick Boyd.

¹ Lord Reid quoted in Carter (2020) 41 *Statute Law Review* 240 (at 263).

² First Herzfeld & Prince (2013), then Barnes, Dharmaranda & Moran (2023).

³ Barnes in *The Coherence of Statutory Interpretation* (at 78-94) is the best.

⁴ Campbell & Campbell (2014) 39 *Australian Bar Review* 1 (at [4.6]).

⁵ Episode 66 seeks to describe the process or method we are to apply.

⁶ reg 5(1)(i) [Waste Avoidance and Resource Recovery Levy Regulations 2008](#).

⁷ [Taylor](#) [2014] HCA 9 (at [38]), [Australian Unity](#) [2018] WASCA 38 (at [87-91]).

⁸ [Deleje](#) [2023] QCAT 214 (at [20]), but see [BBlood](#) [2022] FCA 1112 (at [292]).

⁹ In this case, statute and common law are to be applied ‘side-by-side’.

¹⁰ [Gibb](#) (1966) 118 CLR 628 (at 635), [Kelly](#) [2004] HCA 12 (at [84]).

¹¹ [Mekpine](#) [2016] HCA 7 (at [61-62]).

¹² [Maver](#) (1985) 157 CLR 290 (at 301), [Aye](#) [2010] FCAFC 69 (at [62]).

¹³ s 249E(2) of the [Crimes Act 1900](#) (NSW).

¹⁴ *Finn Fiduciary Obligations* (at 300) cited.

¹⁵ Pearce 9th Edition (at [4.21]), [Brewery Employees](#) (1908) 6 CLR 469 (at 531).

Episode 100 – ‘things good to know about interpretation’

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ISSN 2651-9518