

# interpretation NOW!

Episode 6 – 13 November 2015 (the policy episode)



Australian Government

Australian Taxation Office



The relationship between law and policy has always been difficult. Nowhere is this felt more deeply than at the interpretation stage, and particularly where an administrator is involved. The key rules here are – (A) to apply the law not the policy<sup>1</sup>, (B) to start and finish with the text, and (C) to apply purposive principles. These simple commands, however, only beg the question about how policy affects interpretation at the day-to-day practical level<sup>2</sup>. This episode of *iNOW!* aims to demonstrate the importance of policy in reading statutes, while marking out its proper sphere of influence and the main points of caution. Please enjoy!

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## Importance of policy

### [FCT v Unit Trend Services \[2013\] HCA 16](#)

In 1998, the High Court began emphasising that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’<sup>3</sup>. Last month, this was described as ‘one of the most telling statements of principle’ concerning statutory interpretation<sup>4</sup>, and it is.

Policy is part of the wider context to which regard must be had. The recent GST anti-avoidance case, *Unit Trend* (at [47]) is an example of this, as is Hill J’s rejection of ‘linguistic analysis’ in *HP Mercantile*<sup>5</sup>.

**iTip** – policy has a cemented and significant role to play in the interpretation process, but it should not be your first focus and it has distinct limits.



## Generalised policy

### [BH Apartments v Sutherland \[2015\] VSC 381](#)

The High Court repeatedly warns us against simplistic characterisation of policy at levels too general to be useful. Most legislation invariably reflects political compromise, the correct question being how far the legislation goes in pursuit of its general purpose<sup>6</sup>. Gleeson CJ illustrated this via reading all provisions of the tax laws by reference to a general purpose of raising revenue<sup>7</sup>. ‘Legislation rarely pursues a single purpose at all costs’, he said.

*BH Apartments* (at [24]) summarises the position – *Woodside* is a recent example<sup>8</sup>. **iTip** – always have regard to the policy, but don’t think that high level statements can always resolve what a provision means – interpretation is more nuanced than that!



## Preconceived policy

### [AEU v DECS \[2012\] HCA 3](#)

Listen up – ‘In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose’ – so said the High Court (at [28]). This instruction applies to everyone, including agencies and administrators of the law.

The requirement to start with the text, and not some preconception about what the law was designed to achieve, is at the very core of the approach we are obliged to take. Courts regularly remind us of this<sup>9</sup>. **iTip** – don’t start with externally-derived policy, or you may become pre-suggested when you come to the words of the L-A-W itself.



## Sources of policy

### [Certain Lloyd’s v Cross \[2012\] HCA 56](#)

Where can you search for policy? Hill J said it was ‘enshrined’ in the provisions and in the ‘legislative context, so far as it casts light upon the proper interpretation’<sup>10</sup>. Later comments suggest it may be derived only from the Act<sup>11</sup>. This case (at [23-25]) favours the first approach – policy resides in the text and structure of the Act, but it may be inferred from extrinsic materials ‘where appropriate’<sup>12</sup>.

Extrinsic materials occasionally may assist construction, but they provide no help in the face of clear words. **iTip** – (A) look for policy first of all in the Act itself, (B) next look in the wider permitted context, (C) then see if the words can properly bear a meaning consistent with the resolved policy.

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<sup>1</sup> [W R Carpenter](#) [2007] FCAFC 103 (at [29]).

<sup>2</sup> Robertson QC (2014) 43 AT Rev 22 (at 30).

<sup>3</sup> [Project Blue Sky](#) [1998] HCA 28 (at [69]).

<sup>4</sup> [Macoun v FCT](#) [2015] HCATrans 257.

<sup>5</sup> [HP Mercantile](#) [2005] FCAFC 126 (at [41-43]).

<sup>6</sup> [Mammoet](#) [2013] HCA 36 (at [40-41]), for example.

<sup>7</sup> [Carr v WA](#) [2007] HCA 47 (at [6]).

<sup>8</sup> [Woodside Energy](#) [2009] FCAFC 12 (at [51]).

<sup>9</sup> [Han](#) [2015] FCAFC 79 (at [26]), for example.

<sup>10</sup> [HP Mercantile](#) [2005] FCAFC 126 (at [43-44]).

<sup>11</sup> [Meridien AB](#) [2013] QCA 121 (at [19]).

<sup>12</sup> [FCT v Zammit](#) [2014] NSWCA 104 (at [67]).