

interpretation NOW!

Episode 4 – 11 September 2015



Australian Government

Australian Taxation Office



iNOW! has business line input these days, which is already making the product better – thanks everyone. As new High Court judge Michelle Gordon and ex-High Court judge Ken Hayne put it, ‘the proper construction and application of statutes always has been, **but now more than ever is, an essential legal skill**’ – we agree. The theme we want to leave you with this month comes from a famous American jurist – ‘**Literalness may strangle meaning**’. Please enjoy!

Rebecca Smith guest editor, Tax Counsel Network

Text context text

[Skyy Spirits v Lodestar \[2015\] FCA 509](#)

In 2010, the High Court said you shouldn’t look at extrinsic materials ‘before exhausting the application of the ordinary rules of statutory construction’². Perram J took this as signalling some shift away from the settled idea that we are to look at context in the widest sense upfront.

Now, in *Skyy Spirits* (at [45-47]), Perram J accepts that extrinsic materials *must* be looked at early on. How do we reconcile this with the High Court mantra that interpretation starts and finishes with the text? Our practical and best answer is – ‘text > context > text’. **iTip** – revisit Episode 2 and review what each step involves – it’s not rocket science!

Use of regulations

[EHL Burgess Properties v CSR \[2015\] VSC 295](#)

This case reminds us (at [67]) that you can’t use regulations to interpret the Act they are made under. Otherwise, it ‘would be a case of the tail wagging the dog’³. One exception here is where the Act is expressly made subject to the regs.

Also, where the Act and regs form part of a legislative scheme, the regs may be used to ascertain the scheme and help understand its nature. The old sales tax regime and newer GST system are examples of this⁴. **iTip** – interpreting regs and using them to better understand the legislative scheme is one thing, but leveraging them to construe the Act is a step too far.

Changes in language

[LM v K Lawyers \(No 2\) \[2015\] WASC 245](#)

When parliament uses different language to express an idea, it usually intends a different meaning. This is particularly so, said the court (at [18]), where ‘a long-established form of words’ is abandoned.

However, with mass-migration of provisions from ITAA36, s 1-3(2) of ITAA97 preserves original meaning where the *same idea* is expressed in different words ‘to achieve a clearer and simpler style’⁵. This principle applies generally under s 15AC of the Acts Interpretation Act 1901⁶. **iTip** – it’s always tricky to tell when the ‘same idea’ is being expressed in different words for reasons of clarity. The EM may help, but the words must also be reasonably capable of getting you there.

Deeming provisions

[Matthews v The Tap Inn \[2015\] SADC 108](#)

Phrases in legislation like ‘is taken to be’ create a deeming provision, as this case notes (at [19]). Deeming provisions usually involve a ‘statutory fiction’ – a legal version of ‘let’s pretend’ – but only where the facts required are first made out⁷. They come in various guises – ‘deemed to be’, ‘taken to be’ and ‘as if’ are common deeming mechanisms.

The important point is that deeming provisions are strictly limited to the statutory purpose they are created for⁸. For more, see a Tax Institute paper by Andrew Sommer⁹. **iTip** – once you find a deeming provision, be careful only to give it an operation that is consistent with both its purpose and context¹⁰.

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▪ Special thanks to Jo Stewart and Jonathon Shaw.

¹ Frankfurter J in *Utah Junk Co v Porter* [1946] USSC 81 (at [9]).

² *Saeed v Minister* [2010] HCA 23 (at [33]).

³ *Plaintiff M47* [2012] HCA 46 (at [56]).

⁴ *Ellis & Clark* (1934) 52 CLR 85 (at 89), *Multiflex* [2011] FCAFC 142 (at [15]).

⁵ *Sherlink* [2004] AATA 113 (at [31]), *Metlife* [2008] FCA 568 (at [47]).

⁶ *Dallas Buyers* [2015] FCA 317 (at [70]), *Anglican* [2015] FCAFC 81 (at [14]).

⁷ *Plaintiff B9* [2014] FCAFC 178 (at [47-48]), Pearce & Geddes (at [4.45]).

⁸ *Comber* (1986) 10 FCR 88 (at 96), *Howard* [2012] FCAFC 149 (at [48]).

⁹ Sommer *To deem or not to deem* [2007] TIA GST Intensive paper.

¹⁰ cf *Genex Corporation* [1992] HCA 65 (at [20-21]).