

interpretation NOW!

Episode 7 – 18 December 2015



Australian Government

Australian Taxation Office



There is growing external interest in getting access to **interpretation NOW!** – something which will occur soon. Tax Institute president Stephen Healey says **iNOW!** ‘provides excellent guidance’, and that it ‘distils these complex matters into more user friendly and practical guides’. Professor Dennis Pearce, co-author of Pearce & Geddes *Statutory Interpretation in Australia*, writes – ‘I like your text-context-text formulation. It seems to me to be the best that one can make of the varying dicta and is, in any case, good sense’ – see Episodes 2 and 4. Like the Tax Institute, we hope that making **iNOW!** publicly available will ‘positively encourage greater co-operation and collaboration between members of the profession and the ATO’. Please enjoy!

Will Day guest editor, Tax Counsel Network

✓ Validity

[NAAJA v Northern Territory \[2015\] HCA 41](#)

When provisions can be read so as to invalidate them but may also be read in a way that does not, ‘a court must always choose the latter course when it is reasonably open’¹. Gageler J in this case (at [75-78]) provides extra insight into this rule². He points out that a court has no warrant to depart from ordinary principles of interpretation in this context, and cannot prefer one construction ‘merely to avoid constitutional doubt’³ – a court ‘should be wary’.

Challenges to tax laws are common, as are articles about the validity of new measures, like the [Commissioner’s remedial power](#)⁴. **iTip** – a tax officer must assume validity, but argument before a court to sustain it may call for a more nuanced approach.

? Uncertainty

[Chevron Australia v FCT \(No 4\) \[2015\] FCA 1092](#)

This case raised whether Div 815-A transfer pricing provisions were invalid by reason of textual uncertainty. Robertson J said ‘no’. Legislation can never be void or invalid due to uncertainty⁵. However difficult the exercise, a statute always has a meaning and a singular meaning at that.

Neither a court nor an administrator can hold more than one view of what the law requires at any particular time. They cannot ‘speak with a forked tongue’⁶ – this is fundamental. As the judge in this case put it: ‘difficulties of construction are not to be regarded as synonymous with legal uncertainty’. **iTip** – there is *always* a meaning – our job as interpreters of legislation is to find it.

◀ Retrospectivity

[AEU v Victoria \[2015\] FCA 1196](#)

Acts are presumed not to operate retrospectively⁷ – it’s all about fairness. Bromberg J explains (at [237-262]) that ‘retrospectivity’ has 2 senses – (A) changing legal rights concerning past events⁸, and (B) merely taking account of past events as the basis for how a future law will operate⁹.

The presumption applies only to type (A). It is rebutted by a contrary intention of ‘reasonable certainty’, which may be harder to show in tax contexts. **iTip** – get a feel for whether your situation is (A) or (B) – eg ‘Long-term leases made in 2010 are subject to tax from their commencement’ involves type (A). Next, see if text or context shows any contrary intention with ‘reasonable certainty’.

✋ Inconvenience

[Di Paolo v Salta Constructions \[2015\] VSCA 230](#)

There is a growing jurisprudence about when and how practical consequences properly influence interpretation¹⁰ – this is a controversial area! In 1981, it was said that results which are absurd, extraordinary, capricious, irrational or obscure might drive an alternative construction¹¹. [Section 15AB](#) was legislated for soon after.

The High Court has said¹² that inconvenience of result may assist an alternative conclusion that is ‘reasonably open’. *Di Paolo* (at [48]) cautions that the consequences must be ‘very serious’ before a court will reject an otherwise correct construction¹³. **iTip** – failure to observe this runs the risk of crossing a line into the no-go domain of parliament¹⁴.

■ Writer – Gordon Brysland, Producer – Michelle Janczarski.

■ Thanks to Ivica Bolonja, Robert Olding & Jo Stewart.

¹ [Residual Assco](#) [2000] HCA 33 (at [28]).

² Also, s 15A of the [Acts Interpretation Act 1901](#).

³ [Today FM](#) [2015] HCA 7 (at [65-66]).

⁴ [Wilson-Rogers](#) (2015) 44 AT Rev 242, for example.

⁵ [EHL Burgess](#) [2015] VSCA 269 (at [74]).

⁶ [World Best](#) [2005] NSWCA 261 (at [171]).

⁷ [Palmer & Sampford](#) (1994) 22 *Federal Law Review* 217.

⁸ [Maxwell v Murphy](#) (1957) 96 CLR 261 (at 285).

⁹ [Adco Constructions](#) [2014] HCA 18 (at [45]).

¹⁰ Pearce & Geddes (at [2.38-2.40]).

¹¹ [Cooper Brookes](#) (1981) 147 CLR 297 (at 321).

¹² [CLC Insurance](#) (1997) 187 CLR 384 (at 408).

¹³ [ConnectEast v FCT](#) [2009] FCAFC 22 (at [41]).

¹⁴ [EHL Burgess](#) [2015] VSCA 269 (at [72]).