

DENMAN CHAMBERS STATUTORY INTERPRETATION SEMINARS

The Commonwealth Acts Interpretations Act, 1901

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BACKGROUND AND POLICY

1. Apparently, as a reaction to the growing size of legislation, the Commonwealth and State Parliaments enacted interpretation acts. The Commonwealth did so in 1901. It is called the *Acts Interpretation Act, 1901 (Cth)* ("**AIA**"). The States much later. They are variously known as "*Interpretation Acts*", "*Acts Interpretation Acts*", "*Interpretation of Legislation Acts*" and "*Legislation Acts*" (hereinafter collectively referred to as "**Interpretation Acts**")
2. These Interpretation Acts are designed to deal with a range of procedural issues and commonly used expressions in legislation.
3. It is said that the draftspersons assume that the reader of any piece of legislation will have knowledge of the relevant Interpretation Act applicable to that legislation.
4. The overriding principle in relation to Interpretation Acts is that unless there is a specific provision in a piece of legislation as to a particular phrase or meaning to be ascribed to a commonly used phrase, or a widely used procedural matter, the Interpretation Acts will apply. The manner in which this "contrary intention" principle is applied (or not – as the case may be) is discussed in further detail below.

RECENT AMENDMENTS

5. It was only after I read the relevant chapters in Pearce & Geddes¹ that I picked up the latest copy of Bar News to find that the *Acts Interpretation Amendment Act 2011 (Cth)* ("**the Amendment Act**") was passed on 15 June 2011. I was saddened to read, after my preparation for this seminar on the current Act, that the new Act contains "*extensive revisions*", "*significant re-arrangement within the Act*" and a number of important "*substantive amendments*". It was back to the drawing board for me.
6. The Amendment Act will come into effect at the end of December this year. However, some of the amendments in the Act are dependant upon concomitant amendments in other legislation, but I am not going to refer to those at all. I have enough to do with the new Act.
7. The Explanatory Memorandum of the Amendment Act commences with a comment from the Commonwealth Attorney-General, Robert McClelland that:

¹ DC Pearce & RS Geddes "Statutory Interpretation in Australia" (Seventh Edition, 2011)

“..Australia's first Attorney-General, Alfred Deakin, said on the second reading of the Acts Interpretation Bill on 6 June 1901, the Act: is a measure providing for the simplification of the language of Acts of Parliament and the shortening of their terminology. It constitutes in a sense a legal dictionary, particular meanings being assigned by it to particular phrases, which must be used over and over again in almost every Act of Parliament. [This Act] progresses the implementation of the clearer laws elements of the Government's Strategic Framework for Access to Justice in the Federal Civil Justice System. The amendments address the useability and readability of the Acts Interpretation Act, resulting in clearer legislation and appropriately co-located provisions.”

8. The Amendment Act re-arranges many of the provisions in the AIA but makes no changes to them and I shall deal with a selection of the more commonly used provisions below.
9. The Amendment Act also contains a number of substantive amendments. These include:
 - (a) confirming that powers in relation to “instruments” apply to all types of instruments (an amendment made necessary by some unruly judges ousting the operation of certain powers in certain instruments);
 - (b) providing that anything done by or in relation to a person purporting to act under an appointment is not invalid merely because the occasion for the appointment had not arisen, there was a defect or irregularity in connection with the appointment, or the appointment had ceased to have effect or, in the case of acting appointments, the occasion to act had not arisen or had ceased;
 - (c) similarly, providing that an action by a Minister other than the Minister who is authorised to perform an action is not invalid merely because s/he is not that Minister;
 - (d) if an Act confers a power or function on a person holding an office, then the power must be performed by the person for the time then holding that office or position: see the newly enacted s.34AAA;
 - (e) allowing section 19B and 19BA Orders² to apply retrospectively; and
 - (f) specifying that everything in an Act should be considered part of an Act.
10. There are also a number of amendments to the AIA which modernise some of the concepts. For example:
 - (a) the term “King” is replaced by the term “Sovereign”;
 - (b) providing that a meeting can be comprised of people in different locations, using video-conferencing and the like: s. 33B(3); and

² Such orders update references in legislation to a particular Minister, Department or Secretary of a Department so that they can be read consistently with responsibilities as allocated under the Administrative Arrangements Order

- (c) the term 'document' is now defined in the same ways as the *Evidence Act 1995 (Cth)* to include things like maps, plans, drawings and photographs: see s. 2B of the Act;
 - (d) the term "month" is now differentiated from "calendar month" and is given a comprehensive definition in its own section: see s. 2G.
11. There are also generalised definitional changes such as s. 2J of the AIA which simplifies the position that a reference in any Act to a summons, an information, a claim, a complaint or a declaration includes a reference to any document through which court proceedings are commenced and specifically provides the example of a CAN.

SECTION 15AA

12. The current s.15AA of the AIA states:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

13. According to Pearce & Geddes, this particular provision applies to all executive as well as legislative instruments. It also has retrospective effect so that it applies to legislation that was enacted before s.15AA came into force. Similar provisions exist in the various State Interpretation Acts.
14. Section 15AA requires the purpose or object of the Act to be taken into account even if the meaning of the words, interpreted in the context of the rest of the Act, is clear: *Mills v Meeking* (1990) 169 CLR 214 at 235. In that case Dawson J stated:

"The literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purposes of an Act to one which would not, especially where that purpose is set out in the Act."

[the equivalent of s.15AA in the Victorian Legislation] *must, I think mean that the purposes stated in Part 5 of the Road Safety Act are to be taken into account in construing the provisions of that Part, not only where those provisions on their face offer more than one construction, but also in determining more than one constructions open. The requirement that a Court look to the purpose of an Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a Court would have regard to purpose: Miller v Commonwealth (1904) 1 CLR 668 at 674; Wacal Developments Pty. Limited v Realty Developments Pty. Limited (1978) 140 CLR 503 at 513. The approach required by [the equivalent of s.15AA] needs no ambiguity or*

inconsistency; it allows a Court to consider the purposes of an Act in determining whether there is more than one possible construction. ...”

15. The Amendment Act amended s.15AA to the following:

*“In interpreting a provision of an Act, **the interpretation that would best achieve** the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to reach other interpretation.”*
[emphasis added]

16. This new formulation was inserted in order to address the problem that was identified in *Chugg v Pacific Dunlop Pty. Limited* (1990) 95 ALR 481 at 489 where it was noted that s.15AA does not address the situation where there is a choice between two or more constructions that promote the Parliament’s purpose. This new version now obliges the Court to prefer the construction of an Act that will “best achieve” the purpose or object of the Act. As to how Courts interpret the object or purpose of the Act, that is a matter for another seminar.

COMMENCEMENT OF LEGISLATION

17. Part 2³ of the AIA deals with the commencement of Acts.
18. The term “commencement” is now included in the definitions provision of the AIA. It is said to mean “when Acts come into operation”. The other amendments to the AIA in relation to the term “commencement” make it clear that this term is to be used interchangeably with the phrase “come into operation”.
19. The newly enacted s.3A of the AIA specifies that an Act will commence on the twenty-eighth day after receives Royal Assent. However, if it is an Act amending the Constitution it commences on the day of Royal Assent. These provisions, however, do not apply where the legislation itself specifically provides for its own commencement date.
20. The exact moment at which a repealed Act ceases to have application and a new Act comes into operation or commences is said to be seamless. There is no “hiatus nor any overlapping”: *Lipshut v MacKay* [1950] VLR 57 per Deane J.
21. Section 4 of the AIA (as now amended) provides that there are a limited number of powers that may be exercised under an Act between the time that is enacted but prior to its commencement. Those provisions permit the exercise of powers which would bring the instrument itself into effect or make the Act fully effective at or after the commencement of the Act. This allows some administrative flexibility in relation to, for example, the making of regulations which are referred to in an Act. However, the limitations contained in s.4(4) of the AIA ensure that no substantive powers can be exercised until after the commencement of the Act. These amendments are consistent

³ This is a new Part inserted into the AIA by the Amendment Act and note that the Parts are now referred to by Arabic rather than Roman numerals.

with prior judicial interpretations of the current AIA: Conroy v Carter (1968) 118 CLR 90; Le Cornu Furniture and Carpet Centre Pty. Limited v Parsons (1990) 54 SASR 108. For those who are interested, there is an article authored by D. Pearce entitled "Anticipating Legislation" in (2008) 58 AIAL Forum 8.

REPEAL OF LEGISLATION

22. The Amendment Act has also made substantial changes to what was Part III (notice the antiquated Roman numerals) and is now Part 4 of the AIA in relation to amendment, repeal and expiry of Acts. The previous sections 7-9 have been repealed and replaced with a more streamlined provision. In summary, the new provision clarifies that:
 - (a) the repeal of an Act does not mean that whatever existed before that Act is revived; and
 - (b) the repeal does not affect any right, privilege, obligation liability accrued or incurred under the repealed Act.
23. As such, in the absence of any specific wording in the new Act, legal proceedings in relation to accrued rights and liabilities under the repealed or amended may be brought or continued. So, for example, it has been held that a right to claim under a certificate of insurance was held to continue notwithstanding the repeal of the Act under which the insurance had been issued: Free Lanka Insurance Company Limited v Ranasinghe [1964] AC 541 at 552.
24. However, it will be necessary for some step in relation to a claim, obligation or right to have been taken for the repealed legislation to continue to be applied. Where a statutory right to bring in action has not been exercised before the legislation was repealed, it will be very difficult to establish that the claim was inchoate: Australand Corp Queensland Pty. Limited v Johnson [2007] QFC 13
25. Similarly, a company was held liable to pay a fee for lodging a company return notwithstanding the fact that if the company had lodged the return on time, the repealed Act required no fee to be paid. The Court held that no right accrued until the company lodged the return: Total (Australia) Limited v Registrar of Companies [1969] VR 821.
26. In R v Boland [1974] VR 849, an accused sought to rely on a repealed Act which prevented wives being compellable witnesses in criminal proceedings. The Court held that the accused had acquired no such right because, as at the day the Act was repealed, the accused had not been then charged with the offence.
27. The same approach is taken in relation to the continuation of liabilities incurred under a repealed Act.

28. The Amendment Act provides the new provision in simpler terms:

“Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the effected Act⁴ or part had not been repealed or amended.”

29. Difficulties arise where there is reference to other legislation in an Act and that other legislation is repealed and amended. Pearce and Geddes provides the example of s.26C of the *Income Tax Assessment Act 1936 (Cth)* which provides that the term “prescribed security” is defined by s.4 of the *Loan (Short Term) Borrowings Act 1959*. A handy example given the widespread familiarity that there would be of both of these sections. A question arises when the *Loan (Short Term) Borrowings Act* is amended or repealed. Luckily, the AIA (as recently amended) provides, in s.10, the helpful direction:

“Where an Act contains the reference to a short title that is or was provided by law for the citation of another Act as original enacted, or of another Act as amended, then:

- (a) the reference shall be construed as a reference to that other Act as originally enacted and as amended from time to time; and*
- (b) where that other Act has been repealed and re-enacted, with or without modifications, the reference shall be construed as including a reference to the re-enacted Act as originally enacted and as amended from time to time;*
- (c) if a provision of the other Act is repealed and re-enacted (including where the other Act is repealed and re-enacted) with or without modifications, a reference to the repealed provision extends to any corresponding re-enacted provision”.*

30. Although somewhat dense in its phrasing, this newly amended section identifies that the reference in the original Act is taken to be a reference to any amended provision in the other Act or any corresponding re-enacted provision. In the example provided in Pearce and Geddes, this would mean that if s.4 of the *Loan (Short Term) Borrowings Act* became s.5(b) of that Act and was amended to a different definition, the reference in s.26C of the *Income Tax Assessment Act 1936 (Cth)* would be a reference to that new section.

THE CONTENTS OF AN ACT

31. An important change is made in the new s.13 of AIA. It states that **all** material in an Act, from the first section to the end of the last Schedule, is part of the Act. As such, in contrast to the previous provisions in s.15(3) of the AIA which stated that *“no marginal note, foot note or note to an Act, and no heading to a section of an Act, shall be taken*

⁴ Defined as being the repealed or amended Act

to be part of the Act”, the new section 13 captures all headings (including the heading to the first section of the Act) and explanatory notes within the Act.

32. The Explanatory Memorandum states:

*“It is appropriate for this material to be treated as part of the Act, and given appropriate weight in interpreting the terms of the Act. This weight will ordinarily be less than the words of the section itself, given the function of such notes and section headings (see *Wacando v The Commonwealth* (1981) 148 CLR 1 at 16, Gibbs CJ).”*

“New section 13 would not prescribe how much weight (if any) should be given to particular material forming part of an Act in interpreting the Act. Of course, primacy should normally be given to the substantive provisions of an Act over headings and explanatory notes in interpreting an Act.”

33. I believe that this will make it more difficult to interpret legislation because of the propensity for the examples and notes in legislation to provide narrow constructions.
34. In respect of “examples” in a piece of legislation, the new s.15AD of the AIA provides that the example is not to be taken to be exhaustive but also states that the example is “capable of extending the operation of provisions”. The Explanatory Memorandum states that:

*“If Parliament has enacted an example in a Commonwealth Act, this shows an intention that the example should be covered whether or not it strictly falls within the scope of the provision. However, the amended provision will state that the example **may** extend the operation of the provision: so that a Court can assess whether this is in fact appropriate when interpreting a particular provision that includes an example.”*

35. This displaces the old rule which specifically stated that inconsistent examples would be overridden by the provision itself. It is likely, in my view, to make the Courts and litigants jobs more difficult.

INTERPRETATION – SUBJECT TO CONTRARY INTENTION

36. The unamended AIA was replete with references to “*subject to any contrary intention*” provisions. They have now all been removed. Instead, the new wording of s.2 of the AIA makes it clear that the AIA applies to all Commonwealth Acts except where there is a contrary intention specifically provided for in the Act which is being construed.
37. The issue of application of the contrary intention principle arises most frequently where there is doubt as to whether or not there is a “contrary intention” in the Act under review. Indeed the High Court has held that a “contrary intention” does not necessarily have to be expressly stated. In *Pfeiffer v Stevens* (2001) 209 CLR 57 at 74, McHugh J held:

“An intention contrary to the Acts Interpretation Act may appear not only from the expressed terms or necessary implication of a legislative provision but from the general character of the legislation itself.”

38. One might have thought that doesn't leave the AIA with much work to do. However, Spigelman CJ in *Forsyth v Deputy Commissioner of Taxation* (2004) 62 NSWLR 132 at 138 urged more circumspection *“in an era in which legislative change is frequent and interconnection between Acts is not always the subject of express consideration by drafters of legislation, not least by reason of the almost expedient growth in the quantity of legislation over the course of the last century.”*
39. This somewhat elastic approach leaves the Courts with a great deal of discretion to determine whether the character of the legislation displaces interpretations provided for in the AIA.

COMMON MEANINGS

40. The Amendment Act has inserted new definitions into the AIA in respect of the following terms:
- (a) “Australian Citizen” – has the same meaning in the *Australian Citizenship Act 2007*;
 - (b) “Business Day” – means a day that is not a Saturday, Sunday or public holiday in the place concerned;
 - (c) “Contiguous Zone” – has the same meaning as in the *Seas and Submerged Lands Act 1973*;
 - (d) “Continental Shelf” – also having the same meaning as it has in the *Seas and Submerged Lands Act 1973*;
 - (e) “Exclusive Economic Zone” – also having the same meaning as that term has in *Seas and Submerged Lands Act 1973*;
 - (f) “Insolvent under Administration” – having the same meaning as in the *Incorporations Act 2001*;
 - (g) “Modifications” – in relation to a law, includes additions, omissions and substitutions;
 - (h) “Penalty Unit” – having the same meaning as s.4AA of the *Crimes Act 1914 (Cth)*;
 - (i) “Standards Australia” – to replace references in all legislation including the AIA to various phrases such as “Standards Association of Australia”;
 - (j) “Territorial Sea” – having the same meaning as the *Seas and Submerged Lands Act 1973*;

41. Many of the other definitions have simply been moved around within the legislation to make the flow and context of the AIA more logical.
42. I shall now refer to a selection of commonly used interpretative provisions.

References to one gender include the other

43. Section 23 of the AIA states:

“In any Act:

(a) words importing a gender includes every other gender.”

44. One might ask how many genders there are. However, this provision does not necessarily mean there is a conclusive end to interpretations about gender-based terms. In Ogilvie v Lowe [1963] VR 225, Sholl J found that a reference in a Statute to the “non-Aboriginal wife of an Aboriginal man” could not be read to include a “non-Aboriginal husband of an Aboriginal woman”.
45. Similarly, in Automobile Fire and General Insurance Company of Australia Limited v Davey (1936) 54 CLR 534 the term “the insured or his wife” was not read as being referable to “the insured or her husband”. The Court said that there was a distinction between general references of pronouns such as “he” and “she” and specific words such as in that case “wife”. Whilst the general interchangeability rule applies in relation to the former, the Court said that the insurance company well have made a different contract if it was an insured wife and her husband. I would hope that the same decision would not be made now by the High Court or indeed any Court.

Words in the Singular include the Plural

46. This is a relatively straight forward provision found in s.23(B) of the AIA.
47. Notwithstanding, the Courts (as always) tend to make their own decision. In Blue Metal Industries Limited v Dilley (1969) 117 CLR 651, the Privy Council took the view that a compulsory acquisition by a group of companies was an entirely different thing from an acquisition by a single company and therefore displaced the rule. They relied, as the Courts do, on the “contrary intention” rule and interpreted that that was the intention in the Companies Act.
48. For those looking for a valuable discussion on the “singular – plural question” they are to be directed to a rather lengthy dissertation on that matter in Fordham v Brideson [1986] VR 587.

Penalties and Offences

49. A penalty provision at the foot of a section means that an offence against the section is punishable by a penalty not exceeding that penalty. Further, if a section comprises five subsections, the penalty at the end of the section applies equally to each of the offences described in those subsections.

Measurement of Periods of Time

50. Whilst most pieces of legislation provide time periods with some precision, the Interpretation Acts (in all jurisdictions) contain a fall back provision.
51. The Amendment Act has introduced a new version of s. 36 of the AIA which states as follows:

36 Calculating time

- (1) A period of time referred to in an Act that is of a kind mentioned in column 1 of an item in the following table is to be calculated according to the rule mentioned in column 2 of that item:

Calculating periods of time

Column 1 If the period of time:	Column 2 then the period of time:
is expressed to occur between 2 days	includes both days
is expressed to begin at, on or with a specified day	includes that day.
is expressed to continue until a specified day	includes that day
is expressed to end at, on or with a specified day	includes that day
is expressed to begin from a specified day	does not include that day.
is expressed to begin after a specified day	does not include that day.
is expressed to end before a specified day	does not include that day.

Example 1: If a claim may be made between 1 September and 30 November, a claim may be made on both 1 September and 30 November.

Example 2: If a permission begins on the first day of a financial year, the permission is in force on that day.

Example 3: If a licence continues until 31 March, the licence is valid up to and including 31 March.

Example 4: If a person's right to make submissions ends on the last day of a financial year, the person may make submissions on that day.

Example 5: If a variation of an agreement is expressed to operate from 30 June, the variation starts to operate on 1 July.

Example 6: If a decision is made on 2 August and a person has 28 days after the day the decision is made to seek a review of the decision, the 28-day period begins on 3 August.

Example 7: If a person must give a notice to another person at any time during the period of 7 days before the day a proceeding starts and the proceeding starts on 8 May, the notice may be given at any time during the 7-day period starting on 1 May and ending on 7 May.

52. This reflects previous jurisprudence where if a period of time was to be calculated from one particular day or event, then the time was said to start immediately after the conclusion of that day: *Ex parte Toohey's Limited; Re Butler* 1934) 34 SR (NSW) 277.
53. However, if the operation of an Act is dependent upon the precise time of an event then time commences to run from that event. For example, in *Marshall v D G Sundin and Co Pty. Limited* (1989) 16 NSW LR 463, time commenced at the time of a person's death. This particular application displaces the presumption that parts of days should be ignored and days should be considered in their entirety.
54. If a period of time is to run from the occurrence of a certain event, the time and date at where the event takes place is the time and date which applies – that is local time: See *White Cliffs Opal Mines Limited v Miller* (1904) 4 SR (NSW) 150.
55. A phrase such as “a period of 60 days commencing on the day” literally runs from the first moment in time on that day. It does not commence to run, as it would under the AIA, from the first moment in time on the following day.
56. There used to be some confusion where time in legislation was measured in months. The new amendments to the AIA make clear if a month is referred to then there is a specific definition for that: s.2G of the AIA. The term “calendar month” is now located in the definition section in s.2 of the AIA and means “one of the 12 months of the year”.

“Not Less than” period of time

57. Using the same protocol, Courts have held that where there is an expression in legislation such as “not less than 21 days notice” means 21 days clear of the day on which the notice ends: *Bear v Official Receiver* (1941) 65 CLR 307; *Ex parte McCance; Re Hobbs* (1926) 27 SR (NSW) 35. In the High Court in *Forster v Jododex Australia Pty. Limited* (1972) 127 CLR 421 held that a phrase “not later than 1 month before the

expiry of" a licence was held to mean that an application had to be made at least one clear month before the end last day on which the licence expired, to be within time.

Holidays

58. The rule here is where a legislative provision requires something to be done within a relevant period of time but the expiry of that period falls on a Saturday, Sunday or public holiday, then it may be done on the next following day that is not a Saturday, Sunday or public holiday: Thompson v Les Harrison Contracting Co [1976] VR 238. This rule applies even in respect of regional holidays even though the Act may have been done elsewhere in the State where the holiday was not applicable: Magic Mountain Developments Pty. Limited v Laureate Australia Pty. Limited [1991] 2QdR 570.
59. It is important to remember, however, that this interpretation does not apply where a specific date is provided. If that date happens to fall on a Saturday, Sunday or public holiday, then it must be done by that date: Zangzinchai v Milanta (1994) 53 FCR 35.