

Extrinsic Material:

Definition:

Extrinsic ex•trin•sic adj:

1. Not forming an essential or inherent part of a thing; extraneous.
2. Originating from the outside; external.

Extrinsic materials in the context of tariff are, in their simplest form, certain permitted classes of material that can aid and assist in the interpretation of the primary legislation. In this case, the primary legislation is the *Customs Tariff Act*.

The *Customs Tariff Act* is a legal instrument for conveying parliaments intentions with respect to, among other matters, duties and protection. The first step in interpreting the Tariff ought therefore be to determine what the intention of the legislature was.

In the past, the interpretation of extrinsic materials was subject to a number of complicated rules, the details of which were often in dispute. In determining the ordinary sense of words, the courts were generally free to consult any dictionary they wished, even when the court's choice might appear strained or illogical. Only parts of a printed Act were regarded as the actual text. The rules for reading Acts assigned limits to the use of different parts of the Act depending on whether the purpose of the court was constructive or contextual. In general, the courts were not allowed to use parliamentary materials, such as Second Reading Speeches, as aids to constructive interpretation of statutes.

Acts Interpretations Act:

The Government has enacted legislation that, in effect, has a dramatic effect on an otherwise common law ability to have regard to such things as parliamentary references and international conventions in the interpretation of Australian statutes and their regulations.

In other common law jurisdictions the move away from literalism began as early as the 1960s (REFER PAPER ON THE IMPORTANCE OF STATUTORY INTERPRETATION). However, literalism prevailed in Australian courts until the late 1970s. The turning point was the introduction of section 15AA of the Acts Interpretation Act (Cth). The section provides that:

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

The judicial response to Section 15AA has been mixed. At one extreme has been a "business as usual" attitude among more conservative judges and academics. This is the view that section 15AA is nothing new. According to this interpretation, Section 15AA requires recourse to a purposive approach only if there is an ambiguity or doubt as to the meaning of an Act. In the absence of any uncertainty, the literal meaning should prevail. At other end of the spectrum is the view that Section 15AA requires the courts to interpret the text of an Act in purposive terms, even if the "plain meaning" of the words in their context would otherwise seem clear.

The *Acts Interpretations Act 1901* was amended in 1984 by the insertion of Section 15AB. Section 7 of that Act deems Section 15AB to have application across all Commonwealth Acts and any delegated legislation made under them, whether enacted before or after the commencement of Section 15AB.

It provides

"in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provisions, consideration may be given to that material ..."

The Section went into great detail in listing the sources which could be employed in statutory interpretation:

1. documents attached to the Act itself;
2. relevant reports by Royal Commissions, parliamentary committees etc made to parliament before the Act was enacted;
3. any treaties or other international agreements referred to in the Act;
4. explanatory memorandum relating to the Bill;
5. second reading speeches;
6. any documents declared to be relevant by the Act;
7. relevant material in the Journals of the Senate, Votes and Proceedings or other official records of Parliament.

In theory, Section 15AB swept away the old, complicated rules regarding the use of extrinsic and intrinsic materials in statutory interpretation.

This did not happen in practice. One of the reasons was the construction of Section 15AB. Read Section 15AB of the Acts Interpretation Act 1901 for yourself.

Although the extreme forms of literalism has been largely abandoned in Australia, many judges are still not comfortable with a purely purposive approach. For different reasons, the courts have placed many limitations on the application of section 15AB in practice. These include the requirement that the court must discover ambiguity, absurdity or unreasonableness in the ordinary meaning of a statute before section 15 AB can be applied, the principle that extrinsic materials cannot be used to

overturn the ordinary meaning of an Act, and the discretion on the part of the court to refuse to take into account extrinsic material which amount to no more than a statement of opinion regarding what the statute means or even to disregard extrinsic material which the court regards as misleading or incorrect.

Under these provisions it appears that if the provision under consideration is clear, then recourse to any extrinsic material is absolutely restricted to only those instances where the literal meaning is to be confirmed. That is, they may be regarded but cannot change the interpretation that a Court would place on the provision should no regard have been had.

Notwithstanding, the intentions of the Government are clear, and the far-reaching and powerful authority of Section 15AB are without dispute.

Explanatory Memoranda (and Explanatory Guides):

Explanatory Memoranda follow a strict format and attempt to put in plain words the purpose of a Bill¹, in addition to an explanation of each clause within the Bill. Explanatory Memoranda can, as such, be utilised to aid in the interpretation of the ultimate Act, within the confines of Section 15AB of the *Acts Interpretation Act 1901*.

They must be tabled with every Bill introduced into Parliament.

To locate Explanatory Memoranda you need to know the:

- ✚ **Jurisdiction of the Bill;**
- ✚ **Year the Bill was introduced to parliament; and**
- ✚ **Title of the Bill.**

Explanatory Guides use plain language so that people who may not be well versed in reading and interpreting legislation may more easily understand it.

When provided, they attempt to present information about the reasons behind important parts of the Bills, including why they are drafted the way that they are and what they are trying to achieve. By contrast with Explanatory Memoranda, an Explanatory Guide is less formal and summarises the legislation.

2nd Reading Speech:

There are four formal stages of a Bill's passage through Parliament:

- ✚ **The First Reading:**
 - the introduction of the Bill;
- ✚ **The Second Reading:**
 - debate on the Bill's underlying principles;
- ✚ **The Committee Stage:**
 - scrutiny of the Bill in detail, and the proposal of amendments; and
- ✚ **The Third Reading:**
 - consideration of the Bill as it comes from the Committee Stage for its final approval.

¹ A proposal for a new law which has been presented to Parliament

It is the record of the Second Reading where assistance may be gained in the interpretation of the eventual Act. The Second Reading provides the main occasion for debate on the general principles of a bill - detailed discussion being reserved for the committee stage.

On Second Reading, the Bill is normally proposed by a government minister (often the senior minister) in the department responsible for the measure. Here they précis the main principles of the Bill and review the most important clauses. The official Opposition spokesman then responds and, during the debate, the views of other opposition parties and backbenchers may be heard.

Dictionaries:

It has been recorded in many court decisions that dictionaries should not be taken as the authoritative source of meaning attributable to parliament's use of words, however it is well established that, in general, such words ought to be interpreted in their ordinary sense.

It is the dictionary where such meaning can be sought.

In contrast to the use of the HSEN, courts have, time and again, supported the use of dictionaries as an aid to interpreting the tariff. The use of dictionaries by the courts has not been restricted or limited to strictly "language" dictionaries, having extended such use to technical and scientific dictionaries where appropriate.

Notwithstanding the recognised use of dictionaries, such use must be in accordance with S.15AB of the *Acts Interpretations Act* in as much as they cannot have the consequence of the words of the tariff being forsaken in favour of synonymous language, or causing ambiguity or confusion.

Ordinary Meaning V Trade Meaning:

When classifying goods, the first consideration in the meaning of a word is whether there is a "statutory definition" such as those within the *Acts Interpretation Act* or those contained within section 4 of *Customs Act 1901* or the definitions contained within Section and Chapter Notes of the *Tariff*.

In the absence of any such statutory definition, the cardinal principle is then that the word is to be understood in the way it is understood in ordinary language or "common parlance". However, giving more importance than is due to common dictionary meanings can be misleading as a dictionary gives all shades of meaning of a particular word. Similarly, meanings in technical dictionaries can also have limited application. Therefore, the dictionary definition of a word is the starting point to ascertaining its meaning BUT that meaning must always be determined by having regard to the context in which the word is used.

If there is a specific trade meaning to a word, it should be given due regard if the ordinary meaning does not provide a result or the Tariff itself requires that the terms should be interpreted in a strict technical sense. Technical dictionaries should be used in such circumstances. The common dictionary meaning of technical words should not be accepted in such cases.

In *Re Pacific Film Laboratories Pty. Ltd. and Collector of Customs* 2 ALD 144, the Administrative Appeals Tribunal set out eight propositions for guidance in interpreting the meaning of words used in the legislation when trade meanings are involved. These are:

- (i) With respect to revenue laws directed to commerce, courts are more ready to conclude that items have been described according to common commercial or trade usage rather than in their natural or ordinary sense;
- (ii) Whether there is a common commercial or trade usage in relation to a particular item is a fact to be proved by evidence;
- (iii) The evidence properly admissible is as to what merchants and others did, at the date of the Act, in fact call such articles. ...Evidence is also admissible to ascertain what, according to mercantile understanding, are the characteristics connoted by the descriptive names referred to in the legislation;
- (iv) But how the trade describes goods is not conclusive. Trade evidence may limit the meaning of an expression to the denotation which it has at a particular time without making allowance for its capacity to extend to new exemplifications which have the characteristics of accepted denotations;
- (v) Equally, if particular articles were, at the date of the Act, unknown, or not known by that name, merchants cannot, by merely appropriating a particular tariff designation and attaching that designation to an article, bring it into the country under that name unless it is in truth such an article;
- (vi) It may be less difficult to establish a trade meaning which extends the ordinary meaning of an expression than one which limits the ordinary meaning in a specialized way;
- (vii) If the expression is not uniformly understood in a specialized sense in the trade, it cannot be assumed that Parliament has adopted or recognized that specialized meaning. In that event, the ordinary English meaning of the expression is applied, having regard to the legislative context;
- (viii) If there is a common, commercial or specialized meaning of the particular item established by evidence, it is necessary to determine whether the legislation has used the word in its ordinary signification or in the special sense.

Harmonised System Explanatory Notes:

The Harmonised System Explanatory Notes and Compendium of Classification Opinions (the "Index") have been published by the WCO (CCC) and provide guidance in the classification of goods. The Index lists all goods mentioned in the international legal notes, headings and

subheadings of the Tariff in alphabetical order. The Explanatory Notes give explanations and examples of the intended coverage of goods described in each heading/subheading up to the 6 figure classification level.

These tools can assist in the uniform interpretation and application of the Tariff classification system, however, care should be taken with them and any tariff classification should be made only within the provisions of legal notes and with due consideration of any case law and precedents.

Whilst not feasible to refer to all cases in which the HSEN have been raised, it is enough to précis the common theme of reinforcement of S.15AB of the Acts Interpretations Act with the effect of limiting their use to all but infrequent occasions.

In addition to the HSEN publications, from time to time the CCC issue "opinions". These opinions are generally the result of a signatory member country raising an issue before the Council. Notwithstanding the fact that this Council is a specialised body whose purpose is to attain uniformity of the Harmonised System, it is nothing more than an administrative tribunal when considering matters of tariff classification and, as such, parallel considerations occur as to the acceptability of using this source as an aid to the interpretation of the Australian Customs Tariff as with the HSEN.