

interpretation NOW!

Episode 63 – 28 August 2020



Australian Government

Australian Taxation Office



iNOW! turned 60 back in May. What started as a little in-house ATO experiment to boost awareness of basic interpretation principle now has its own website, 400-odd subscribers and a fat kudos file. It was expected that, after a few years, there would be little new to write about and we could go home. Precisely the opposite turned out to be the case. Courts every week say important things about interpretation that everyone reading statutes and saying what they mean needs to know. iNOW! seeks to capture this judicial intel in bite-sized bits. Its vision is limited; it doesn't try to be the 'last word'. Our modest aim is to draw attention to principle and its application, providing signposts to the learning. We still hold aspirations to process map digitally the basic landscape of interpretation. Despite doubts elsewhere, 'one giant leap' of this kind is now not beyond the stars.

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Tortious conduct

[Binsaris v Northern Territory \[2020\] HCA 22](#)

When officers at the *Don Dale Youth Detention Centre* used tear gas on young detainees after a 'serious disturbance' causing property damage, the detainees sued for damages asserting these actions were in breach of legislation & unlawful¹. All judges agreed.

One judge (at [25]) emphasised the principle that statutory authority to engage in what would otherwise be tortious conduct 'must be clearly expressed in unmistakable and unambiguous language'². This legislation did not pass that test because its terms were far too general. While realities must be taken into account³, intentional action involving a calculated choice to do harm is not.



Legislative codes

[Pickett v Western Australia \[2020\] HCA 20](#)

A man was stabbed to death when 8 males attacked him at a railway station. The act of killing was likely done by a child, who was not responsible due to his age. Accordingly, the rest argued they could not be charged. Each of them was convicted of murder.

The issue was how s 7 of the *Criminal Code* is to be read⁷. This section attributed the act of stabbing to the others, not the level of legal responsibility of the child stabber⁸. The court (at [22-25]) said the code 'determines the issue'. The code replaced the common law, and was read by its natural meaning 'without any presumption that it was intended to do no more than restate the existing law'⁹.

■ Credits – Gordon Brysland, Oliver Hood, Emily Tokic & Sally Snashall.
¹ s 62(2) of the *Prisons (Correctional Services) Act* (NT).

² *Coco* (1994) 179 CLR 427 (at 436), *Wilson* (1950) 51 SR (NSW) 26 (at 28-29).

³ *R (Laporte)* [2006] UKHL 55 (at [83]) for example, cf Episodes [37](#), [46](#) & [61](#).

⁴ s 134AB(1) of the *Accident Compensation Act 1985* (VIC).

⁵ *expressio unius est exclusio alterius* – see Pearce 9th ed (at [4.44-4.45]).

⁶ *Maves* [2001] UKHL 20 (at [55]), cf Herzfeld & Prince (at [6.120-6.130]).

⁷ s 7 deems enablers to have taken part in the offence & be chargeable.



Patchwork statutes

[Australian Rail v Dollisson \[2020\] NSWCA 58](#)

This case involved the meaning of 'compensation' in Victorian legislation⁴, and whether an old rule of linguistic logic⁵ could be applied to what Bell ACJ (at [47]) called a 'patchwork statute'. Modern statutes are often subject to patchwork amendment where there may be little debate and much compromise.

Rejecting the general application of rigorous rules to patchwork statutes, the judge said legislation of that kind rarely contains the 'linguistic logic and consistency upon which the *expressio unius* maxim depends for it to operate as a useful construction tool'⁶. **iTip** – take care when seeking to apply linguistic logic rules where they really don't fit.



*Copulatio verborum*¹⁰

[AJ & PA McBride Ltd v FCT \[2020\] AATA 1909](#)

The taxpayer bought a property with existing 'fencing assets'. A \$2.74m deduction was claimed for capital expenditure incurred on 'construction, manufacture, installation or acquisition' of that fencing¹¹. The AAT (at [73-77]) denied the deduction.

Statutory purpose required 'a fence coming into existence on the land and not just the transfer of an existing fence from one person to another'¹². The AAT applied the Latin maxim, *copulatio verborum*¹³ - 'the linking of words indicates that they should be understood in the same sense'. This speaks to the modern weight which context has in interpretation¹⁴. **iTip** – maxims or 'rules' provide soft guidance only¹⁵.

⁸ cf *Osland* [1998] HCA 75 (at [27]), *IL* [2017] HCA 27 (at [2, 29, 65]) cited.

⁹ *Stuart* (1974) 134 CLR 426 (at 437), Episodes [39](#) & [51](#).

¹⁰ In full - *copulatio verborum indicat acceptationem in eodem sensu*.

¹¹ s 40-525(4) of *ITAA97*, cf s 75B of *ITAA36*, Case W9 88 ATC 178 (at [181]).

¹² This would reward conduct beyond that 'envisaged by the statute'.

¹³ *Dick* [2007] NSWCA 190 (at [10-13]), *Broome's Legal Maxims* (at 373-374).

¹⁴ *SAS Trustee* [2018] HCA 55 (at [64]), *Barnes* 41 UNSWLJ 1083 for example.

¹⁵ *AMMA!* [2018] FCAFC 223 (at [79]), Episodes [41](#) & [51](#).