

interpretation NOW!

Episode 73 – 29 June 2021



Australian Government

Australian Taxation Office



Gordon Brysland Tax Counsel Network

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Interpretation Acts

[Doyle’s Farm Pty Ltd v MDBA \[2021\] NSWSC 369](#)

Was the Murray Darling Basin Authority a ‘public or other authority’ for civil liability purposes²? A note directed the reader to the *Interpretation Act 1987*. That Act applies to all NSW statutes except to the extent of any contrary intention. While the Act is only a starting point and ‘readily rebutted’³, Adamson J (at [32]) said it was ‘undoubtedly relevant to the task’.

In this case, various definitions supported a finding that the MDBA was not a ‘public or other authority’ here. Another recent case says Interpretation Acts ‘do not compete for attention’ with other statutes – ‘they work together’⁴. For more about this, see Pearce *Interpretation Acts in Australia* (at [1.1-1.5])⁵.



Legislative codes

[Namoa v The Queen \[2021\] HCA 13](#)

Namoa and her husband were convicted for conspiring to do acts in preparation for a terrorist act⁸. She argued spouses can’t be guilty of conspiracy due to an old common law rule. Gleeson J (at [11])⁹ said codes take their natural meaning with no presumption that they merely restate the common law¹⁰. Unless the code is ambiguous or uses an undefined word with an established technical meaning, its ordinary meaning will prevail¹¹.

Whatever the historical position, there is no longer any principle in our common law regarding the ‘single legal personality of spouses’¹². **iTip** – codes are not read through the lens of the common law.

■ **Credits** – Gordon, Oliver, Andrew, Patrick, Claudia, Nick, Eric & Matt.

¹ King *Tax Evasion Findings Part 2* [2021] WTB [311] Key Point 5.

² s 41 of the *Civil Liability Act 2002* (NSW).

³ *DRJ (No 2)* [2020] NSWCA 242 (at [33]), *Botany* (1992) 175 CLR 453 (at 466).

⁴ *Douglas* [2021] VSCA 128 (at [24]) quoting *AIRC* [2002] HCA 42 (at [7-8]).

⁵ cf *Waterfront* [2019] VSCA 156 (at [36]), Episodes 17 & 51.

⁶ Pearce 9th ed (at [3.51-3.59]), PSANSW (1985) 1 NSWLR 627 (at 640).

⁷ s 322(2) *Workplace Injury Management and Workers Compensation Act 1998*.



Re-enactment presumption

[Ozcan v Macarthur Disability \[2021\] NSWCA 56](#)

When parliament re-enacts provisions courts have construed, it is presumed to have adopted that interpretation as applying to the new law⁶. This case (at [32-34]) flags a practical difficulty. This is that the strength of the presumption varies with the confidence with which it may be gauged that the legislature knew of the decision, so that absence of an amendment may be seen as a ‘considered choice’.

In this personal injury case⁷, the court said it was ‘artificial and unpersuasive’ that an earlier decision had been considered and acted on consciously by parliament. **iTip** – you need to look beneath the surface when seeking to apply this presumption.



Impossible obligations

[Barnden, in re Millrange Pty Ltd \[2021\] FCA 415](#)

What happens when a statutory obligation is impossible to comply with? In this corporations law case, the liquidator had to notify all creditors a pooling order was to be sought¹³. Jagot J (at [5]) held that, where a statutory obligation cannot be complied with ‘for some reason beyond the control of the person’, compliance is not insisted on¹⁴.

As a more general proposition, in all civilised legal systems ‘laws must not command the impossible’¹⁵. Bennion (at 1129-1133) deals with the principle under its Latin tag – *lex non cogit ad impossibilia*. **iTip** – regard this principle with caution and remember that it will not apply where the incapacity is self-induced.

⁸ s 11.5(1) of the *Criminal Code* (Cth), *Namoa* [2020] NSWCCA 62.

⁹ All 6 other judges said – ‘I agree with Gleeson J’, cf *AAM17* [2021] HCA 6.

¹⁰ *Pickett* [2020] HCA 20 (at [22-23]), Episodes 39, 51 & 63.

¹¹ *Mellifont* (1991) 173 CLR 289 (at 309), *LK* [2010] HCA 17 (at [97]) resp.

¹² *Magill* [2006] HCA 51 (at [55]), *Tooth & Co* (1956) 95 CLR 605 (at 615-616).

¹³ s 579E of the *Corporations Act 2001* (Cth).

¹⁴ *Natkunarahaj* [2020] FCA 419 (at [40]), Pearce 9th ed (at [11.28]) cited.

¹⁵ *St Pancras* (1834) 110 ER 1138 (at 1146), *Vanit* (1997) 190 CLR 378 (at 384).

Episode 74 – omitting words; ordinary meaning; regulations; what judges say

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