

interpretation NOW!

Episode 77 – 28 October 2021



Australian Government

Australian Taxation Office



Every statute is a ‘diktat by the state to the citizen’¹. Interpretation of these diktats really matters. A recent case where a mining company sued the State on constitutional grounds illustrates this². The main issue was whether amendments validly took away the benefit of earlier arbitral awards³. Part of the argument was whether State legislation merely enabled a mining agreement to go ahead, or whether it gave that agreement force of law. Edelman J accepted a literal reading may suggest the former, but context confirmed the latter. The judge said (at [138]) that there is ‘rarely any magic in the use of particular words’ in a statute. It depends on the context of the words and their statutory purpose. The amendments were valid, but the principle is more important. This is that the reach of diktats depends critically on context and purpose, not a search for literal meaning.

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✈ Re-enactment presumption

[DPP Reference No 1 of 2019 \[2021\] HCA 26](#)

A 1995 case set the test for criminal recklessness in Victoria as awareness of the accused that serious injury would *probably* result⁴. Later amendments were silent on the test to be applied. The test in NSW required only a *possibility* in this regard, and the High Court later also cast doubt on the Victorian case⁵.

The re-enactment presumption applies where parliament repeats words it can be taken to bear the meaning judicially attributed to them. It all depends on circumstances, however. In some cases, it will be ‘quite artificial’ but in others the presumption has ‘real force’⁶. Here, the presumption applied. If the law was to change, that was for parliament.

💡 Context and purpose

[Sydney Seaplanes v Page \[2021\] NSWCA 204](#)

A woman died in a plane crash in 2017. Less than 2 years later (just within the limitation period), her father sued the operator for damages in the FCA. This was dismissed, as the flight was wholly within NSW. To re-start in the NSWSC, there had to be ‘an order of a federal court ... dismissing ... a proceeding relating to a State matter for want of jurisdiction’⁷.

Literally, it seemed so, but the court said ‘no’ due to context and purpose. ‘Want of jurisdiction’ meant situations where jurisdiction had been improperly conferred on a court, not accessed by a plaintiff. Cases on context and purpose are discussed⁸. **iTip** – click above and read the passages (at [26-41, 96-97])⁹.

👤 Meaning of ‘person’

[Genesian Theatre v NSW \[2021\] NSWSC 1089](#)

Paula Bate said many times she wanted to leave everything to the theatre. There was no dispute about this, but she never made a will. She died, her estate vested in the State, and the theatre tried to claim it – refused. The issue was whether the theatre as a corporation was a ‘person’ in this regard¹⁰.

The [Interpretation Act](#) said it was, unless ‘context or subject-matter otherwise indicates or requires’. Garling J stressed the impact of context¹¹. Also, one ‘must not be too ready’ to depart from the [Interpretation Act](#) position. The test is whether context clearly requires a different outcome – ‘a fairly high hurdle to jump’¹² – here, it was too high.

📄 Objective exercise

[AAI Limited v Technology Swiss \[2021\] FCAFC 168](#)

This insurance case (at [163]) stresses that the meaning of a contract has nothing to do with subjective intentions of the parties. The High Court case quoted from, *Byrnes v Kendall*, makes parallel observations for statutes¹³. From every angle, interpretation in both spheres is to be objective.

With statutes, we are not looking for what parliament intended to say, but instead for what they objectively meant by the words they used¹⁴. This is a crucial aspect of our ‘modern approach’, on which Episode [66](#) about the *Circle of Meaning* provides more detail. Extrinsic materials which try to say what a provision means exert little weight in the process¹⁵.

■ Credits – Gordon, Oliver, Amy Doyle, John Larocque & Michelle Janczarski.

¹ Lord Oliver (1993) 14 *Statute Law Review* 1 (at 2).

² [Mineralogy Pty Ltd v WA](#) [2021] HCA 30, cf [Palmer v WA](#) [2021] HCA 31.

³ [Iron Ore Processing \(Mineralogy Pty Ltd\) Agreement Amendment Act 2020](#).

⁴ s 17 of the [Crimes Act 1958](#) (VIC), [Campbell](#) [1997] 2 VR 585.

⁵ [Aubrey](#) [2017] HCA 18 (at [45-46]).

⁶ [Reynhoudt](#) (1962) 107 CLR 381 (at 388), [Fortress](#) [2015] HCA 10 (at [15]).

⁷ s 11(1) of the [Federal Courts \(State Jurisdiction\) Act 1999](#) (NSW).

⁸ [Lake](#), [Project Blue Sky](#), [CIC Insurance](#), [SZTAL](#), [SAS Trustee](#), etc.

⁹ An application for special leave in the High Court has been lodged.

¹⁰ s 61B(8) of the [Wills, Probate and Administration Act 1898](#) (NSW).

¹¹ [Project Blue Sky](#) [1998] HCA 28 (at [78]), [Kaldas](#) [2017] NSWCA 275 (at [115]).

¹² [Hunter](#) [2005] NSWSC 616 (at [16]), cf [Affco](#) [2017] NZSC 135 (at [59]).

¹³ [Byrnes v Kendall](#) [2011] HCA 26 (at [97]), [Calidad](#) [2020] HCA 41 (at [91]).

¹⁴ [Black-Clawson](#) [1975] AC 591 (at 613), [Albert](#) [2021] NSWLEC 1401 (at [30]).

¹⁵ [Harrison](#) [2008] NSWCA 67 (at [12]), [Country](#) [2018] FCA 1636 (at [115-117]).

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