



interpretation NOW!

Episode 85 – 30 June 2022



Sir Gerard Brennan, a titan of the law, died this month. His stellar career, traced elsewhere¹, was founded on deep dedication to principle. Brennan succeeded Barwick on the High Court in 1981 just before *Cooper Brookes* and s 15AA. After *Mabo*, and in line with a credo of general restraint, a major legacy is his reorientation of administrative law away from common law limitations and towards those to be found in statutes by their interpretation². Brennan also led the way on ‘principle of legality’ and tied statutory interpretation to its public law roots. As CJ, he joined in cementing our ‘modern approach’ in *CIC Insurance*. Despite these contributions, he was more facilitator than engineer on interpretive matters³. Yet his impact is instrumental and enduring. As in all things, it was informed by the disciplined reach for principle for which the great judge will ever be known⁴.

Gordon Brysland Tax Counsel Network, FAAL, onetime associate to Brennan J



Influence of purpose

[Azizi v DPP \[2022\] VSCA 71](#)

A and O jointly owned a house for which O provided the whole purchase price. O was charged with drug offences and a restraining order placed on the house. O was convicted. A argued her interest should be excluded from confiscation as she acquired it from O ‘for sufficient consideration’⁵. This was rejected.

The court said (at [63]) that the provision was to be read having regard ‘to the purposes of the Act as a whole’⁶, one of which was ‘to provide for the automatic forfeiture of restrained property of persons convicted of certain offences’. The purpose of the Act was indeed ‘to achieve a harsh outcome’⁷ and there was no ambiguity about the provision in question⁸.



Remedial legislation

[Krajcar \[2022\] VSC 173](#) and [Kildair \[2022\] VSC 251](#)

Two Victorian cases make key points on remedial and beneficial legislation. In the first, Croft J (at [39-41]) notes that, while remedial laws ‘should be given a beneficial construction’⁹, this does not allow a court ‘to transcend express words ... or to disregard the fundamental structure and approach of legislation’¹⁰.

In the second, Engelfield JR (at [38-40]) says that, while the overall purpose may be remedial, the ‘particular purpose of each provision must be identified’¹¹. A provision of limitation does ‘not call for artificial extensions’. **iTip** – that remedial legislation is to be read beneficially in line with purpose confers no open licence on the interpreter.



Statutory definitions

[Piastrino v Seascope Constructions \[2022\] VSC 202](#)

It is taken as read that statutory definitions are to be inserted into the substantive provision before interpretation is applied¹². To do otherwise ‘invites error’. Delany J (at [68]) makes the important extra point that the substantive provision expanded by incorporation of the definition also needs to be read in context and as part of the Act as a whole¹³.

It may be easy to forget what Mason J described as the ‘cardinal rule’ that a provision is ‘not to be read in isolation from the enactment of which it forms a part’. **iTip** (repeated from Episode 26) – parliament does not enact provisions as little islands of self-contained meaning, nor are they to be read that way.



Characterisation

[Twin Rivers Developments v FCT \[2022\] AATA 887](#)

This decision makes an important point about characterisation. The issue was whether payments to the director of a development entity and his wife were ‘wages’ giving rise to a ‘cash flow boost’ entitlement¹⁴. The director gave evidence they were wages and that he and his wife were employees.

However, as Olding SM said (at [42]), neither labels adopted nor statements made are determinative of the legal nature of a relationship – ‘Rather, it is the nature of the legal rights and duties that, as a matter of law, determine its character’¹⁵. The balance of the evidence given, however, indicated the tribunal accepted there was employment some of the time.

■ **Thanks** – J Barnes, W Bateman, T Brennan, J Dharmananda, M Janczarski.

¹ Baker & Gageler in *Oxford Companion to the High Court* (at 66-68).

² Bateman & McDonald (2017) 45 FLR 153, cf Basten *AIAL Forum No 100*.

³ cf Brennan CJ *Speech on Swearing In as Chief Justice* (21 April 1995).

⁴ *Quin* 170 CLR 1 (at 33 on), *Theophanous* 182 CLR 104 (at 143) illustrate.

⁵ (at [59-60]), s 22A(1)(c) of the *Confiscation Act 1997* (VIC).

⁶ *Lordianto* [2019] HCA 39 (at [61-62]), cf *Song* [2020] VSC 465 (at [26]).

⁷ (at [65-66]), as confirmed by extrinsic materials.

⁸ (at [70-71]), *Coleman* [2018] VSCA 264 (at [178]) quoted.

⁹ *Kearney* (1984) 52 ALR 24 (at 28) cited, cf Episodes 67 & 71.

¹⁰ *Houry* (1984) 165 CLR 622 (at 650), *Fitzroy Dental* [2013] VSC 344 (at [42]).

¹¹ *ADCO* [2014] HCA 18 (at [29]) cited, cf *Burns* [2022] VSC 294 (at [45]).

¹² *Kelly* [2004] HCA 12 (at [103]) quoted, with 8 other cases cited.

¹³ *K & S Lake* (1985) 157 CLR 309 (at 315), cf *Unit Trend* [2013] HCA 16 (at [47]).

¹⁴ s 5 *Boosting Cash Flow for Employers (CERP) Act 2020*.

¹⁵ *Personnel* [2022] HCA 1 (at (58, 127)), cf *Rossato* [2021] HCA 23 (at [57]).