



# interpretation NOW!

Episode 90 – 30 November 2022



That legislation is ‘always speaking’ in the present is a baseline assumption in our system of interpretation<sup>1</sup>. Some States have even legislated for it<sup>2</sup>. The core idea is that words take their current meaning and are not to be ‘locked in a statutory time capsule’<sup>3</sup>. One way this is described is that, while the connotation of a word remains stable, its denotation may change and evolve over time. Two examples from the cases concern the words ‘gas’ and ‘mutilate’<sup>4</sup>. The older approach of fixing meaning at the point of enactment – *contemporanea expositio* – may apply to some very old statutes and rare other categories<sup>5</sup>. In America, it applies more generally. Otherwise, the problem with ‘always speaking’ is how it may apply in a particular situation<sup>6</sup>. **iTip** – any evolved meaning adopted must be supported by proper evidence and be consistent with legislative purpose.

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## 👤 Meaning of ‘person’

### [Boulos v Warrumbungle SC \[2022\] NSWSC 1368](#)

Whatever ‘person’ means in any legislation is very much context-dependent. In this case, the issue was whether the director of a development company was a ‘person’ who carries out construction and by reason of that status had a duty to exercise reasonable care to avoid economic loss caused by certain defects<sup>7</sup>.

It was argued the provision only applied to someone who does construction work ‘in their own capacity’. The judge rejected this (at [61]) as he was unable to see by what process of interpretation the word could be read down that way. Considered in reaching this conclusion were other provisions of the statute, extrinsic materials and the *Interpretation Act 1987*.

## 💡 Single process

### [Edelman J Implications \[2022\] Spigelman Oration](#)

In his *Spigelman Oration*, Edelman J stresses that interpretation involves a ‘single process’, not a two-step one. This derives from statements in *CIC Insurance* (and other cases) that context and purpose are to be considered at the same time as the text.

The judge says (at 9) that it is ‘emphatically, not a two-step process of identifying a range of possible semantic meanings of words and then choosing the best of those meanings’. The task involves a concurrent investigation of context and purpose. We are to consider all viable meanings – not just literal and ordinary ones – and select the one which is open and best achieves the statutory purpose.

## 👤 Delegated legislation

### [Warburton v VicForests \(No 5\) \[2022\] VSC 633](#)

The traditional approach to delegated legislation – taken by Garde J (at [267-268]) – is that, being less carefully drafted and directed at ‘practical people’, legislation of this kind is to be given some latitude in its interpretation<sup>8</sup>. Others say there is no principle requiring laxity<sup>9</sup>. Are these positions reconcilable?

The answer is ‘yes’. Our approach subjects statutes and delegated legislation to the same essential discipline. The circumstances in which delegated legislation is drafted (including the status of those involved) may be contextual and purposive factors supporting a ‘sensible practical approach’<sup>10</sup>. The ‘whatever’ and ‘wherever’ of context guides us<sup>11</sup>.

## 🏛️ Penal provisions

### [GL v R \[2022\] NSWCCA 202](#)

One issue was the basis on which the ‘standard non-parole period’ (SNPP) for child sex offences was to be determined. Sentencing must accord with ‘patterns and practices at the time of sentencing’, but the SNPP is that period ‘(if any) that applied at the time of the offence’<sup>12</sup>. Transitional provisions, however, appeared to produce a different outcome.

Hamill J (at [108]) preferred the ‘time of offence’ answer in the core provision. This was supported by the ‘last resort’ principle<sup>13</sup> that, absent clear words, penal provisions are read to ‘favour the liberty of the subject’<sup>14</sup>. This is consistent with meaning being resolved by reference to context and purpose<sup>15</sup>.

▪ **Thanks** – Oliver Hood, Jeremy Francis & Jacinta Dharmananda.

<sup>1</sup> [Aubrey](#) [2017] HCA 18 (at [29-30]), [Eaton](#) [2013] HCA 2 (at [97]).

<sup>2</sup> s 8 [Interpretation Act 1984](#) (WA), s 21 [Acts Interpretation Act 1915](#) (SA).

<sup>3</sup> [Gee](#) [2003] HCA 12 (at [113]), cf [Forsyth](#) [2007] HCA 8 (at [99]).

<sup>4</sup> [Lake Macquarie](#) (1970) 123 CLR 327 (at 331), [A2](#) [2019] HCA 35 (at [169-170]).

<sup>5</sup> Asimakis (2021) 95 ALJ 869 (at 871-872), [Fitzpatrick](#) [2001] 1 AC 27 (at 49).

<sup>6</sup> cf [Meagher](#) (2020) 43 UNSWLJ 191, Goldsworthy (2022) 43 SLR 79.

<sup>7</sup> s 37(1) of the [Design and Building Practitioners Act 2020](#) (NSW).

<sup>8</sup> [Gill](#) [1963] 1 WLR 929 (at 933-934), [Condon](#) [2014] NSWCA 149 (at [44-45]).

<sup>9</sup> [Anature](#) [2017] NSWCA 191 (at [45]), Argument 26 *Public Law Review* 137.

<sup>10</sup> [City of Swan](#) [2017] WASC 217 (at [37]), cf [Lilley](#) [2013] FCAFC 121 (at [67]).

<sup>11</sup> cf Byers QC in [AGD](#) [1983] Symposium on statutory interpretation (at 22).

<sup>12</sup> ss 25AA(1) & (2) of the [Crimes \(Sentencing Procedure\) Act 1999](#) (NSW).

<sup>13</sup> [Beckwith](#) (1976) 135 CLR 569 (at 576-577), [Stevens](#) [2005] HCA 58 (at [45]).

<sup>14</sup> [Aubrey](#) [2017] HCA 18 (at [39]), [Grajewski](#) [2017] NSWCCA 251 (at [55]).

<sup>15</sup> cf Episodes [25](#), [35](#), [50](#) & [71](#).