

interpretation NOW!

Episode 102 – 30 November 2023



Australian Government

Australian Taxation Office



The Melbourne Cup was run this month and a horse named *Interpretation* came sixth. Horseracing and statutory interpretation have one thing in common. They are both about picking winners. A degree of 'interpretation' may be applied to the form-guide, and there are any number of 'systems' dedicated to this exciting pursuit. They include raw statistics, urban mythology, superstition and the sure-bet 'trainer talk'. With statutes, however, there is but one system to determine which meaning wins. This is the orthodox 'text>context>purpose>text' process. Four things can be noted. First, all starters run strictly on their merits. Second, never think you know the winner before the race is over. Third, you may fox the bookies, but you can't game the interpretation system. Fourth, purpose almost invariably crowns the winner! **iTip** – interpretation ... don't leave it to chance!

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Civil penalties

[AER v Pelican Point Ltd \[2023\] FCA 1110](#)

A regulator sought declarations that Pelican had under-reported the electricity it could produce on a given day. Pelican argued that any doubt or ambiguity in the civil penalty provisions should be resolved in its favour. *Besanko J* (at [680]) agreed generally².

This is similar to criminal situations where, if real ambiguity persists after the 'modern approach' is applied, it is resolved in favour of the accused³. This means that, if at the point of returning to the text ambiguity remains, then and only then may the scales be tipped. This additional step is secondary and is not to be applied 'mechanistically'. The old rule about reading penal provisions strictly has lost its impact.



Delegated legislation

[Croc's Franchising v Alamdo \[2023\] NSWCA 256](#)

Did COVID regulations protect Croc's as an 'impacted lessee' from termination by Alamdo?⁴ Clause 7 required regard be had to National Code principles when decisions affected 'impacted lessees'.

While ordinary interpretation principles apply to delegated legislation⁵, that legislation will often not be drafted with the same care as statutes⁶. Clause 7 was to be read to 'best give effect to the purpose and language'⁷ and to be 'coherent and consistent' with the National Code. On this basis, the majority reconciled the operation of clause 7 with the wider scheme. It was held that the clause 7 period of operation protected Croc's from action by Alamdo.



Reach of Interpretation Act

[Granville Hotel v ILGA \[2023\] NSWCA 248](#)

Granville's application to operate pokies late at night was rejected on the basis there were insufficient gaming 'venues' proximate to the hotel. The dispute turned solely on whether 'venues' in a guideline⁸ included the singular⁹. Granville argued it should.

Kirk JA (at [32]) accepted that the *Interpretation Act* applied to the guideline, subject to contrary intent. As it was not drafted by parliamentary counsel, however, no assumptions could be made about intent¹⁰. The issue therefore was to be resolved on a text-context-purpose basis. This confirmed that the plural 'venues' did not include the singular. The appeal by Granville was accordingly dismissed.



Time of decision

[Raiz v PSR \(No 2\) \[2023\] FCA 1293](#)

Dr Raiz challenged referral of a complaint to a committee. He said a prior 'inclination to refer' was itself a 'decision' which was flawed because his submissions had not been taken into account¹¹. The issue was what is meant by 'make a referral'¹².

The judge held no 'decision' was made until the instrument of referral was given. Within complex provisions, the judge stressed the impact of purpose in requiring a non-grammatical outcome¹³. This was also supported by the meaning of 'decision' more generally¹⁴. Only the formal instrument involved a 'decision'. This was when the 'temporal guillotine'¹⁵ fell and the Raiz submissions had to be considered.

■ **Thanks** – Matt Snibson, Oliver Hood & Annie Huang.

¹ s 15AA of the [Acts Interpretation Act 1901](#) (Cth), Episode [66](#).

² [Pelican Point](#) [2023] FCA 1110 (113), cf [Yazaki](#) [2018] FCAFC 73 [68].

³ [R v A2](#) [2019] HCA 35 [52], cf [Grajewski](#) [2017] NSWCCA 251 [55].

⁴ Schedule 5 to the [Conveyancing \(General\) Regulations 2018](#) (NSW).

⁵ [Agfa-Gevaert Ltd](#) (1996) 186 CLR 389 (398), [Ketchell](#) [2008] HCA 38 [19].

⁶ [Orchard](#) [2014] NSWCA 149 [44-45], [M House](#) [2023] FCA 768 [78].

⁷ [Project Blue Sky](#) [1998] HCA 28 [70] cited.

⁸ clause 1.2 in a guideline under the [Gaming Machines Act 2001](#) (NSW).

⁹ s 8(c) of the [Interpretation Act 1987](#) (NSW).

¹⁰ [Blue Metal](#) (1969) 117 CLR 651 (656), [Pfeiffer](#) [2001] HCA 71 [56-58].

¹¹ This would have legally undermined the entire referral process.

¹² s 89C(2) of the [Health Insurance Act 1973](#) (Cth).

¹³ [Certain Lloyd's](#) [2012] HCA 56 [25], cf [Carr v Carr](#) [2022] NSWSC 166 [82].

¹⁴ [Semunigus](#) [2000] FCA 240 [19, 20], cf [Amir](#) [2021] FCA 745 [51].

¹⁵ [Amir](#) [2022] FCAFC 44 [66] quoted.

Episode 103 – compulsory acquisition; extrinsic materials; composite expressions; power of purpose

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