



interpretation NOW!

Episode 103 – 21 December 2023



Given the time of year, something might be said about holidays and interpretation. Usually, if an Act requires or allows a thing to be done and ‘the last day for doing the thing is a Saturday, a Sunday or a holiday’: then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday². Rules about calculation of time, all simple on their face, are much litigated³. A recent NSW case shows how difficult it is to displace the holiday rule by reason of contrary intention⁴. Environmental prosecutions had to be brought within 2 years – by Saturday 11 June 2022 ‘despite anything ... in any other Act’⁵. Prosecutions were commenced on Tuesday 14 June (Monday being a public holiday). The court denied that the holiday rule was ousted and allowed the actions to continue. Consistent with the statutory purposes, ‘despite ...’ was facultative, not restrictive. Happy (public) holidays!

Gordon Brysland Tax Counsel Network gordon.bryslan@ato.gov.au

Compulsory acquisition

[Kingston v Transport for Victoria \[2023\] VSC 618](#)

In this case, Quigley J examines the interpretation principles applicable to compulsory acquisition.

First, the right to compensation is ‘entirely statutory’⁶. Second, although these statutes are subject to the usual rules of interpretation, ‘obscure matters should be resolved in favour of the dispossessed party’⁷. Third, this means that compensation doubts over quantum are to be ‘resolved in favour of a more liberal estimate’. Fourth, while the test of value is the same, the court’s attitude to its application is affected. French CJ had explained the rationale for all this as being protection of private interests from interference ‘as an aspect of the rule of law’⁸.

Extrinsic materials

[Jusand Nominees v Rattlejack \[2023\] FCAFC 178](#)

An issue in this infringement case was whether the patent specification disclosed and supported the invention⁹. The statutory requirements had been amended to align our law with offshore practice. On the basis they were ‘ambiguous’ under s 15AB(1)(b)(i) of the *Acts Interpretation Act*, Perram J had regard to extrinsic materials describing the offshore practice. Those materials clarified the new requirements.

At common law, regard is had in any event to these materials from the outset, ambiguity or not¹⁰. Perram J raised if the search for purpose is confined to the text. Evidence of purpose may be found externally, but that purpose always resides in the Act.

Composite expressions

[EPA v Sydney Water \[2023\] NSWLEC 119](#)

SW resisted a subpoena for documents because their sole purpose was that of a ‘voluntary environmental audit’ (protected). The interpretation point was how this composite expression was to be construed.

Moore J said the ‘task is to construe the language of the statute, not individual words’¹¹. Composite expressions are not to be deconstructed unless it is necessary to provide meaning to the whole by considering the separate constituent parts. The judge stressed the danger in relying on a contextual dictionary meanings within composite expressions¹².

iTip – the first task, however, is to determine that your phrase is in fact a composite expression¹³.

Power of purpose

[Russell v R \[2023\] NSWCCA 272](#)

This ‘extreme body modification’ case is a sequel to the genital mutilation decision, [R v A2](#) [2019] HCA 35. R was convicted of genital mutilation¹⁴ – labiaplasty on a consenting adult female. He appealed on the basis High Court dicta made it clear the offence was confined to ritual acts committed on female children.

The court found ‘no textual support’ for this and plenty against it. Despite the fact that the High Court statements were not part of the ratio, however, they were ‘seriously considered dicta’ and to be followed¹⁵ – appeal allowed. The court emphasised (at [33-38]) that an ordinary meaning inconsistent with purpose ‘must be rejected’. **iTip** – purpose is powerful!

■ **Thanks** – Oliver Hood, Amanda Bingham, Kiran Tiwana & Cheryl D’Amico.

¹ s 36(3) defines ‘holiday’ – cf [Onebey](#) [2016] VSC 284.

² s 36(2) of the [Acts Interpretation Act 1901](#) (Cth), cf Pearce [4-39].

³ Particularly in procedural settings – [Cheng](#) [2020] FCA 1859 illustrates.

⁴ [Aerotropolis](#) [2023] NSWCCA 195, cf [Wignalls](#) [2002] TASSC 67.

⁵ s 190(3) of the [National Parks and Wildlife Act 1974](#) (NSW).

⁶ [Walker](#) [2008] HCA 5 [29], [Manor Lakes](#) [2017] VSCA 114 [24-25].

⁷ [Rigby](#) [2012] VSC 427 [28], [Executor Trustee](#) (1947) 74 CLR 358 (373-374).

⁸ [Fazzolari](#) [2009] HCA 12 [40-41], [K Generation](#) [2009] HCA 4 [47].

⁹ ss 40(2)(a) & 40(3) of the [Patents Act 1990](#) (Cth).

¹⁰ [CIC Insurance](#) (1997) 187 CLR 384 (408), [Bay Street](#) [2020] FCAFC 192 [5].

¹¹ [Sea Shepherd](#) [2013] FCAFC 68 [34] quoted.

¹² [XYZ](#) [2006] HCA 25 [19], [Campbell](#) [2008] NSWCCA 214 [49].

¹³ [Nature’s Care](#) [2018] FCA 1936 [32-34], [BHP Billiton](#) [2019] FCAFC 4 [85].

¹⁴ s 45(1)(a) of the [Crimes Act 1900](#) (NSW).

¹⁵ [Farah](#) [2007] HCA 22 [134], [Hill v Zuda](#) [2022] HCA 21 [25].