interpretation NOW!

Episode 64 – 29 September 2020

It's not only the High Court which provides key guidance on interpretation principles. All courts high and low make their contribution, but the NSW Court of Appeal stands out as an engine of scholarship. From the time of *Project Blue Sky* until retirement in 2011, Spigelman CJ progressed evolution and explanation of the 'modern approach'. In the first *Spigelman Public Law Oration*, Gageler J said it was Spigelman CJ 'who first clearly articulated the now dominant text-in-context approach to statutory interpretation'[1]. Current powerlifters, among them John Basten and Mark Leeming, bring a principled and technocratic approach to diverse zones of difficulty, including legislative intention[2] and interactions between statutes and the common law[3]. Much of the work done by this court will inform and guide future developments. This episode looks at 4 of its recent cases.

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Text not cases

[Cottle v Commissioner of Police [2020] NSWCA 159](#)

Question – Could the *Industrial Relations Commission* hear a police dismissal case despite a negative High Court decision on a related issue?[4] Yes, held the court. The case is significant, not so much for the technical issue it decides, but for the approach to be taken to prior cases on related interpretation issues.

Bell P (at [58-59]) stressed that the task is one of *statutory* interpretation, not simply to construe what the High Court said. The High Court case had to be carefully considered, but the 'beginning and end of the task of statutory interpretation is the statute'[5]. This is very important. **iTip** – court decisions 'are not substitutes for the text of legislation'[6] – cf Episode 9.

Statutory definitions

[Singh bhnf Kanwar v Lynch [2020] NSWCA 152](#)

Singh was injured in a race fall and sued another jockey. He lost because the harm resulted from obvious risks of a dangerous recreational activity[7]. He said that the 'recreational activity' definition was influenced by the ordinary meaning of 'recreational'.

Rejecting this, Leeming JA (at [98-131]) considered in-depth the High Court position that, for circularity reasons, definitions are not read 'by reference to the term defined'[8]. What he found was variable practice and contrary views elsewhere. Plus, terms defined in statutes are usually chosen to be meaningful[9] and mechanistic approaches are out[10]. The High Court view 'remains controversial', Leeming JA said[11].

Dictionaries

[Michael Brown PS v WSC [2020] NSWCA 137](#)

Use and abuse of dictionaries is a regular topic for judicial comment[12]. This case involved planning consent given on the basis that the development (flats) 'is compatible with the flood hazard of the land'[13]. Was 'is' used here merely to indicate present compliance, or did it cover things later to be done?

Basten JA (at [12-15]) said courts can always look at dictionaries, but they are not bound by them[14]. Dictionaries say nothing about context, which is crucial in determining what the words mean. Both dictionaries cited emphasised that the natural use of 'is' is to indicate present tense, a usage confirmed by the planning instrument read as a whole.

History lessons

[Forrest v DPP [2020] NSWCA 162](#)

The bedrock requirement to consider context in the widest sense and up-front includes an obligation to consult the legislative history of provisions. *Forrest* was about stating cases on questions of law, an issue on which Leeming JA had ruled in an earlier decision.

On reading Basten JA's legislative history in the present case, however, Leeming JA said his earlier reasons 'cannot survive that analysis'. This illustrates the critical role that an in-depth investigation of legislative history may play in interpretation. It also reflects a more general experience that cases reaching appellate courts may 'rarely involve a choice between clearly right and wrong meanings'[15].

▪ Credits – Gordon Brysland, Oliver Hood, Claudia Hodge, Philip Borrell.

[1] Gageler *Deference in Williams* (ed) *Key Issues in Public Law* 1 (at 1).
[2] eg Basten *Legislative Intention* (2019) 93 ALJ 367.
[3] eg Leeming *The Statutory Elephant in the Room* (2013) 36 *UNSWLJ* 1002.
[4] *Commissioner of Police v Eaton* [2013] HCA 2.
[5] *Consolidated* [2012] HCA 55 (at [39]), *Alcan* [2009] HCA 41 (at [47]) cited.
[6] *Walker* [2008] HCA 5 (at [31]), *ABS* [2015] HCA 48 (at [227]).
[7] s 5L of the *Civil Liability Act 2002*, *Goode* [2017] NSWCA 311 (at [194-196]).
[8] *King* [2020] HCA 4 (at [18]), *Eichmann* [2020] FCAFC 155 (at [45]).
[9] (at [120]), *Streller* [2013] NSWCA 348 (at [43]) quoted.
[10] (at [128-130]), *AVS* [2010] NSWCA 81 (at [133]).
[11] (at [126]), cf Herzfeld & Prince *Interpretation* (at [3.50]) coyote example.
[12] Pearce 9th ed (at [3.33-3.35]), *Hunter's Hill* [2017] NSWCA 188 (at [76-83]).
[13] clause 7.9(3)(a) of the *Wingecarribee Local Environmental Plan 2010*.
[14] Herzfeld & Prince (at [20.40]), *Bendixon* (1943) 68 CLR 401 (at 415).
[15] *Pfeiffer* [2001] HCA 71 (at [88]), French CJ (2013) 87 ALJ 820 (at 824).

Episode 65 – consistent meaning; earlier decisions; Mondelez angles; refresher course

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ISSN 2651-9518