interpretation NOW!

Episode 80 – 25 January 2022

Australian Government
Australian Taxation Office

Episode 78 dealt with how best to use iNOW! under an easy '1-2-3 system'. Ultimately, it is about getting the reader to the latest intel relevant to their issue as fast as possible. Selection of cases each month for this purpose is a much slower process. While the High Court often frames interpretation themes briefly and in systemic terms[1], other courts sometimes produce real super-monsters[2]. Clearly, not all these cases need to find their place in iNOW! But hidden away in some of them may be something of value – a small jewel, even. iNOW! aims to select from within all cases each month the 4 most important developments. Routine applications of settled principle are discarded in favour of novel situations and things not already covered in past episodes. That way, the website can grow into something more comprehensive with more value add to users – that's the plan.

Gordon Brysland Tax Counsel Network

Advantage of own wrong

Charara v Waverley Council [2021] NSWLEC 1650

Charara sought consent to add a mezzanine floor to his house in Bronte in breach of the applicable Floor Space Ratio standard. He succeeded by showing (A) the standard was unreasonable and unnecessary, (B) there were sufficient other grounds met, and (C) that public interest elements were satisfied.

Unapproved modifications already undertaken, however, could not be taken into account in Floor Space Ratio calculations – 'existing dwelling-house' means a lawful one. Otherwise, said the court (at [36]) would have allowed Charara to take advantage of his own wrong[3]. As Episode 11 reports, this ancient rule still exerts its influence in modern times[4].

Extrinsic materials

Re K and M [2021] NSWSC 1314

In this family law case, Sacker J (at [32]) repeats the point that extrinsic materials may be taken into account without first having to find ambiguity or other difficulty. This is timely given the confusion which still appears to cloud the issue.

The instruction in *CIC Insurance* to consider context in the 'widest sense' in the first instance is one of the brightest stars by which modern statutory interpretation is to be navigated[5]. Three things may be observed – (A) the common law and statute operate in tandem in this area[6], (B) the uses to which any extrinsic materials may be put must be carefully observed[7], & (C) they are to be treated like evidence.

Coherent utility

Programmed v CILSLPB [2021] WASCA 208

What did 'site' mean in the definition of 'construction industry' in long service leave legislation?[8] Martin J drew attention to the assumption that all words are assumed to have meaning and affect. This, he described (at [63]) as legislative words being 'afforded some measure of coherent utility'[9].

Consistent with the statutory purpose, 'site' meant where work was done rather than a 'construction site' as ordinarily understood. The judge (at [148-157]) rejected that the label 'construction industry' could influence what 'site' meant, and that older High Court authority 'ought no longer be followed or applied'[10]. Not all courts see it this way, however[11].

Manner of Manufacture

Commissioner v Aristocrat [2021] FCAFC 202

Aristocrat sought to patent a 'system or method for providing a feature game' on poker machines[12]. Was the claim for a 'manner of manufacture within the meaning of s 6 of the Statute of Monopolies'?[13]

Although 'manner of manufacture' appears in the legislation, its meaning is not resolved by the ordinary principles of statutory interpretation. It is determined by what courts regard as falling within the scope of the patent system in line with principles developed for the application of s 6[14]. This is an example of a term embedded in a old statute taking an evolving legal meaning within a new statute[15]. The feature game system was not patentable.

- **Credits** – Gordon Brysland & Oliver Hood.

[1] Moorcroft [2021] HCA 19 (at [15]), Westpac [2021] HCA 3 (at [54].
[2] Swiss Re International v LCA Marrickville [2021] FCA 1206 for example.
[3] Vic Vellar [2010] NSWLEC 266 (at [75]), Green [1999] NSWLEC 256 (at [32]).
[4] Vo [2015] NSWSC 1523 (at [17]), Meridien [2013] QCA 121 (at [20-27]).
[5] Episode 43 case 2 (context), A2 [2019] HCA 35 (at [33]).
[6] Gayle [2019] NSWCA 172 (at [258-259]), cf Mohamud [2021] VSC 787 (at [17]).
[7] Mondelez [2020] HCA 29 (at [70]), Consolidated [2012] HCA 55 (at [39]).
[8] s 3(1)(a) Construction Industry Portable Paid Long Service Leave Act 1985.
[9] Baume (1905) 2 CLR 405 (at 414), Project Blue Sky [1998] HCA 28 (at [71]).
[10] Shin Kobe [1994] HCA 54 (at [26]), cf WZAPN [2015] HCA 22 (at [48]).
[11] Auctus [2021] FCAFC 39 (at [59-69]), Episodes 1, 46, 61, 64 & 71.
[12] A 'feature game' is one awarded to keep players wagering for longer.
[13] s 18(1)(a) of the Patents Act 1990 (Cth).
[14] CCOM (1994) 51 FCR 260 (at 291), Myriad [2015] HCA 35 (at [18]) cited.
[15] cf Synthon BV [2005] UKHL 59 (at [57]), Bennion 5th ed (at 548).

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