



interpretation NOW!

Episode 81 – 24 February 2022



In *Stanley v DPP*, Basten JA draws attention to one of the most basic basics of our system¹. The judge channelled *Project Blue Sky* in turn quoting Bennion² – ‘The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern ... Furthermore there needs to be brought to the grammatical meaning ... due consideration of the relevant matters drawn from the context (using that term in its widest sense)³. We derive the legal meaning of provisions, as informed by context and purpose. Often this will coincide with the grammatical or literal meaning, as is to be expected. What we cannot do is pre-confine the search to the narrow fields of grammar or linguistics. The ice-age of literalism has passed³.

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Inclusive definitions

[NSW Bar Association v EFA \[2021\] NSWCA 339](#)

A drunken barrister approached a female clerk at a dinner and suggested oral sex. The tribunal found he had not engaged in ‘professional misconduct’, which included ‘conduct ... that would ... justify a finding that the lawyer is not a fit and proper person to engage in legal practice’⁴. The Association appealed.

Inclusive definitions ‘generally – but not always’ expand the ordinary meaning of words⁵ (it depends on context⁶). It was held (at [118]) that common law ‘professional misconduct’ was incorporated into the definition, which then extended to character (not just conduct). Although there was ‘appalling conduct’, it did not justify a finding of unfitness to practice here⁷.

Coherence

[Tay v Building Services Board \[2021\] WASC 433](#)

Did engineering activities involve supervising ‘building construction’ for the purposes of someone becoming a building service practitioner⁸. In this case, not all the provisions, regulations and forms fitted together that well. Hill J (at [83-84]) stressed that, where possible, provisions of an Act must be understood as part of ‘the coherent whole’⁹.

Where 2 statutes (or a statute and regulations) form a legislative scheme, the court ‘should endeavour to produce a rational, sensible, efficient and just operation ...’ The judge rejected technical arguments and excluded the activities concerned. This case illustrates the obligation to look for coherence¹⁰.

Administrative guidelines

[Antegra Pty Ltd v CCSR \[2021\] NSWSC 107](#)

Payne JA in a land tax case (at [87]) said Treasury guidelines are ‘to be construed according to their text and purpose as evident from the document itself in the context of the legislative scheme in which the guidelines are required to be applied’. Ordinary principles of interpretation apply to them¹¹.

They may be read in an ‘unvarnished way’¹², but cannot be approached without regard to context and purpose. Interpretation must be objective, not opportunistic. Where several administrative documents inter-relate, it may be ‘possible to have regard to each of them for the purposes of construing expressions used in any one of them’¹³.

Calculation of time

[AFP v Cranston \(No 15\) \[2021\] NSWSC 1332](#)

Calculation of time often creates angst¹⁴. The issue was when an application to extend the date of forfeiture had to be made by. The statute said the ‘period at the end of which the property is forfeited is ... the 6 month period starting on the conviction day’¹⁵ (1 April 2021). The calculation here was ‘not without doubt’, with 3 possibilities – end of 30 September, beginning of 1 October, or on 2 October.

Item 2 in s 36(1) of the *Acts Interpretation Act 1901* says a period of time expressed on a specified day ‘includes that day’. But, if item 2 applied, forfeiture would take place within 6 months. It ‘would seem preferable’ then that forfeiture occur on 2 October.

▪ Credits – Gordon Brysland & Oliver Hood.

¹ *Stanley v DPP* [2021] NSWCA 337 – exercise of sentencing discretions.

² *Project Blue Sky* [1998] HCA 28 (at [78]), Bennion (at 343-344).

³ *Az* [2019] HCA 35 (at [37]), *Sydney Seaplanes* [2021] NSWCA 204 (at [26]).

⁴ s 297(1)(b) of the *Legal Profession Uniform Law* (NSW).

⁵ (at [115]), *Dilworth* [1899] AC 99 (at [106]), *YZ Finance* (1964) 109 CLR 395.

⁶ *Cranbrook* [2006] NSWCA 155 (at [38-43]) cited, Pearce 9th ed (at [6.8]).

⁷ Particulars of the conduct in question appear in the judgment.

⁸ s 17 of the *Building Services (Registration) Act 2011* (WA).

⁹ *Mohammadi* [2018] WASC 98 (at [35]), *Aldi* [2017] HCA 53 (at [16]) cited.

¹⁰ *SAS Trustee* [2018] HCA 55 (at [20]) for example, Episode 43 case 10.

¹¹ (at [82-86]), Pearce 9th ed (at [1.2]), Herzfeld & Prince (at [16.10]) cited.

¹² *Javasinghe* [2016] FCAFC 79 (at [38]), cf *Javasinghe* [2017] HCA 26 (at [52]).

¹³ *Mailes* [2001] NSWCCA 155 (at [108]), *Lennox* [2021] NSWCATAD 81.

¹⁴ Pearce *Interpretation Acts* (at [4.23-4.41]), Episodes 42 & 72.

¹⁵ s 92(3) of the *Proceeds of Crime Act 2002* (Cth).