interpretation NOW!

Episode 86 – 31 July 2022

Australian Government
Australian Taxation Office

It's more than easy to fall into the **'1 + 1 = 3' trap** when interpreting statutes – that is, 'provision + dictionary = answer'. We all recall that line from the old American case, repeated by our courts – 'don't make a fortress out of a dictionary'[1]. The point is that we have a contextual system of interpretation and dictionaries say nothing about context (they record common usage). We are to have regard to context in the 'widest sense'. Rather often, as is to be expected, context will confirm that the ordinary meaning is what parliament meant by the words it used. Sometimes, however, some other meaning will be suggested by context and confirmed by purpose[2]. In both situations, however, **'1 + 1 + 1 = 3'** – that is, 'provision + dictionary + context = answer'. The crucial element, context, steers us from unconscious literalism and provides essential quality assurance.

Gordon Brysland Tax Counsel Network

Purpose and coherence

Hurley v Collector of Customs [2022] FCAFC 92

Imported alcohol went into home consumption under a permission allowing deferral of duty. When duty went unpaid, payment demands were served[3]. It was conceded H had 'possession, custody or control' of the goods, & they were 'subject to customs control'.

The issue was whether he had failed 'to keep the goods safely'. It was held this was irrelevant on the facts, as the goods went into home consumption consistent with a permission. Something adverse (like loss or destruction) must happen to the goods in question[4]. To hold otherwise, said the court (at [84]), would undermine the purpose of the permission system and coherence of the statute[5].

Principle of legality

NSW v Kaiser [2022] NSWCA 86

This case is about whether a prisoner convicted of manslaughter was a 'supervised offender' against whom an 'extended supervision order' could be made[6]. He said this would restrict his rights contrary to the 'principle of legality', which meant the power to make the order should be construed strictly[7].

The court said (at [60-62]) the clear intention of the legislature was to curtail liberty and protect the community. There was, therefore, 'limited (if any) scope for the application of the principle of legality'[8]. Meaning was not to be derived in this context by seeking to apply a general presumption 'against the very thing the legislation sets out to achieve'.

What the High Court says ...

Hill v Zuda Pty Ltd [2022] HCA 21

In this case (at [25]), 7 judges of the High Court confirmed that an 'intermediate appellate court should not depart from seriously considered *dicta* of a majority of this Court'[9] – 'dicta' are statements which are not part of the reasons for a decision.

Leaving aside the uncertain boundary between 'considered' and 'seriously considered'[10], the High Court is saying that 'when a majority makes a point, we expect you to follow it'[11]. This applies as much to administrators as it does to courts, probably more so. Arguably, it also applies in some special leave situations where the court goes out of its way to clarify the law or make some definitive statement[12].

Contractual labels

BSA v Ventia Australia [2022] NSWCA 82

Ventia subcontracted provision of social housing services to BSA under an arrangement which said each work order was a separate contract. BSA made a claim of 5 work orders which Ventia rejected as violating the 'one contract rule' in the legislation[13].

The court said it was 'strongly arguable' there was no such rule. In any case (at [76-80]), the parties could not determine by contractual label their relationship for the purposes of the legislation[14]. Indeed, an attempt to do this 'may cause the court to scrutinise the contract with greater care'[15] (as happened here). **iTip** – contractual labels adopted by parties cannot be ignored but must be subjected to proper scrutiny.

▪ **Thanks** – Oliver Hood, Eric Armstrong, Patrick Boyd & Charlie Yu.

[1] *Thiess* [2014] HCA 12 (at [23]), *Sea Shepherd* [2013] FCAFC 68 (at [36]).
[2] *R v A2* [2019] HCA 35 (at [32-44]), for example.
[3] s 35A(1) of the *Customs Act 1901*.
[4] *Southern Shipping* (1962) 107 CLR 279 (at 287 etc), cf *Zappia* [2018] HCA 54.
[5] An application for special leave has been filed in the High Court.
[6] s 5I of the *Crimes (High Risk Offenders) Act 2006* (NSW).
[7] *Al-Kateb* [2004] HCA 37 (at [19]), *Smith* (1980) 147 CLR 134 (at 139) cited.
[8] *Lee* [2013] HCA 39 (at [314]), cf *DM Management* [2000] HCA 7 (at [43]).
[9] *Farah* [2007] HCA 22 (at [134]), Harding & Malkin (2012) 34 *Sydney LR* 239.
[10] We should always presume the High Court is serious about what it says.
[11] Mason P called this a 'profound shift', but there is irony here also.
[12] eg *Jireh* [2011] HCA 45 (at [3-5]), cf *Ratu* [2021] FCAFC 141 (at [44]).
[13] *Building and Construction Industry Security of Payments Act 1999* (NSW).
[14] *Radaich* (1959) 101 CLR 209 (at 222), *Fearnley* [2006] FCAFC 3 (at [27]).
[15] *Hollis* [2001] HCA 44 (at [58]), Lewison & Hughes (at [9.07]).

ISSN 2651-9518