



interpretation NOW!

Episode 88 – 30 September 2022



In a recent VSCA case¹, Sifris JA's minority judgment (at [145-152]) touched on the interplay between text and purpose in resolving constructional choice. If the ordinary or literal meaning of statutory words conflicts with legislative purpose, it is justifiable to depart from it in favour of an alternative construction that is 'reasonably open' on the words of the Act if it best achieves the Act's purpose, even if that construction is 'less immediately obvious or more awkward'². This is uncontroversial, and is the 'unqualified statutory instruction' in s 15AA³. A complicating factor, however, is the need to derive purpose from the statutory text itself, as purpose 'resides in the text [and] structure' of the Act and is not found by importing external assumptions about its desired effect⁴. Consequently, text and purpose inform each other throughout the dynamic process of statutory interpretation.

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Meaning of 'interest'

[Olde English Tiles v TfNSW \[2022\] NSWCA 108](#)

OET occupied land under a bare licence terminable at will with no market value. When the land was compulsorily acquired, OET claimed compensation in what SMH called a 'high-stakes *The Castle*-style stoush'⁵. OET argued it had a compensable 'interest', namely a 'privilege over, or in connection with, the land', relying on the *Macquarie* definition of 'privilege'.

Basten AJA disagreed. He said (at [33-34]) that dictionaries often '[fall] short of providing useful assistance' and 'privilege' 'may be expected to have a legal meaning which is not to be found in a dictionary providing examples of ordinary usage'⁶. Here, OET's legally unenforceable licence was not a 'privilege'.



Environmental consents

[Hitchcock v Reed \[2022\] NSWLEC 81](#)

Development consents are statutory instruments governed by the same rules of construction as statutes⁷, as Robson J observed here (at [61-63]). R's development consent would have lapsed if work had not physically commenced⁸. The work had begun, but conditions in the consent were not met. Did this mean the work didn't constitute commencement?

Robson J said 'yes', after close study of text, context (including the governing statute) and purpose under ordinary principles. He said there are no principles allowing 'laxity or flexibility' or rewriting based on practical considerations when construing consents⁹, although some courts have taken a different view¹⁰.



Consistent usage

[R v Jacobs Group \[2022\] NSWCCA 152](#)

JG pleaded guilty to foreign bribery offences¹¹. One maximum penalty was potentially three times the 'benefit' JG obtained from the offence. 'Benefit' was used elsewhere in the same section to mean gross (not net) benefit. Did it take the same meaning here?

No, said Bell CJ (at [98-99]). Although words 'ordinarily' have the same meaning throughout an Act, this rule is not absolute¹². On rare occasions context supports ascribing different meanings to cognate terms¹³. Here, the penalty's intended proportionality to JG's gain or advantage, and the differing contexts of each usage of 'benefit' in the section, supported a 'net benefit' reading.



Industrial awards

[D&D Traffic Management v AWU \[2022\] FCAFC 113](#)

This case (at [47-48]) summarises principles for interpreting industrial awards. Similar to statutes, the starting point is the natural and ordinary meaning of the award's words, 'read as a whole and in context', with regard to history and subject matter.

Importantly, awards are designed for specific industries, so cannot be read 'in a vacuum divorced from industry realities' such as working conditions, customs and practices¹⁴. Moreover, as awards can result from agreements between parties that are drafted less precisely than Acts, they may generally be construed generously to give effect to purpose if there are drafting infelicities¹⁵. **iTip** – context is key.

■ **Thanks** – Oliver Hood, Gordon Brysland & Patrick Boyd.

¹ [Barodawala](#) [2022] VSCA 198.

² [CIC Insurance](#) (1997) 187 CLR 384 (at 408), [Taylor](#) [2014] HCA 9 (at [66]).

³ s 15AA of the [Acts Interpretation Act 1901](#), [SZTAL](#) [2017] HCA 34 (at [39]).

⁴ [Certain Lloyd's](#) [2012] HCA 56 (at [25-26]), [AEU v DECS](#) [2012] HCA 3 (at [28]).

⁵ Sydney Morning Herald, "'Completely unfair' ..." (2 August 2022).

⁶ [Roads and Maritime Services](#) [2019] NSWCA 41 (at [37]), Episodes [76](#) & [69](#).

⁷ [Kovacevic](#) [2016] NSWCA 346 (at [83]), Episode [36](#).

⁸ s 4.53 of the [Environmental Planning and Assessment Act 1979](#) (NSW).

⁹ [JK Williams](#) [2021] NSWLEC 23 (at [61]), [anature](#) [2017] NSWCA 191 (at [45]).

¹⁰ [Bupa](#) [2018] FCA 2033 (at [45]), [Condon](#) [2014] NSWCA 149, Episode [45](#).

¹¹ ss 11.5(1) and 70.2(1)(a)(iv) of the [Criminal Code](#) (Cth).

¹² [Tabcorp](#) [2016] HCA 4 (at [65]), [Franzon](#) [1975] HCA 41 (at [11]).

¹³ [Clyne](#) [1981] HCA 40 (at [11]), Episodes [3](#) & [12](#).

¹⁴ [Wanneroo](#) [2006] FCA 813 (at [57]), Episode [30](#).

¹⁵ [Amcor](#) [2005] HCA 10 (at [96, 145-146]), [King](#) [2021] FCAFC 123 (at [42]).

Episode 89 – singular and plural; statutory definitions; special circumstances; ejusdem generis

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