



interpretation NOW!

Episode 95 – 28 April 2023



Episode 90 observed that ‘always speaking’ is a baseline assumption in our system, but that how to apply it is often problematic. A recent UK case – *News Corp UK* – throws more light on this¹. The issue was whether ‘newspapers’ in older VAT provisions extended to cover digital editions – answer ‘no’. The court confirmed that always speaking is ‘merely an aspect of purposive interpretation’². It involves ‘taking into account changes in our understanding of the natural world, technological changes, changes in social standards and ... changes in social attitudes’³. The aim is to apply the purpose of the original provisions to the present situation. VAT exemptions are construed strictly and a ‘standstill provision’ restricted expansion of zero-rated categories. Legislative purpose, therefore, narrowed any role for ‘always speaking’ and prevented digital editions being ‘newspapers’.

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🔍 Examples in legislation⁴

[R v Clark \[2023\] SASCA 15 \(at \[14\]\)](#)

Section 20 of the [Legislation Interpretation Act 2021](#) (SA) says that an example included in legislation ‘is not exhaustive’ and ‘may extend, but does not limit, the meaning of the provision ... to which it relates’⁵.

The word ‘may’ allows a court to assess if an example in fact extends a provision. It also caters to situations where parliament intends a provision to cover the example ‘whether or not it strictly falls within the scope of the provision’⁶. Older versions of these sections say that ‘if the example is inconsistent with the provision, the provision prevails’⁷. Examples in legislation (A) are increasingly common, (B) have more influence, and (C) enjoy strong user support⁸.

📄 Super documents

[Application by Ellasil Pty Ltd \[2023\] VSC 69](#)

This case (at [88]) explains how superannuation trust deeds are to be interpreted. Unsurprisingly, they are to be read in the same practical, objective and purposive way as all commercial documents⁹.

McMillan J said that attention must be paid to the language used, commercial circumstances, operational context, and the objectives to be secured¹⁰. Words are to be given their ‘ordinary and fair meaning’, approached in a ‘practical and realistic way’. Overly fine or theoretical approaches are to be avoided. **iTip** – super deeds as commercial documents are always to be understood objectively and not by reference to subjective intentions¹¹.

👤 Delegated legislation

[NL v Chief Executive DFCP \[2023\] SASCA 20](#)

Delegated legislation is invalid if it is inconsistent with the statute under which it is made¹². As the court explained (at [118-123]), inconsistency may involve direct collision between the two, or may arise where the statute is ‘plainly intended’ to ‘cover the field’¹³ – that is, where the statute is objectively intended as a complete statement of the law.

Applying this, the court held (at [168]) that s 60 of the *Safety Act*¹⁴ involved an ‘exhaustive statement’ of situations where a youth court may make an order for costs against the Crown. Various factors showed that the provision conferred only a limited discretion that could not be extended by delegated legislation.

🧠 Preconception

[Attorney General v FJG \[2023\] NSWCA 34](#)

In this case, Bell CJ (at [1]) observes that interpretation should never start from some preconceived policy outcome considered desirable then ‘work backwards’. Preconception may be unconscious just as much as deliberate. Within our purposive system, it is a particular problem that appellate courts have been concerned to call out¹⁵.

Could the NSW marriage register be changed retrospectively as to name and sex in a way that contradicted the federal marriage certificate? This was not possible because the respective laws were to be construed harmoniously. If this outcome was considered harsh, the remedy is via parliament.

▪ **Thanks** – Cheryl D’Amico, Matt Snibson, Philip Borrell & Patrick Boyd.

¹ *News Corp UK & Ireland Ltd v CRC* [2023] UKSC 7, **iTip** – read this case.

² plurality (at [37]) quoting *Owens v Owens* [2018] UKSC 41 (at [38]).

³ plurality (at [35]) citing *Test Claimants* [2020] UKSC 47 (at [218-219]).

⁴ Episodes [17](#) & [30](#), Pearce 9th edition (at [4.75]).

⁵ cf s 15AD *Acts Interpretation Act 1901*, *FTAC* [2002] NSWSC 624 (at [17]).

⁶ cf *EM to the Bill* inserting current s 15AD (at 19).

⁷ cf *Mondelez* [2020] HCA 29 (at [72]), *Gold* [2022] WASCA 134 (at [265]).

⁸ Barnes Dharmananda & Moran (at [20.12]), *Quiggin* (2011) 1 *Loophole* 96.

⁹ *Byrnes* [2011] HCA 26 (at [102]), cf Episode [34](#).

¹⁰ *Eastaugh* [2017] VSCA 218 (at [61]), cf *Butler* [2022] VSCA 102 (at [27]).

¹¹ *Woodside* [2014] HCA 7 (at [35]), *Laundy* [2023] HCA 6 (at [27]).

¹² *White* [1899] 2 QB 34 (at 37), *Webster* (1980) 49 FLR 317 (at 320-321).

¹³ *Cullis* (1914) 18 CLR 540 (at 543), Pearce & Argument (at [19.23]).

¹⁴ s 60 of the *Children and Young People (Safety) Act 2017* (SA).

¹⁵ *Certain Lloyd’s* [2012] HCA 56 (at [26]), *Greensill* [2021] FCAFC 99 (at [70]).