interpretation NOW!

Episode 127 – 19 December 2025

Australian Government
Australian Taxation Office

In *Badari*, access to extrinsic materials in the interpretation of court orders is considered by the High Court[1]. Importantly, the court said that 'as is generally the case with the interpretation of written instruments, there is no threshold requirement before extrinsic context can be considered'. This appears to clear up any residual uncertainty as to whether ambiguity must first be shown before extrinsic materials can be consulted. Where an order is ambiguous, the court said that it may be necessary to look at the reasons for judgment, and sometimes the pleadings, the evidence and how the case was conducted[2]. Although the court is explaining a systemic principle of interpretation here, it is qualified by the word 'generally'. This may be in recognition of the contract law idea that ambiguity must first be shown before wider context can be accessed[3].

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Extrinsic materials

Hvalica v Wollongong CC [2025] NSWLEC 119

This case is about the scope of extrinsic materials available in determining purpose around whether words could be read into an environmental plan[4].

The judge (at [58-60]) referred to the 'liberality' of the modern approach, and that 'indeed any material that may throw light on the meaning' of the instrument could be consulted[5]. Caution was expressed as to whether non-public materials could be accessed[6]. The communications in question here merely reflected private subjective opinions of people involved rather than any official notional position of government. **Comment** – This case does not refer to *Ravbar*, decided before *Hvalica* was heard – see Episode 122.

Surplusage

Farmer v Minister [2025] HCA 38

Edelman J (at [105]) said the presumption against surplusage in statutes 'seldom … carries great weight'[7]. The corollary that all words are to be given meaning and effect therefore has a similar status. Importantly, the presumption 'carries almost no weight when the provision is part of a scheme of overlapping circumstances', as this case illustrates.

In *Palmanova*, it was said there may be many reasons for surplusage, and that context and purpose are surer guides than the logic of provisions[8]. In *Farmer*, that the provisions sought to cover a variety of different and related grounds for visa refusal meant the presumption carried 'almost no weight'[9].

De minimis principle

Bilal v Ampol Australia [2025] FedCFamC2G 1724

The idea that the law does not concern itself with trifling matters is frequently invoked – see Episode 33. This case (at [91-93]) illustrates 3 things – (1) The law as stated by Hill J in *Farnell* remains correct[10]. (2) The principle is a rule of thumb rather than a rule of law. (3) Whether it applies in an interpretation situation depends on text, context and purpose. Appeal courts have also endorsed the principle[11].

This leaves for attention precisely when *de minimis* will apply. In *Bilal*, it was held not to apply as breach of the relevant obligation involved a 'completed contravention' of the statute[12]. **iTip** – *de minimis* is about context & judgment rather than assumption.

Variation of instruments

Ziegler v FCT [2025] FCAFC 168

Section 33(3) of the Acts Interpretation Act 1901 *says* –

> **Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character … the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.**

It had been held that s 33(3) confers a power to amend notices of penalty assessment[13]. In *Ziegler* (at [57-64]), this was held to be 'erroneous' – s 33(3) is a 'statutory direction about construing a power conferred by another statute'. It directs the manner in which powers elsewhere are exercised[14]. Finally[15].

▪ **Thanks – Oliver Hood, Jeremy Francis & Charlie Yu.**

[1] Badari v Minister [2025] HCA 48 [12] joint reasons of five judges.
[2] Doyle [2020] NSWCA 34 [58], Owston [2003] FCA 629 [27] resp.
[3] Jireh [2011] HCA 45 illustrates, cf Herzfeld & Prince [36.90].
[4] cl 4.1A(3)(a) Wollongong Local Environmental Plan 2009.
[5] Stevens [2005] HCA 58 [124] quoted, cf Pearce 10th ed [3.25-3.26].
[6] [78] citing Hillside [2022] UKSC 30 [27], *Hunter* [2019] NSWCA 147 [64].
[7] Walker [2000] 1 WLR 799 (805) quoted, cf Herzfeld & Prince [5.160].
[8] Palmanova [2025] HCA 35 [73, 75], Episode 125.
[9] s 501(6)(d) Migration Act 1958 (Cth).
[10] Farnell (1996) 142 ALR 322 (324-327), Pearce 10th ed [4.45].
[11] Redbubble [2024] FCAFC 15 [111-115], Sydney Metro [2023] NSWCA 200 [54].
[12] s 536(1) Fair Work Act 2009 (Cth).
[13] Aurora (No 2) [2011] FCA 1090 [118-119], Thomas [2015] FCA 968 [573].
[14] See the case for further background – cf Sunflower [2025] FCA 1442 [72].
[15] All the very best for the festive season to iNOW! subscribers and users.

Episode 128 – statutory definitions; common law; Anthony Hordern; meaning of 'institution'

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