interpretation NOW!

Episode 101 – 4 October 2023

Australian Government
Australian Taxation Office

E100 talks about the controlling influence of purpose in our system. But purpose does not solve all problems. Purpose may operate as the 'statutory decider' only where it can be derived from objective evidence within or outside the statute. Purpose may involve a compromise, be obscure or unexpressed[1]. This happened in a recent GST food case[2]. Hespe J said (at [141]) that the 'legislative scheme with its arbitrary exemptions is not productive of cohesive outcomes' and that parliament had 'left the court in the unsatisfactory position of having to determine whether to assign novel food products to a category drafted on the premise of unarticulated preconceptions'. Comments like this are not new[3]. Implicit in them is that you cannot make up your own idea of what purpose should look like[4]. If there is no evidence for it, context or other factors will be determinative.

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Injustice

Ramsay v Minister [2023] NSWLEC 66

Farmers were granted access licences for lesser amounts of water than they applied for. They tried to appeal on the basis that 'a decision refusing to grant an access licence' had been made[5]. They raised the principle that, where two meanings are open, it is proper to adopt the one which avoids injustice[6].

Pain J rejected this and held the appeal incompetent. Only one meaning of the provision was open, and that meaning was supported by an identified legislative purpose not to confer merit review rights in all circumstances. **iTip** – this is a reminder that cases on interpretation decided before s 15AA was enacted need to be read subject to our 'modern approach'[7].

Legislative purpose

The King v Jacobs Group [2023] HCA 23

This case is about the penalty imposed after a company conspired to bribe a foreign official on construction projects[8]. The penalty provision mirrored treaty obligations and was to be read consistently with international law[9]. Penalties should be 'effective, proportionate and dissuasive'; and proportionate to the gravity of the offence. Benefit to the offender is 'but one aspect' to be considered[10].

The plurality, citing s 15AA, said that a construction 'which achieves these purposes including by promoting certainty and consistency in application' was to be preferred. The prosecution appeal against leniency of the penalty imposed was duly allowed.

Remediation

Disorganized Developments v SA [2023] HCA 22

Hells Angels is a criminal organisation. Two members were directors of Disorganized, which owned land at Cowirra. It is an offence for members of a criminal organisation to enter property declared a 'prescribed place'[11]. Regulations sought to (but did not on their face) declare the land a 'prescribed place'. After conviction, the members argued the regulations were invalid for not actually declaring anything.

The majority agreed. A declaration must involve a positive statement that the land was a 'prescribed place' (something the regulations lacked). Evidence of purpose did not assist here, nor could words be added 'to remedy perceived legislative inattention'[12].

Singular meaning

MK v R [2023] NSWCCA 180

MK was convicted of maintaining an 'unlawful sexual relationship' with a child[13]. That term is defined as 'a relationship in which an adult engages in 2 or more unlawful sexual acts towards a child over any period'. Two earlier cases held that a sexual relationship over and above commission of the offences was needed[14].

This was 'plainly wrong'. Consistent with context, purpose and history, the definition had only one possible meaning – that there was a relationship of some kind (eg teacher and student) within which the offences were committed. There was no miscarriage of justice. Beech-Jones CJ confirmed that statutory context extends to the existing state of the law[15].

▪ **Thanks** – Jeremy Francis, Andrew McCrossin & Oliver Hood.

[1] cf *Outback Ballooning* [2019] HCA 2 [76], *Thiess* [2014] HCA 12 [23].
[2] *Simplot Australia Pty Ltd v FCT* [2023] FCA 1115, 'prepared meal'.
[3] French [2007] FedJSchol 14 [11-12], *Telstra* 96 ATC 4805 (4806-4807).
[4] *Certain Lloyds* [2012] HCA 56 [24-26], *Wreck Bay* [2019] HCA 4 [79].
[5] s 368(1)(a) of the *Water Management Act 2000* (NSW).
[6] *J Murray-More* (1975) 132 CLR 336 (350), Pearce 9th Edition [2.59].
[7] cf *Victoria v R* [2014] VSCA 311 [61]. Section 15AA was enacted in 1981.
[8] s 70.2(5) of the *Criminal Code* (Cth).
[9] [22] citing *Kingdom of Spain* [2023] HCA 11 [16].
[10] [24] citing *Hellenic Republic* [1992] ECR I-6735 [20].
[11] s 83GD(1) of the *Criminal Law Consolidation Act 1935* (SA).
[12] *Taylor* [2014] HCA 9 [65], *EFX17* [2021] HCA 9 [28] cited.
[13] s 66EA(1) of the *Crimes Act 1900* (NSW).
[14] *R v RB* [2022] NSWCCA 142, *RW v R* [2023] NSWCCA 2.
[15] *Page* [2021] NSWCA 204 [30], cf Gageler (2011) 37/2 *Monash ULR* 1 (at 9).

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