interpretation NOW!

Episode 111 – 30 August 2024

Edelman J uses the term 'textual fundamentalism' to describe a mode of interpretation 'that divorces the words from their context and purpose'[1]. The term has a long history with scriptural texts. It also resonates with the *New Textualism* approach to statutes in America[2]. Textual fundamentalism, notes the judge, drives narrow literalism and the isolation of words – both rejected in our system. Text, context and purpose exist in a 'symbiotic relationship', and a court should read provisions 'with both eyes open to all context, within and outside the legislation'. As Edelman J has noted before, '*con*text is, literally, those matters to be considered (simultaneously) together with the text'[3]. Trying to understand speech without context 'is like an attempt to understand the meaning of a painting before the paint is applied to the canvas'[4] – cf Episode 97.

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Same word, same meaning

Shafran v Secretary [2024] FCA 621

S challenged a review of his pension on the basis that 'evidence' considered was not otherwise admissible. Banks-Smith J (at [113]) held it was intended that pension reviews consider a wide range of material, and that 'evidence' here should bear this extended meaning across the statute in question[5].

The judge quoted the High Court for the presumption that the 'same meaning is given to the same words appearing in different parts of the statute'[6]. There needs to be a good reason for this not applying, and it would be 'odd and unsatisfactory' here if it didn't. This presumption is always dependent on context[7] and, in this case, context confirmed its application.

Expressio unius

EMJ18 v Secretary DHA [2024] FCAFC 87

What was said in this case (at [52]) about the *expressio unius* principle calls for comment[8]. First, always apply the principle with caution[9]. Second, this is consistent with the general rejection of rigid rules under our 'modern approach'. Third, even where the principle may be relevant, it may be of 'limited utility'.

The facts in this case are not important. What is to note, however, is how older 'rules of construction' like *expressio unius* fit with our 'modern approach'. As Episode 100 suggests, these 'rules' provide us with soft help, rather than hard instruction. Any mechanical application of *expressio unius*, therefore, is inconsistent with how we are to read statutes.

Environmental plans

Sharp v Kiama Council [2024] NSWLEC 1360

This case concerned a dispute over residential lot sizes in an environmental plan. Commissioner Espinoza (at [41]) commented on the correct way instruments of this kind are to be interpreted. He quoted Robson J in another case for the following[10].

(1) The same principles applied to statutes apply to environmental planning instruments[11]. (2) This involves the 'text>context>purpose' approach, as in *SZTAL*[12]. (3) These instruments are to be read in a 'practical manner' avoiding meticulous analysis. (4) This does not override general principles, however, nor does it call for 'laxity or flexibility'[13]. **iTip** – our system generally avoids intense linguistic analysis.

Deeds of company arrangement

Academy Construction [2024] NSWSC 808

DOCAs facilitate voluntary administration by binding the company and others to certain procedures in the administration. This DOCA termination case raises how they are to be read. Black J (at [97]) said they are to be 'construed as statutes or, more precisely, as subordinate legislation' rather than as contracts[14].

DOCAs derive their 'operative force' from the Corporations Act, not by the action of agreement by parties. One problem is that DOCAs 'are frequently ill-drafted and certainly fall short of the standards of excellence of statutory draftspersons'. A solution suggested is severance of any problematic parts if their original purpose can still be preserved[15].

▪ **Thanks** – Oliver Hood, Matt Freestone, Jeremy Francis, Janhavi Bhandari.

[1] *Greylag Goose Leasing v P T Garuda Indonesia Ltd* [2024] HCA 21 [107, 114-117].
[2] *MCI* 512 US 218 (235), (2022) 135 *Harvard Law Review* 890 (910) illustrate.
[3] *SAS Trustee* [2018] HCA 55 [64], cf *Compass* [2021] QCA 98 [201].
[4] *Harvey* [2024] HCA 1 [106], cf Dharmananda *Sliding Doors* (2024) 35 PLR 1.
[5] *Veterans' Entitlements Act 1986* (Cth).
[6] *Jacobs Group* [2023] HCA 23 [25], cf *Tabcorp* [2016] HCA 4 [65].
[7] *Murphy* [1988] HCA 31 [7], *Beane* (1987) 162 CLR 514 (518), Episode 3.
[8] Express mention of one thing impliedly excludes other things.
[9] *Wentworth* (1992) 176 CLR 239 (250), Pearce 10th ed [4.64], cf Episode 94.
[10] *Elimatta* [2021] NSWLEC 75 [43-45], cf *Australian* [2023] NSWLEC 49 [55].
[11] *Cranbrook* [2006] NSWCA 155 [36] cited, cf Episodes 36 & 88.
[12] *SZTAL* [2017] 34 [14] quoted, cf *R v A2* [2019] HCA 35 [32-33].
[13] *Tovir* [2014] NSWCA 379 [54], *4nature* [2017] NSWCA 191 [45] cited.
[14] *Lehman* [2009] FCAFC 130 [5-9], cf *Antquip* [2020] NSWSC 487 [66-71].
[15] *Antquip* [71], Herzfeld & Prince [13.210], *Harrington* 190 CLR 311 (328).

Episode 112 – ordinary meaning & machine learning

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