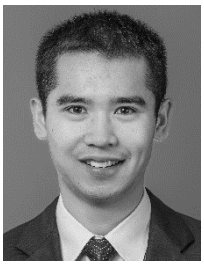
interpretation NOW!

Episode 116 – 31 January 2025

Australian Government
Australian Taxation Office



Statutory interpretation is not (and has never been) about finding an old maxim in a textbook to support an outcome you think may be correct or desirable. An approach of this kind inverts the process and subverts the outcome[1]. Finding out what parliament meant by the words it used involves the application of a rational method by which text, context and purpose are all consulted to arrive at a robust answer[2]. That method presents as an amalgam of common law and statutory principles applied flexibly and objectively. Reaching in isolation for a maxim that 'solves the problem' is reckless and laden with risk. Constructional choices are to be made through the 'application of [a] workaday interpretive methodology'[3]. It is the conscientious application of the text>context>purpose method[4] which most reliably produces outcomes that withstand scrutiny.

Charlie Yu – tipstaff to Justice John Robson, Land and Environment Court of NSW

Mathematical logic

Martinus Rail v Qube (No 3) [2024] NSWSC 1483

An adjudicator awarded full costs where, on his reasoning, only 96.07% was allowable. The question was whether this involved jurisdictional error due to 'legal unreasonableness'. This, noted Parker J (at [48]), was a question of statutory interpretation.

It was held the error was simply arithmetical, 'not a contestable error of legal logic, but an uncontestable error of mathematical logic'. It could not have been intended that an award 'based on adding 2 and 2 and getting 5 would be binding'. Because of the mistake, the adjudicator had no legal reason to award 100% costs. Parker J held (at [51]) that the error was jurisdictional and therefore open to judicial review[5].

Power and duty

Gill v Liverpool City Council [2024] NSWLEC 133

Mortgagees of land compulsorily acquired objected to the compensation amount offered. The issue was whether the mortgagees could force joinder of the owner, who had not objected to the offer. The statute said that the court '<u>may</u> order that any other person [with an interest] be joined as a party'[6].

Pepper J held that 'may' in this context meant 'must'[7]. The starting point is the presumption that 'may' indicates discretion[8]. Here, the preconditions for joinder were met, so that it <u>must</u> be ordered[9]. The judge (at [59]) set out 11 non-exhaustive 'contextual indicia' to be considered. The decisive factor, it was said, however, 'is likely to be textual'[10].

Contractual basics

Elisha v Vision Australia [2024] HCA 50

The High Court rarely says very much about the basic principles applied in working out what a contract means. In this case (at [38]), the plurality stated –

The meaning of the terms of the … Contract … 'is to be determined by what a reasonable person would have understood [the terms] to mean'. This requires consideration of the common intention of the parties by reference to the object and text of the provision as well as the surrounding circumstances. [This] is 'to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement'.

This emphasises the objective nature of the task[11]. A reasonable person here would have understood the policies in question to create binding obligations[12].

Serious High Court dicta

Cipla Australia v Novo Nordisk [2024] FCA 1414

E86 reported on *Hill v Zuda Pty Ltd*, where the High Court said that it expects lower courts to follow 'seriously considered dicta' of a majority of that court[13]. Much has been said about the outworking of this principle since it was reconfirmed in 2022[14].

Perram J in *Cipla* (at [185]), with some hesitation in a patent context, declined to follow a statement of the High Court. This was because it was not a '*considered* obiter dictum [emphasis added]'[15]. **Queries** – What counts as judicial 'consideration' of an issue? When exactly is the threshold level of 'seriousness' met? And does this principle invite indelicate second-guessing on the quality of High Court outputs?

▪ **Thanks** – Charlie Yu, Agnes Liu, Mannat Mandhan & Patrick Boyd.

[1] cf *Certain Lloyd's* [2012] HCA 56 [26], *Deal* [2016] HCA 31 [37].
[2] *CIC Insurance* (1997) 187 CLR 384 (408), *Jayasinghe* [2016] FCAFC 79 [6-8].
[3] *Esso* [2017] HCA 54 [71] Gageler J, *Charles* [2017] FCAFC 218 [51].
[4] *Qantas* [2023] HCA 27 [47-56] illustrates, cf Episodes 66 & 100.
[5] cf *Rogers* [2024] NSWSC 1344 [54], *Australian Unity* [2023] NSWLEC 49 [16].
[6] s 25(2) of the *Land and Environment Court Act 1979* (NSW), emphasis added.
[7] cf Episodes 12, 15, 22, 34 & 92, BDM *Modern Statutory Interpretation* [36.5].
[8] s 9(1) *Interpretation Act 1987* (NSW), Pearce *Interpretation Acts* [5.44-5.63].
[9] *Leach* [2007] HCA 3 [38], *Finance Facilities* (1971) 127 CLR 106 (134).
[10] Herzfeld & Prince *Interpretation* [4.250] cited.
[11] cf *Automotive Invest* [2024] HCA 36 [115], Episodes 92 & 96.
[12] *Romero v Farstad Shipping* [2014] FCAFC 177 [55] quoted.
[13] Obiter dicta are statements not essential to the reasons for a decision.
[14] *Catholic* [2024] NSWCA 30 [198], *Aerotropolis* [2023] NSWCCA 195 [60-61].
[15] *Alphapharm* [2014] HCA 42 [23] fn 40, cf *Ying* [2009] NSWSC 1344 [21-25].

Episode 117 – dictionary definitions; criminal offences; legislative purpose; is 'or' binary?

ISSN 2651-9518