interpretation NOW!

Episode 91 – 20 December 2022

Lord Wilberforce once said the uncertainty of words was what made statutory interpretation 'so exciting'. This must be one of the most super-nerdy statements in legal history. It was made at a symposium held prior to the enactment of s 15AB[1]. It reveals, however, two fundamental truths about the 'modern method' we are to apply. The first is that words are inherently capable of bearing a range of meanings, especially by reference to context in the widest sense[2]. Second, we are to avoid preconception about meaning in default of applying that method objectively and with rigour[3]. Alarm bells should ring whenever you or someone else thinks they just know what the correct answer should be or where some answer is positively wanted in advance. iTip – don't be afraid to enjoy the excitement of not knowing the answer before application of the 'modern method' is complete.

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Beneficial provisions

***Vicinity Funds Re Ltd v CSR* [2022] VSCA 176**

This case concerns whether a taxpayer could make serial requests to appeal an objection decision[4]. It shows that the remedial aspects of a provision will not necessarily resolve constructional choice. It was accepted (at [71]) that the taxpayer argument was 'open on the bare text' and that the provision was remedial in one sense at least. These factors alone, however, were not enough. The particular purpose (at [86]) was to provide a mechanism by which a taxpayer could trigger an enforceable deadline for the making of a determination. **iTip** – just because a provision is beneficial in some sense will not resolve all issues in favour of the protagonist[5].

Impossibility maxim

***John Holland Pty Ltd v Wallis* [2022] WASC 358**

Was an inspector authorised to launch a prosecution for workplace offences? One issue was whether a particular statutory power[6] covered this via the 'impossibility maxim' – ***Whenever anything is authorized … and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment***[7]. Professor Pearce (at [5.3]) deals with this more intuitively under *Conferral of Power Carries Power of Performance*. Archer J said 'no' given another provision was wide enough to cover the situation. A 'power to perform' is implied only to the extent shown to be necessary[8].

Development consents

***Kousis v Inner West Council* [2022] NSWLEC 1611**

The council gave consent in the 1990s for a gate at the rear of an inner-city property on condition that a further application be made for vehicular access. No application was made, but the new owners said the gate was lawfully used for this purpose and there was implied consent (via council correspondence). Despite consents attracting the same principles of interpretation as other documents[9], it was said (at [95]) that council files were not available as extrinsic materials for that purpose[10]. Evidence may identify a thing or place or establish its physical features[11], which might include the consent application with plans/annexures, but not council correspondence[12].

Always speaking

***Monash University v EBT* [2022] VSC 651**

Episode 90 says one issue with 'always speaking' is how it may apply in any particular situation. This case, about whether an electronic-only file is a 'document' for FOI purposes[13], illustrates this. Cavanough J (at [5]) held that a thing is a 'document' if it is a record of information 'regardless of the way in which the thing is stored'. He quoted from a textbook[14] and 2 cases[15]. The latter confirmed there is no meaningful distinction between information stored on paper and that 'stored in the electronic impulses of a computer'. The connotation of 'document' remained constant but the denotation had evolved to cover a new form of storage.

- **Thanks** – Oliver Hood, Charlie Yu, Annie Huang & Philip Borrell.

[1] Maher (1984) 14 MULR 468 (at 509), cf Geddes [2005] UNELJ 1 (at 11).
[2] *Maunsell* [1975] AC 373 (at 391), cf *Mineralogy* [2021] HCA 30 (at [138]).
[3] *Certain Lloyds* [2012] HCA 56 (at [26]), *AEU* [2012] HCA 3 (at [28]).
[4] s 106(1) of the *Taxation Administration Act 1997* (VIC).
[5] *Melbourne Water v Vaughan Constructions* [2022] VSCA 241 also illustrates.
[6] s 230(1)(b) of the *Work Health and Safety Act 2011* (Cth).
[7] *Trolly* (1905) 2 CLR 509 (at 523), *TWU* [2008] FCAFC 26 (at [38]).
[8] *Essendon* [2014] FCA 1019 (at [278]), *Djordjevich* [2022] VSC 732 (at [85-93]).
[9] *JK Williams* [2021] NSWLEC 23 (at [61]), *Trump* [2015] UKSC 74 (at [60]).
[10] *Lake Macquarie* [2015] NSWLEC 114 (at [42-44]) quoted.
[11] *Allandale* [2013] NSWCA 103 (at [44]), *Shell* [1972] 2 NSWLR 632 (at 637).
[12] Episode 88 reviews another recent case on development consents.
[13] Definition in s 5 of the *Freedom of Information Act 1982* (VIC).
[14] (at [109]), Herzfeld & Prince *Interpretation* (at [2.30]).
[15] *Victor* [2000] 1 WLR 1296 (at 1307), *Muin* [2002] HCA 30 (at [104-105]).

ISSN 2651-9518