Perry v Attorney General of the Northern Territory & Ors [2014] NTSC 17

PARTIES:	PERRY, Gregory John v ATTORNEY GENERAL OF THE NORTHERN TERRITORY AND LANDS, PLANNING AND MINING TRIBUNAL AND GROUP 1 CONSULTING PTY LTD (ACN 066 014 328)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No. 13 of 2014 (21410222)
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JUDGMENT OF:	HILEY J

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ENVIRONMENT & PLANNING – Development control – Appeals against decision of consent authority – Third party rights of appeal – *Planning Act 1999* (NT) s 117

STATUTORY INTERPRETATION – Words and phrases – "including" – *Planning Act 1999* (NT) s 117(4)

STATUTES – Regulations – Validity – *Planning Regulations 2000* (NT) r 14, 15

STATUTES – Regulations – Abrogation or modification of statutory rights by regulation – *Planning Regulations 2000* (NT) r 14, 15

O'Connell v Nixon (2007) 16 VR 440; *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162, applied

British American Tobacco Australia v Western Australia (2003) 2017 CLR 30; *Cohns Industries Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1979) 37 FLR 508; *R v Tkacz* (2001) 25 WAR 77; *Solomons v District Court* (NSW) (2002) 211 CLR 119; *Victims Compensation Fund v Brown and Ors* (2002) 54 NSWLR 668; *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395, referred to

Interpretation Act 1978 (NT)
Planning Act 1999 (NT)
Planning Regulations 2000 (NT)

DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011)

REPRESENTATION:

Counsel:

Plaintiff:	Mr Hayes QC, Mr McIntyre
First and Second Defendants:	Mr Bruxner

Solicitors:

Plaintiff:	Medina Lawyers
First and Second Defendants:	Solicitor for the Northern Territory
Third Defendant:	Cridlands MB

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Perry v Attorney General of the Northern Territory & Ors [2014] NTSC 17
No. 13 of 2014 (21410222)

BETWEEN:

GREGORY JOHN PERRY
Plaintiff

AND:

ATTORNEY GENERAL OF THE NORTHERN TERRITORY
First Defendant

AND:

LANDS, PLANNING AND MINING TRIBUNAL
Second Defendant

AND:

GROUP 1 CONSULTING PTY LTD (ACN 066 014 328)
Third Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 19 May 2014)

Introduction

[1] The plaintiff owns and resides at a property next door to Lot 689 Town of Darwin, 6 Schultz Street, Larrakeyah, NT (**the Land**) which was

subject of a development application by the third defendant under s 46 of the *Planning Act 1999* (NT) (**the Act**). On 16 December 2013 the Development Consent Authority (**the DCA**) issued Development Permit DP13/0850 under s 53(a) of the Act consenting to the proposed use and development subject to conditions. The Development Permit allows the Land to be used and developed "for the purpose of a 3 x 3 bedroom multiple dwellings in 1 x 2 storey building, in accordance with the attached schedule of conditions and the endorsed plans."

[2] By letter dated 16 December 2013 addressed to the third defendant and copied to a number of other people including the plaintiff, the DCA advised of its decision to grant consent and its reasons, attached a copy of the Development Permit and gave advice concerning rights of appeal to the "Appeals Tribunal". The letter advised that "there is no right of appeal by a third party under s 117 of the Act in respect of this determination as s 117(4) of the Act and regulation 14 of the Planning Regulations apply to the application."

[3] On 30 December 2013 the plaintiff lodged an appeal against the determination with the second defendant purportedly under s 118 of the Act. On 6 January 2014 the second defendant wrote to the plaintiff advising that it was "of the view that there is no right of appeal" having regard to s 117 of the Act and Part 4 of the *Planning Regulations 2000* (NT) (**the Regulations**).

[4] In these proceedings the plaintiff is challenging the second defendant's refusal to entertain his appeal against the grant of the Development Permit. In order to do so he seeks a declaration that sub-regulations 14(2) and 14(3) of the Regulations are invalid and are of no legal effect. If such a declaration is made the plaintiff seeks orders quashing the second defendant's decision refusing to entertain his appeal and remitting the plaintiff's appeal back to the second defendant to be heard and determined according to law.

[5] The first defendant intervened and was substituted as a party. The other defendants agreed to abide the decision of the Court subject to the question of costs.

Relevant legislation

[6] On 30 September 2005 s 117 of the Act and corresponding amendments to the Regulations came into effect. The relevant regulation was regulation 15. Prior to then there was no provision for appeals by third parties in respect of development applications.

[7] Section 117 provides as follows:

> "117 Appeals by third parties in respect of development applications
>
> (1) Subject to the Regulations, a person or local authority who made a submission in accordance with section 49 in relation to a development application may appeal to the Appeals Tribunal against a determination under section 53(a) or (b):

(a) to consent to the development, as proposed or as altered; or

(b) to impose conditions on the proposed development or proposed altered development, including a condition referred to in section 70(3).

(2) The appeal must be made within 14 days after the person or local authority is served with the notice of determination in respect of the development application.

(3) A person or local authority must not appeal under this section for reasons of commercial competition.

(4) The Regulations may specify other circumstances under which there is no right of appeal under this section, including by reference to the type of development in conjunction with:

(a) the zone of the land on which the development is to take place;

(b) the zone of land adjacent to the land on which the development is to take place; or

(c) the zone of land referred to in both paragraph (a) and (b).

Example for section 117

The Regulations may specify there is no right of appeal in respect of development on land zoned for industrial use or development unless the land is adjacent to land zoned for residential use or development."

[8] Regulation 15 (now repealed) provided as follows:

"15 Circumstances when no right of third party appeal

(1) For section 117(4) of the Act, this regulation specifies circumstances under which there is no right of appeal under section 117 of the Act against a determination of the consent authority.

(2) There is no right of appeal if the determination relates to the subdivision or consolidation of land.

(3) There is no right of appeal if the determination relates to any of the following proposed developments on land to which a planning control provision applies:

(a) a detached dwelling not exceeding 2 storeys above ground level;

(b) attached dwellings not exceeding 2 storeys above ground level;

(c) any other type of development on land in any zone except a residential zone, or on land for which no zone is specified, unless the land –

(i) is adjacent to land in a residential zone; or

(ii) is directly opposite land in a residential zone and is on the other side of a road with a reserve of 18 m or less in width;

(d) a non-residential use in a residential zone if the use complies with all the planning control provisions relating to the use and the consent authority, in making the determination, has not exercised any power it has in respect of the planning control provisions to vary or waive that compliance.

(4) There is no right of appeal if the determination relates to a proposed non-residential use of land in a residential zone if –

(a) the relevant Plan does not include any planning control provision relating to the non-residential use; and

(b) the proposed non-residential use complies with the criteria for the use specified in Schedule 1, Part B."

[9] Regulation 15 was replaced by (the current) regulations 14 and 15. They came in to force on 1 February 2007. Regulation 14 provides as follows:

"14 NT Planning Scheme – when no right of third party appeal

(1) This regulation specifies circumstances under which there is no right of appeal under section 117 of the Act

against a determination of the consent authority relating to development on land to which the NT Planning Scheme applies.

(2) There is no right of appeal if the determination relates to the subdivision or consolidation of land.

(3) There is no right of appeal if the determination relates to any of the following proposed developments on land to which a planning control provision applies:

(a) a single dwelling or multiple dwelling not exceeding 2 storeys above ground level;

(b) setbacks for a single dwelling;

(c) any other type of development on land in a residential zone if it complies with all the planning control provisions relating to the development;

(d) any other type of development on land that is not in a residential zone, or for which no zone is specified, unless the land:

(i) is adjacent to land in a residential zone; or

(ii) is directly opposite land in a residential zone and is on the other side of a road with a reserve of 18 m or less in width."

[10] The new regulation 15 is very similar to (the new) regulation 14, but relates to land to which the Jabiru Town Plan applies, as distinct from land to which the NT Planning Scheme applies.

Contentions and consideration

[11] Although it is regulation 14(3)(a) which would apply in the present matter, the plaintiff challenges the validity of the whole of regulation 14(3) and also of regulation 14(2) on the basis that they are not

regulations authorised by s 117(4) of the Act (or by any other provision such as the broader regulation making power contained in s 148). The plaintiff also contends that regulation 14(2) and (3) are not capable of meaningful severance and that the whole regulation should be struck down. (The same consequences would apply to regulation 15 if the plaintiff's contentions were correct.)

[12] The plaintiff contends that the right of appeal conferred upon third parties by s 117 is broad and is only limited by s 117(3) and regulations that specify circumstances of the kind described after the word "including" in s 117(4). The contention is that the regulations can only "specify … circumstances" which refer to "the type of development in conjunction with" one or both of the zones referred to in paragraphs (a) to (c), namely the zone of the land on which the development is to take place, the zone of land adjacent to such land, or both.

[13] Counsel for the plaintiff referred to the example given at the end of s 117 as supporting this contention. However the example does not refer to a "type of development". Rather, the example seems to assume that the regulations can prohibit a right of appeal in respect of any type of development, and exclude from that prohibition developments on some land, for example where that land is adjacent to land zoned for a particular use or development. In any event, examples in an Act are

not exhaustive and do not limit or extend the meaning of the relevant provision.[1]

[14] Counsel also pointed to the reference in the opening words of s 117(4) to "other circumstances" and submitted that the word "other" was a reference back to s 117(3) and thus that the circumstances contemplated in s 117(4) would be circumstances other than those referred to in s 117(3), namely "reasons of commercial competition." Whilst I agree with this submission I do not consider that it adds any support to the plaintiff's contentions. If anything those opening words in s 117(4) would seem to contemplate a very broad range of "other circumstances" which the regulations may specify as circumstances where there may be no right of appeal.

Context of the provision for third party appeals

[15] Counsel for the plaintiff referred to and stressed other provisions in the Act which provide for community consultation, such as s 22 (which relates to the making and amendment of planning schemes), s 39 (which relates to applications for the grant of an "exceptional development permit") and s 81B(d) (which relates to the preparation of plans, guidelines and assessment criteria for inclusion in the NT Planning Scheme). He also referred to various provisions regarding development applications including ss 47, 49 and 51(e), which provide

1 *Interpretation Act 1978* (NT) s 62D.

for public notice of development applications and for submissions to be made to and considered by the consent authority, and to ss 53A(3) and 53B(3) which require the provision of particulars about rights of appeal under Part 9 (which includes s 117). He contended that those provisions indicate Parliament's intention to confer broad rights upon members of the public, not only in relation to planning schemes and the like but also in relation to third party appeals against determinations of development applications under s 53 of the Act.

[16] I do not find those provisions of any real assistance in the present matter, which simply involves the construction of the regulation making power contemplated by s 117 and conferred by s 117(4). Such provisions regarding community consultation in the process of making and amending planning schemes and the like are common in most planning legislation. So too are provisions which require the exhibition of development applications and provide opportunities for people to make submissions which the relevant consent authority must take into account. Indeed such provisions were always contained in the Act, and its predecessor, the *Planning Act 1979* (NT). But neither Act contained any provision for third party appeals prior to the enactment and commencement of s 117 in 2005.

Abrogation or modification of statutory rights by regulation

[17] Counsel for the plaintiff contended that the regulations could not destroy or avoid the primary objective of s 117, namely to create third party rights of appeal, and that the regulation making powers in s 117 (and s 148) should be construed accordingly. On the other hand, counsel for the first defendant contended that the right of appeal is subject to modification by the regulations.

[18] A contention similar to that advanced by the plaintiff was considered and rejected by the Victorian Court of Appeal in *O'Connell v Nixon*.[2] That matter also concerned a right of appeal expressly granted by statute, which provision commenced with the words "(s)ubject to the regulations".[3] Well before the enactment of that statutory provision there was already in place an extensive scheme relating to appeals established under the Police Regulations.

[19] The appellant in that matter contended that notwithstanding that s 8AA of the *Police Regulation Act 1958* (Vic) described the right of appeal as one which was "subject to the regulations", that Act:

> "does not contemplate or authorise the promulgation of regulations which restrict or limit the right of appeal any further than it is directly limited by the provisions of the Act. Accordingly, the appellants say that, inasmuch as reg 28(2)(b) purports to limit or restrict the right of appeal given by s 8AA in a fashion that is not directly provided for in any provision of

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2 *O'Connell v Nixon* (2007) 16 VR 440 ("*O'Connell*").
3 *Police Regulation Act 1958* (Vic) s 8AA(1).

> the Act, it is invalid as departing from or varying the plan for appeal which the legislature has adopted."[4]

[20] Nettle JA, who wrote the lead judgment, and with whom the other two judges agreed, rejected that argument. At [19] he said:

> "In my view the legislative scheme of appeal is not defined solely by the provisions of the Act. Rather, to adopt and adapt the words of Dixon J from another legislative context, it:
>
> > … depends in a remarkable degree upon the regulations made under the power which it confers on the Executive. Without the regulations, not only is it unworkable, but the expression of the legislative policy is so inadequate as almost to be unintelligible."

[21] His Honour said that "(s)o much emerges from the history of the legislation."[5] He then outlined the extensive history of the appeal provisions that had been expressed in the regulations, and said that "it was against that background, and in terms 'subject to' it, that the right of appeal created by s 8AA was enacted."[6] Accordingly the reference at the start of s 8AA(1) to "subject to the regulations" was clearly a reference back to regulations already in place which would continue to operate with full force and effect notwithstanding the introduction of s 8AA(1).

[22] At [27] Nettle JA said that: "(h)ence … the right of appeal enacted in s 8AA was from its inception limited by the regulations." His Honour

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4 *O'Connell* at [18].
5 *O'Connell* at [20].
6 *O'Connell* at [23].

then responded to the appellant's contention "that to reason in that fashion is to construe the Act by reference to regulations."[7]

[23] At [28] his Honour said:

> "… I acknowledge that, generally speaking, the intention of parliament in enacting legislation is not to be ascertained by reference to the terms in which a delegated power to legislate has been exercised.[8] But, as is pointed out in Pearce and Geddes,[9] there are exceptions to the general rule. As has been noticed, where a legislative scheme is comprised of both an Act and the regulations made under it, one may look to the regulations in order to understand the nature of the scheme. It has also been held in this country that it is permissible to refer to delegated legislation as a direct aid to construction of an ambiguous or obscure statutory provision, at least in cases where a contemporaneously prepared act and set of regulations may be seen to establish an interdependent regime. There are too the developments in this area of the law in England, which are encapsulated in Lord Lowry's six-part categorisation of the cases in *Hanlon v Law Society*[10] (of which one is essentially, as stated by Lord Scarman in that case, "where a statutory provision permits exceptions to be made to it by regulations").[11] And I note that in *Ward v Commissioner of Police*[12] Moore J of the Federal Court of Australia referred to the *Hanlon* analysis with apparent albeit qualified approval. I also agree with the judge below that, just as when a section of an Act of Parliament expresses itself as being subject to another section of the Act it may be taken as meaning that the latter is to some extent intended to prevail,[13] so too when a section of an Act of Parliament expresses itself as subject to regulations it may be taken as meaning that the latter is to some extent intended to

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7 *O'Connell* at [28].

8 *Webster v McIntosh* (1980) 32 ALR 603 at 606; 49 FLR 317 at 321; 3 A Crim R 455 at 457 per Brennan J; *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 244 per Mason CJ and Gaudron J.

9 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) at [3.37].

10 [1981] AC 124 at 193-4.

11 [1981] AC 124 at 186 based on the decision of the English Court of Appeal in *Britt v Buckinghamshire County Council* [1964] 1 QB 77.

12 (1998) 151 ALR 604 at 614.

13 *C & J Clark Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905 at 911; *Davis v Grocon Ltd* [1992] 2 VR 661 at 668; *Hadgkiss v Aldin* (2006) 155 FCR 499 at 502, [11].

> prevail. Most importantly, however, the fundamental question is whether the regulations are within the scope of the section,[14] and as a matter of logic and common sense one can hardly come to a view about that without first looking to the regulations to which the section expresses itself to be subject."

[24] Nettle JA proceeded to hold that the expression "subject to the regulations" was neither otiose nor confined in meaning to "in accordance with the regulations".[15] Nor was the expression to be read as if it was followed by the words "not inconsistent with this Act".[16]

[25] His Honour also referred to some of the regulation making powers conferred in the legislation there being considered and noted that some of them contemplated the augmentation and in some cases modification of various other statutory provisions, including the provision there being considered, namely the provision relating to appeals.[17]

[26] Counsel for the plaintiff sought to distinguish *O'Connell* from the present matter on the basis that before the relevant right of appeal was inserted in s 8AA(1) of the *Police Regulation Act 1958* (Vic) there was already an extensive scheme relating to appeals established under the Police Regulations. Accordingly the reference at the start of s 8AA(1) to "subject to the regulations" was clearly a reference back to regulations already in place which would continue to operate notwithstanding the introduction of s 8AA(1). Counsel submitted that

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14 *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565 at 577.
15 *O'Connell* at [30] – [31].
16 Supra at [32].
17 Supra at [34].

this is to be contrasted with the present case where the relevant regulation did not already exist when s 117 was enacted.

[27] I do not see this as a relevant basis for distinction. Although regulation 14 did not commence until some time after the commencement of s 117, its predecessor did. Regulation 15 (now repealed), which commenced at the same time as s 117, is similar in relevant respects to the current regulation, regulation 14. That regulation was very much a part of the legislative scheme that introduced third party appeals.

[28] Further, as counsel for the first defendant submitted, there is nothing objectionable in principle about a statute that delegates to the executive the power to make regulations circumscribing a right that otherwise exists under the statute. See for example the observations of French CJ in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment*[18] at [18]:

> "A parliament may also authorise the making of regulations which have effect notwithstanding provisions of the Act under which they are made… Such powers are analogous to so-called "Henry VIII" clauses, authorising the making of regulations which amend the Act under which they are made. Those powers have been criticised for their effects upon the relationship between the parliament and the executive, but not held invalid on that account under either the Commonwealth Constitution or constitutions of the States."

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[18] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 ("*PSA*").

[29] Moreover, unlike the main provisions being discussed in *O'Connell* and in *PSA*, the provision in the Act which confers the right of appeal also includes a provision which expressly contemplates the making of regulations which may specify circumstances under which there is no right of appeal, namely s 117(4).

[30] I conclude therefore that the opening words of s 117(1), "subject to the regulations", and s 117(4), each contemplate that the right of appeal conferred by s 117 can be modified by way of regulation.

"including"

[31] Much of the argument concerned the relevance and meaning of the word "including" before the remaining provisions of s 117(4). The plaintiff's construction leaves no work for that word to do and requires it to be ignored. On the other hand, counsel for the plaintiff contends that if the regulation making power is broader than that for which the plaintiff contends, all of the words following the word "including" are otiose.

[32] The first defendant contends that there is no warrant for reading down s 117(4) by reference to the words commencing "including". It submits that those words are illustrative. The words identify a range of ways by which the right of appeal might be circumscribed by the regulations.

[33] Counsel for the first defendant referred to a number of decisions which refer to s 79(1) of the *Judiciary Act 1903* (Cth) which provides as follows:

> "79 State or Territory laws to govern where applicable
>
> (1) The laws of each State or Territory, including the laws relating to procedure , evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

[34] In *British American Tobacco Australia v Western Australia*,[19] McHugh, Gummow and Hayne JJ said of s 79(1):

> "Section 79 of the *Judiciary Act* directs where the Supreme Court is to go for the applicable statute law dealing with matters of procedure. But, as the phrase in s 79 "*including* the laws relating to procedure, evidence and the competency of witnesses" shows, s 79 is not limited to laws of that description."
>
> (emphasis in original)

[35] Similarly, in *Solomons v District Court (NSW)*,[20] Kirby J observed:

> "…it is important to remember the generality in which s 79 is expressed. Although the section makes special reference to 'laws relating to procedure, evidence, and the competency of witnesses', these are mentioned only by way of illustration ('including')."

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19 (2003) 2017 CLR 30 at [65].
20 (2002) 211 CLR 119 at [117].

[36] At the start of their discussion concerning the use of the expressions "means" and "includes" where words are being defined in legislation, *Pearce & Geddes*[21] say, at [6.61]:

> "The orthodox and, it is submitted, the correct approach to the understanding of the effect of these expressions is that 'means' is used if the definition is intended to be exhaustive while 'includes' is used if it is intended to enlarge the ordinary meaning of the word."

[37] At [6.64] under the heading "Some guides to effect of 'includes'" the learned authors say:

> "[6.64] Some guidance can be obtained from the cases as to when it should be exhaustive. In *Re Gray; Ex parte Marsh* (1985) 157 CLR 351; 62 ALR 17 the fact that matters could be identified additional to those listed in the definition and falling within the word defined was taken to indicate that it was not an exhaustive definition. See particularly at 27 per Gibbs CJ, with whom the other members of the court agreed on this point. If the matters listed are seen as being illustrative only of the word defined, they should again not be taken as covering its field of operation: *Buckle v Josephs* (1983) 9 A Crim R 336 at 341; 47 ALR 787 at 792. The inclusive form may be used to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases: *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 206-7; 61 ALR 236 at 239."

[38] The two differing functions of the word "includes", namely whether the words that follow are intended to be exhaustive or illustrative, have been subject of much other judicial discussion, including by Spigelman

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[21] DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011).

CJ in *Victims Compensation Fund v Brown and Ors*,[22] and by Malcolm CJ in *R v Tkacz*,[23] both of whom refer back to dicta in earlier decisions and commentary by *Pearce & Geddes*.

[39] In *VCF* [30] Spigelman CJ said:

> "The word 'includes' has been given an exhaustive meaning where the context in which it appears indicates an intention to confine a general word by providing a limited list of words. Indeed, even though the primary meaning of 'include' is expansive, where the words that follow would ordinarily fall within the meaning of the general word, the fact that they are expressed will often indicate an exhaustive or exclusive use of 'includes'."

[40] Spigelman CJ also attached significance to the fact in that particular matter the clause which contained the word "includes" was an "operational clause, not merely definitional" and he added that "such a clause is more likely to be exhaustive than illustrative."[24]

[41] At the commencement of his detailed discussion in *Tkacz* Malcolm CJ quoted from the following passage in the decision of Young CJ, Starky and Gray JJ in *Cohns Industries Pty Ltd v Deputy Commissioner of Taxation (Cth)*:[25]

> "When the word 'includes' is used in the definition section, it is generally used to enlarge the meaning of the word it describes, that is to say, to bring within the word something that would not otherwise be within it. … In *YZ Finance Co Pty Ltd v*

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22 *Victims Compensation Fund v Brown and Ors* (2002) 54 NSWLR 668 (*"VCF"*) at 674-5 [28] – [36].
23 *R v Tkacz* (2001) 25 WAR 77 (*"Tkacz"*) at 88- 92 [43] – [57].
24 *VCF* at [32].
25 (1979) 37 FLR 508 at 510.

> *Cummings* (1964) 109 CLR 395 at 401-402 Kitto J said 'Unlike the verb "means", "includes" has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which the word appears. …' The question whether a particular provision is exclusive although 'includes' is the only verb employed is therefore a question of the intention to be gathered from the provision as a whole."

[42] Malcolm CJ then quoted from and discussed a number of other decisions the main thrust of which is that the word "include" is often used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, so that they would comprehend "not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include"[26] and sometimes "not so much to extend the ordinary meaning of the defined term as to specify as falling within the definition that which might otherwise have been in doubt."[27]

[43] His Honour also referred to various passages in *YZ Finance Co Pty Ltd v Cummings*[28] where the breadth of the words that appeared after the word "include" and the particular context of the Act in which the relevant provision occurred and the legislative intention to be discerned therefrom, indicated that in that case the word "include" was

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26 *Tkacz* [50] quoting from Lord Watson in *Dilworth v Commissioner of Stamps* [1899] AC 99.

27 *Tkacz* [56] quoting from Gummow J in *Hepples v Commissioner of Taxation* (1990) 22 FCR 1 at 21.

28 (1964) 109 CLR 395.

used in an exhaustive sense and was equivalent to "mean and include".[29]

[44] In summary, I consider that the word "include" will generally have an expansive, illustrative and or explanatory meaning, unless the statutory context in which it appears indicates that it must have an exhaustive meaning.

The legislative scheme relating to third party appeals

[45] It is permissible and often important to consider the legislative scheme which Parliament has attempted to establish by enacting a particular statutory provision which is to be accompanied by complimentary regulations.[30]

[46] The written submissions of the plaintiff quoted from the Second Reading speech of Dr Burns, the Minister of Lands and Planning, in December 2004 when the bill providing for the introduction of rights of appeal by third parties was read.[31] Counsel for the plaintiff contended that "it is apparent on its face that Regulation 14 does not respond to the Parliamentary intention there articulated by the Minister."

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29 *Tkacz* at [52] – [54].

30 Cf Nettle JA in [28] of *O'Connell.* See too *Interpretation Act 1978* (NT) s 62A.

31 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 2 December 2004 (Chris Burns).

[47] However the speech refers to the introduction of "limited rights of third party appeal" which "should be focused on the residential zones". It concludes as follows:

> "The regulations will prescribe classes of development, in respect of which there will be no right of third party appeal. Generally, appeals will not be allowed for subdivisions or consolidations. They will not be allowed for development in a non-residential zone unless it is on land that interfaces with residential zoned land. Thus, development in the Darwin CBD and Winnellie will not be subject to third party appeals, but development in a local shopping centre could be. Third party appeals will be allowed for residential developments over two stories in height, such as the controversial unit development in Ostermann Street. Non-residential uses in a residential zone, such as child-care facilities and home occupations where the use does not comply with the relevant provisions of the Planning Scheme, will be appealable."

[48] Whilst I consider that the proper construction of the regulation making power can be identified without recourse to extrinsic materials such as the Second Reading speech, it does shed some light on a range of "other circumstances" where third party rights of appeal might be curtailed under the regulations, in addition to those expressly referred to in the words following the word "including" in s 117(4).

[49] These include subdivisions, consolidations,[32] "classes of development", (any type of) development in a non-residential zone unless it is on land that interfaces with residential zoned land,[33] residential developments

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[32] Cf Regulations 14(2) & 15(2).
[33] Cf Regulations 14(3)(d) & 15(3)(d).

not exceeding two storeys in height[34] and non-residential uses in a residential zone where the use complies with the relevant provisions of the Planning Scheme.[35]

[50] Further, I see no reason in principle why such "other circumstances" could not refer to a particular type of development without any reference to a particular zone, or conversely, to a particular zone without any reference to a particular type of development. The words following the word "including" in s 117(4) make it clear that the circumstances could also be specified by referring to a particular type of development "in conjunction with" the zone of the relevant land or adjacent land.

[51] In other words, the word "including" is not used in an exhaustive way, but to illustrate the kinds of circumstances that could be specified and to avoid possible uncertainty by expressly providing for one set of criteria to be specified in conjunction with another.

Unintended consequences of the plaintiff's contentions

[52] Although the plaintiff's primary concern only relates to one of the various exclusions in regulation 14, namely that in regulation 14(3)(a), his contentions necessarily involve an attack on the validity of most other parts of regulation 14. These include regulation 14(2) which

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34 Cf Regulations 14(3)(a) & 15(3)(a).

35 Cf Regulations 14(3)(c) & 15(3)(c).

relates to subdivisions and consolidations. Although regulations 14(3)(c) & (d) do expressly refer to types of development and zones the plaintiff contends that those regulations are also invalid, presumably because they only apply to "any other type of development" on such land, namely a type of development other than that referred to in regulation 14(3)(a). Moreover, the clear and understandable intent of regulation 14(3)(c) is to limit such appeals to developments on residential land that do not comply with all relevant planning control provisions.

[53] Not only would the plaintiff's construction render otiose the word "including" in s 117(4), it would lead to the result that there is no valid regulation for the purposes of s 117, and thus no limitation upon a third party's right of appeal (except for that prohibited by s 117(3)). This would apply to all land to which the NT Planning Scheme applies and also land to which the Jabiru Town Plan applies.

[54] There does not appear to me to be any logical or good planning reason for construing the word "including" in an exhaustive sense, particularly if such a construction would render invalid and nugatory this important part of the legislative scheme aimed at conferring limited rights for third parties to appeal. I do not consider that such a construction would promote the purpose or object underlying the Act, and in

particular the limited conferral of third party rights of appeal under s 117.

Conclusions

[55] For the above reasons I reject the plaintiff's contention that sub-regulations 14(2) and 14(3) of the Regulations are invalid and of no legal effect. I therefore dismiss the plaintiff's application.

[56] Unless there is any good reason to the contrary, I propose to order the plaintiff to pay the costs of all of the defendants, and the third defendant to pay any costs of the plaintiff thrown away as a result of the third defendant's summons filed 31 March 2014. The parties will have 14 days within which to file and serve written submissions to the extent that they do not agree with my proposals in relation to costs.