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What is 'Necessary'?

The meaning of the simple term 'necessary' is not straightforward. The Oxford English Dictionary defines it as "that which cannot be dispensed with or done without; requisite, essential, needful". It does not mean merely 'expedient' or 'appropriate'".

The High Court has considered the meaning of the term 'necessary' in multiple contexts. In 1907, it considered the term 'all things necessary to be done', in the context of a share or land transfer or gift. It found it meant that nothing remained outstanding within the power of the transferor.¹

In 1958, within the context of Commonwealth income tax and whether losses and outgoings were 'necessarily incurred', it found, that it meant more than inevitable or unavoidable, but rather what was appropriate or plainly adapted to the needs of a certain activity.²

In a 2007 case concerning terrorism control orders³, it found necessary:

'has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports.'⁴

The Court referred to a US Supreme Court judgment⁵, which found the word 'necessary':

'Does (not) always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? ... (W)e find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. ...'⁶

In 2008 considering the suspension of a medical practitioner's registration, the Victorian Supreme Court accepted that 'necessary' should be construed as meaning more than simply "convenient" or "useful".⁷

In 2007, the New South Wales Land & Environment Court, in considering whether a planning scheme amendment held that 'necessary' involves contextual considerations. Judgments of fact, degree and imperatives were needed to achieve clarity, even where it involved something less than absolute necessity. It particularly found that a 'necessary amendment' is one that cannot await the making of a local environmental plan.⁸

The Family Court has also considered the term 'necessary', finding that it must be given its ordinary meaning but should be contrasted with the word 'proper' which is a broader concept.⁹ It goes beyond what is absolutely necessary to what is reasonably required,¹⁰ and is more than merely what is morally or socially desirable.¹¹

In 2012, the New South Wales Court of Criminal Appeal found that the meaning of 'necessary' depends on its context, the particular regulatory grounds relied upon and the factual circumstances.¹² This criminal Court accepted a number of relevant variables affecting what is considered 'necessary', whether prejudice may be a possibility or a certainty, its effect and matters of degree or actions that may diminish a risk.

From the overview above it is clear that the meaning of 'necessary' can be complex, nuanced and difficult. The word does not simply mean that something is absolutely required, but involves careful analysis of the law itself and the circumstances surrounding its application.

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¹ *Anning v Anning* (1907) 4 CLR 1049 (Griffith CJ).

² *Federal Commissioner of Taxation v Snowden and Wilson Pty Ltd* (1958) 99 CLR 431, 437 (Dixon CJ). This decision has been adopted widely. A 1993 example is the New South Wales Court of Appeal decision in *Sutherland Shire Council v Telope Pty Ltd* (1993) 85 LGERA 103.

³ *Thomas v Mowbray* (2007) 233 CLR 307

⁴ *Thomas v Mowbray* (2007) 233 CLR 307

⁵ (*McCulloch v Maryland*),

⁶ *McCulloch v. Maryland*, 17 U.S. 316

⁷ *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414 (Hollingworth J).

⁸ *Castle Constructions Pty Ltd v Director-General of the Department of Planning* [2007] NSWLEC 783, [53] (NSW Land & Environment Court) (Jagot J).

⁹ *In the Marriage of Oliver* (1977) 4 Fam LR 252, 253 (Asche J)

¹⁰ *In the Marriage of Tuck* (1979) 7 Fam LR 492.

¹¹ *In the Marriage of Gamble* (1978) 4 Fam LN 28.

¹² *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125.