interpretation NOW!

Episode 8 – 29 January 2016

Australian Government
Australian Taxation Office

As flagged in Episode 7, ***interpretation NOW!*** goes public this month in response to growing external interest – find it under 'miscellaneous papers' in the ATO Legal Database. ***iNOW!*** is a TCN initiative to improve awareness about what courts are saying in this increasingly important field. ***iNOW!*** is not legal advice or a public ruling, nor is it a substitute for legal research. The aim is to draw attention to key principles, expressed in easily digestible chunks, and to provide **iTips** on how they may be applied. ***iNOW!*** is part of a wider ATO exercise in capacity-building towards reaching out for better, more practical tax solutions in the public interest. As courts remind us, there are 'almost always constructional choices to be made' when reading statutes[1].

Gordon Brysland Tax Counsel Network

Re-enactment

Fortress Credit v Fletcher [2015] HCA 10

What happens when parliament re-enacts words already judicially construed? As this case explains (at [15]), parliament 'is taken to have intended the words to bear the meaning … judicially attributed to [them]'[2]. This presumption does not bite in all situations[3], but it was applied in this case to provisions concerning voidable transactions[4].

iTip 1 – take care with replacement or consolidating legislation in this context, as the presumption may be weaker or inapplicable – the rationale being that parliament has considered only the form and not the substance of the new law[5]. **iTip 2** – there must also be a *considered* decision on point, with lower court cases attracting less or maybe no weight[6].

Fundamental rights

Hoskin v Bendigo City Council [2015] VSCA 350

Ever had to consider how fundamental rights affect interpretation? One issue in this mosque case was how the phrase 'significant social effect' in planning laws should be read. The court said (at [29]) that religious equality is of fundamental concern in a multi-religious society like Australia[7].

If a law 'is capable of a rational construction which permits persons to exercise their religion at the place where they wish to do so … a court should prefer that construction to one which will prevent them from doing so'[8]. **iTip** – subject to a contrary intention being clearly expressed, the 'principle of legality' requires that all laws be read subject to fundamental rights (including religious equality)[9].

Similar phrases

Australian Building Systems [2015] HCA 48

Episode 3 of ***iNOW!*** dealt with consistent usage. This case, on liquidator tax obligations, provides more insight (at [27]). It was pointed out that a High Court decision on a provision 'is a powerful indicator of the correct interpretation of a provision of the same Act which serves similar purposes and uses identical or substantially similar language'[10].

Although the same meaning presumption 'readily yields to the context'[11], it was applied to retention obligations in ss 254 & 255 of ITAA36 – 'two adjacent provisions serving the same general purposes and sharing a common legislative history'. **iTip** – don't discount operation of the presumption merely because of the tax setting – that is the key message.

Exclusive codes

Commonwealth v Sanofi [2015] FCAFC 172

Determining if provisions involve an exhaustive code which excludes common law remedies is often hard. In this case, the court (at [101-102]) held that there was 'no inconsistency or incompatibility' in allowing therapeutic goods provisions to coexist with a damages remedy[12], adding that the contrary would be 'inconvenient and unjust' (at [96]).

Code arguments frequently arise in tax-related situations[13], often in overpayment contexts[14]. **iTip** – a careful purposive approach needs to be taken to these questions, with an eye to whether parliament intended general law rights to be ousted by the statute or to coexist with it.

- Writer – Gordon Brysland, Producer – Michelle Janczarski.
- Special thanks to Mike Ingersoll and Alex Affleck.

[1] See Episode 2 ***iNOW!***
[2] *Re Alcan Australia* [1994] HCA 34 (at [20]).
[3] *Electrolux* [2004] HCA 40 (at [81]), Pearce & Geddes (at [3.48]).
[4] s 588FF of the *Corporations Act 2001*.
[5] *Melbourne Corporation* (1922) 31 CLR 174 (at 186-188).
[6] *Re Judge Schoombee* [2011] WASCA 129 (at [54]).
[7] See s 116 of the Constitution.
[8] *Moslem Alawy* (1985) 1 NSWLR 525 (at 543-544).
[9] *Lacey* [2011] HCA 10 (at [43]), cf Bennion (5ed at 842-843).
[10] cf *Walker Corporation* [2008] HCA 5.
[11] *Clyne v FCT* (1981) 150 CLR 1 (at 15).
[12] cf *Monro v HMRC* [2008] EWCA Civ 306 (at [22-23]).
[13] *ACN 005 057 349 Pty Ltd* [2015] VSC 76 (at [95-106]), for example.
[14] *Lamesa Holdings* [1999] FCA 612, illustrates.

Episode 9 – legislative scheme; words of judgment; delegated legislation; incurable defects