interpretation NOW!

Episode 10 – 30 March 2016

Australian Government
Australian Taxation Office

Senior judges routinely draw attention to the complex nature of interpretation within which constructional choices are all but 'inescapable'[1]. One observation is that the choice between open alternatives for the 'best contextual interpretation' is more art than science[2]. The more skilled and perceptive the reader, the more apparent and abundant the choices based on the text may become. In our system, selection between them is made primarily by reference to statutory purpose 'whose sympathetic and imaginative discovery' within the text is the surest guide to what provisions mean[3]. The central idea about which ***iNOW!*** revolves is that building interpretational muscle is a necessary first step to better and more practical tax outcomes.

Hoa Wood Tax Counsel Network

Meaning of 'person'

Plaintiff M68 v Minister [2016] HCA 1

In the offshore detention case, the High Court held the Republic of Nauru to be a 'person or body' under regional processing amendments[4]. Section 2C(1) of the *Acts Interpretation Act 1901* presumes that expressions used to denote persons generally 'include a body politic or corporate as well as an individual'. Provisions like this one operate subject to contrary intent and depend on context.

Not all statutes use 'person' for designating who is to be subject to their commands, however. Tax laws adopt 'entity' (widely defined)[5], with the 'you' applying 'to entities generally'. **iTip** – if personality becomes an issue, consult definitions, consider provisions like s 2C(1), and examine the context[6].

Meaning of 'Australia'

ACCC v P T Garuda Indonesia [2016] FCAFC 42

Geography is often important in the application of legislation, especially where 'Australia' is used. This case was about whether an air cargo market existed 'in Australia'. There is a general definition of 'Australia' in s 2B of the *Acts Interpretation Act 1901*, but many federal statutes have their own definitions[7]. The GST Act has forsaken 'Australia' as a jurisdictional indicator, and now uses the more generic 'indirect tax zone'. This modifies the ITAA97 'Australia' definition by exclusion and inclusion.

It is significant that 'Australia' has no singular or intuitive meaning that applies across the legislative spectrum. **iTip** – don't assume geography, and take special care in all offshore and maritime contexts[8].

'as amended from time to time'

Endeavour v Precision [2015] NSWCA 169

What happens when a statutory provision cross-refers to a provision in another Act and the latter is amended? In this case, the second provision was amended after an accident to increase the liability cap. The court held (at [76]) that the first provision picked up the second as amended from time to time. Crucially, this included the time from which the amendment itself operated.

Acts Interpretation Act 1901 s 10 (and like provisions in other jurisdictions) reflect this principle, as part of the 'always speaking' approach[9]. These provisions, however, are subject to contrary intention. **iTip** – always look to the wider context and avoid applying these interpretation provisions reflexively[10].

'means X and includes Y'

Roden v Bandora Holdings [2015] NSWLEC 191

Pearce & Geddes (at [6.64]) say that using 'means and includes' in definitions 'ought to be eschewed by drafters'. This case shows why. The issue was whether wedding venues were 'tourist facilities', in turn defined in the 'means X and includes Y' form with no reference to weddings whatsoever.

Two general problems may arise. 'Means and includes' pulls in different directions[11] – one restrictive and the other expansive. The solution is usually to treat the phrase as exhaustive – that is, as 'means' alone[12]. However, 'includes' by itself may also be taken to mean 'means and includes'[13]. **iTip** – always be wary of definitions in this form, and pay particular attention to context and purpose[14].

- Writer – Gordon Brysland, Producer – Michelle Janczarski.
- Thanks to Alex Reid, Ivica Bolonja & Jo Stewart.

[1] French CJ (2015) 40 *Monash University Law Review* 29.
[2] Steyn (2003) 25 *Sydney Law Review* 5 (at 8).
[3] *Thiess v Collector* [2014] HCA 12 (at [23]).
[4] s 198AHA(1) of the *Migration Act 1958*.
[5] s 184-1 of the GST Act, for example.
[6] *FCT v Warner* [2015] FCA 659, illustrates.
[7] ITAA97 s 960-505, for example.
[8] *Pocomwell (No 2)* [2013] FCA 1139 (at [25-30]), illustrates.
[9] *Forsyth v FCT* [2007] HCA 8 (at [96]), cf Episode 2.
[10] *Paciocco* [2015] FCAFC 50 (at [392-394]), illustrates.
[11] *Hepples v FCT* (1990) 22 FCR 1 (at 21), *Yazgi* [2007] NSWCA 240 (at [29-30]).
[12] *BHP Billiton* [2008] HCA 45 (at [32]), *Horsell* [2013] NSWCA 368 (at [161]).
[13] *Dilworth* [1899] AC 99 (at 105-106), *Tkacz* [2001] WASCA 391 (at [45-56]).
[14] *R v Smith* [2008] QCA 406 (at [16-19]), discusses.

Episode 11 – statutory definitions; beneficial legislation; taking advantage of own wrong; commanding the impossible