interpretation NOW!

Episode 18 – 30 November 2016

Australian Government
Australian Taxation Office

Have you ever known (or thought you've known) the purpose of a provision because you were involved, in one way or another, in its drafting? You may have spoken to someone who claims to have written the law and is dead-set certain what they meant. This may be interesting but, when it comes to interpretation, it is irrelevant.

As ***iNOW!*** said in Episode 1, the High Court tells us that 'legislative intention' is just a metaphor[1]. It doesn't matter what the Minister, or anyone else, actually intended. When we make decisions or submissions to a court, we must take a step back and judge legislative purpose objectively – for example, by considering the wording of the section and how it fits within the broader legislative context.

Andrew Orme Review and Dispute Resolution

Later amendments

AQO v Minister [2016] NSWCA 248

Later amendments can inform the interpretation of an earlier version of the Act, but only where the earlier provision is ambiguous and the amendment wasn't simply meant to clarify the law and remove doubt[2]. Even then, you should only use later amendments in limited circumstances – for example, to reject an interpretation of the earlier provision that would make the amendment wholly redundant[3].

In this case (at [80-89]), a new provision that expressly says 'a Minister' is a 'public sector agency' was said to indicate that ministers were previously excluded from the definition of that phrase, as the amendment would otherwise have been unnecessary.

General & specific words

Van Heerden v Hawkins [2016] WASCA 42

If a provision mentions several specific things of the same type, and 'other' things generally, those 'other' things may also need to be of that type[4]. However, the specific things must have something in common – you must be able to identify a 'genus'[5]. **iTip** – don't apply this reasoning mechanically – it's just part of interpreting words in their statutory context[6].

In this case, an Act prohibited the sale of 'any food, toy or other product' designed to resemble a tobacco product. The Court said (at [114]) that 'other product' should not be limited because food and toys 'do not have a common or dominant characteristic' (no genus). Food and toys were simply examples of prohibited products.

Express powers

FCT v Croft [2016] QSC 190

If an Act expressly confers a specific power constrained by certain conditions, it may implicitly exclude the use of more general powers that could otherwise have achieved the same result[7]. However, like the 'express references' rule in Episode 16, this needs to be supported by context, and it shouldn't be the only interpretive argument you rely on[8].

The two powers must also be intended to cover the same field – that is, they should relate to the same subject matter and have the same general consequences[9]. In this case (at [38, 48]), Jackson J held that the powers in question were different and not inconsistent[10], and could be exercised separately.

Similar Acts

Byrne v Owners [2016] WASC 153

It is presumed, subject to contrary intent, that similar expressions attract the same meaning in similar statutes[11] – *in pari materia*. Tax cases and a recent High Court decision illustrate the idea[12]. Pritchard J in this case (at [131]) observed that the presumption only applies between statutes, not where a mere 'statutory contract' is involved.

Even where there are two statutes, courts have declined to provide precise criteria for when the presumption will operate. This is generally consistent with purposive principles and rejection of rigid rules[13]. **iTip** – in practice, a very close connection between the Acts is usually needed[14].

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- Thanks to Ivica Bolonja and Jo Stewart.

1 *Certain Lloyds Underwriters v Cross* [2012] HCA 56 (at [24-25]).
2 *Flanagan* [2010] FCA 647 (at [35]), *Allina* [1991] FCA 78 (at [42]).
3 *Grain Elevators Board* (1946) 73 CLR 70 (at 86), Episode 16.
4 '*ejusdem generis*' – Pearce & Geddes (at [4.25-4.31]).
5 *DFCT v Clark* [2003] NSWCA 91 (at [126]).
6 *Cody v J H Nelson* (1947) 74 CLR 629 (at 649).
7 '*expressum facit cessare tacitum*' – Pearce & Geddes [4.36-4.39].
8 *Balog v ICAC* [1990] HCA 28 (at [15]).
9 *Nystrom* [2006] HCA 50 (at [59]), *Glass* [2016] VSC 507 (at [256]).
10 cf *Bruton Holdings* [2009] HCA 32 (at [16-17]).
11 *AQO v Minister* [2016] NSWCA 248 (at [76]).
12 *ICI Australia* (1972) 127 CLR 529 (at 542), *Coverdale* [2016] HCA 15 (at [43]).
13 cf *Daley* [2016] NSWCA 111 (at [110]), Episode 13.
14 Pearce & Geddes (at [3.36-3.37]).

Episode 19 – Double Tax Agreements; meaning of 'under'; 'operational realities'; connection phrases