interpretation NOW!

Episode 19 – 21 December 2016

Australian Government
Australian Taxation Office

Justice John Logan of the Federal Court makes two points in a recent paper about statutory interpretation[1]. The first is that a 'plethora of prescription' in legislation 'has, almost exponentially, increased the construction tasks a member of the [AAT] may be called upon to confront'[2]. The second is that interpretational principles 'do not differ as between the judicial and executive branches of government'. One irony is that the complexity of our legislation both (A) reflects anxiety about ground-level delivery of what parliament wants and (B) undermines the certainty of legal outcomes. We cannot change this overnight, but we can all improve at reading legislation to better secure the purposes of parliament – that's the challenge.

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Double Tax Agreements

***Bywater Investments v FCT* [2016] HCA 45**

Episode 3 dealt with how to approach the interpretation of DTAs. Gordon J in this case (at [145-150]) provides further guidance in the context of a dispute about residency for income tax purposes.

Where a DTA is set out in an Act in the same words, the 'transposed text should bear the same meaning in the domestic statute as it bears in the treaty'[3]. *Vienna Convention on the Law of Treaties* principles apply to its interpretation[4], rather than the normal rules we apply to statutes generally. Otherwise, the risk of differential outcomes across countries party to the DTA is created[5], something which would frustrate the whole point of the agreement.

Meaning of 'under'

***Siddique v Martin* [2016] VSCA 274**

The word 'under' is common in statutes. In this case, the court had power to direct that items seized 'under a search warrant' be returned to their owner. A magistrate had held he could not return things seized by police but not listed on the warrant[6].

The court (at [19]) quoted a tax case to say that the word 'admits of degrees of precision and exactness on the one hand, and of looseness and inexactness on the other'[7] – it takes its meaning from context[8]. Given the provision here was to allow citizens to get their property back, there was no good reason for 'under' to be read narrowly[9]. **iTip** – always go back to the context and purpose of the provision.

Principle of legality

***Jeremiah v Lawrie* [2016] NTCA 6**
***Plaintiff S99* [2016] FCA 483**

Episode 13 dealt with the 'principle of legality' that clear words are needed to interfere with important common law rights and doctrines. These two cases show the flexibility with which it may apply in practice. In *Jeremiah* (at [76-84]), validity of a search warrant was upheld despite interference with some personal rights on the basis of so-called 'operational realities' regarding the detection of crime.

In *Plaintiff S99* (at [448-459]), the Minister was stopped from procuring an abortion in PNG for a refugee held on Nauru. Denial of her right to safe medical care would breach the principle 'that there is no wrong without a remedy' – 'protective justice'[10].

Connection phrases

***R v Kay* [2016] QCA 269**

It is nothing new to observe, as this case does (at [26]), that common connection phrases like 'in relation to' and 'in connection with' often raise problems. The precise degree of connection fluctuates depending on purpose and context[11], including 'the subject matter of the inquiry, the legislative history, and the facts of the case'[12].

In its broadest sense, 'in connection with' may signify 'any relationship between two subject matters, no matter how remote'[13]. Pearce & Geddes (at [12.7-12.8]) set out the principles and provide examples. **iTip** – for more guidance, re-read Hill J's analysis of 'relates to' in an early GST case[14].

- Writer – Gordon Brysland, Producer – Michelle Janczarski.
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[1] AAT Members Conference [2016] FedJSchol 5.
[2] 'micro-management', the judge called it.
[3] *Koowarta* (1982) 153 CLR 168 (at 265).
[4] Arts 31 & 32, set out in Pearce & Geddes (at [2.20]).
[5] *Povey* [2005] HCA 33 (at [25]).
[6] Confirmed on appeal, [2015] VSC 423.
[7] *Energy Resources* [2003] FCA 26 (at [37]).
[8] Pearce & Geddes (at [12.11]).
[9] cf *Griffith University v Tang* [2005] HCA 7 (at [89]).
[10] cf *Li* [2014] NSWCA 176 (at [35]), *Brock* [2007] FCAFC 3 (at [97]).
[11] *Citrofresh* [2007] FCA 1873 (at [66-70]), illustrates.
[12] *Travelex* [2010] HCA 33 (at [25]), *Khazaal* [2012] HCA 26 (at [31]).
[13] *American Express* [2009] FCA 683 (at [55]).
[14] *HP Mercantile* [2005] FCAFC 126 (at [34-39]).