interpretation NOW!

Episode 38 – 31 July 2018

Australian Government
Australian Taxation Office

Episode 37 presented the *Possum Case*[1] as a practical illustration of how to do constructional choice. We emphasised that interpretation turns on 'evaluation of the relative coherence of the alternatives with identified statutory objects or policies'. Two more recent cases progress the learning in this space. The first makes the point that the choice between alternatives is not to be made by recourse to norms external to the statute, like fairness for example[2]. The second observes that, in legislative scheme situations, the choice should favour promotion of harmony between the statutory texts[3]. We 'should endeavour to produce a rational, sensible, efficient and just operation'[4]. **iTip** – these points are valuable further guides for us all.

Gordon Brysland Tax Counsel Network

Legislative proclamations

Aregar v Cox [2018] NTCA 3

When an Indonesian national was prosecuted for fishing in Australian waters, proof of boat location became critical. This turned on a proclamation defining our 'exclusive economic zone'. As a legislative instrument, the proclamation was to be interpreted as if it was an Act of parliament[5].

This meant context and purpose were central and that every effort should be made to avoid invalidity. It was also to be read to produce the 'greatest harmony and the least inconsistency'[6]. Applying these principles, the vessel was found to have been in Australian waters. This case shows how context and harmony rules apply to legislative instruments[7].

Extent of policy

APRA v TMeffect Pty Ltd [2018] FCA 508

We know that legislation rarely pursues some singular policy at all costs[8]. It follows that the duty generally to align meaning with legislative purpose[9] may be of little help when provisions strike a subtle balance between competing policy objectives.

Perry J (at [30]) says that the question is often not about identifying some general object. It is about how far particular provisions go in pursuit of that object. When bedrock tax law pursues a range of economic and social objectives, the answer can never simply be to tie your answer to the notion that tax laws are there to raise revenue[10]. **iTip** – not only is this wrong in principle; it can also mask bias.

Purposive limits

Commissioner v CLP Power HK [2017] HKCFA 18

Parliament requires constructional choice by reference to best achievement of legislative purpose[11]. Courts sometimes express concern, however, that this may be taken too far. In this case (at [34]), a HK court warned against an 'exorbitantly purposive' approach under which the text was given a meaning it was 'incapable of bearing'[12].

Similarly, our High Court in *Esso* said that you cannot overcome unintended consequences by giving a provision a meaning parliament 'did not intend it to have'[13]. Care needs to be taken in determining (A) what meanings are open on the text, and (B) how statutory purpose is to be characterised.

Policy advisers

Cole v Minister [2018] FCAFC 66

This case (at [40]) repeats the caution that digging into legislative history 'might be misunderstood as part of any enquiry as to the subjective intent of legislators or policy advisers'[14]. It may seem natural enough to want to interrogate the inner motivations of the named policy advisers who conceived and drove the architecture of new provisions. You should resist this temptation.

It is now far beyond argument in Australia that legislative intention has nothing to do with what anybody (or any body) actually intended or believed[15]. **iTip** – asking policy advisers what was on their mind will only distract you from the real task.

▪ Writers – Gordon Brysland & Joseph Tranzillo. Producer – Suna Rizalar.

[1] *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178.
[2] *Return to Work Corporation v Robinson* [2018] SASCFC 32 (at [184]).
[3] *Mohammadi v Bethune* [2018] WASCA 98 (at [36]).
[4] *Trajkoski* [2010] WASCA 119 (at [51-52]) cited, cf Episode 9.
[5] s 13(1) of the *Legislation Act 2003*, *Agfa-Gevaert* (1996) 186 CLR 389 (at 398).
[6] *Australian Alliance* [1916] SR Qd 135 (at 161), Pearce & Geddes (at [2.26]).
[7] cf Episodes 9, 13 & 28.
[8] *Nicholls* [2005] HCA 1 (at [8]), *Palgo* [2005] HCA 28 (at [28]).
[9] s 15AA of *Acts Interpretation Act 1901*.
[10] *Carr* [2007] HCA 47 (at [6]), *Alcan* [2009] HCA 41 (at [11]), cf Episode 6.
[11] Generally - Brysland & Rizalar *Constructional choice* (2018) 92 ALJ 81.
[12] *China Field (2)* [2009] HKCFA 95 (at [36]), *Wai* [2006] HKCFA 84 (at [63]).
[13] *Esso* [2017] HCA 54 (at [52]), cf *UFUA* [2018] VCAT 631 (at [153]).
[14] *Wilson* [2010] NSWCA 198 (at [12]), cf *Axiak* [2012] NSWCA 311 (at [57]).
[15] Episodes 1, 18, 29 & 36.