interpretation NOW!

Episode 74 – 29 July 2021

Australian Government
Australian Taxation Office

Moorcroft is a High Court migration decision about when a person is 'removed from Australia'[1]. Given the issues raised, there was some expectation the case would delve into various interpretation areas, perhaps providing new perspectives or extended analysis. This didn't happen. In a unanimous judgment, the court merely said (at [15]) the provision had 'to be interpreted by considering the text, having regard to its context and purpose'[2]. Also, construction has to be 'consistent with the language and purpose of the whole of the Act'[3]. Cognate expressions, consistent usage and harsh consequences are later mentioned. At the highest level, the core principles to be applied have become stable to the point their content is rarely contested. They are 'well settled'. This shifts the focus to application of the principles, which is seldom easy and never boring.

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Omitting words

CGX20 v Minister [2021] FCAFC 69

What happens when you find a simple drafting error in a provision? A ministerial direction under migration law required regard to be had to 'impact on victims' in visa revocation situations[4]. Clause 14.4(1) begins – 'Impact of a decision not to revoke on members of the Australian community [etc] … ' The word 'not' in this context looks wrong and is problematic.

The court said (at [19-20]) that it was okay to eliminate words where the literal meaning did 'not conform to the legislative intent'[5]. The word 'not' in clause 14.4(1) was anomalous and 'should be ignored'. **Comment** – these issues are more usually resolved under principles confirmed by the High Court in 2014[6].

Ordinary meaning

Compass Group Education v CSR [2021] QCA 98

In this payroll tax case, Williams J (at [195-205]) gives a grand tour of interpretation principle, with quotes from High Court cases – a convenient refresher. One thing (at [201]), which is not so often highlighted, is that in practice it is more difficult to displace an interpretation that 'has a powerful advantage in ordinary meaning and grammatical sense'[7].

Cases explain when and how statutory words can take a meaning other than their ordinary meaning[8]. But experience shows this to be comparatively rare. The 'modern approach' is geared to testing for these situations, but the power of ordinary meaning in regular grammar is not to be underestimated.

Regulations

Fuchs Lubricants v Quaker [2021] FCAFC 65

Quaker held a patent for detecting injuries caused by hydraulic fluid under pressure penetrating a worker. Sued for infringement, Fuchs said the patent was invalid for breaching 'reasonable trial' provisions in the legislation[9]. One argument Fuchs put meant that regulations would prevail over the Act.

The court (at [166]) said regulations 'cannot inform or dictate the proper construction of an Act'. Even where there is a 'legislative scheme', regulations cannot expand or rewrite the Act 'absent clear stipulation in the principal legislation elevating the status of the subordinate instrument'[10]. Fuchs failed here, but the patent was invalid on other grounds.

What judges say

Virgin Australia Airlines v FCT [2021] FCA 523

This case held that pilots have a 'primary place of employment' for FBT purposes[11]. Griffiths J (at [80]) cautioned about the 'danger and inappropriateness of over-emphasising the form of expression by individual judges and treating them as though those expressions were themselves the text of a statute'[12]. Interpretation principles represent a 'settled approach of some clarity'[13] – cf editorial above.

We should not hang on every word a judge may use to describe basic principles[14]. Interpretation involves the flexible application of principles within our purposive system[15]. If there is to be any fundamental change, the High Court or parliament will tell us.

▪ **Credits** – Gordon Brysland, Oliver Hood, Patrick Boyd & Josie Ganko.

[1] *Minister v Moorcroft* [2021] HCA 19.
[2] *Project Blue Sky* (1998) 194 CLR 355 (at 381), *Alcan* [2009] HCA 41 (at [47]).
[3] *Metropolitan* (1925) 35 CLR 449 (at 455), *K & S Lake* 157 CLR 309 (at 312).
[4] clause 14.4(1) Ministerial Direction 79 under s 499(2A) *Migration Act 1958*.
[5] *Cooper Brookes* 147 CLR 297 (at 321), *Weedon* (1907) 4 CLR 895 (at 904-905).
[6] *Taylor* [2014] HCA 9 (at [35-40]), cf *PQ (No 3)* [2021] NSWSC 420 (at [26]).
[7] *Hepples* (1992) 173 CLR 492 (at 535-536) cited.
[8] *A2* [2019] HCA 35 (at [32]), *SZTAL* [2017] HCA 34 (at [14]).
[9] s 24(1)(a) *Patents Act 1990*, reg 2.2(2)(d) *Patents Regulations 1991*.
[10] *Plaintiff M47* [2012] HCA 46 (at [56]), *Lundbeck* [2017] FCA 56 (at [87]).
[11] s 39A(1) FBTAA86 – 'pilots work on planes', Andrew Sommer said.
[12] *Bay Street* [2020] FCAFC 192 (at [3]) cited, cf *Fanani* [2021] FCA 595 (at [31]).
[13] *A2* [2019] HCA 35 (at [32]), *Bay Street* (at [5]), cf Episode 69.
[14] *Saeed* [2010] HCA 23 (at [33]), cf *Mondelez* [2020] HCA 29 (at 66]).
[15] *Taylor* [2014] HCA 9 (at [37]), *Li* [2018] SASCFC 52 (at [96]).

Episode 75 – territorial reach; adding words; international law; anomalous outcomes

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