interpretation NOW!

Episode 75 – 27 August 2021

Australian Government
Australian Taxation Office

As the 'circle of meaning' diagram in Episode 66 illustrates, the process of interpretation begins and ends with the text of the law. A recent case shows why this is important – *Minister v ERY19*[1]. Two options were available on how to read a migration 'character test', neither of which was clearly correct. The plurality (at [77]) said the text 'is the natural starting and ending place in any construction inquiry'[2]. The choice involved was resolved (at [87]) by 'giving weight' to the requirement to 'always return to the statutory text' and selecting the 'preferable view' accordingly. Ending with the text is more than a formality. We do it at least for the additional reason to confirm that the option chosen is open on the words of the statute. Returning to the text is evaluative, therefore, and can be decisive (as here). **iTip** – always return to and anchor your conclusions in the text of the law.

Gordon Brysland Tax Counsel Network

Territorial reach

LibertyWorks Inc v Cth [2021] FCAFC 90

A private think-tank challenged a COVID overseas travel ban made under laws to prevent the spread of disease[3]. It said its members should not be subjected to a measure a named individual could not be. Also, the ban could only cover domestic movements – cf s 21(1)(b) of the *Acts Interpretation Act 1901* – and its members each had a human right to leave Australia[4].

Rights of movement are never absolute in their character or operation, however, and a clear purpose to protect public health would be emasculated otherwise. Section 21(1)(b) is also subject to contrary intention – as was shown in this context[5]. Further, government is empowered 'to respond to a crisis'[6].

Adding words

Coleman v Caesarstone Australia [2021] QSC 125

This is a rare case where words were added into legislation[7]. A stonemason contracted accelerated silicosis and later depression caused by that disease. Proceedings for a 'personal injury that is a dust-related condition' are fast-tracked due to the low life expectancy of sufferers[8]. Did he have to maintain separate proceedings for his depression? – 'no'.

Bowskill J (at [39]) added words to the provision so it read – 'personal injury that is or results from a dust-related condition'. A literal reading would defeat the purpose; there was a drafting error; the substance of what parliament would have done was clear; and the change to be made was not 'too far reaching'[9].

International law

Attorney-General v Driver [2021] SASC 66

A violent sex offender was kept in prison after his term expired on community safety grounds[10]. He said this was 'draconian' and would strip him of fundamental human rights under international law[11].

Livesey J (at [39-47]) held that, while the provision was subject to the principle of legality, the 'language here is clear and intractable'[12]. The principle is that, while statutes are read consistent with international law, this applies only 'so far as the language permits'. The judge also said that it is necessary to find that the statute 'recognises the relevant international law obligation'. **iTip** – implication of international human rights into domestic law is not automatic.

?? Anomalous outcomes

Peter Greensill Family v FCT [2021] FCAFC 99

This tax case at the intersection of CGT and trust provisions raises how argument by reference to anomalous outcomes may distort the interpretation process. Arguments of this kind may obscure rather than assist identification of statutory purpose.

The court said (at 70]) that care needs to be taken not to allow anomaly to obscure the real choice made by parliament[13]. A similar idea comes through in the warning about using extreme examples for resolving constructional choices[14]. The other risk in this context is that of preconceiving (consciously or not) a policy by reference to the suggested anomaly then reading the legislation against that policy[15].

▪ **Credits** – Gordon Brysland and Oliver Hood.

[1] *Minister v ERY19* [2021] FCAFC 133.
[2] *Consolidated* [2012] HCA 55 (at [39]), cf *Thiess* [2014] HCA 12 (at [22]).
[3] Determination made under s 477 of the *Biosecurity Act 2015* (Cth).
[4] Art 12 of the *International Covenant on Civil and Political Rights*.
[5] s 2(2) of the *Acts Interpretation Act 1901*.
[6] *Palmer* [2021] HCA 5 (at [155]) quoted, cf *Pape* [2009] HCA 23 (at [233]).
[7] cf *CGX20* [2021] FCAFC 69 (at [19-20]), Episode 74.
[8] s 6(3)(b) of the *Personal Injuries Proceedings Act 2002* (Qld).
[9] *Taylor* [2014] HCA 9 (at [39]), *HFM043* [2018] HCA 37 (at [24]) applied.
[10] s 57(7) of the *Sentencing Act 2017* (SA).
[11] Art 9 of the *International Covenant on Civil and Political Rights*.
[12] cf *Humphrys* [2018] SASCFC 69 (at [12]), *Al-Kateb* [2004] HCA 37 (at [19]).
[13] *Esso* (1998) 83 FCR 511 (at 519), *ConnectEast* [2009] FCAFC 22 (at [41]).
[14] *Forge* [2006] HCA 44 (at [46]), *Shaw* [2003] HCA 72 (at [32]).
[15] *Certain* [2012] HCA 56 (at [26, 41]), *Deal* [2016] HCA 31 (at [37]).

Episode 76 – artificial intelligence; dictionaries (again); changes in style; characterisation; injustice

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