interpretation NOW!

Episode 57 – 28 February 2020

Australian Government
Australian Taxation Office

Episode 55 observes a 'certain stability of the law' on interpretation. But, given that stability, why is the task so hard, and why do so many cases still turn on a complicated application of the rules? A few points can be made. The first is that interpretation is first and always an objective exercise. Absent objectivity, it becomes too easy to fall into the trap of searching for factors that support a desired outcome (consciously or unconsciously)[1]. The second is that interpretation is a process to be followed, not some revelation to be awaited. We must have the discipline to follow the steps the High Court tells us to take and not jump to easy or convenient conclusions. The third is that it is the principles which are important, not any rigid application of granular rules[2]. Keeping these things in mind will make us all better at statutory interpretation.

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Legislative scheme

NNXF v NDIA [2019] AATA 5552

Episode 55 includes a case where 2 pieces of legislation were not a scheme[3]. Here the AAT said there was a scheme, comprising national disability & AAT Act provisions[4]. These were to be construed 'harmoniously and justly'[5] as 'beneficial legislation' and to ensure correct and preferable decisions. The meaning of the provisions each informed the other.

Forgie DP disagreed, saying (at [215]) that, if the provisions were read together, other legislation to which the AAT provision applied would go 'to form 400 odd schemes'. The deputy president quoted the High Court for the need to have 'coextensive fields of operation' and the 'same subject matter'[6].

Principle of legality

Hogg v R [2019] NSWCCA 323

In this sexual assault appeal, the accused said the principle of legality should prevent his right to silence during official questioning being eroded by any adverse inference drawn under s 89(1) of the *Evidence Act 1995*. This was rejected (at [100]).

The principle of legality requires clear words in legislation to adversely impact fundamental rights[7]. Both the provision here and extrinsic materials, however, expressly showed an intention to affect the right of silence. As noted in Episode 13, the principle of legality cannot frustrate legislation that is 'plain on its face'[8]. The principle exists 'to protect from inadvertent and collateral alteration of rights'[9].

Meaning of 'Australia'

Crotty v Minister for Immigration [2020] AATA 39

A person born overseas can become a citizen if a parent was a citizen at the time of birth and that person has been in Australia for a total of 2 years[10]. Crotty's mother fell short by 65 days. He argued this was made up by her residing at an Australian diplomatic mission overseas, and that 'Australia' meant any area subject to Australian law[11].

Pascoe DP rejected this argument, referring (at [26]) to the fiction that foreign missions are outside the territory of the receiving State[12]. That fiction, another recent case noted, had been further popularised by an episode of *The Simpsons*[13]. **iTip** – the Russian Embassy is not a little piece of Russia.

Statutory powers

Blacktown CC v Concato (No 4) [2020] NSWSC 9

Can an official change a statutory decision already made? Here, 'yes'. The Valuer-General sought to amend a determination of compensation on a compulsory acquisition. Subject to contrary intention, common-form provisions say statutory functions may be exercised 'from time to time as occasion requires'[14]. It was held there was nothing in the text, context or purpose to exclude this principle.

These common-form provisions were enacted in all jurisdictions to counter the old rule of *functus officio* that decisions once made could not be revisited. Nowadays, the issue is one purely of statutory interpretation (and often not so easy in practice)[15].

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[1] *Certain Lloyd's* [2012] HCA 56 (at [26]), *Williams* [2019] HCA 4 (at [79]).
[2] *Taylor* [2014] HCA 9 (at [37]), *Li* [2018] SASCFC 52 (at [96]).
[3] *Caltex* [2019] FCA 1849, cf *RD Miller* [2019] NSWLEC 129 (at [84]).
[4] ss 100 & 103 of the *NDIS Act 2013* read with s 25(5) of the *AAT Act 1975*.
[5] *Maroondah* [2009] VSCA 250 (at [85]), *Eaton* [2013] HCA 2 (at [98]).
[6] *Certain Lloyd's* [2012] HCA 56 (at [33-39, 99]) quoted.
[7] *Lee* [2013] HCA 39 (at [313]), cf Pearce 9th edition (at [5.1-5.4]).
[8] *WB* [2020] NSWCA 7 (at [45]), cf *Melco* [2020] NSWSC 53 (at [49]).
[9] *NAAJA* [2015] HCA 41 (at [81]), *Caratti* [2017] FCAFC 177 (at [25]).
[10] s 16(2) of the *Australian Citizenship Act 2007*.
[11] cf s 2B of the *Acts Interpretation Act 1901*.
[12] *Magno* (1992) 37 FCR 298 (at 321), *Petroff* (1971) 17 FLR 438.
[13] *Woutersz* [2017] ACTSC 212 (at [46]), (1995) Season 6, Episode 16.
[14] s 48(1) of the *Interpretation Act 1987* (NSW), Pearce *IAIA* Ch 8.
[15] *Bhardwaj* [2002] HCA 11 (at [5-7]), *CLV16* [2018] FCAFC 80 (at [62]).

Episode 58 – tariff classifications; statutory labels; Project Blue Sky; common sense

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