interpretation NOW!

Episode 62 – 30 July 2020

Context is always important and often decisive, as the case on access to correspondence between Sir John Kerr and the Queen shows[1]. Marked 'personal and confidential', these papers have been the subject of intense speculation ever since the dismissal. Public access could be had if each was a 'Commonwealth record', defined as 'a record that is the property of the Commonwealth'[2]. Were they 'property of the Commonwealth' or did they remain part of Kerr's estate? The plurality said 'property' was not limited to common law concepts of possession, and was 'informed by the statutory context'. Within the Archives Act, it was 'best understood as a legally endorsed concentration of power to control the physical custody of the record' (at [95]). The 'capacity to control the physical custody' made it a 'record' to which public access must be given[3]. **iTip** – statutory context may require departure from the common law meaning of words – **Steven Churches** Adelaide-based barrister

??? Presumption of validity

***Burgess v Commonwealth* [2020] FCA 670**

When it is argued that a provision is constitutionally invalid[4], a presumption of validity applies on the basis that parliament 'did not intend to pass beyond constitutional bounds'[5] – see Episode 7.

This presumption, said Besanko J (at [96]), is not to be pushed beyond its 'proper limits'. Courts should not strain to give a meaning to provisions that is artificial or departs markedly from the ordinary meaning to preserve validity[6]. In the present case, given the construction in favour of validity was not strained, the presumption applied. **iTip** – be careful not to trample on ordinary interpretation principles 'merely to avoid constitutional doubt'[7].

Unenacted treaties

***Meyrick v Home Affairs* [2020] FCA 677**

Statutes are generally read in line with Australia's international obligations. In this visa cancellation case[8], however, the decision-maker failed to have regard to a convention to which Australia was party but parliament had not yet legislated for[9].

Unenacted treaties may guide the common law[10], but failing to consider one is only an error where the statute (expressly or impliedly) requires it to be taken into account[11]. Jackson J (at [55-57]) said nothing in this statute had that effect when deciding whether or not to revoke a visa cancellation. **iTip** – it is a matter for interpretation whether an unenacted treaty needs to be taken into account.

Singular and plural

***Taylor v The Queen* [2020] VSCA 50**

This is a rare case where contrary intention rebuts the presumption that the singular includes the plural[12]. T was charged with trafficking in a 'drug of dependence'[13] – 'anabolic or steroid agents', which is a class of drugs rather than an individual drug. The question was whether a class of drugs (plural) can be a drug (singular) under the provision.

The court (at [65]) said 'no', and T was acquitted. The provision emphasised singularity ('*a* substance ... *a* drug'), a theme continued throughout the Act – cf offences where inclusion of the plural was deliberate and explicit. **iTip** – assess contrary intention by reference to text, context and purpose.

Harmony rules, OK!

***Universal Property v BCC* [2020] NSWCA 106**

The old idea that parliament does not intend to contradict itself[14] finds modern emphasis in the 'principle of harmonious operation'[15]. Brought to attention in *Project Blue Sky*, this requires harmony to be sought for warring provisions within and between statutes of the same legislature. Implied repeal only occurs where 'actual contrariety is clearly apparent'.

Basten JA (at [12]) said the 'search for harmonious operation' applies even more to instruments administered by the same department within a 'single broad subject matter' – here, environmental planning instruments. **iTip** – seek peace not war in the land of statutes wherever reasonably possible.

- Credits – Steven Churches, Gordon, Amy & Oliver.

[1] *Hocking v Director-General of the National Archives* [2020] HCA 19.
[2] s 3(1) of the *Archives Act 1983* (Cth).
[3] Made public on 14 July 2020 – Kerr did not tell the Queen in advance.
[4] In this visa cancellation case, parts of s 196 of the *Migration Act 1958* (Cth).
[5] *Munro* (1926) 38 CLR 153 (at 180), Pearce 9th ed (at [5.11]).
[6] *International* [2009] HCA 49 (at [42]), cf *NAAJA* [2015] HCA 41 (at [79]).
[7] *NAAJA* [2015] HCA 41 (at [76]), *Gaynor* [2020] NSWCA 48 (at [53]).
[8] s 501CA(4) of the *Migration Act 1958* (Cth).
[9] *Convention on the Rights of the Child*, s 60B(4) of the *Family Law Act 1975*.
[10] *Royal* [2006] VSCA 85 (at [75-77]), cf *Togias* [2001] NSWCCA 522 (at [85]).
[11] *Peko-Wallsend* (1986) 162 CLR 24 (at 39-40), *Lam* [2003] HCA 6 (at [101]).
[12] s 37 *Interpretation of Legislation Act 1984* (VIC), cf Pearce IAIA (at [4.7]).
[13] s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (VIC).
[14] Garnett (1878) 3 App Cas 944 (at 966), *Butler* (1961) 106 CLR 268 (at 276).
[15] *Eaton* [2013] HCA 2 (at [98]), cf *Tomaras* [2018] HCA 62 (at [125]).

Episode 63 – tortious conduct; patchwork statutes; legislative codes; *copulatio verborum*

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