interpretation NOW!

Episode 68 – 20 January 2021

Australian Government
Australian Taxation Office

The reach of extrinsic materials in the world of statutory interpretation can be misunderstood. A good place to start for guidance is a High Court case last year[1]. Two key principles are that extrinsic materials cannot displace the meaning of the text, nor may they be substituted for it[2]. A related point is that these materials cannot be taken into account for what the words mean. They may assist in ascertaining the statutory purpose and the targeted mischief, but parliament cannot declare with binding effect what their enactments mean. NSW cases establish this[3], a position which is 'otherwise consistent with recent High Court authority'[4]. To adopt a different stance would breach our objective approach to interpretation. It would also give to legislation a kind of *Alice in Wonderland* dimension as parliament would effectively be saying – 'the words mean whatever I say they mean'[5].

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Double jeopardy

***SafeWork NSW v BOC Limited* [2020] NSWCA 306**

BOC was acquitted of offences after installing gas lines to a hospital operating theatre. Nitrous oxide lines were wrongly labelled as 'oxygen'. One baby died and another suffered brain damage. SafeWork sought review of the acquittal after final orders were made. BOC pleaded 'double jeopardy' – that is, they could not be 'vexed' again for the same offence[6].

Basten JA said the rule against double jeopardy is deeply ingrained and operates as a principle of construction in criminal appeal statutes. The statute here also cast doubt on the very idea that, 'lurking in the unexplored interstices' of jurisdiction, there exists some general right to review acquittals.

Virtual judgments

***Bay Street Appeal* [2020] FCAFC 192**

Allsop CJ (at [4]) cautions against so-called 'virtual judgments'. The same judge has written about why judicial work should not be done by 'judge-bots'[7]. But that is not what he is getting at in this instance.

What Allsop CJ is concerned about is treating court judgments literally 'as if they were the text of a statute'[8], sometimes also called the 'formula trap'. He says that sentences from High Court judgments should not be strung together to support an argument about interpretation 'almost as if to create a new, virtual, High Court judgment'. The reason for this, and the principle, is clear. The task, first and last, is to attribute meaning to the text of the law itself.

Anomalous outcomes

***N & M Martin Holdings v FCT* [2020] FCA 1186**

In this case, Steward J was asked to go against an earlier case about when capital gains arise 'from' a CGT event[9] - he declined. The taxpayer pointed to various 'anomalous outcomes' if the earlier case was followed. Arguments like this are often framed at the outer limits of speculation in order to make the constructional choice as stark as possible.

Steward J pointed out (at [83]) that care needs to be taken to ensure that anomalies presented to the court do not obscure the constructional choice made by parliament[10] – cf 'chamber of legislative horrors'[11]. The immediate statutory context and language was more important than framing extreme examples.

Tax & general law

***Carter v FCT* [2020] FCAFC 150**

Gummow J once singled out tax officers as needing to better understand the general law against which tax disputes often play out[12]. This trusts case may illustrate the point. It was argued that disclaimer of a present entitlement in a later year was ineffective. In a payroll tax context, it had been held that a later private agreement had no impact on the tax law[13].

The court pointed out that trusts concepts in Div 6 of ITAA36 take their general law meaning, however, and that disclaimer of an entitlement involves no disposal[14]. Nothing in the tax legislation contradicted this. It followed (at [110]) that the tax consequences were determined by the general law of trusts[15].

▪ Credits – Gordon Brysland, Oliver Hood, Claudia Hodge & Jeffrey Barnes.

[1] *Mondelez* [2020] HCA 29 (at [67-72]), Pearce 9th ed Ch 3, Episodes 27 & 60.
[2] *CMH* [2012] HCA 55 (at [39]), *Bolton* (1987) 162 CLR 514 (at 518) respectively.
[3] *Harrison* [2008] NSWCA 67 (at [162]), *A2* [2018] NSWCCA 174 (at [471-472]).
[4] Barnes *Harrison v Melhem* [2018] 5 *UNSW Law Journal Forum* 1 (at 16).
[5] Lewis Carroll *Alice in Wonderland*, *Weti-Safwan* [2018] FCA 1761 (at [22-23]).
[6] *Keepers* (1890) 25 QBD 357 (at 360), *Duncan* (1881) 7 QBD 198 (at 199).
[7] Allsop (2019) 38 *UQLJ* 1, Allsop [2019] FedJSchol 1.
[8] *Cassell* [1972] AC 1027 (at 1085) cited, cf *PVYW* [2013] HCA 41 (at [15-16]).
[9] s 855-10(1) of ITAA97, *Peter Greensill* [2020] FCA 559, Episode 61.
[10] *Esso* (1998) 83 FCR 511 (at 518-519), *ConnectEast* [2009] FCAFC 22 (at [41]).
[11] *Forge* [2006] HCA 44 (at [46]), *MZXOT* [2008] HCA 28 (at [128]).
[12] Gummow (2014) 37 *Melbourne University Law Review* 834 (at 835).
[13] *Smeaton* [2017] NSWCA 184 (at [104]), *McDonald* [2001] FCA 305 (at [20]).
[14] *Bamford* [2010] HCA 10 (at [37]), *Paradise* [1968] 2 All ER 625 (at 632).
[15] *Thomas* [2018] HCA 31 (at [54]), cf *Executor* (1939) 62 CLR 545 (at 563).

Episode 69 – meaning of 'includes'; interpretation code; effect of repeal; dictionaries (again)

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