

interpretation NOW!

Episode 70 – 30 March 2021



Australian Government

Australian Taxation Office



Recent appeal cases stress 4 related propositions – ■ purpose is to be considered throughout the interpretive process¹, ■ harmony between provisions must be sought², ■ we must try to ensure the legislative target is hit not missed³, and ■ a purposive answer may rule over ordinary meaning⁴. These propositions wrap up in a meaningful way the practical impact of our ‘modern approach’. The High Court itself has said next to nothing on interpretation lately. In a case about difficult tax administration provisions, for example, the court wrote but 10 pages and remained wholly silent on interpretation. There are issues bubbling away in the intermediate courts which will ultimately require apex court attention – like the circuitry issue with statutory definitions⁵. However, as a systemic baseline, stability rules! The 4 propositions referred to above are core aspects of that stability.

Gordon Brysland Tax Counsel Network

Meaning of ‘agreement’

[Bob Brown Foundation v Cth \[2021\] FCAFC 5](#)

Normally an ‘agreement’ is an accord which is legally enforceable. BBF argued this seeking to prevent forestry operations affecting habitat of the swift parrot. Earlier approvals were invalid, said BBF, because the inter-governmental agreement (IGA) in question was not an ‘agreement that is in force’ under the legislation⁶. This was rejected (at [47-49]).

The court pointed out that not every ‘agreement’ must be judicially enforceable⁷. IGAs, being political in nature, are not intended to be adjudicated on by courts. Requiring this ‘agreement’ to be enforceable would also defeat the statutory purpose (at [68]).
iTip – an IGA is not ‘merely a scrap of paper’⁸.

International treaties

[Spain v Infrastructure Services \[2021\] FCAFC 3](#)

Investors secured an arbitration award for €1.1m under the ICSID Convention⁹ against Spain for default on a solar power project. They sought execution in Australia under ICSID, a point being whether ‘execution’ extends to ‘enforcement’. ICSID is made in English, French & Spanish – all equally authentic.

Treaty terms are presumed to ‘have the same meaning in each authentic text’¹⁰. Difficulties are resolved by adopting the meaning which ‘best reconciles the texts’ by reference to objects and purpose. Perram J held that ‘execution’ and ‘enforcement’ took their meanings from the French and Spanish texts – the English text did not prevail.

Procedural fairness

[Raina v CIC Allianz Insurance \[2021\] NSWSC 13](#)

Raina was injured when another driver ran into the back of his car. He challenged medical review panel assessments on grounds which included denial of natural justice. Campbell J (at [92]) rejected this, given Raina refused a further medical examination.

The judge (at [51-56]) describes how statutory powers are interpreted to require procedural fairness for persons affected. The basic principle is that the critical issue on which the decision is likely to turn must be brought to the person’s attention ‘so that he may have an opportunity of dealing with it’¹¹. This extends to confronting the person with inconsistencies and providing an option to respond¹².

Guidelines and rulings

[Antegra Pty Ltd v CCSR \[2021\] NSWSC 107](#)

Payne JA (at [86-87]) held that the ordinary principles of interpretation apply to Treasurer guidelines, and that it was ‘to be construed according to its text and purpose as evident from the document itself in the context of the legislative scheme in which the guidelines are required to be applied’¹³. Text writers¹⁴ and other factors supported this outcome.

The discussion in this case points the way on how public rulings issued by the ATO are to be read. This is particularly important because proper reliance on a ruling which ‘applies to you’ operates to bind the Commissioner¹⁵. **iTip** – read administrative rulings and guidelines in the same general way as statutes.

■ **Credits** – Gordon Brysland, Oliver Hood & Patrick Boyd.

¹ [Cheshire \(No 2\)](#) [2021] SASFC 11 (at [90]), cf [Calidad](#) [2020] HCA 41 (at [91]).

² [Groupline](#) [2020] QCA 245 (at [98-101]), cf [Wigmans](#) [2021] HCA 7 (at [77]).

³ [Douglas](#) [2020] FCAFC 220 (at [90-91]), cf [Taylor](#) [2014] HCA 9 (at [60]).

⁴ [Lawson](#) [2021] NSWCA 6 (at [25, 58]), cf [SZTAL](#) [2017] HCA 34 (at [38-39]).

⁵ [Auctus](#) [2021] FCAFC 39 (at [56-69]), [Singh](#) [2020] NSWCA 152 (at [98-131]).

⁶ s 4 of the [Regional Forest Agreements Act 2002](#) (Cth) RFA definition.

⁷ [South Australia](#) 108 CLR 130, cf Rose in Finn (ed) *Essays on Contract* (at 240).

⁸ [South Australia](#) (at 155), cf Seddon *Government Contracts* (at [3.6]).

⁹ [Convention on the Settlement of Investment Disputes](#) [etc].

¹⁰ [Vienna Convention](#), cf [Pharma-a-Care](#) [2020] HCA 2 (at [36]), Episode 58.

¹¹ [Kioa](#) (1985) 159 CLR 550 (at 587), [SZGUR](#) [2011] HCA 1 (at [9]).

¹² [Frost](#) [2014] NSWCA 39 (at 31-32]), cf [ACN](#) [2020] FCAFC 190 (at [178-180]).

¹³ [Salvation Army](#) [2018] NSWSC 128 (at [159-166]), cf s 46 [AIA 1901](#) (Cth).

¹⁴ Pearce 9th ed (at [1.2]), Herzfeld & Prince *Interpretation* (at [16.10]).

¹⁵ s 357-60(1) of Sch 1 to [IAA53](#), cf [Resource](#) [2019] FCAFC 51 (at [94-95]).

Episode 71 – beneficial legislation; penal provisions; statutory definitions; commercial contracts

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