interpretation NOW!

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Australian Government
Australian Taxation Office

AI

Rarely comes a case that is truly iconoclastic, but ***Thaler v Commissioner of Patents*** is one of them[1]. It smashes the cherished norm that an 'inventor' must be a natural person. In a world first, Beach J held that an AI system (known as DABUS) can be an 'inventor' for patent law purposes[2] – here, of a new kind of food container. The approach taken falls generically into the 'if not, why not' category[3]. One thing this case shows is the impact of objects clauses[4]. Section 2A said the object of the Act is to promote 'economic wellbeing through technological innovation …' Not recognising the reality that AI systems already manifest autonomy in generating otherwise patentable results 'would be the antithesis of the s 2A object', the judge said. Beyond the power of objects clauses, *Thaler* illustrates the non-stop advance of AI into the sphere of human-centric activities[5].

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Dictionaries (yet again)

Thaler v Commissioner of Patents [2021] FCA 879

On the use of dictionaries to resolve the meaning of 'inventor', Beach J in *Thaler* (at [15]) said more was required than 'mere resort to old millennium usages'. If words are only 'pictures of ideas', the judge needed 'to grapple with the underlying idea'.

The judge (at [147-153]) noted – (1) choice between dictionaries is always problematic, (2) agent nouns like 'inventor' can now aptly extend to machines[6], (3) dictionary definitions are 'inclusive and exemplary' not exclusive, (4) those definitions cannot control meaning, (5) dictionaries are developed on the basis of historical usage, and most importantly (6) dictionaries are no substitute for interpretation[7].

Changes in style

King Educational v CEO (No 3) [2021] FCA 692

This case deals with an amended provision requiring a decision-maker to be satisfied the applicant 'is complying, or will comply' with conditions[8]. The contextual meaning of 'and' and 'or' is discussed[9].

Also dealt with is a 'changes in style' argument that, because the amended provision 'appears to have expressed the same idea' as the original, it takes the same meaning. Wheelahan J (at [97]) rejected this. Nothing in the amending legislation or extrinsic materials suggested it. Arguments on this general basis are difficult to sustain in practice. The gateway 'same idea' concept is easy to state but hard to prove and there must be evidence of statutory purpose[10].

Characterisation

WorkPac Pty Ltd v Rossato [2021] HCA 23

Interpretation and characterisation go hand-in-hand in legal work. It is one thing to say what a statutory term means, but quite another to determine whether something meets that description.

If R had a 'reasonable expectation of continuing employment'[11], he could request a change from casual to permanent status. But he needed to show some 'firm advance commitment' in this regard. This required characterisation of his contract on the basis of legal obligations created[12], rather than '[s]ome amorphous, innominate hope or expectation'. R could show no legally enforceable right here and he therefore remained a casual employee.

Injustice

Ke v R [2021] NSWCCA 177

It has long been true that, where one interpretation will do manifest injustice and another will avoid it, the latter should be adopted[13]. This is an instance of consequences being taken into account. Ke pleaded guilty to recklessly dealing with proceeds of crime (funds derived from stolen baby formula)[14]. It was argued she was entitled to a discount on sentence by reason of an earlier rejected offer to plead guilty.

This was accepted (at [53-54]) on the basis that, if the provision was read otherwise, injustice would result. This is merely an aspect of our purposive system. It is argued mainly in criminal and migration contexts, often in tandem with 'principle of legality' points[15].

▪ **Credits** – Gordon Brysland, Oliver Hood & Alex Bounds.

[1] *Thaler* [2021] FCA 879, cf *Thaler* [2020] EWHC 2412 (at [45-46]).
[2] reg 3.2C(2)(aa) *Patents Regulations 1991*, cf s 15(1) *Patents Act 1990*.
[3] An appeal to the Full Federal Court has been lodged.
[4] (at [122-134]), cf *Mondelez* [2020] HCA 29, *Marke* [2021] VSC 483 (at [84]).
[5] cf *Northern Land Council v Quall* [2020] HCA 33 (at [21]).
[6] cf *Atlantis* [1997] FCA 1105 (at [12]), *JMVB* [2006] FCAFC 141 (at [71-72]).
[7] cf US textualism approach - *Van Buren* 593 US __ (2021) illustrates.
[8] s 10E(1) of the *Education Services for Overseas Students Act 2000* (Cth).
[9] *Pileggi* [2004] FCA 955 (at [37]), Pearce 9th Edition (at [2.48-2.50]).
[10] Pearce *Interpretation Acts* (at [3.83-3.93]), Episode 42.
[11] s 65(2) of the *Fair Work Act 2009* (Cth).
[12] *Burswood* [2021] FCAFC 151 (at [93]) is another recent example.
[13] *Murray-More* (1975) 132 CLR 336 (at 350), Pearce 9th Edition (at [2.59]).
[14] s 193B(2) of the *Crimes Act 1900* (NSW).
[15] *Stewart* [2020] FCAFC 196 (at [38]), *EFX17* [2021] HCA 9 (at [41]).

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