interpretation NOW!

Episode 79 – 15 December 2021

Australian Government
Australian Taxation Office

The High Court in *Port of Newcastle* said the principles of interpretation are 'familiar' and 'can seem banal'[1]. This case, about 'access' to port facilities[2], is a refresher on four of those principles. 1 – The term is read as 'always speaking'[3]. 2 – It is construed within its 'broader context'. 3 – The applicable 'shade of ordinary meaning' involves a constructional choice. 4 – That choice is made by applying the purposive principle reflected in the 'statutory instruction' of s 15AA[4]. Given the legislative purpose was to promote economic efficiency and effective competition, 'access' meant the right or opportunity to benefit from or use a system or service. This case is a vivid illustration of our 'well settled' method at work. The principles involved may indeed seem 'banal' (boring) but (A) they are the keys to meaning, & (B) they are obligatory. **iTip** – click & read the case (at [85-97]).

Gordon Brysland Tax Counsel Network

Uncertainty

Sunland Group v Gold Coast CC [2021] HCA 35

A developer argued that it was subject to lower infrastructure contributions under earlier DA conditions rather than at a higher rate under later planning legislation. All the judges rejected this.

Gordon J (at [18-19]) emphasised that the duty to attribute legal meaning to the text 'remains constant, regardless of whether the words of a statutory provision are uncertain or unclear'[5]. There is 'no void-for-vagueness doctrine in Australia', the judge added[6]. As Steward J further pointed out (at [58]), DA conditions as statutory instruments are 'not construed by recourse to those principles directed at saving bargains between consensual parties'[7].

Closely structured legislation

Buddhist Society WA v FCT (No 2) [2021] FCA 1363

The ATO revoked the DGR status of the society. The latter argued that, by doing this and seeking further information[8], the ATO now had a reverse onus to show why the society was not entitled to DGR status.

This was rejected by the judge (at [36-38]) because the revocation power had a different and narrower purpose. The power to revoke DGR status was an example of 'closely structured' provisions under which text 'may be paramount' and the 'room for interpretation must contract'[9]. The particular purpose of those provisions prevented them being read to have any reversing impact on the standard onus of proof borne by taxpayers in this context.

International treaties

Addy v FCT [2021] HCA 34

A UK national on a working holiday visa was taxed at a higher rate than an Australian national would be. She said this was unlawful under a treaty because it subjected her to 'other or more burdensome' taxation than Australians 'in the same circumstances … in particular with respect to residence'[10].

The court rejected the idea that, because she was on a working holiday visa, her circumstances could never be the same as an Australian. The treaty text should also bear the same meaning in domestic law as in the treaty[11], and (at [23]) international instruments should be interpreted in a 'more liberal manner' than domestic legislation[12] – see Episode 53.

Beneficial purpose

Patten v Mareangareu [2021] VSCA 295

A police officer was convicted of offences and dismissed. The convictions were later quashed and he sought reappointment[13]. The trial judge said the power to reappoint 'should be construed beneficially for the police officer' and ordered reappointment.

The appeal court, however, held (at [57]) that to identify a beneficial purpose up-front 'may invert the correct approach'. It 'may obscure the essential question regarding the meaning of the words used'[14], and 'may therefore not only distract attention from the text, but offer little guidance to its meaning'. This case reminds us that framing legislative purpose at a high level of generality can derail the process[15].

▪ **Credits** – Gordon Brysland & Oliver Hood. Happy holidays everyone!

[1] *Port of Newcastle Operations v Glencore Coal Assets* [2021] HCA 39 (at [85]).
[2] Part IIIA of the *Competition and Consumer Act 2010* (Cth).
[3] *Aubrey* [2017] HCA 18 (at [29-30]), *A2* [2019] HCA 35 (at [141, 169]) cited.
[4] s 15AA of the *Acts Interpretation Act 1901*, *Thiess* [2014] HCA 12 (at [23]).
[5] *Brown* [2017] HCA 43 (at [452]), *Kennedy* [1985] 1 Qd R 48 (at 49) cited.
[6] cf *Chevron* [2015] FCA 1092 (at [551]), *EHL* [2015] VSCA 269 (at [74]).
[7] *King Gee* (1945) 71 CLR 184 (at 195), *Cann's* (1946) 71 CLR 210 (at 227-228).
[8] s 14ZZO(b)(ii), s 426-55(1) in S1, s 426-40 in S1 of TAA53, respectively.
[9] *Channel* [2015] FCAFC 57 (at [6]), *Helvering* (1934) 69 F (2d) 809 (at 810).
[10] Art 25(1) of *United Kingdom Convention* [2003] ATS 22.
[11] *Applicant A* (1997) 190 CLR 225 (at 230-231), Episode 19.
[12] *Applicant A* (at 255), *Lamesa* (1997) 77 FCR 597 (at 604-605) cited.
[13] s 136(3) of the *Victoria Police Act 2013* (VIC).
[14] *NSWALC* [2016] HCA 50 (at [33]) quoted, cf Episode 67.
[15] cf *Carr* [2007] HCA 47 (at [5-7]), Episode 43 case 4 (compromise).

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