interpretation NOW!

Episode 89 – 31 October 2022

Australian Government
Australian Taxation Office

Two recent High Court cases probe difficult corners of interpretation law. The first[1] explores presumptions both at common law and under statute[2] against the extraterritorial operation of domestic statutes[3]. Kiefel CJ and Gageler J (at [34]) said these presumptions had no application in the circumstances – that is, they did not exclude non-residents from being a 'group member' under Federal Court provisions. The second case[4] deals with the somewhat slippery presumption against retrospective operation[5]. The plurality (at [29, 33]) noted the 'considerable confusion' in this area, saying that the terminology of the presumption should not distract from interpreting the temporal operation of legislation on the basis of 'reasonable expectations'. **iTip** – resolution of questions around extraterritoriality or retrospectivity should begin with an understanding of these cases.

Gordon Brysland Tax Counsel Network

Singular and plural

R v Wiggins (No 7) [2022] NSWSC 1249

W was charged with murder and another offence. He had priors for violence plus a long-term association with bikie gangs. In dispute was whether s 110(3) of the *Evidence Act 1995*, which allows character evidence to be led 'in a particular respect' without putting general character into issue, prevented him leading particular evidence in multiple respects.

Adams J said (at [79]) the presumption that the singular includes the plural may be rebutted by contrary intention[6]. The provision here, held the judge, was not subject to the presumption as its purpose was to limit the giving of evidence to one discrete aspect of character relevant to each offence[7].

Statutory definitions

BBlood Enterprises v FCT [2022] FCA 1112

In this share buy-back case, Thawley J (at [119]) said the idea that the meaning of a statutory definition cannot be controlled by the term defined[8] 'is not an inflexible rule' of interpretation[9]. The issue was whether the word 'reimbursement' as part of the term defined controlled or limited the meaning of 'reimbursement agreement' in s 100A(7) of ITAA36.

The judge held it didn't, stating (at [120]) that the phrase was 'no more than a convenient label'. He pointed out, however, that any rule excluding recourse to terms defined in all situations would breach fundamental norms of interpretation. This issue has a long and increasingly tangled history[10].

Special circumstances

DJ v DPP (WA) [2022] WASC 303

This case raised what are 'special circumstances' in an application to disregard young offender convictions[11]. Smith J (at [58-63]) looked at other statutory contexts, of which there are many, where the same expression is used. These confirmed that the subject case must be 'different in kind'.

An important point of general application is that the expression involves 'words of indeterminate reference and will always take their colour from their surroundings'. The surroundings or statutory context were against the present situation reaching the level of 'special circumstances'. **iTip** – what is 'special' in one context may not be in another.

Ejusdem generis

Kelly v CFMMEU [2022] FCAFC 130

An application for a secret ballot was made to determine if a division of the union might become a separate organisation[12]. One issue was whether the division was a 'separately identifiable constituent part' of an amalgamated organisation under a statutory definition. The union said general words in the definition should be read down by reference to the *ejusdem generis* ('of the same kind') principle[13].

Reading down in this manner was rejected by the court because of two things – (A) it was doubtful any genus could be identified here as would activate the principle[14] and, importantly, (B) the wider context, legislative history and purpose was against it[15].

▪ **Thanks** – Oliver Hood, Charlie Yu & Michelle Janczarski.

[1] *BHP Group Ltd v Impriombato* [2022] HCA 33.
[2] *Morgan* (1912) 15 CLR 1 (at 13), s 21(1)(b) of the *Acts Interpretation Act 1901*.
[3] In this case, Part IVA of the *Federal Court of Australia Act 1976* (Cth).
[4] *Stephens v The Queen* [2022] HCA 31.
[5] *Kidman* (1915) 20 CLR 245 (at 443), cf *Maxwell* (1957) 96 CLR 261 (at 285).
[6] s 8(b) of the *Interpretation Act 1987* (NSW), cf Episode 62.
[7] *Seymour* [2006] NSWCCA 206 (at [52]), *Gabriel* (1997) 76 FCR 279 (at 298).
[8] *Shin Kobe Maru* (1994) 181 CLR 404 (at 419), *Prestige* [1998] HCATrans 279.
[9] *Auctus* [2021] FCAFC 39 (at [68-69]) quoted.
[10] cf *Singh* [2020] NSWCA 152 (at [98-131]), Episodes 64 & 71.
[11] s 189 of the *Young Offenders Act 1994* (WA).
[12] s 94 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
[13] Episodes 25 & 56 provide further background.
[14] *Clark* (2003) 57 NSWLR 113 (at 143), cf *Cody* (1947) 74 CLR 629 (at 647).
[15] *Clark* (2003) 57 NSWLR 113 (at 143), cf *Vella* (2015) 230 FCR 61 (at 77).

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