interpretation NOW!

Episode 94 – 31 March 2023

Australian Government
Australian Taxation Office

In a 2022 speech, Allsop CJ stressed that tax laws are subject to the same interpretation principles as other statutes. Although some 'peculiarities' arise for tax provisions – for example, their 'fiscal and commercial context' is critical[1] – these merely stem from the *application* of settled principles. This fits with the High Court position that 'tax statutes do not form a class of their own', but that their fiscal nature is part of their context[2]. Allsop CJ also noted that, while tax laws have an overarching revenue-raising purpose, this 'does not mean that beneficial constructions in favour of the Commissioner should be adopted or sought'. Tax laws raise revenue 'not by all means possible but in accordance with a detailed and complex plan of fiscal policy'[3]. Equally, the fact that tax laws interfere with property rights does not 'require a narrow construction in favour of taxpayers'.

Michelle Janczarski Tax Counsel Network

Expert evidence

Odisho v Central Coast Council [2023] NSWLEC 1017

When meaning is at stake, a natural inclination may be to call in an expert. But, while experts might give evidence on the technical meaning of non-legal words[4], their views on ordinary meaning of words are inadmissible[5]. This case makes an even bigger point.

At issue was the extent of 'beach erosion' on a DA to build a new pool in a coastal backyard. The word 'beach' was defined in the statute but not 'beach erosion'[6]. It was argued that the opinion of an expert on the ordinary meaning of 'beach' should be substituted for the statutory definition. This was rejected. Experts cannot determine ordinary meaning, much less can they override parliament.

Statutory purpose

Sunsie Pty Ltd v KDD [2023] WASC 18

S pre-paid $380K to an agent in relation to purchase of a unit; the agent gave it to the developer before strata plan registration; the project failed; the agent claimed the money was a loan, not part of the price.

Archer J held the money was recoverable under strata title provisions preventing 'defalcation' and 'contracting out'[7]. Text, context and (especially) purpose confirmed this. The text reflected a beneficial policy, which should not be 'whittled away'[8]. Prior assumptions about the desired reach of the provisions are out[9]. This case illustrates how the objective discernment of statutory purpose is integral to the interpretation of legislation[10].

Expressio unius

Case (pseudonym) v The King [2023] VSCA 12

C was convicted in Victoria of involving another in production of child abuse material – s 51B of the *Crimes Act 1958*. While in SA, he phoned someone in Victoria giving step-by-step instructions about what was to occur. Related provisions had extraterritorial effect, but not s 51B. C argued this meant his SA conduct was not caught because positive extension of other provisions implied no extension of s 51B[11].

The court (at [128]) said *expressio unius* must be applied with care[12]. Differences between provisions may be deliberate or the product of 'inadvertence or accident'[13]. The latter was likely here, due to the 'base position' of physical contact under the statute.

Extrinsic materials (again)

NDIA v Foster [2023] FCAFC 11

F needed a catheter to urinate – did he meet access rules to become an NDIS 'participant'[14]? He said that 'effectively or completely' in the context of his ability to participate in self-care activities took its ordinary meaning without regard to extrinsic materials.

The court (at [31]) rejected this. The notion these materials 'cannot be looked at until some ambiguity is drawn out of the text itself cannot withstand the weight and clarity of HCA authority since 1985'[15]. This was put beyond all tolerable doubt in *CIC Insurance*. The phrase 'effectively or completely' was not to be construed in a vacuum. Simply because F needed a catheter did not mean he met NDIS access rules.

▪ **Thanks** – Annie Huang, Janhavi Bhandari & Cheryl D'Amico.

[1] *Chevron* [2017] FCAFC 62 (at [3]).
[2] *Alcan* [2009] HCA 41 (at [57]), Episode 14.
[3] Gleeson *Statutory Interpretation*, *Carr* [2007] HCA 47 (at [5-7]).
[4] *Olney* (1992) 34 FCR 470 (at 480), *Clegg* [2017] WASCA 30 (at [56]).
[5] *Uber BV* [2017] FCA 110 (at [104]), *Lansell House* [2010] FCA 329 (at [60]).
[6] s 4 of the *Coastal Management Act 2016* (NSW).
[7] Former ss 70 & 70A of the *Strata Titles Act 1985* (WA).
[8] *Mirvac* [2011] WASC 162 (at [34]), *Harman* [2012] WASCA 189 (at [66-68]).
[9] *Australian* [2020] WASCA 157 (at [155]), *Gribbles* [2005] HCA 9 (at [21]).
[10] *Thiess* [2014] HCA 12 (at [23]), *SZTAL* [2017] HCA 34 (at [39]).
[11] *expressio unius est exclusio alterius* – *Spence* [2019] HCA 15 (at [302]).
[12] *Houssein* (1982) 148 CLR 88 (at 94), *Saunders* (1861) 11 ER 611 (at 615) cited.
[13] *Colquhoun* (1888) 21 QBD 52 (at 65), cf Pearce 9th ed (at [4.43-4.45]).
[14] r 5.8(a) of the *NDIS (Becoming a Participant) Rules 2016* (Cth).
[15] *Bay Street Appeal* [2020] FCAFC 192 (at [5]).

Episode 95 – examples in legislation; super documents; delegated legislation; preconception

ISSN 2651-9518