interpretation NOW!

Episode 13 – 29 June 2016

Australian Government
Australian Taxation Office

iNOW! has noted the 'constructional choices' that may emerge in zones of contested interpretation. Two things are usually necessary to bring forward those choices. First, a working knowledge of the principles for determining ***what parliament meant by the words it used***. Second, a mindset to apply those principles flexibly and with understanding. Courts tell us to be 'wary of propounding rigid rules' when reading statutes – *Daley v SAS Trustee,* for example[1]. This means keeping in mind the dangers of a blinkered approach[2]. Rejection of rigid rules also naturally gives weight to the role that lateral thinking may play with difficult provisions. Later selection between 'constructional choices', however, is to be made by reference to purpose and context.

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Back to basics

BPG Caulfield Village v CSR [2016] VSC 172

The past dozen episodes of ***iNOW!*** cover a decent range of interpretational issues. Regularly, however, courts direct us back to the basics.

This case (at [32]) quotes *Alcan*[3] for the following – (A) interpretation 'must begin with a consideration of the text itself', (B) historical considerations and extrinsic materials cannot 'displace the clear meaning', (C) the language of the text is the 'surest guide to legislative intention', (D) the meaning of the text 'may require consideration of the context', and (E) context includes the general purpose and policy of a provision and the 'mischief it is seeking to remedy'.

Punctuation

Lockhart v United States 577 US __ (2016)[4]

In America, child pornography offences attract extra jail time if X has prior convictions for 'aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor'. X pleaded guilty but had a prior for adult sexual abuse. Argument raged between 2 technical grammar rules – the 'last antecedent' and 'series qualifier' rules[5]. The former prevailed – that is, 'involving a minor' applied only to 'abusive sexual conduct'. X got 10 years.

In Australia, we apply wider purposive principles and don't get too hung up on grammatical rules[6]. **iTip** – have regard to punctuation[7], but be wary of hanging someone on a comma or its absence[8].

Principle of legality

Commissioner of Police v Guo [2016] FCAFC 62

The principle of legality gets plenty of court time these days. Very clear words in an Act are needed to exclude important common law rights and doctrines. The issue in this case was whether public interest immunity was available in the AAT to prevent police being asked about informants. The finding (at [62-66]), that immunity was *not* excluded here, shows the practical grip of the principle.

The same principle applies with human rights – that is, a 'construction favouring liberty' is preferred[9]. However, human rights are 'not absolute', especially where their exercise would frustrate legislation that is 'plain on its face'[10].

Delegated legislation

Heatscape v Mahoney (No 2) [2016] NSWLEC 45

Episode 9 explains how regulations cannot control what an Act means. This case (at [149]) reminds us that the same principles we apply to statutes 'are equally applicable to the interpretation of subordinate legislation' – no surprises here.

An additional point[11], however, is that delegated legislation is 'less carefully drafted, and less keenly scrutinised, than primary legislation'[12]. This implies that extra wriggle room is allowed when we interpret regulations and the like. But how much and in what situations is anything but clear. **iTip** – always read delegated legislation in context, with sympathy for both its purpose and function.

- Writer – Gordon Brysland, Producer – Michelle Janczarski.
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[1] *Daley* [2016] NSWCA 111 (at [110]), *Taylor* [2014] HCA 9 (at [37]).
[2] *Agfa-Gevaert* (1996) 186 CLR 389 (at 401).
[3] *Alcan* [2009] HCA 41 (at [47]).
[4] Read this case for its clear writing, not its legal learning.
[5] Scalia & Garner *Reading Law* (at 144-151).
[6] *Gambro* [2004] FCA 323 (at [146]), *Campbell* [1995] 2 VR 654.
[7] Pearce & Geddes (at [4.59]), Bennion (5 ed at 751-758).
[8] *Chew* (1992) 173 CLR 626 (at 648).
[9] *Foster v Shaddock* [2016] QCA 35 (at [43]).
[10] *R v IBAC* [2016] HCA 8 (at [71, 77]).
[11] *Condon* [2014] NSWCA 149 (at [44]).
[12] Not everyone agrees – Argument (2015) 26 *Public Law Review* 137.

Episode 14 – status of tax laws; context & ambiguity; tax retrospectivity; general & special provisions