interpretation NOW!

Episode 47 – 30 April 2019

Australian Government
Australian Taxation Office

Treaties are traditionally interpreted in a more open way than domestic statutes. They are to be read in line with the international rules of construction[1]. Treaties enacted into domestic law are also interpreted against a different context compared to an ordinary statute[2]. Adoption of a treaty into domestic law also signals an objective intention by parliament to satisfy international obligations assumed by the executive[3]. A common concern is that reading treaty text by reference to ordinary domestic rules may be overly restrictive. Some advocate for an even more liberal interpretation of international agreements, in reflection of a global community operating under 'shared laws'[4]. **iTip** – know the differences between interpreting treaties and statutes.

Oliver Hood Tax Counsel Network

Double Tax Agreements

Satyam Computer Services v FCT [2018] FCAFC 172

In this case, it was argued that double tax agreements can only ever be 'shields not swords'. That is, DTAs can only limit domestic taxing rights, and cannot operate to grant extra taxing powers.

The court disagreed (at [28]), saying it was an error to approach construction of the Indian DTA from the basis of some assumption drawn from outside the text of the instrument. Nothing in the purpose or objects of the DTA in question supported reading the agreement in this way. To do otherwise would not give primacy to the text of the treaty[5]. **iTip** – as with domestic legislation, the same basic rule applies to DTAs … always begin with the text!

EU interpretation

When reading overseas decisions, we should keep in mind their approach to interpretation. EU judges, for example, take a 'teleological' approach. This translates roughly as 'purposive', but not as we know it. Outcomes are driven more by economic policy and political factors than the text. Judges fill gaps in ways we see as activist in the extreme[6]. Ends justify means, and working backwards from desirable answers attracts far less (if any) stigma.

Lord Denning called it 'the European way'[7]. Bennion said that the 'continental version of purposive construction enables the legislative animal to be skinned alive'[8]. All this should make us wary in using ECJ decisions to help solve our statutory problems[9].

Statutory rights

Michos v Eastbrooke Medical [2019] VSC 131

Con Michos tried to exercise his statutory right to access a medical report about him[10], but was required by the clinic first to see a doctor. After telling the clinic he had accessed the report another way, the clinic cancelled his appointment. Despite this, Michos continued to assert his right to access.

The clinic said the request had been impliedly withdrawn and lapsed, and the court agreed. Withdrawal of a right which 'plainly exists for the sole benefit of the person concerned' was implied by cancelling. The principle for which this case stands (at [50]) is that statutory rights provided solely for individual benefit can be waived[11].

Always speaking

Bhalsod v Perrie [2018] WASCA 108

The 'always speaking' concept arose in the 19th century as a style of drafting[12], where present tense was used to cover future events in order to give effect to an Act's 'spirit, true intent and meaning'.

Now 'always speaking' is widely understood to allow statutory language to be 'adaptable to new circumstances'[13] under an ambulatory approach to interpretation. The common law already allows for meaning to evolve with society and technology where this is consistent with text and context[14]. For example, 'gas' includes 'LPG'[15], and 'taxi' covers UberX operations[16]. Provisions like s 8 in WA[17] seem now to add little to what the common law provides.

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[1] Article 31 of the Vienna Convention, for example. See also TR 2001/13.
[2] *Applicant A* [1997] HCA 4 (at [64-65]).
[3] *Tech Mahindra* [2015] FCA 1082 (at [51]).
[4] *Zeller & Andersen* [2019] 1 *Nordic Journal of Commercial Law* 7 (at 8).
[5] *Tech Mahindra* [2016] FCAFC 130 (at [22]), Episode 3.
[6] *Beck* (2017) 36 UQLJ 333 (at 353), cf *Zines* (1973) 5 FLR 171 (at 199).
[7] *Bulmer* [1974] Ch 401 (at 425), cf *James Buchanan* [1977] 2 WLR 107 (at 112).
[8] *Bennion on Statutory Interpretation* (at 966).
[9] cf *Reliance Carpet* [2008] HCA 22 (at [30]), *Avon* [2006] HCA 29 (at [28]).
[10] ss 33 & 34 of the *Health Records Act 2001* (Vic).
[11] *McGrouther* [2015] FCAFC 34 (at [4, 23]), Pearce & Geddes (at [11.28]).
[12] Jacobi *Interpretation Acts: Origins and Meaning* (at [21.30]).
[13] *Aubrey* [2017] HCA 18 (at [30]), Episode 2.
[14] Jacobi (at [21.30]), Pearce & Geddes (at [4.11]).
[15] *Lake Macquarie* [1970] HCA 32 (at [15]).
[16] *Uber BV* [2017] FCA 110 (at [52, 130]), Episode 21.
[17] s 8 of the *Interpretation Act 1984* (WA).

Episode 48 – judicial powers; statutory definitions; retrospective legislation; purpose & objects