interpretation NOW!

Episode 109 – 28 June 2024

Australian Government
Australian Taxation Office

The legal 'person' is the sun around which the planets of the law revolve. Only a thing with legal personality can have rights and obligations or bear criminal sanctions[1]. To which category of 'person' a statute applies poses perennial puzzles for judges, as a recent High Court case illustrates[2]. The issue was whether the corporatised Director of National Parks (Cth) could be held liable as a 'person' for unauthorised trackwork in Kakadu[3]. In other words, did the presumption against the Crown being criminally liable under general statutes apply here?[4] This was resolved by the context and purpose of the offence provision[5]. All judges held that the presumption immunised the Commonwealth body politic from liability, but not the corporatised Director. Two judges stressed the duty of all government officers to observe the law[6]. The Director later pleaded guilty to all charges.

Gordon Brysland Tax Counsel Network gordon.brysland@ato.gov.au

Headings

Riverina Solar Pty Ltd [2024] NSWSC 480

How much influence do headings have on interpretation? In 2021, the High Court said the modern approach takes account of headings 'in much the same way as use is made of extrinsic materials'[7].

Riverina concerned the impact of the heading to s 600G of the *Corporations Act 2001*. Williams J (at [69-70]) said the heading was part of the Act and to be taken into account. The words of the provision, however, were both wide and unambiguous. To read down the provision by reason of the heading would 'impose an unnaturally constricted' interpretation, as well as reading further words into the provision itself. **iTip** – always treat headings with care and caution.

Enterprise agreements

ANMF v Barwon Health [2024] FedCFamC2G 376

This case states the interpretation principles which apply to enterprise agreements[8]. (1) The starting point is ordinary meaning read in context, including the industrial context and history. (2) A generous construction is preferred to a literal one. (3) Words are not to be construed in a vacuum 'divorced from industrial realities', but read in light of the customs and working conditions of the particular industry[9].

The judge (at [24]) said 'little attention is given to the niceties of drafting' in enterprise agreements. A different wording 'often reflects no more than a failure to appreciate the desirability of consistency in terminology when the same meaning is intended'.

Explanatory memoranda

Two opposing perspectives

Episode 106 focussed on comments by Edelman J on the status of extrinsic materials[10]. It was said EMs are 'important and weighty sources of information that invite the available implication that these materials are more reflective of government intent'.

This was applied directly in *R v RB*[11]. We should not expect that all EMs will exert this degree of influence however. *Binqld Finances* draws attention to the fact that it was 'not impossible' that the EM was 'simply wrong'[12]. Gageler J referred to this generally in *Mondelez*, noting that EMs lack the 'precision of parliamentary drafting'[13]. **iTip** – the impact of any EM depends on its content, quality and relevance.

Similar provisions elsewhere

EXV v Uniting Church [2024] NSWSC 490

Weinstein J refused to set aside under new laws deeds of settlement already concluded between child sex abuse victims and the church[14]. Similar laws had been enacted elsewhere at the same time. What impact should decisions under those laws have?

The judge (at [166]) drew attention to comments by Gageler J saying the provisions elsewhere were different enough as to make decisions under them inapplicable[15]. Weinstein J accepted this but maintained those decisions were 'not wholly irrelevant'. He said those decisions are guides only, but that 'coherent development of the law' was not promoted by adopting a different approach.

▪ **Thanks** – Oliver Hood & Suzanne McMahon.

[1] *Queensland Rail* [2015] HCA 11 [53], cf *Stanley* [2015] NY Slip Op 05257.
[2] *Aboriginal Areas Protection v Director of National Parks* [2024] HCA 16.
[3] s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).
[4] *Cain v Doyle* (1946) 72 CLR 409 (424), Pearce 10th ed [9.23] (535).
[5] cf ss 17 & 24AA of the *Interpretation Act 1978* (NT).
[6] [15-16], *Residential* 190 CLR 410 (427), cf *Hayden* (1984) 156 CLR 532 (580).
[7] *Rolfe* [2021] HCA 38 [18], Episode 84, Herzfeld & Prince [5.110].
[8] [22], *James Cook* [2020] FCAFC 123 [65], *Murthi* [2024] FCA 663 [51].
[9] *Wanneroo* (1989) 30 IR 362 (378-379), *Skene* [2018] FCAFC 131 [197].
[10] *Harvey v Minister* [2024] HCA 1 [103-116].
[11] *R v RB* [2024] NSWSC 471 [37]; other cases are expected to follow.
[12] *Binqld Finances v Binetter* [2024] FCA 361 [59].
[13] *Mondelez* [2020] HCA 29 [72] citing *Brooks* [2000] FCA 721 [68].
[14] s 7D of the *Civil Liability Act 2002* (NSW) commencing 18 November 2021.
[15] cf *TRG v Trustees of the Brisbane Grammar School* [2021] HCATrans 92.

Episode 110 – axiomatic approach; comity of nations; Across the Tasman; legislative codes

ISSN 2651-9518