interpretation NOW!

Episode 114 – 29 November 2024

Australian Government
Australian Taxation Office

The recent 'ankle bracelet' challenge in the High Court is an example of the 'text>context>purpose' protocol in practice[1]. At issue was the validity of punitive curfew restrictions on aliens awaiting deportation, enforced by an 'electronic monitoring device affixed to the person'[2]. This applied unless the Minister was satisfied it was not necessary 'for the protection of any part of the Australian community'. The Minister said the words 'from the risk of harm arising from future offending' were to be implied. The court rejected this and held the restriction invalid. The extra words were inconsistent with the text, context and purpose. The provision could not be read 'more narrowly than the ordinary grammatical meaning of its language'[3]. Adding words would create uncertainty, did not produce a 'reasonably open' construction[4], and would involve unauthorised policy-making.

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Statutory definitions

SkyCity Adelaide v Treasurer [2024] HCA 37

30 years ago, the High Court said it 'would be quite circular to construe the words of a definition by reference to the term defined'[5]. Other courts saw this as out-of-step with how we are to read statutes[6].

In *SkyCity*, the court said (at [32]) there is no inflexible rule here and the principle involved is 'more nuanced'. The term defined is part of the context but the 'purpose of a definition is to fix or to clarify the meaning of the defined term'. Definitions are construed in the context of the substantive provision according to its 'natural and ordinary meaning' unless clearly otherwise required[7]. This case clears up longstanding misunderstandings on a recurring issue[8].

Three principles

HBSY Pty Ltd v Lewis [2024] HCA 35

In this cross-vesting case, 3 key principles of our interpretation system are touched on – always speaking, statutory harmony and objective enquiry.

On the first 2, Gageler CJ (at [53]) said that legislation is always speaking in the present. Statutes must be construed as currently in force given parliament 'intends its legislation that speaks in the present to speak harmoniously[9]. Jagot J (at [157]) noted the 'mandatory objective approach' to interpretation in terms of text, context, and purpose. The focus is on the meaning of the words of the statute, not any divination of the actual intentions of the legislature or drafter of the legislation', the judge added.

Foreign statutes

X Corp v eSafety Commissioner [2024] FCA 1159

Whether X Corp (new owner) was subject to online safety penalties imposed on Twitter (old owner) depended on the status of X Corp and whether 'liabilities' under Nevada law included regulatory obligations[10]. Wheelahan J first observed (at [134]) that 'Australian courts know no foreign law'[11].

Foreign law is a question of fact to be proved by expert evidence. The judge accepted that Nevada statutes take their plain meaning in the absence of ambiguity. In finding that the penalties imposed were now 'liabilities' of X Corp, Wheelahan J rejected one expert's conclusion. Foreign law is a matter of fact but the ultimate issue is for the judge to decide.

Grammar

Qube Ports v CFMEU [2024] FCA 132

The issue in this fair work case was whether an enterprise agreement could be varied retroactively to remove ambiguity on application of an employer who was no longer 'covered by the agreement'[12].

Wheelahan J (at [73]) said interpretation 'requires more than matching up statutory text against pronouncements in books on grammar or English usage'[13]. Legal meaning often reflects grammatical usage 'but not always'[14]. Powers to vary instruments in this way go back over a century and are remedial[15]. It was held that the power to vary the agreements was retroactive, and that it did not matter that the employer was no longer 'covered by the agreement'.

▪ **Thanks** – Oliver Hood, Agnes Liu, Matt Snibson & Patrick Boyd.

[1] *YBFZ v Minister* [2024] HCA 40 [67-76] – cf Episode 66 'Circle of Meaning'.
[2] clause 070.612A(1)(a) of Schedule 2 to the *Migration Regulations 1994* (Cth).
[3] s 3A(1) *Migration Act 1958* (Cth), s 15A *Acts Interpretation Act 1901* (Cth).
[4] *Ruhani* [2005] HCA 42 [148-149], *NAAJAL* [2015] HCA 41 [76-79] cited.
[5] *Shin Kobe Maru* (1994) 181 CLR 404 (419), *Wacal* (1978) 140 CLR 503 (507).
[6] *Singh* [2020] NSWCA 152 [129-130], *Auctus* [2021] FCAFC 39 [68].
[7] *PMT Partners* (1995) 184 CLR 301 (310) quoted.
[8] Episode 1 looked at this, then followed Episodes 11, 46, 61, 64, 71, 89 & 108.
[9] *Eaton* [2013] HCA 2 [98], cf *Cottle* [2022] HCA 7 [23].
[10] NRS § 92A.250, s 7(3) *Foreign Corporations (Application of Laws) Act 1989*.
[11] *Neilson* [2005] HCA 54 [115], *Shi* [2021] HCA 22 [31].
[12] s 217 *Fair Work Act 2009* (Cth).
[13] *Cunard SS* (1922) 284 F 890 (894), *Weiss* [2005] HCA 81 [10] cited.
[14] *ENT19* [2023] HCA 18 [86], *Project Blue Sky* [1998] HCA 28 [78] quoted.
[15] *George Hudson* (1923) 32 CLR 413 (435-436), cf *Pearce* 10th edition [10.22].

Episode 115 – awareness of cases; meaning of 'or'; headings; meaning of 'in relation to'

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