

interpretation NOW!

Episode 98 – 31 July 2023



Australian Government

Australian Taxation Office



What has Franz Kafka's *The Trial* got to do with interpretation? *Patrick v AIC (No 2)*¹ is about when the AIC had a 'duty' to make an FOI review decision² as would allow the Federal Court to intervene for 'unreasonable delay'³. It was argued no duty arose until the review process was complete. Wheelahan J (at [43]) said this 'result would be absurd' – no delay by the AIC would ever then engage the remedial ADJR jurisdiction. This 'door to the law', he said, would remain shut in the same way as it did in *The Trial*⁴. The constructional choice was 'clear' given the remedial purpose was best achieved by the duty arising on the application for review contingent on completion⁵. Judicial references to Kafka are often a metaphor for the absurd consequences the law may sometimes produce⁶. Interpretation method responds, as in this case, to avoid absurdity by requiring a purposive outcome.

Gordon Brysland Tax Counsel Network

⇒ Frequent amendment

[DMQ20 v Minister \[2023\] FCAFC 84](#)

Generally, the same expression in a statute takes the same meaning, while different expressions indicate different meanings. This is not to be pressed too far, and 'is of very slight force' if the words are clear⁷.

The presumption is also muted where differences in wording can be attributed to the scope or frequency of amendment⁸. This is another manifestation of the impact of context on interpretation. In the present case, variations in reference to the 'Australian community' within the statute were seen as 'nothing of substance' in the context of a ministerial discretion to deny a protection visa on the basis that the applicant 'is a danger to the Australian community'⁹.

↗ Constructional choice

[DN v Secretary \[2023\] NSWSC 595](#)

The issue was whether the Children's Court had jurisdiction to vary a care order made after children were placed with UK carers¹⁰. The mother (DN) argued that there was no power to vary the order.

Kunc J rejected this. The jurisdiction of courts is to be construed broadly¹¹, and more particularly where child protection legislation demands a 'maximal, beneficial and practical approach'. What Kunc J called a 'constructional preference' should be applied where it is open on the 'text and context'. DN's interpretation was 'impractical' and 'inconvenient' because it would require the Children's Court to constantly evaluate whether it had jurisdiction.

⚖ Singular and plural

[Tickle v Giggle for Girls Pty Ltd \[2023\] FCA 553](#)

Tickle alleged discrimination on the basis of gender identity¹². This complaint was later withdrawn and a new one lodged out of time. Despite the ordinary position that the singular includes the plural in statutes¹³, Giggle argued that, for policy and finality reasons, the statute envisaged only one complaint.

Bromwich J (at [38-44]) disagreed. When evaluating whether there was a contrary intention, it was necessary 'to consider the substance and tenor of the legislation as a whole'¹⁴. The remedial nature of the statute was consistent with more than one complaint being possible. Ordinary abuse of process provisions deal with any misuse of the provisions.

☰ Specific powers

[Whitebull HTL Pty Ltd v ILGA \[2023\] NSWSC 588](#)

Specific powers in a statute exclude access to more general ones¹⁵. ILGA purported to exercise general powers under one statute to limit gaming machine numbers. Whitebull challenged this, arguing that a second statute set out exclusively, and more precisely, how numbers were to be regulated.

McNaughton J surveyed the authorities (at [123-134]) and agreed (at [153]) with Whitebull. The judge noted that the second statute 'provides a predictable, certain and transparent way of keeping, transferring and leasing gaming machines'. **iTip** – This case is an example of the general principle applying to powers found in different statutes.

■ **Thanks** – Matt Snibson, Cheryl D'Amico & Philip Borrell.

¹ [Patrick v Australian Information Commissioner \(No 2\)](#) [2023] FCA 530.

² s 55K of the [Freedom of Information Act 1982](#) (Cth).

³ s 7(1) of the [ADJR Act 1977](#) (Cth).

⁴ [Wang](#) [1997] FCA 70, cf [Neat Domestic](#) [2003] HCA 35 (at [140]).

⁵ s 15AA of the [Acts Interpretation Act 1901](#) (Cth) referred to.

⁶ cf Buonamano [Kafka and Legal Critique](#) [2016] UTSLRS 6.

⁷ [Lennon](#) (1921) 29 CLR 579 (at 590), [Stewart](#) [2020] FCAFC 196 (at [44]).

⁸ [Robert Bosch](#) [2011] FCA 1133 (at [35]), Pearce 9th Edition (at [4.9]).

⁹ s 36(1C)(b) [Migration Act 1958](#), cf [SLGS](#) [2023] FCAFC 104 (at [76, 82-83]).

¹⁰ s 90 [Children and Young Persons \(Care and Protection\) Act 1998](#) (NSW).

¹¹ (at [111]) citing [Leeming Authority to Decide](#) (at [5.4]).

¹² s 46PO(2) of the [Australian Human Rights Commission Act 1986](#) (Cth).

¹³ s 23(a) of the [Acts Interpretation Act 1901](#) (Cth), Episodes 3, 62 & 89.

¹⁴ [Walsh](#) (1996) 188 CLR 77 (at 90-91), [Pfeiffer](#) [2001] HCA 71 (at [59]).

¹⁵ [Anthony Hordern](#) (1932) 47 CLR 1 (at 7), Pearce 9th Edition (at [4.47]).

Episode 99 – adding words; extrinsic materials; statutory definitions; words with a legal meaning

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