

Tax Treaties – How to Read Them

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This is different

Who is interested? It's not just ATO and a known taxpayer.



Consequences. Beyond one other Contracting State:
with what other States has, or will, Australia contract in those terms?



A result in one case may be counter-intuitive – take a wider view: A
Local Authority v AG [2020] EWFC 18, [38] (iii) & (iv)

Our treaty network

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Modest number of DTAs – 46. Efforts are targeted.

And 36 TIEAs



Variety of DTA wordings – depends on age; which OECD or other model used; & hard bargaining



Some DTAs modified by the MLI.
(MLI is a whole topic itself.)

Leading authorities on interpretation of treaties

- ▶ *NGBM v Minister for Immigration &c* [2006] HCA 54; 231 CLR 52, [61]
- ▶ And as to DTAs in particular – see recent summary in *Addy v FCT* [2019] FCA 1768; 2019 ATC ¶¶20-719, [75]-[78]
- ▶ In UK – *Fowler v Revenue & Customs Commissioners* [2020] UKSC 22; [2020] 1 WLR 2227, [16]-[19]
- ▶ In NZ – albeit on narrower points, *Chatfield v CIR* [2019] NZCA 73; [2019] 2 NZLR 832, [103]-[107]; leave to appeal denied [2019] NZSC 84
- ▶ On the VCLT – Dörr & Schmalenbach “Vienna Convention on the Law of Treaties: A Commentary” (2ed, 2018)
- ▶ On DTAs – Klaus Vogel on Double Tax Conventions (4ed, 2015)

Start with the Words

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01

Start with domestic law, not the treaty

02

Ascertain “with precision” how far treaty has been adopted, qualified, modified

03

Construe only the parts of treaty including qualifications as required in Australia

VCLT



When we can use Vienna Convention



Difference between Articles 31 and 32



Illustration of difference – use of commentaries

CIR v Lin – Article 31(3)(a)

Bywater (HCA) and *Smallwood* (EWCA) – Article 32

Vienna Convention on the Law of Treaties – article 31



**Drives you to
the actual
words used, in
context**



Context:

Preamble,
annexes
Parties'
agreement re the
treaty made in
conexion with
conclusion of
treaty
Instrument, even if
made by one
party, if accepted
by others as an
instrument related
to the treaty



**Beyond
“context” as
defined
above – may
take into
account:**

Subsequent
agreement, or
subsequent
practice
accepted as
agreed
Rules of
international law
applicable to
both parties



**Use any
special
meaning of a
word, if
intended for
that special
meaning**

VCLT Article 32

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Supplementary means of interpretation include:

- Preparatory work of the treaty (eg OECD commentaries)
- Circumstances of conclusion of treaty

When can you look at these “supplementary means”? Only:

- To confirm meaning arising from Article 31
- To determine the meaning, after application of Article 31, when that leaves:
 - Ambiguous or obscure meaning
 - Result that is manifestly absurd or unreasonable



More liberal approach to interpretation?



International fiscal language?



Common approach in application of DTAs?



Okay to look at practices/cases of other States?



Primary objective – protect against double taxation?

Testing Propositions

Matters sometimes taken into account

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Foreign case law



Pre-existing state of the law – as context



Unilateral statement of a State



Whether Australian Courts will look at
later agreements and agreed practices

Language

Function of the International Tax Agreements Act 1953

Language – often as many as two languages being equally authoritative

Relevance of Article 33 of the VCLT

Australian statement about approach to interpretation – Tech Mahindra

Version of treaty commentary to use



OECD model convention or UN model convention (or another)



Relevance of later amendments to OECD commentary



Our region - NZ vs Australian positions



Additional Australian issue – Australian Constitution



“International fiscal language”

Worked example - background

The worked example deals with a request for exchange of information under a DTA

This example has been chosen as it levels the playing field for the audience – no particular knowledge of substantive tax law in either country is required

Worked Example – a heads up

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Laszlo's problem – if not emailed to you – obtain from www.davidwmarks.com, the recent papers tab.



Essentially, a case of identity confusion, at the higher end. Arguably the foreign request is irreparably bad, even though in perfect good faith.



The foreign request (in this fictitious example, from Hungary – only chosen for its old DTA wording) is sought by FOI, then by court process, and despite secrecy requirements in the DTA there is OECD commentary arguably supporting release (but it is more recent commentary).



Can ATO defend the request based on the new commentary which attempts to equate old wording with the modern OECD model?



Is there a difference between the 2 language versions? (Work with me here – I used Google Translate, and it did give a different nuance, but is not a recommended method of conducting legal proceedings!)

Worked example (contd.) - background

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Discussion of developments in Singapore,
Australia, New Zealand and elsewhere



Crucial issues –

whether can get disclosure or FOI - of foreign request
test of what requestor has to show: “necessary”,
“foreseeably relevant”
efforts of requestor at home
procedural hurdles for taxpayer

Worked example - László's problem

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Australian state of law



Treaty provision – Article 26



Compare present OECD Article 26



“Necessary” versus “foreseeably relevant” – difference in commentary and Article

Worked example - Laszlo problem - Cont'd

- ▶ Difference in meaning of words used in equally authentic texts

Tájékoztatás csere

1. A Szerződő Államok illetékes hatóságai ki fogják cserélni az Egyezmény vagy a Szerződő Államoknak az Egyezmény által érintett adókra vonatkozó belső jogszabályai végrehajtásához **szükséges** tájékoztatásokat, amennyiben az általuk előírányzott adóztatás nem ellentétes az Egyezménnyel. A kölcsönös tájékoztatást az 1. cikk nem korlátozza. A Szerződő Állam

Worked example - lessons



Focus on the correct and persuasive foreign material (eg version of commentary)



Understand how to dismiss less persuasive material



Use of the rules in the VCLT, for promoting or disparaging arguments



Skepticism about arguments which do not engage the text (in whichever language)



Questions?