

9-16-2015

The High Court has an opportunity to reverse the dangerous and unwise precedent set by the Federal Court in *FCT v Macoun*

John Azzi

Follow this and additional works at: <http://epublications.bond.edu.au/rlj>

Recommended Citation

Azzi, John (2015) "The High Court has an opportunity to reverse the dangerous and unwise precedent set by the Federal Court in *FCT v Macoun*," *Revenue Law Journal*: Vol. 25 : Iss. 1 , Article 1.
Available at: <http://epublications.bond.edu.au/rlj/vol25/iss1/1>

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Revenue Law Journal by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

The High Court has an opportunity to reverse the dangerous and unwise precedent set by the Federal Court in *FCT v Macoun*

Abstract

This note suggests that unless the Full Federal Court decision in *FCT v Macoun* [2014] FCAFC 92 is overturned by the High Court in the upcoming appeal, the literalist interpretation of domestic legislation enacting international obligations preferred by the Federal Court would set a dangerous and unwise precedent that is not only antithetical to the consistent and uniform development of international law in Australia but also to Australia's effective participation in the OECD/G20 Base Erosion and Profit Shifting Project.

Keywords

emoluments, pensions, statutory interpretation and international obligations, privileges and immunities of international organisations' employees

THE HIGH COURT HAS AN OPPORTUNITY TO REVERSE THE DANGEROUS AND UNWISE PRECEDENT SET BY THE FEDERAL COURT IN *FCT V MACOUN*

DR JOHN AZZI*

This note suggests that unless the Full Federal Court decision in *FCT v Macoun* [2014] FCAFC 92 is overturned by the High Court in the upcoming appeal,[#] the literalist interpretation of domestic legislation enacting international obligations preferred by the Federal Court would set a dangerous and unwise precedent that is not only antithetical to the consistent and uniform development of international law in Australia but also to Australia's effective participation in the OECD/G20 Base Erosion and Profit Shifting Project.

In a note to appear in the *Law Quarterly Review* (the "LQR note"¹), I argue the Federal Court in *FCT v Macoun*² erred in construing domestic legislation without regard to the international obligations the legislation was introduced to implement. I conclude that "[i]f allowed to stand... the [Federal Court] decision in *Macoun* would render largely ineffectual implementation of future outcomes from the G20/OECD forum, in turn, threatening national economic progress."

Since then, the High Court has granted the taxpayer leave to appeal the Full Federal Court decision.³ Accordingly, this note revisits briefly the main arguments made in the LQR note and further expounds why the decision in *Macoun* sets a dangerous and unwise precedent that could unravel Australia's commitment and effective participation in the G20/OECD base erosion and profit shifting (BEPS) Project.

The issue in *Macoun* was simple, should the taxpayer pay Australian income tax on pension he has received since 2007 from the International Bank for Reconstruction and Development (IBRD) given s 6-20(1) of the *Income Tax Assessment Act 1997* ('ITAA97')? Under that provision, the pension would not constitute assessable income if expressly exempt under the *International Organisations (Privileges and Immunities) Act 1963* (Cth) ('the Act').

* Senior Lecturer, School of Law, Western Sydney University.

On 15 May 2015 French CJ and Bell J granted the taxpayer special leave to appeal: *Macoun v Commissioner of Taxation* [2015] HCATrans 112.

¹ John Azzi, 'Domestic Legislation and Australia's International Obligations' (2015) 131 *Law Quarterly Review* 525-531.

² [2014] FCAFC 162.

³ *Macoun v FCT* [2015] HCATrans 112 (15 May 2015).

Finding it had jurisdiction to hear the appeal, and that the AAT had erred in law,⁴ the Full Federal Court concluded that the pension was not exempt under the Act despite the *Convention on the Privileges and Immunities of the Specialized Agencies*⁵ (‘the Convention’).

The Convention was incorporated into Australian domestic law by the Act and it obliged Australia not to impose income tax on pension payments received by Mr Macoun from the IBRD. The IBRD is a member organisation of the World Bank, which is an international organisation within the meaning of the Act and the Convention.

It was readily conceded that both the Act and the Convention exempted the taxpayer’s salary from Australian taxation whilst with the IBRD.⁶ Part I is headed “*Privileges and Immunities of an Officer (other than High Officer) of International Organisation*”. Item 2 of Part I exempts from taxation “salaries and emoluments” received from the IBRD. On other hand, Part II of the Fourth Schedule concerns “*Immunities of Former Officer (other than High Officer) of International Organisation*” and merely provides “[i]mmunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.”

According to Edmonds and Nicholas JJ (Perram J agreeing) in the Full Federal Court:

... the [taxpayer] did not hold office in the IBRD in the years of income and therefore the privilege conferred by ... [Part I] was not available to him in respect of the pension payments received by him in the years of income....⁷

Their Honours found that the dichotomy between privileges and immunities conferred on office holders and former office-holders established in s 6(1)(d) of the Act prevailed.⁸ The Court concluded that s 6(1)(d) “provides the mechanism by which privileges may be conferred on officers of international organizations”.⁹ Consequently, the exemption in Item 2 of Part I of the Fourth Schedule to the Act could not operate in respect of Mr Macoun’s pension payments as he did not hold office at the time of receipt.

In upholding the Commissioner’s appeal, the Federal Court reversed the finding of the Tribunal member at first instance, which held that pension payments were ‘emoluments’ as commonly understood and therefore entitled to the exemption from income taxation conferred under Item 2 of Part I of the Fourth Schedule.

⁴ Questions 1 and 2 in the Commissioner’s notice of appeal were held to raise “pure questions of law”: *FCT v Macoun* [2014] FCAFC 162 at [36] (Edmonds and Nicholas JJ). Note: On 30 June 2015, a bench of five (5) Federal Court judges handed down a decision overturning the insistence on a “pure” question of law: *Haritos v FCT* [2015] FCAFC 92 at [62](10) (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).

⁵ 1947, 33 UNTS 261 (entered into force 2 December 1948).

⁶ The Act, Schedule 4, Part I.

⁷ *FCT v Macoun* [2014] FCAFC 162 at [44] (Edmonds and Nicholas JJ) (Perram J agreeing at [49]).

⁸ Section 6(1) of the Act states:

“Subject to this section, the regulations may, either without restriction or to the extent or subject to the conditions prescribed by the regulations:

d. confer:

(i) upon a person who holds an office in an international organisation any of the privileges and immunities specified in Pt I of the Fourth Schedule; and

(ii) upon a person who has ceased to hold such an office the immunities specified in Part II of the Fourth Schedule.”

⁹ *FCT v Macoun* [2014] FCAFC 162, [13] (Edmonds and Nicholas JJ).

The Tribunal found no dichotomy ‘can be inferred that exemptions from tax on emoluments ceases after the person entitled ceases to hold office’¹⁰ as “emoluments” continue to bear that impressed character after the person ceases to hold office.¹¹ It was reasoned that in the absence of clear language to the contrary, ‘Parts I and II of the Fourth Schedule are distinct provisions ... [that] should be read according to their own specific provisions and language.’¹²

As mentioned in the LQR note, the Full Court’s preferred approach was too narrow, concentrating on text without proper regard to context or the mischief the Act was introduced to remedy.¹³ This is notwithstanding the current shift in Australia back towards a more literalist approach, particularly in the tax area,¹⁴ which gives primacy to Australian law without regard to international obligations and which finds support in two related High Court decisions.¹⁵

Had the Full Court had proper regard to context from the outset, as required,¹⁶ it would have discerned that Parliament intended for s 6 of the Act

... to be read in conjunction with the schedules ... [to] lay down very clearly the upper limits, so to speak, of the privileges and immunities which might be conferred by the regulations upon international organizations (sic) and persons connected with those organizations (sic)....¹⁷

The Federal Court further failed to apply widely accepted construction principles directing decision-makers to discern the meaning of an expression adopted in domestic law from an international treaty by reference to the treaty interpretation.¹⁸

To have concluded that s 6(1)(d) provides the framework for conferral of benefits under the Act ascribes insufficient weight to the Schedules. These constitute part of the Act¹⁹ and “describe the privileges and immunities which may be conferred by the regulations, as well as the classes of persons upon whom privileges and immunities may be conferred.”²⁰

Instead of construing the Act to further its purpose of providing a more adequate framework to enable conferral of recognized benefits,²¹ the Full Court sought to search for the largest meaning the words of s 6(1)(d) could bear without regard to the practical context within which the Act was

¹⁰ *Macoun and Commissioner of Taxation* [2014] AATA 155, [41].

¹¹ *Ibid*, [43].

¹² *Ibid*, [42].

¹³ See Azzi, above n 1.

¹⁴ See Richard Vann, ‘Hill on tax treaties and interpretation’ (2013) 28 *Australian Tax Forum* 87 at 122.

¹⁵ See, *Minister for Immigration and Multicultural Affairs v QAAH* (2006) 221 CLR 1 and *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52: “In both cases the Court emphasized (*sic*) the primary position of the words used in Australian legislation and the Australian rules of statutory interpretation in construing legislation which gives effect to international obligations, including treaties,” *Russell v FCT* [2011] FCAFC 10, [26] (Dowsett J; Edmonds and Gordon JJ agreeing).

¹⁶ See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 87 ALJR 98 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

¹⁷ Second Reading Speech in the House of Representatives (8 May 1963) in relation to the Act (“Second Reading Speech”), 1161.

¹⁸ See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

¹⁹ See s 13(2) of the *Acts Interpretation Act 1901* (Cth). See also Pearce D.C. & Geddes R.S., *Statutory Interpretation in Australia* (8th ed) (LexisNexis Butterworths, 2014) at [1.38] and [4.54].

²⁰ Second Reading Speech (8 May 1963) (SRS), 1163.

²¹ Second Reading Speech, 1164.

intended to operate.²² An important consideration informing context in this regard is the “great store ... set upon certainty and uniformity of application”.²³

It is commonly accepted that judicial decisions expounding a treaty (or specific provision in it) in nations that are parties to the treaty provide a source of public international law for other municipal courts called upon to interpret the treaty (and/or its provisions).²⁴ This practice is grounded in the need for uniformity and consistency and is implemented domestically by giving weight to relevant decisions of other national courts “to avoid a multitude of divergent approaches in the territories of the contracting parties on the same subject matter.”²⁵

Notwithstanding, the Full Court in *Macoun* was unconcerned with decisions of other national courts interpreting the text of the Convention, explaining that no error was committed by the Tribunal for having regard to these decisions as it did not “reach its conclusion on the back of decisions of Spanish Tribunals and the Vienna Convention. At most, the Tribunal drew comfort from those matters”.²⁶

The Vienna Convention on the Laws of Treaties – [1974] ATS 2 (the “Vienna Convention”), particularly articles 31 and 32, embodies the interpretative principles that apply generally to treaties. These do not differ markedly from general interpretation rules under either common law²⁷ or the Acts Interpretation Act 1901 (Cth).²⁸ Each generally requires consideration of text and context, including policy and extrinsic materials.

As the Act transposes the text of the Convention and there is some ambiguity²⁹ as to whether the expression “emoluments” in Item 2 of Part I of the Fourth Schedule is in fact qualified by the asserted dichotomy in s 6(1)(d) of the Act, the Federal Court should have construed the Act by reference to the Convention. This conforms with the Vienna Convention and the holistic approach advocated by Brennan CJ in *Applicant A*.³⁰

Perram J, who delivered a separate concurring judgment in *Macoun*, was the only member of the Federal Court to consider the Convention or relevant decisions of other national courts. Whilst acknowledging Australia’s “clear international obligations” not to impose income tax on Mr Macoun’s pension, Perram J nevertheless agreed with the reasons given by Edmonds and Nicholas

²² *Cf* *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1, [89] (Hayne and Bell JJ).

²³ *Shipping Corporation of India Ltd v Gamlen Chemical Co (A'asia) Pty Ltd* (1980) 147 CLR 142 at 159 (Mason and Wilson JJ; Gibbs and Aickin JJ agreeing).

²⁴ See James Crawford, *Brownlie's Principles of Public International Law* (OUP, 8th ed, 2012) at 41. See also *FCT v Macoun* [2014] FCAFC 162 [53] (Perram J).

²⁵ *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* [1995] FCA 1188; (1995) 56 FCR 406 at [54] (Spender, Einfeld and Tamberlin JJ); followed in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 at [35] (Warren CJ), [130] Hansen JA and Kyrou AJA. And referred to in *Macoun and Commissioner of Taxation* [2014] AATA 155 at [57]. See also *Shipping Corporation of India Ltd v Gamlen Chemical Co (A'asia) Pty Ltd* (1980) 147 CLR 142 at 159 (Mason and Wilson JJ; Gibbs and Aickin JJ agreeing), and Pearce D.C. & Geddes R.S., *Statutory Interpretation in Australia* (8th ed) (LexisNexis Butterworths, 2014) at [2.20].

²⁶ *FCT v Macoun* [2014] FCAFC 162, [32] (Edmonds and Nicholas JJ).

²⁷ See *Jumbanna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Momicilovic v The Queen* (2011) 245 CLR 1, 37 [18] (French CJ).

²⁸ Vann, above n 14, 97.

²⁹ A narrow conception of ambiguity was rejected by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

³⁰ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231 (Brennan CJ).

JJ “because the meaning of the Convention cannot overcome the plain meaning of the text of the Act”.³¹

Yet, the Full Court’s preferred interpretation breaches one of the most fundamental construction canons – viz., that courts should strive to give “meaning and effect” to every word of the provision.³² As construed, the word “emoluments” in Item 2 would have no work to do; its meaning and effect being governed by the dichotomy established in s 6(1)(d) of the Act, contrary to legislative intention.

Had the Full Court adopted a “holistic approach”, it could have discerned that the privileges and immunities under the Act “are conferred by member states, not for the personal benefit of any individuals but solely in the interests of the [prescribed international] organization, to enable it to perform its functions.”³³ What this infers may readily be gleaned from a decision of the Disputes Chamber of the Supreme Court of Andalusia in *Searfin and Yolanda*,³⁴ which explained that pension payment received by a former official of the United Nations constituted emoluments as they:

... are received as a consequence of having been an active official [of the] United Nations, which in no way can be dissociated from the reality of belonging to that cited international organisation.³⁵

In view of the preceding and the upcoming appeal, the High Court now has an opportunity to reverse the “hostile”³⁶ and inward looking approach increasingly being adopted by Australian courts construing municipal law without regard to the international convention the domestic law implements or decisions in other national courts expounding the convention. Unless overturned, the decision in *Macoun*, potentially, creates a serious impediment to implementation of current G20/OECD BEPS initiatives.

In a paper released in September 2014, Mark Konza, Deputy Commissioner – International, outlined Australia’s commitment and support for the G20/OECD Base Erosion and Profit Shifting (BEPS) Action Plan.³⁷ Among other things, this included “Supporting the work by the Forum on Tax Administration for greater cooperation and collaboration by tax authorities in tax compliance matters”.

The BEPS Action Plan has 15 Action Items aimed at addressing global tax planning where the existing international tax architecture has not kept up with modern business structures. Its guiding principle being the St Petersburg declaration that companies should pay tax in the country where the real economic activity occurs and where the profit is earned.

³¹ *FCT v Macoun* [2014] FCAFC 162, [48]-[49].

³² *Preston v Commissioner of Fair Trading* [2011] NSWCA 40, [90] (Campbell JA, Tobias and Young JJA agreeing). See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow Kirby and Hayne JJ).

³³ Second Reading Speech, 1163.

³⁴ (unreported, appeal number 478/2001) (17 January 2003).

³⁵ The above passage appears in Perram J’s reasons for decision in *FCT v Macoun* [2014] FCAFC 162, [54].

³⁶ *Cf NBMG v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, [18] (Kirby J dissenting).

³⁷ BEPS – a progress report on G20/OECD action (<https://www.ato.gov.au/printfriendly.aspx?url=/Media-centre/Speeches/Other/BEPS---a-progress-report-on-G20/OECD-action/>), accessed on 10 March 2015.

Whilst the guiding principle has drawn recent criticism,³⁸ it is equally concerning that the OECD is organizing an international conference to further pursue the aim of Action Plan 15 to develop a multilateral convention that would amend the vast network of existing bilateral treaties at one time. Drawing on precedents for modifying bilateral treaties in non-tax areas of public international law, the OECD believes such a multilateral instrument is desirable and feasible.³⁹

Despite the confidence expressed by the OECD however, *Macoun* represents a real threat to the effective implementation of Action Plan 15 in Australia. Whilst Australian courts are encouraged to endeavour to interpret domestic legislation conformably with an associated international convention, “if that construction is available”,⁴⁰ an Australian court called upon in future to construe any proposed multilateral convention will unlikely be receptive to adopting a ‘holistic approach’ given the modern approach favoured in *Macoun*. In this regard, it bears recalling that in dismissing the taxpayer’s special leave application in *Resource Capital III LP v FCT*,⁴¹ the High Court considered it ‘very interesting’, albeit unhelpful, to rely on OECD commentary in aid of construction of a bilateral tax treaty based on the OECD Model Convention.

In contrast, the approach adopted by the Tribunal better reflects the holistic approach. It facilitates the objects and purpose of the Act to ensure performance of work undertaken by the IBRD is “not frustrated by interference on the part of any individual government”⁴² by according certain privileges and immunities to persons working for it. As shown, it is anathema to legislative purpose and policy to tax Mr Macoun’s pension payments when entitlement to such payments is a direct consequence of having been an active official of the IBRD.

In conclusion, unless the High Court overturns the decision in *Macoun*, the effective implementation of the critically important Action Plan 15 is likely to fail, in turn, threatening economic progress.

³⁸ See Michael P. Devereux and John Vella, ‘Are We Heading Towards a Corporate Tax System Fit for the 21st Century?’ (Research Paper No 88, Oxford Legal Studies, 2014).

³⁹ *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: 2014 Deliverable* (OECD, 2014).

... the goal of a multilateral instrument is to expedite and streamline the implementation of the measures developed to address BEPS, in particular by modifying bilateral tax treaties. Developing such a mechanism is necessary not only to tackle BEPS, but also to ensure the sustainability of the consensual framework to eliminate double taxation. (<http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm> (accessed 10 March 2015)).

⁴⁰ *Minister for Immigration and Multicultural Affairs v QAAH of 2004* [2006] HCA 53; (2006) 231 CLR 1, [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ).

⁴¹ [2014] HCATrans 235 (17 Oct 2014).

⁴² Second Reading Speech, 1162.