



interpretation NOW!

Episode 61 – 26 June 2020



Statutory interpretation rarely makes the front page. But news outlets everywhere¹ have reported the US Supreme Court decision making it illegal to sack people simply for being gay or transgender² – *Bostock v Clayton County*³. Much of the ruckus was over the fact that it was a Trump appointee, Neil Gorsuch, who held that the *Civil Rights Act of 1964* protects LGBTQ people being discriminated against on the basis of ‘sex’. Americans look first to the ordinary public meaning of statutory words when they were enacted⁴. But where those words are clear, the judge said, ‘it’s no contest’; adding that ‘only the words on the page constitute the law’, and that ‘the limits of the drafters’ imagination supply no reason to ignore the law’s demands’. The *Judicial Crisis Network* said Gorsuch J had ‘bungled textualism so badly’⁵. Although the US follows different protocols to ours, this case shows the pivotal role interpretation may play in public affairs – **Gordon Brysland**.



Context and policy

[Peter Greensill Family Co v FCT \[2020\] FCA 559](#)

The meaning of connecting words depends very much on context. Were certain capital gains to be disregarded as being ‘from’ a CGT event?⁶ That word indicates a causal connection⁷ but as Thawley J found (at [52]) ‘causation is not the exclusive criterion’.

It requires a stronger degree of connection than ‘in relation to’ or ‘in respect of’ and (at [55]) ‘should be understood as requiring a direct connection between the capital gain and the CGT event’ – absent here. Further, in making assumptions about the ‘desired or desirable’ tax outcome, the taxpayer had erred. As the judge pointed out (at [70]), the ‘correct process is the inverse’⁸. The wider context made this clear.



Prison decisions

[Hamzy v Commissioner \[2020\] NSWSC 414](#)

A number of restrictions were placed on prisoner Hamzy – monitoring phone calls, security-checking his lawyers and denying audio-visual access. He said his right to legal representation had been infringed, and that security-checking was unreasonable.

Bellew J disagreed saying (at [73-77]) that prison rules can be applied to take account of particular circumstances. Authorities must have broad power to administer prisons and should be given ‘full scope’ to carry out their tasks ‘without undue influence from the courts’. Judges should also avoid ‘becoming enmeshed’ in the merits of prison management decisions which are often complex⁹.



Statutory definitions

[BWP Management v Ipswich \[2020\] QCA 104](#)

The long-held High Court position on statutory definitions is that, for circularity reasons, the term defined has no influence on the meaning of the definition¹⁰. Other courts have questioned this on the basis the term defined is part of the Act and available to be used in construing the definition¹¹.

McMurdo JA (at [51]) held that, for rating purposes, 2 Bunnings outlets were together a ‘Shop-Single’ rather than a ‘Drive-In Shopping Centre’. Each description could apply, but regard was had to the ‘label’ of the second to imply a qualification to the first. There was ‘no circularity’ in doing this, said the judge. **iTip** – statutory definitions are often tricky¹².



Legislative intention

[Corliss v R \[2020\] NSWCCA 65](#)

The High Court position is that legislative intention is an output of the interpretative process – that is, what parliament is objectively taken to have intended by the words used¹³. 2 judges in this case now add their names to others who doubt this¹⁴.

Johnson J said that to reduce intention to a label for the outcome of constructional choice is to miss the point¹⁵. This continues a mood against exclusion of ‘intention’ as a meaningful input into the process of interpretation. 3 things can be noted – (1) a purpose analysis would produce the same result, (2) the wider debate is largely of semantic interest, and (3) the comment by Johnson J does not change the law.

■ Credits – Gordon Brysland, Oliver Hood & Jeffrey Barnes.

¹ [Shear](#) (15 June 2020) *New York Times* (at 1) for example.

² Gerald Bostock was sacked for participating in gay softball games.

³ [590 US](#) (2020), cf [MacDonald](#) [2003] UKHL 34 (at [107, 114]).

⁴ Gorsuch J (at 4), [New Prime](#) 586 US (2019), Scalia & Garner (at 78-92).

⁵ Trump tweeted that it was ‘a very powerful decision, actually’.

⁶ s 855-10 of the [Income Tax Assessment Act 1997](#).

⁷ [Deal](#) [2016] HCA 31 (at [41]), [Pizzino](#) (1982) 56 ALJR 843 (at 845) cited.

⁸ [Certain Lloyd’s](#) [2012] HCA 56 (at [26]), cf [Rio](#) [2015] FCA 94 (at [30]).

⁹ [Fyfe](#) [2000] SASC 84 (at [18]), [Bernard-Ross](#) [2018] NSWSC 182 (at [41]).

¹⁰ [Shin Kobe Maru](#) (1994) 181 CLR 404 (at 419), [King](#) [2020] HCA 4 (at [18]).

¹¹ [Tovir](#) [2014] NSWCA 379 (at [20]), [Barangaroo](#) [2014] NSWCA 279 (at [11]).

¹² cf Pearce 9th ed (at [6.4]), Episodes [1](#), [11](#), [23](#), [33](#), [46](#) & [48](#).

¹³ [Lacey](#) [2011] HCA 10 (at [43]), Episodes [1](#), [29](#), [36](#) & [43](#).

¹⁴ [Ekins & Goldsworthy](#) (2014) 36 *Sydney Law Review* 39, for example.

¹⁵ [Outback](#) [2019] HCA 2 (at [77]), cf Pearce 9th ed (at [2.4]), Episode [46](#).