



# interpretation NOW!

Episode 65 – 29 October 2020



Following the death of Ruth Bader Ginsburg, Amy Coney Barrett has been appointed to the US Supreme Court. The high-octane confirmation process for the new judge illustrates a basic truth – interpretation matters! In a country with no working consensus on how the Constitution or statutes are to be read, the stance of any candidate is of great importance to the warring tribes of the republic. Where RBG was ‘sensibly pragmatic’ with the text as an ‘imperfect guide’, ACB favours a strict originalism where legal meaning is all but frozen-in-time<sup>2</sup>. The influence of ACB far into the future may indeed be profound given US judges are appointed for life – here they retire at 70. Appointment of judges to our apex court is also contested, but without the intense public scrutiny we see in America<sup>3</sup>. In both systems, however, the way judges interpret statutes really matters!

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## ➔ Consistent meaning

### [Orr v Cobar Management \[2020\] NSWCCA 220](#)

The presumption of consistent meaning is a strong one across the statute book even though it bows to context in appropriate situations<sup>4</sup>. The court in this case<sup>5</sup> points out that, even in statutes amended from time-to-time, the presumption exerts its power<sup>6</sup>.

When parliament uses a term (or a related one) that has been interpreted judicially in the same statute, it will ‘generally be taken’ to bear the same meaning<sup>7</sup>. Although doubts have been expressed about this in the past, the court points out (at [66]) that it is a ‘permissible approach’<sup>8</sup>. **iTip** – this case provides a powerful boost to the presumption in defiance of doubters and in aid of greater statutory certainty.

## 📄 Earlier decisions

### [Berkeley Challenge v United \[2020\] FCAFC 113](#)

BC argued they were not liable for redundancy payments because dismissal of their employees was within ‘the ordinary and customary turnover of labour’<sup>9</sup>. Rejecting this, the court held (at [188]) that the legislative motivation in re-enacting the words in question was that they play the ‘same role as they did under the pre-existing law’.

Both legislative history and decided cases provided a ‘historical context in which to read the words’<sup>10</sup>. This case shows how caselaw experience, as part of the wider context, may be a valuable guide to meaning. **iTip** – legislation is not approached like a goldfish seeing everything as new each and every time.

## 🔍 Mondelez angles

### [Mondelez Australia v AMWU \[2020\] HCA 29](#)

This decision on the meaning of ‘day’ for leave purposes touches various interpretation themes<sup>11</sup>. One, it offers a clear example of the need always to ‘start with the statute’ (at [14]). Two, it illustrates the influence an objects clause may have (at [41]).

Three, the proper role of extrinsic materials is fully explained (at [66-73]). They cannot displace the text, are not an infallible guide and ‘sometimes get it wrong’<sup>12</sup>. Four, ordinary meaning and consistent usage are discussed (at [95-98]). The words of a statute ‘are not a secret code for lawyers’. Five, the status of notes as aids to interpretation when they are not part of the Act is discussed (at [17])<sup>13</sup>.

## 🔄 Refresher course

### [ASIC v Rent 2 Own Cars \[2020\] FCA 1312](#)

From time to time, courts set out comprehensively and in one place key principles which apply to the interpretation of statutes<sup>14</sup>. This *national credit code* case, from Greenwood J, provides an easy-access refresher course (at [150-151]) on the basics<sup>15</sup>.

Things start with an explanation of legislative intention as a ‘conclusion’, then move to the role played by s 15AA in requiring purposive construction. The insistence to consult context in the ‘widest sense’ up-front is followed by *Project Blue Sky* learning on resolving inconsistencies. Constructional choice and the need to start & end with the text are discussed, along with the limits of extrinsic materials.

▪ Credits – Claudia Hodge, Gordon Brysland & Oliver Hood.

<sup>1</sup> Wolff *Ruth Bader Ginsburg and Sensible Pragmatism* (2010) [70\(4\) OSLJ 839](#).

<sup>2</sup> Bernick *Amy Coney Barrett on Interpretation* (2018) *YaleJReg* blog.

<sup>3</sup> Appointment of Steward & Gleeson JJ to our High Court illustrates this.

<sup>4</sup> Clyne [\(1981\) 150 CLR 1](#) (at 15), Herzfeld & Prince *Interpretation* (at [5.170]).

<sup>5</sup> Bathurst CJ & Bell P (at [63-66]), Johnson, Garling & Loneragan JJ agreeing.

<sup>6</sup> cf Dollison [\[2020\] NSWCA 58](#) (at [47]) Bell ACJ, Episodes [49](#) & [63](#).

<sup>7</sup> Yuill [\(1991\) 172 CLR 319](#) (at 322-323), *Alcan* [\(1994\) 181 CLR 96](#) (at 106).

<sup>8</sup> *Fortress* [\[2015\] HCA 10](#) (at [15]), Herzfeld & Prince (at [8-60]).

<sup>9</sup> s 119(1)(a) of the *Fair Work Act 2009* (Cth).

<sup>10</sup> cf Gageler (2011) [37\(2\) Monash ULR 1](#) (at 1), Mason 90 ALJ 324 (at 328).

<sup>11</sup> AGS Express Law on [14 August 2020](#) provides a concise case summary.

<sup>12</sup> (at [72]) citing Brooks [\[2000\] FCA 721](#) (at [68]), Hepples [\[1992\] HCA 3](#).

<sup>13</sup> s 15AB(2)(a) *Acts Interpretation Act 1901*, X [\[2007\] HCA 4](#) (at [35-38]).

<sup>14</sup> Episode [5](#) dealt with another one, GHP 104 160 689 [\[2014\] AATA 515](#).

<sup>15</sup> The judge adds to remarks in *Isentia* [\[2020\] ACOpyT 2](#) (at [60-73]).