

# interpretation NOW!

Episode 87 – 29 August 2022



Australian Government

Australian Taxation Office



This month the number of iNOW! subscribers passed the 1000 mark. Many are within the ATO but most are external. They come from across the professions, government, academia and the courts. Improving the reliability of answers to what legislation means caters to an important public interest across the community. The modest aim of iNOW! is to provide access to the latest intel on our ‘modern approach’. Three things stand out. First, we have a well-settled method or system of interpretation – Episode [66](#). Second, that system is based on contextual and purposive principles – Episode [43](#). Third, those principles are applied objectively and by reference to evidence. Whether you subscribe or just use the site now and then, Episode [78](#) explains how to get the best out of iNOW! **iTip** – using the search function can uncover the cases you need in under a minute – try it.

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## Extrinsic materials

### [R v RB \[2022\] NSWCCA 142](#)

Statements in extrinsic materials cannot be substituted for the statutory text<sup>1</sup>. They may reveal legislative purpose, but must be subjected to scrutiny and treated with caution. They can also be wrong<sup>2</sup>, as this case shows. The issue was whether sex offence provisions required a relationship to exist or merely the commission of multiple unlawful acts<sup>3</sup>.

Introducing the Bill, the A-G said categorically it was the latter. Everything contradicted this, the clear aim having been replication of a Queensland offence<sup>4</sup>. Fagan J (at [57-58]) found the statement to be ‘anomalous’ and questioned whether it reflected the ‘considered intention’ of either the A-G or parliament.



## Uncertainty

### [BXS20 v Minister \[2022\] FedCFamC2G 151](#)

Calculation of administrative fees often presents problems. In this case, various factors (including increases) made the fees ‘more difficult to calculate’<sup>5</sup>. But this ‘did not render the effect of the provisions uncertain’, as Judge Laing held (at [32]).

The court was bound to give effect to the regulations ‘even where they require some mathematical application’, she said. Contracts may be void for uncertainty but not statutes. There is no void-for-vagueness doctrine in Australia<sup>6</sup>. In very rare situations, legislation has been found to be ‘incurably defective’<sup>7</sup>. **iTip** – there is no ‘too hard basket’ when it comes to ascertaining statutory meaning.



## Principle of legality

### [Smith v R \[2022\] SASCA 48](#)

Statutes are read not to breach fundamental rights and freedoms, absent clear words<sup>8</sup>. This protects against ‘inadvertent and collateral’ contraventions<sup>9</sup>. The boundaries here are ever being tested<sup>10</sup>.

In this roadside licence check case<sup>11</sup>, it was accepted (at [28-29]) there is a common law right to go about your lawful business undisturbed. It was argued that, after telling Smith his licence was ‘all clear’ but not then returning it to him, he was under de facto arrest in breach of that right – rejected. It was held that the law authorised the licence check, and there was no evidence the purpose in stopping the car was ‘unconnected with proper policing enquiries’.



## Legislative purpose

### [LCM Funding v Stanwell \[2022\] FCAFC 103](#)

Anderson J (at [79]) provides a statement of principle at the very heart of our ‘modern approach’ – ‘**Consideration of purpose in statutory interpretation is not optional: s 15AA of the Acts Interpretation Act 1901**’<sup>12</sup>. It was a ‘clear error’ of an earlier court to forego a purposive approach to a definition in favour of an overly technical approach<sup>13</sup>.

Section 15AA is ‘imperative’, added the judge (at [101]). That provision as an ‘unqualified statutory instruction’<sup>14</sup> directs constructional choice and generally steers us away from the perils of literalism. The present case shows how the full force of s 15AA, enacted in 1981, continues to play out in the courts<sup>15</sup>.

■ **Thanks** – Oliver Hood, Charlie Yu & Michelle Janczarski.

<sup>1</sup> [Consolidated](#) [2012] HCA 55 (at [39]), [Beane](#) (1987) 162 CLR 514 (at 518).

<sup>2</sup> [Mondelez](#) [2020] HCA 29 (at [72]), cf [Facebook](#) [2022] FCAFC 9 (at [72]).

<sup>3</sup> s 66EA(1) of the [Crimes Act 1900](#) (NSW).

<sup>4</sup> [Royal Commission into Institutional Responses to Child Abuse](#).

<sup>5</sup> reg 4.13 of the [Migration Regulations 1994](#).

<sup>6</sup> [Sunland](#) [2021] HCA 35 (at [18-19]), [Brown](#) [2017] HCA 43 (at [452]).

<sup>7</sup> [Walters](#) [2015] VSCA 303 (at [10]), cf Episode [9](#).

<sup>8</sup> [Coco](#) (1994) 179 CLR 427 (at 437), [Lacey](#) [2011] HCA 10 (at [43-44]).

<sup>9</sup> [NAAJA](#) [2015] HCA 41 (at [81]), [Caratti](#) [2017] FCAFC 177 (at [25]).

<sup>10</sup> [Hopkins](#) [2020] FCAFC 33 [at [40-44]] is another recent instance.

<sup>11</sup> s 40H of the [Road Traffic Act 1961](#), s 96 of the [Motor Vehicles Act 1959](#).

<sup>12</sup> cf [Thiess](#) [2014] HCA 12 (at [22-23]), Episode [66](#) ‘Circle of Meaning’.

<sup>13</sup> ‘managed investment scheme’ under s 9 of the [Corporations Act 2001](#).

<sup>14</sup> [SZTAL](#) [2017] HCA 34 (at [38-39]), [Ellis](#) [2019] FCAFC 1 (at [116]).

<sup>15</sup> cf Barker [Harry Houdini paper](#) [2012] FedJSchol 34 (at [16]).

Episode 88 – meaning of ‘interest’; environmental consents; consistent usage; industrial awards

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ISSN 2651-9518