

interpretation NOW!

Episode 92 – 31 January 2023



Australian Government

Australian Taxation Office



When the High Court frames an interpretation issue these days, it often says no more than that the legislation ‘is to be interpreted by considering the text, having regard to its context and purpose’¹. This mirrors the position legislated for in New Zealand, where s 10(1) of the [Legislation Act 2019](#) provides – ‘The meaning of legislation must be ascertained from its text and in the light of its purpose and its context’². This is considered in *Beca Carter*, the first NZ case referred to in iNOW!³ A further point made is that the ‘meaning of the text ... should always be cross-checked against purpose’³. The meta-principles applying to the interpretation of statutes in both countries are all but identical. Across the Tasman, they are hard-wired into legislation. Our High Court says they are well-settled and non-controversial. **iTip** – these principles guide the ‘method’ we are required to apply.

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⚠ Meaning of ‘may’

[Walker v Members Equity Bank \[2022\] FCAFC 184](#)

Under the ASIC Act, prosecution of one offence ‘may be commenced within 3 years after [its] commission’⁴. Was this a hard time limit, or did the word ‘may’ make it merely discretionary, optional or permissive?

Wigney J (at [41-50]) went with the former. While laws providing that a person, court or body may do an act or thing generally confer discretion (subject to contrary intention)⁵, it was held that ‘may’ was used differently here. It was only permissive in the sense that prosecution was discretionary within the 3-year limit. An optional time limit would have no real meaning or utility. Also, purpose with legislative history and other cases supported a hard time limit⁶.

📖 Coming of Age

Gageler J in a new book ‘Dynamic and Principled’

Ch 1 in a book about Sir Anthony Mason is titled *The Coming of Age of Australian Law*⁷. *Gageler J* calls out 2 developments in interpretation as contributing to this ‘coming of age’. The first was federal legislation ‘mandating attention to legislative purpose and facilitating recourse to extrinsic materials’⁸. Second was the 1974 book *Statutory Interpretation in Australia* by Dennis Pearce⁹. To these may be added judgments of *Mason J* in several influential cases¹⁰.

All of these signal an independence leading up to the Twin Pillars of our well-settled method – [CIC Insurance](#) 1997 and [Project Blue Sky](#) 1998. Those cases are also significant ‘coming of age’ events in our legal history.

📄 Contractual interpretation

[Realestate.com.au v Hardingham \[2022\] HCA 39](#)

R commissioned H to photograph properties for sale under an informal agreement. R later provided them to a sub-licensee for uploading to a subscription website. H sued R for breach of copyright.

In determining contractual terms, *Kiefel CJ* and *Gageler J* (at [15-17]) said the test is what reasonable people with knowledge of the circumstances then known to both parties would have taken their words and conduct to mean. The focus is on what they objectively conveyed¹¹, not their ‘uncommunicated subjective motives or intentions’¹². The silence of H and the ‘commercial reality’ of website uploading, confirmed there was no breach of copyright.

📄 Meaning of ‘includes’

[Nuon \[2022\] FCAFC 197](#) & [QCoal \[2022\] QCA 237](#)

These appeal cases show the different meanings ‘includes’ may take in a statutory definition¹³. In *Nuon* (at [22]), it removed doubt that certain things fell within ‘imprisonment’ as ordinarily understood¹⁴. In *QCoal* (at [57]), it extended the ordinary meaning. This was confirmed by the fact that inclusions to the definition were themselves defined widely.

While the latter situation of expansion in *QCoal* is more common, *Nuon* illustrates that this will not always be the case. What ‘includes’ means in any definition will depend on purpose and context, part of which involves the function of the definition within the scheme of provisions being considered.

■ **Thanks** – Oliver Hood, Annie Huang, Charlie Yu & Michelle Janczarski.
¹ [Moorcroft](#) [2021] HCA 19 (at [15]), [Westpac](#) [2021] HCA 3 (at [54]), cf *Barnes, Dharmananda & Moran Modern Statutory Interpretation* (at [2.1]).
² [Beca Carter Hollings & Ferner Ltd v Wellington CC](#) [2022] NZCA 624 (at [51]).
³ [Fonterra](#) [2007] NZSC 36 (at [22]) *Tipping J* quoted.
⁴ s 12GB(6) of the [Australian Securities and Investments Commission Act 2001](#).
⁵ s 33(2A) of the [Acts Interpretation Act 1901](#), Episodes [12](#), [22](#) & [34](#).
⁶ cf [Oates](#) [1999] HCA 35 (at [9]), [Parker](#) [2006] NSWSC 390 (at [65]).

⁷ McDonald, Chen & Gordon *Dynamic and Principled* Federation Press.
⁸ ss 15AA and 15AB of the [Acts Interpretation Act 1901](#) respectively.
⁹ Now in its 9th edition, the 2nd to 8th being co-authored with Harry Geddes.
¹⁰ [Cooper](#) 147 CLR 297 with *Wilson J*, [K & S Lake](#) 157 CLR 309 dissenting.
¹¹ [Ermogenous](#) [2002] HCA 8 (at [25]), [Pacific](#) [2004] HCA 35 (at [40]).
¹² cf [Abignano](#) [2022] NSWSC 1739 (at [50]), [Toll](#) [2004] HCA 52 (at [40]).
¹³ Pearce 9th ed (at 265-270), Herzfeld & Prince (at 478-479).
¹⁴ [Australian Central Credit Union](#) (1985) 157 CLR 201 (at 206-207) cited.