

# interpretation NOW!

Episode 31 – 21 December 2017



Australian Government

Australian Taxation Office



**iNOW!** is a modest initiative from the ATO built on a simple idea – ‘*anyone who reads legislation and writes down what it means needs to know this stuff*’. Over 140 cases and 31 episodes later, **iNOW!** is an accessible toolkit of principle and practice. This year alone, AustLII will record over 2500 cases dealing with the subject in one way or another. Every month the High Court says something important on interpretation – this month, it’s *Esso Australia*<sup>1</sup>. The relentless march of statutes into society means the tools necessary for understanding them are all the more valuable. Hopefully this will pave the way to the more efficient understanding of parliament’s commands. To close the year, please revisit our ultimate **iTip** from Episode 4 – **text > context > text!**

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## ✕ Judicial wrongness

### [Kemp v Medical Board of Australia \[2017\] VSC 691](#)

When may a court overturn a longstanding decision on interpretation? There is a reluctance to do so unless the earlier decision is clearly wrong<sup>2</sup>. But, it is no part of the judicial role to perpetuate error, even where provisions have been re-enacted<sup>3</sup>. Decided cases also should not distract from the text<sup>4</sup>.

Forrest J in this case (at [100]) declined to follow an earlier decision about the meaning of the word ‘proceeding’ in evidence legislation. Administrators, however, do not enjoy the same luxury as judges in this regard. The tax commissioner, for example, has to follow decisions binding on him, even if he thinks they are wrong<sup>5</sup>. His job is to apply the tax law.

## 📄 Meaning of ‘lodged’

### [Kaczmariski v Legal Services Board \[2017\] VSC 690](#)

The statute allowed Kaczmariski 7 days to appeal a notice posted on 1 May. He emailed his appeal at 7.43pm on 10 May. Did he lodge in time? A thing is ‘lodged’ if it is deposited in person (or electronically) and accepted, said the judge (at [32-36]). An email is ‘lodged’ when it is ‘capable of being received’<sup>6</sup>.

The clock started on May 3 – that is, 2 days after the appeal was posted under service rules. The word ‘day’ takes its ordinary meaning and includes time outside business hours. It was, therefore, ‘lodged’ in time. A lesson from this case is that ‘time is tricky’. Interpretation Acts may affect its computation, and a range of slippery problems await the unwary<sup>7</sup>.

## ⬆️ Appeal rights

### [Lewis v Sergeant Riley \[2017\] NSWCA 272](#)

What if 2 Acts provide separate rights of appeal from the same proceedings? In this case: one to the District Court, one to the Supreme Court. The answer, said Basten JA (at [5, 21]), is not to assume inconsistency, but instead to try and give each provision an operation consistent with its terms.

Both avenues of appeal remained open, and there was a need to ‘regulate their independent operation’<sup>8</sup>. Express words are usually needed before appeal rights are to be restricted<sup>9</sup>. Further, the principle that specifying a particular procedure impliedly negates all others did not apply<sup>10</sup>. **iTip** – courts are vigilant in protecting access to justice.

## 🔗 Composite provisions

### [FCT v Hacon Pty Ltd \[2017\] FCAFC 181](#)

This case confirms that the ATO can decline to make a private ruling where it ‘would depend on which assumptions were made about a future event’<sup>11</sup>. One argument rejected (at [21-27]), however, was that provisions about making private rulings and applying for them should ‘be read as a composite’<sup>12</sup>.

To read the former into the latter could erode the duty to consider the substance of an application<sup>13</sup>. More generally, statutes are to be read as a whole in context, rather than as provisions in isolation<sup>14</sup>. That does not mean, however, absent formal linkage or incorporation, that separate provisions are to be treated as some kind of singular composite.

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<sup>1</sup> *Esso Australia Pty Ltd v AWU* [2017] HCA 54, see Episode 32.

<sup>2</sup> *Aubrey* [2017] HCA 18 (at [35]), *Babaniaris* [1987] HCA 19 (at [13]).

<sup>3</sup> See Episode 8, Pearce & Geddes (at [3.48-3.49]).

<sup>4</sup> *Shi* [2008] HCA 31 (at [92]), *Smith* [2009] FCAFC 175 (at [35]).

<sup>5</sup> *Indooroopilly* [2007] FCAFC 16 (at [4-6]), *Obeid* [2015] NSWCCA 309.

<sup>6</sup> s 13A of the *Electronic Transactions (Victoria) Act 2000*.

<sup>7</sup> Pearce & Geddes (at [6.46]), *What is the time?* (2007) 42 TIA 327.

<sup>8</sup> cf *Nystrom* [2006] HCA 50 (at [2,59]), *Nash Bros* [2016] NSWCA 225.

<sup>9</sup> *Shin Kobe Maru* [1994] HCA 54 (at [29]), quoted.

<sup>10</sup> cf *Anthony Hordern* (1932) 47 CLR 1 (at 7), Pearce & Geddes (at [4.36]).

<sup>11</sup> s 357-10(1) of S1 to *TAA53*, cf *White* [2012] FCA 109 (at [32-41]).

<sup>12</sup> ss 359-5 and 359-10, respectively.

<sup>13</sup> cf *Nicovations* [2016] FCA 394.

<sup>14</sup> Pearce & Geddes (at [4.2]), *Scaffidi* [2017] WASCA 222 (at [130]).