interpretation NOW!

Episode 120 – 30 May 2025

Australian Government
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In 2021, the High Court said the principles of interpretation are 'familiar', adding – 'Oftentimes they can seem banal'[1]. The sense of this is that the principles are trite, commonplace or mundane. Gageler J described them as 'workaday'[2]. A recent case observes again (A) that the principles are 'well established', and (B) that the language of the text 'in light of its context and purpose … is the surest guide to legislative intention'[3]. Sheer repetition of these themes may seem to condemn the principles to a kind of banality. It was Chekhov who once said there was 'nothing more awful, insulting and depressing than banality'. Our interpretation principles, however, are anything but banal in this way. As Edelman J explained in *Babet v Commonwealth*, they largely reflect the natural means by which we humans understand ordinary communication[4] … including the works of Chekhov.

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$$ Statutory fictions

Bogan v Estate of Smedley [2025] HCA 7

The general prohibition of contingency fees is subject to an exception in Victoria for 'group costs orders'. It was held that making an order of this kind was relevant to whether the proceedings should be transferred to NSW. The transferee court was required to deal with the proceeding 'as if' steps taken in the first court had been taken in that court[5].

This was held to create a statutory fiction[6], which 'cannot be taken to have a legal operation beyond that required to achieve the object of its enactment'[7]. The older setting that fictions are read 'strictly' is to be understood in its context. They are now read purposively in the same way as any other provision[8].

●→● Transitional provisions

Hanave [2025] NSWLEC 19, *Hixson* [2025] NSWSC 192

Two aspects of transitional provisions are touched on in these cases. *Hanave* (at [62]), emphasises their temporary nature. The judge observed that 'transitional' means passing from one condition to another. It was added that provisions of this kind are meant to be 'passing' and not forever applicable.

In *Hixson* (at [55]) it is their functional nature to which attention in drawn. They make 'special provision for the application of the amending statute to the circumstances existing at the time when the provisions came into force' – Herzfeld & Prince [11.210] quoted. Their precise reach and longevity depends on their object and purpose.

Inversion of process

Billyard Ave v Sydney City [2025] NSWLEC 22

Walsh C had refused a DA due to inconsistency with the objectives of the development zone in question[9]. The first objective of the R1 zone was 'to provide for the housing needs of the community'. Walsh C construed this objective by reference to expert opinion and party evidence on what it meant.

Preston CJ said that 'statutory interpretation is not a matter of evidence, but rather a question of law applying settled principles'. Deriving alternative views from the evidence then testing each against the R1 first objective 'inverted and subverted the proper process'[10]. Rules against preconception[11] and giving evidence on legal meaning[12] align with this.

Tautologies

ZeroBonds v Commissioner [2025] NSWSC 265

This case is about the phrase 'before or when' in residential bond provisions[13]. Refusing declarations sought by Z, Brereton J held the phrase was used in a temporal sense rather than in a conditional sense.

In the former, the words 'before' and 'when' had different meanings, but in the latter they 'usually mean the same thing'. It was noted that, while the presumption against surplusage is a 'valuable guide'[14], tautology 'is not uncommon in statutes'. This he illustrated by the phrase 'misleading or deceptive', which he described as 'an indulgence into tautology'[15]. This case underlines the starting idea that all words are to be given meaning and effect.

▪ **Thanks** – Oliver Hood, Jacinta Dharmananda & Michael Mirtsis.

[1] *Port of Newcastle* [2021] HCA 39 [85], Episode 79.
[2] *Esso* [2017] HCA 54 [71], cf *Charles* [2017] FCAFC 218 [51].
[3] *DZY* [2025] HCA 16 [23] citing *Certain Lloyd's* [2012] HCA 56 [24].
[4] *Babet* [2025] HCA 21 [131], cf Pearce 10th ed [4.1], Glass (1991) 7 AJLS 16.
[5] s 1337P(2) of the *Corporations Act 2001* (Cth).
[6] [55], *Macks* [2000] HCA 62 [115], *Williams* [2019] HCA 4 [101] cited.
[7] [57], *Makasa* [2021] HCA 1 [51], *Vunilagi* [2023] HCA 24 [71] cited.
[8] *Ellison* [2018] FCAFC 44 [209], *Holdsworth* [2020] NSWSC 228 [41] cited.
[9] cl 4.6(4)(a)(ii) of the *Sydney Local Environmental Plan 2012* (paraphrased).
[10] Walsh C had adopted an 'atomised construction of individual words'.
[11] *Certain Lloyd's* [2012] HCA 56 [26], *AEU* [2012] HCA 3 [28].
[12] *Simplot* [2023] FCA 1115 [86], *Uber* [2017] FCA 110 [115], Pearce 10th [4.18].
[13] s 23(1) of the *Residential Tenancies Act 2010* (NSW).
[14] *Taheri* [2014] NSWCA 209 [121] cited, cf Pearce 10th ed [2.44-2.45].
[15] *Parkdale* (1982) 149 CLR 191 (198) cited, cf *Southregal* [2017] HCA 7 [55].

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