interpretation NOW!

Episode 132 – 28 May 2026

Australian Government
Australian Taxation Office

The High Court has clarified the meaning of 'honest' within the expression 'honest concurrent use' as a defence to trade mark infringement[1]. After Firstmac registered the mark *ZIP* for financial products, Zip used substantially the same mark for its loan products. It was held that Zip had failed to prove 'honest concurrent use'. The court noted (at [57]) that 'honest' is an ordinary English word which will generally take its ordinary meaning[2]. The person must 'have a state of mind that is honest by the standards of ordinary, decent people'[3]. This may be proved by direct evidence of the person, or inferred from other facts and circumstances. Rejected was the so-called *Robin Hood* test which focuses on the subjective standard of honesty held by the infringer. Also rejected was any requirement that the person must realise they were in fact dishonest by the standards referred to.

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Development consents

Wollondilly SC v Godfrey [2026] NSWLEC 21

Robson J in this case (at [66-69]) comments on the interpretation of development consents[4].

First, ambiguity is to be resolved by application of the ordinary rules as apply to statutes[5]. Second, no principle of laxity in drafting is conceded to them. Third, nor is ambiguity to be resolved against the grantor on some default basis. Fourth, consents are not to be re-written 'to meet what a court may think is a practical outcome'[6]. Fifth, development consent conditions are to be approached by asking 'what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole'[7].

Correct procedure

Anderson v Anderson [2026] QCA 50

In this case, it was argued that the trial judge erred in law by considering policy before consulting the text. This was rejected. Brown JA quoted cases for starting with the text and also considering context in the widest sense 'at the first stage of the process …'

Comment – the requirement to have regard to both things 'at the same time' is entrenched[8]. This may present a dilemma for interpreters. Episode 66 grapples with how to address both things at once by reference to a *Circle of Meaning* model. In practice, this involves moving back and forth (often multiple times) between text, context and purpose testing the fit of what is found against the textual words[9].

Judgment words

Aguasa v Hunter [2026] WASCA 37

Whether a statutory requirement is procedural or substantive is often difficult to determine[10]. Various 'formulations' of the test to be applied have emerged. Vaughan J said (at [163]), however, that nothing is served by expressing a preference for one formulation over another. Courts in this regard are 'not offering a dictionary or statutory definition'.

Cases of this type should not be decided on a 'literal interpretation' of a formulation, as if the court was 'providing a statutory formula'[11]. This observation by the judge is part of a more general principle against treating judicial comments on statutory provisions as if they were themselves statutory[12].

Legal meaning

SEPL Pty Ltd v FCT [2026] FCAFC 36

Were three brothers each an 'employee' (undefined) for FBT purposes?[13] While 'employee' might take its common law meaning, subject to context, the court noted (at [25]) that it could take a 'commercial and trade usage', its 'natural and ordinary meaning', or a meaning peculiar to the specific legislation involved.

Where a term has a legal meaning, however, it will take that meaning in the absence of 'countervailing considerations'[14]. In a fair work context, the High Court had held that the ordinary meaning of 'employee' was its common law meaning[15]. Nothing displaced that meaning in the present case and it was open to find the brothers were not employees.

▪ **Thanks – Matt Freestone, Oliver Hood, Jeremy Francis & Charlie Yu.**

[1] *Zip Co Ltd v Firstmac Ltd* [2026] HCA 16; s 44(3) *Trade Marks Act 1995* (Cth).
[2] *Peters* [1998] HCA 7 [86] cited; cf *Sofronoff* [2025] FCA 1565 [206].
[3] [58-60]; *Macleod* [2003] HCA 24 [137-138], *Alex Pirie* (1933) 50 RPC 147.
[4] cf Episodes 88, 91 & 123, Herzfeld & Prince [16.190-16.230].
[5] *Sunland* [2021] HCA 35 [58], cf *Westfield* [2007] HCATrans 367 (126-127).
[6] *Baulkham Hills* [2009] NSWCA 160 [99], *J K Williams* [2021] NSWLEC 23 [61].
[7] *Trump* [2015] UKSC 74 [34], cf *Sandalwood* [2018] FCA 1502 [33].
[8] *Rohan* [2024] HCA 3 [25], *Palmanova* [2025] HCA 35 [6] illustrate.
[9] aka 'hermeneutic circles' – Campbell & Campbell (2014) 39 ABR 1 [4.6].
[10] In this case, s 12B *Defamation Act 2005* (NSW).
[11] *Hamilton* [2006] NSWCA 55 [128] cited, cf *Peros* [2024] QSC 80 [113].
[12] *ABS* [2015] HCA 48 [227], *PVYW* [2013] HCA 41 [15-16].
[13] s 136(1) *Fringe Benefits Tax Assessment Act 1986* (Cth).
[14] Herzfeld & Prince [2.170] cited, cf BDM [18.6], Pearce [4.32-4.33].
[15] *Personnel* [2022] HCA 1 [93, 161], *ZG Operations* [2022] HCA 2 [4].

Episode 133 – ordinary meaning; international treaties; not the common law; deeming provisions

ISSN 2651-9518