

interpretation NOW!

Episode 128 – 29 January 2026



Australian Government

Australian Taxation Office



When a public authority undertook construction of a light rail project, affected businesses sued in private nuisance for substantial interference with their use and enjoyment of their premises¹. They succeeded and were awarded damages. The case illustrates the complexities arising at the intersection of public works and private occupation. In the context of project legislation, the common law presumption against legislative authorisation of what would otherwise be tortious conduct (nuisance) became relevant². In this regard, legislation is read to justify conduct only to the extent it is the ‘inevitable result’ of the work³. There was substantial interference caused by dust, noise and road closures which the authority failed to show was reasonably minimised.

Gordon Brysland Tax Counsel Network gordon.brysland@ato.gov.au 0417 605 338

Statutory definitions

[Otsuka v Sun Pharma \[2025\] FCAFC 161](#)

This case raises whether a statutory definition may change in meaning when provisions to which it relates are later amended. Otsuka sought extension of its aripiprazole patent on the basis that other ‘pharmaceutical substances’ were disclosed in the patent specification. A ‘pharmaceutical substance’ is defined as a ‘substance ... for therapeutic use ...’⁴

It was held that the ‘formulations’ in question fell outside this definition, the meaning of which was unchanged by amendments – extension refused. The interest in this case lies in the principles applied in assessing change of meaning⁵, and the impact of a protracted failure of parliament to amend the law⁶.

Common law

[Jayasinghe v Perry \[2025\] VSC 751](#)

Vacant land sold by P to J was subject to a restrictive covenant as to building height to protect ‘rather stunning views’. After the new house exceeded the height limit by 3m, J sought to vary the covenant⁷. When an issue arose on how the underlying statutory provision was to be interpreted, the judge (at [126]) invoked the presumption that, where more than one option is open, ‘the interpretation consonant with the common law is to be preferred’⁸. This supported variation of the covenant in J’s favour – duly ordered.

Comment – other cases stress the weak nature of this presumption, one judge saying it is ‘inconsistent with modern experience and borders on fiction’⁹.

Anthony Hordern principle

[FCT v Runcity Pty Ltd \[2025\] FCAFC 152](#)

It was argued a consent order made under a general power to extend time for company reinstatement was invalid because specific voidable transaction provisions were the only way to extend time¹⁰.

This raised, among other things, the Anthony Hordern principle, and whether the general power to make ‘any other order’ was subject to time limits in the specific power¹¹. As the court explained, however, the Anthony Hordern principle ‘is not an analytical straitjacket’. It is ‘but one way’ of asking if the statute ‘confers only one power to take the relevant action’¹². The court held this to be the case with the result that the consent order was invalid.

Meaning of ‘institution’

[Commissioner v Montessori \[2025\] QCA 153](#)

A charitable trust was established to further indigenous education under the Montessori method at Cape York. With an expansion of operations, the trustee sought charitable institution status¹³. The sole question was whether the trustee, in carrying out the trust, was an ‘institution’ – answer, yes.

That term took its ordinary meaning – that is, ‘an establishment, organization, or association, instituted for the promotion of some object, especially one of public utility, religious, charitable, educational etc’¹⁴. Observations by other courts in other situations gave no technical meaning to the term. The term had to be considered in its present statutory context¹⁵.

■ Thanks – Jeremy Francis, Patrick Boyd, Michael Mirtsis & Charlie Yu.

¹ *Hunt Leather Pty Ltd v Transport for NSW* [2025] HCA 53.

² [36], *Coco* (1994) 179 CLR 427 (436), cf *Smethurst* [2020] HCA 14 [118].

³ [36], *Benning* (1969) 122 CLR 249 (309), *Farnworth* [1930] AC 171 (183).

⁴ s 70(2)(a) *Patents Act 1990* (Cth); definition found in Schedule 1.

⁵ [187-190], *Elder’s* (1936) 57 CLR 610 (625-626), *Grain* (1946) 73 CLR 70 (86).

⁶ [207], *Probuild* [2018] HCA 4 [52], *Cunneen* [2015] HCA 14 [113].

⁷ s 84(1) *Property Law Act 1958* (Vic).

⁸ Herzfeld, Prince & Tully *Interpretation* (2013) [25.1.1980].

⁹ *Gifford* [2003] HCA 33 [36], cf *Kassam* [2021] NSWCA 299 [90].

¹⁰ ss 601AH(3)(d) & 588FF(3)(b) *Corporations Act 2001* (Cth) resp.

¹¹ *Pearce* [4.67-4.68], *BDM* [18.11] generally, cf Episode 121.

¹² *Plaintiff M70* [2011] HCA 32 [50], *Nystrom* [2006] HCA 50 [59].

¹³ s 149C(1) *Taxation Administration Act 2001* (Q).

¹⁴ [49], *Stratton* (1970) 125 CLR 138 (158), cf *Mackay* [2025] QCAT 476.

¹⁵ cf *Geocon* [2025] FCAFC 172 [134-136], *Landrey* [2024] FCAFC 76 [74].

Episode 129 – definition & explanation; beneficial provisions; surplusage; contractual interpretation

iNOW! is not a public ruling or legal advice and is not binding on the ATO.

All episodes are online, fully searchable & linked to primary sources – interpretationnow.com – subscribe NOW!

ISSN 2651-9518