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Episode 129 – 26 February 2026



Australian Government

Australian Taxation Office



Can statutes die of old age? The answer seems to be ‘not in law but sometimes in practice’¹. Repeal by parliament is needed to kill them off in a legal sense. A statute may fall into desuetude for practical purposes, however, where the ‘tooth of time’ deprives it of all factual application². The law is also against the natural death of common law precedent and principle. There is US scholarship about so-called ‘zombie precedents’³ – that is, an old case or principle widely criticised but applied out of the blue in some irregular way⁴. Scalia J said – ‘Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad ...’⁵ Lord Simon invoked Rip van Winkle and Sleeping Beauty⁶. Three points can be made – statutes do not die of old age; they live on until put to the sword by parliament; and ancient ones often enough have their say in modern affairs.

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Definition and explanation

[Farshchi v The King \[2025\] HCA 46](#)

F appealed against federal convictions on the basis that directions to the jury under state law diminished the criminal standard of proof⁷. The trial judge said ‘a reasonable doubt is not ... an unrealistic possibility’.

The plurality (at [16]) said that the state law merely carved out things that ‘could not raise a reasonable doubt’ – appeal dismissed. Edelman and Steward JJ (at [58-60]) said ‘unrealistic’ in this context was used ‘only as a negative or exclusionary explanation to clarify or remove uncertainty’. After discussing generally the differences between definition and explanation, the two judges discussed the rationale for the criminal standard and its community context⁸.



Beneficial provisions

[NSW Aboriginal LC v Minister \[2025\] NSWLEC 144](#)

Just because legislation has a general beneficial purpose does not mean all provisions bend to that objective. The issue usually resolves to how far provisions go in progressing a general purpose⁹. The question here was whether 2 lots claimed by the council were ‘claimable Crown lands’¹⁰. The Minister had ruled each lot was needed for other reasons.

Although the beneficial purpose of the statute was not in question, Pepper J said (at [89-94]) that framing the issue by reference to that purpose ‘may obscure the essential question’ of what the words mean. The judge added that general beneficial preference here was an ‘interpretative red herring’¹¹.



Surplusage

[Harris v Military Rehabilitation \[2025\] FCAFC 198](#)

Edelman J recently explained why the presumption against surplusage seldom carries great weight¹². In the present case (at [23]), further reasons are suggested by the Full Federal Court. Once it is appreciated parliament has approved a text which includes surplusage, parliamentary supremacy ‘necessarily includes accepting that sometimes parliament might approve the superfluous’.

Three comments ... First, implicit here is that parliament is supreme, albeit imperfect. Second, there is no licence to ignore all surplusage. Third, sometimes the presumption will apply in practice, as Edelman J has pointed out in the High Court.



Contractual interpretation

[Campbelltown Central v CCSR \[2025\] NSWSC 1568](#)

Bennett J held that ‘confirmation deeds’ involved no declaration of trust for duties purposes. Our interest in the case is twofold. First, the ‘well established’ principles by which contracts are read are set out¹³. Second, it was confirmed that it is not necessary to find ambiguity before ‘surrounding circumstances’ can be looked at¹⁴. Only objective circumstances known to all parties can be taken into account.

Comment – This case shows a growing consensus in intermediate courts that surrounding circumstances may be consulted as a first step to determining if ambiguity is present. It remains for the High Court to provide full clarity on this longstanding issue¹⁵.

■ **Thanks** – Oliver Hood, Ross Carter, Andrew Maslaris & Patrick Boyd.

¹ [Jolley](#) [1933] 49 CLR 242 (277), [Bennion](#) (313), [Carter](#) (525-526).

² [Ashman](#) [1985] 2 NZLR 224 (228), [Tagaloa](#) [1927] NZLR 883 (900).

³ Dallas [What in the world is ‘zombie precedent?’](#) (19/12/2025) SCOTUSblog.

⁴ cf [Golden Eagle](#) [2007] HCA 15 [4], [Athans \(No 2\)](#) [2022] SASCA 70 [122].

⁵ [Lamb’s](#) (1993) 508 US 384 (398), quoted in Kagan [The Essential Scalia](#) (129).

⁶ [McKendrick](#) [1972] SC (HL) 25 (61), cf [VWB](#) [2018] EWCA 928 [48].

⁷ s 270.6A [Criminal Code](#) (Cth), s 64(1)(e) [Jury Directions Act 2015](#) (Vic) resp.

⁸ [61-62], [Brown](#) 17 CLR 570 (584), [Thomas](#) (1960) 102 CLR 584 (604-605).

⁹ [NSWALC](#) [2016] HCA 50 [92, 94].

¹⁰ s 36 [Aboriginal Land Rights Act 1983](#) (NSW).

¹¹ [93], [Quarry Street](#) [2025] HCA 32 [138-140].

¹² [Palmanova](#) [2025] HCA 35 [73], [Farmer](#) [2025] HCA 38 [105], [E125](#) & [E127](#).

¹³ [18], [Woodside](#) [2014] HCA 7 [35] quoted, cf [Ecosse](#) [2017] HCA 12 [16-17].

¹⁴ [19, 67], [Cherry](#) [2017] NSWCA 295 [77-85], [Mount Bruce](#) [2015] HCA 37 [50].

¹⁵ cf [Jireh](#) [2011] HCA 45, Seddon & Bigwood [Cheshire & Fifoot](#) [10.12].

Episode 130 – legal meaning; meaning of ‘court’; meaning of ‘beneficial’; contract theory

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ISSN 2651-9518