Statutes: context, meaning and pre-enactment history

The following paper was presented by the Hon Justice James Allsop at the 'Working with statutes' conference, hosted by the New South Wales Bar Association and the Australian Bar Association, in Sydney, on 18-19 March 2005.

By way of preliminary comment, the search for context in any given case may increase the burden of work in resolving any particular problem. That consideration is real, and reflected in the law itself: see s15AB(3) of the *Acts Interpretation Act 1901* (Cth) and state equivalents. The law, however, requires what can be called a contextual and purposive approach and this must be recognised in approaching problems of statutory interpretation.

The framework for consideration of enactment and pre-enactment history is both common law and statutory. The difference in scope of, and the interplay between, the relevant statutory provisions and the common law should be recognised.

The development of the common law attending the interpretation of statutes in the last 20 to 30 years has seen the passing of the so-called 'literal approach'. Under this approach, the language of the statute (both as a whole and in the respective provision) was examined first. If the ordinary and natural meaning was clear and lacked ambiguity, that meaning was obeyed and no further enquiry was required. It mattered not that the meaning so ascribed led to inconvenient, impolitic or improbable consequences, unless this inconvenience amounted to absurdity or repugnance or inconsistency with the rest of the statute. There was a degree of uncertainty as to whether the identification of the 'mischief' to which the statute was directed permitted recourse to at least some extrinsic material, in contradistinction to interpreting the statute.[1]

In the place of the literal approach has grown the so-called 'purposive approach'. This grew from understanding the 'mischief' with which the statute or provision was seeking to deal. You will find, however, statements which seem to require the identification of ambiguity before the purpose of the statute or provision becomes relevant. This sometimes led to what might be said to be an extended notion of ambiguity. The modern Australian common law (as distinct from s15AB of the *Acts Interpretation Act 1901* (Cth)) does not require ambiguity to be demonstrated before context is examined. Rather, it demands that context and purpose be examined first as basal considerations. This modern Australian approach to the construction of statutes has been recently stated by the High Court on a number of occasions.[2] In *Network Ten* the matter was summarised as follows by McHugh ACJ, Gummow J and Hayne J at [11]:

In *Newcastle City Council v GIO General Ltd*, McHugh J observed:

> [A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context.

'Working with statutes' conference at the Westin Sydney. Photo: Chris D'Aeth

His Honour went on to refer to what had been said in the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*. There, Brennan CJ, Dawson, Toohey and Gummow JJ said:

> It is well settled that at common law, apart from any reliance upon s15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. … Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.…Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty* Ltd,… if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent….

This notion of context, used in this 'widest' sense, may make relevant a number of bodies of material which can be seen as pre-enactment and enactment history:

(a) the state of the law at the time of the enactment;

(b) through the understanding of the law at the time of the enactment, the mischief to which the enactment was directed;

(c) especially in statutes of some pedigree, the historical development of the enactment;

(d) in areas of law with some pedigree, the historical development of the law;

May I suggest that you use skilled librarians. They exist, and they are usually very helpful.

(e) statutes *in pari materia* (not necessarily only of the polity in question);

(f) in areas of the law where the enactment wholly or partly reflects an international agreement, the history and background to the development of that agreement and how that agreement has been considered by other legal systems; and

(g) the sources reflecting the enactment history of the statute – being the corpus of knowledge relating to its introduction as a Bill, its progress through parliament, including amendments, and its passing by parliament.

As can be seen from the arguments in *Newcastle City Council v GIO*, the scope of the common law is potentially wider than ss15AA and 15AB of the Acts Interpretation Act (and like state provisions), although those provisions stem from the same jurisprudential development. This difference can be seen starkly in *Newcastle City Council v GIO*, especially in the judgment of McHugh J. The argument of the appellant that s15AB permitted reference to extrinsic material was rejected. McHugh J said at 112-113 that s15AB required linguistic ambiguity or obscurity before resort could be had to the extrinsic material. Nevertheless, the common law, in the manner referred to in *CIC Insurance*, permitted resort to the extrinsic material in question, being the Australian Reform Commission (ALRC) report on the *Insurance Contracts Act 1984* (Cth).

Indeed, when one looks at the text of s15AB one sees its direct (and ameliorating) relationship with the 'literal approach' (as recognised by McHugh J in *Newcastle City Council v GIO*). In s15AB(1)(a) the words: 'ordinary meaning conveyed'; in s15AB(1)(b)(i) the words 'ambiguous or obscure'; and in s15AB(1)(b)(ii) the words 'manifestly absurd or … unreasonable'.

The development of this common law approach, wider in important respects than ss15AA and 15AB, is very important. It unifies, as part of the Australian common law, an approach that makes less relevant state and territory statutory differences. It also makes it unnecessary to consider the issue of identifying the relevant statute governing statutory interpretation in the exercise of federal jurisdiction and the operation of s79 of the *Judiciary Act 1903* in the way that section picks up state and territory statutes as surrogate federal laws. That question may remain, however, to the extent that the interpretation statutes are wider than the common law, a proposition which is by no means clear.

Other interpreting questions may arise in the exercise of factual jurisdiction in any state or territory which has human rights legislation which purports to affect the way statutes of that polity are interpreted.

Three comments are appropriate at this point. First, whilst the above common law approach as to purpose and context is mandatory, it will vary from case to case how much work and analysis is involved. Not every case will cause any particularly large amount of work. Secondly, the matters of context and background may not be either determinative or decisive; one is not redrafting the statute, one is attempting to place the words chosen by parliament in their context. Thirdly, a recognition of the importance of what the law is may avoid counsel appearing in matters not even having begun to think about what assistance the court should be given on these questions. For instance I have been a member of a full court before which senior counsel submitted (Scalia J-like) that only the words of the statute should be examined and the historical context of the Act could not, by law, be considered. Senior counsel on the other side dealt with the matter by referring to two nineteenth century English cases of little relevance. The court was left either to construe the statute with that assistance (and so risk misunderstanding it) or to do the work itself. The court's responsibility in interpreting an Act of parliament goes beyond choosing between the competing contentions of the parties. It has a responsibility to decide upon the interpretation it considers to be correct: *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529, 547-48. The professional judgments about these matters are not straightforward; but they should be thought about, and not merely as an afterthought. It should be a process at the beginning of your consideration of any serious piece of statutory interpretation. It is rare that an inordinate amount of work needs to be done. If it does, I would suggest that your responsibility to the court and the public requires a decent fist to be made of it, and not necessarily at one client's expense. This is part of your goodwill and is an aspect of the underpinning of your status as a learned profession.

(a) – (d) The state of the law at the time of enactment and in some cases its historical development

The subject matter of the provision in question will assist you to understand the extent of the relevant universe of discourse. Once you have identified that, you need to find sources to assist you. May I suggest that you use skilled librarians. They exist, and they are usually very helpful. Find the contemporaneous texts of quality, the nearest *Halsbury*, any report of a law reform commission or equivalent body, the leading appellate case (including the argument of counsel), any papers at seminars of recognised professional organisations. Often the explanatory memorandum, parliamentary debate or professional discussion will help identify the relevant legal framework to which the provision was directed.

Unfortunately, and this will become a major problem as years go by, the loose-leaf services which the commercial publishers

insist on forcing on the profession disguise rather than elucidate in this area. Because of the constant replacement of material in the search for utter contemporaneity in what otherwise should be textbooks, one is deprived of understanding the state of the law at a number of different times in the past, as one can by, say, referring to past editions of major texts. What you can do is buy and keep annual legislative compilations of statutes in your field of expertise. These will provide an invaluable and ready annual resource if kept.

The law at any given point cannot be divorced from how it reached that point. The deficiency in the law, to which the statute was directed, may be best understood by recognising how the law came to grow to that point. For instance, that growth may reflect an outdated social value which, though the value itself may have fallen from currency, has given rise to the independent legal rule that has lived on through precedent. The recognition of that historical growth, of the death of the informing social value and of the need for statutory change may give added perspective and illumination to the mere mechanical deficiencies of the law prior to enactment.

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This need for an understanding of the past is likely to arise most clearly in statutes with a clear pedigree. The *Bankruptcy Act 1966*, the *Corporations Act 2001*, and the *Patents Act 1990* are examples of legislation that has grown over many years. Of course, the latter years' development is often the most relevant, but an understanding of the major legislative steps and the historical development may be vital in illuminating the context of the posited recent provision.

Even where there is no long standing statutory pedigree, an understanding of the depth of legal context may be essential. For instance, one cannot begin to construe workably and reliably the *Insurance Contracts Act 1984* or the *Admiralty Act 1988* without reading the erudite and well written reports of the ALRC that preceded each. Similarly, a problem under the *Evidence Act 1995* should not be essayed without careful recourse to the ALRC discussion paper and report.

Let me give you an example of a statute with a pedigree and the relevance of context and historical development. The Bankruptcy Act 1966 is the lineal descendant of legislation commencing in 1825 in England. Its development can be traced in learned texts, Halsbury and reports of enquiries and law reform commissions with the expenditure of not too much time. (Done once, the location of the sources should be kept to avoid future duplication.) In one case, the relationship between the operation of the Bankruptcy Act and the fundamental common law privilege against self-incrimination arose. The issue was whether by implication and not express words, the particular provision in question (the obligation of the bankrupt under s77(1)(a) to deliver all his or her documents to the trustee) overrode the privilege. Integral to the consideration of this question was understanding how the Bankruptcy Act had evolved and how the issue in question, and cognate issues, had been dealt with in England and Australia in the past. That assisted in understanding the lack of relevant importance of an absence of express words dealing with the topic: see *Griffin v Pantzer* (2004) 207 ALR 169, [80]-[186] and see esp. [126], [148], [174], [175] to [181].

(e) statutes *in pari materia*

Similarity of expression is assumed in similar statutes, whether in the same polity or, especially in a federation, in another polity dealing with similar subject matter in a similar social context e.g. the phrase 'mining operation' was construed in the *Income Tax Assessment Act 1936* (Cth) having regard to like expressions in state mining Acts. What is a similar Act may be a question of judgment. A number of Acts may comprise a scheme, e.g. Acts dealing with conveyancing, real property and trustees.[3]

(f) statutes with an international background

Some statutes have provisions reflecting the language of international agreements. Some adopt international agreements into domestic or municipal law. In such cases it may be necessary to understand the extent or substance of the international agreement as an antecedent step to construing the municipal statute.

There is an international treaty on the interpretation of international treaties: The Vienna Convention on the Law of Treaties 1969. It is easily obtained from the Internet. You should print it off, bind it and keep it next to your copy of the Acts Interpretation Act. Articles 31 and 32 are important. A reading of Articles 31 and 32 will reveal a striking similarity to modern common law principles referred to above and s15AB of the Acts Interpretation Act. Indeed, with the possible exception of the use in interpretation of later treaties or later practice (see Art 31(3)), the similarity between the modern approach to the interpretation of domestic statutes and the correct approach to the interpretation of international treaties can be seen. Although, there is perhaps a parallel municipal rule in the use of later statutes in cases such as *Grain Elevators Board v Dunmunkle* (1946) 73 CLR 70, as to which see generally Pearce and Geddes (5th Edn) pp 74-6. (It should be noted, however, that the High Court views this technique of assuming parliament legislates in the knowledge of particular cases as artificial and has said generally weight should not be

given to it. See the comments of McHugh J in *Commissioner of Taxation v ERA* [2004] HCATrans 509 (30 November 2004)).

The body of authority dealing with the interpretation of international agreements can be expressed as follows: Subject to any contrary intention revealed by the domestic statute making an international instrument relevant, the ascertainment of the meaning of, and obligations within, an international instrument is to be ascertained by giving primacy to the text of the international instrument, but also by considering together in a holistic way the context, objects and purposes of the instrument.[4] The manner of interpreting the international instrument is one which is said to be more liberal than that ordinarily adopted by a court construing exclusively domestic legislation. That proposition, to a degree, may rest on a perception of the guiding techniques for interpreting domestic legislation to be the literal approach. Nevertheless, the interpretation of international instruments is to be undertaken in a manner unconstrained by technical local rules or precedent, but on broad principles of general acceptation.[5] Most importantly, this approach recognises the use of language in a broader, more liberal framework to embody compromises of people and governments of different cultures and legal systems. This last point and the reasons for a more liberal approach were described by Lord Diplock in *Fothergill* at 281-2, as follows:

> The language of that convention that has been adopted at the international conference to express the common intention of the majority of the states represented there is meant to be understood in the same sense by the courts of all those states which ratify or accede to the convention. Their national styles of legislative draftsmanship will vary considerably as between one another. So will the approach of their judiciaries to the interpretation of written laws and to the extent to which recourse may be had to *travaux préparatoires*, doctrine and jurisprudence as extraneous aids to the interpretation of the legislative text.
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> The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in James *Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd*. [1978] A.C. 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.'

The need for a broad or liberal construction is seen in the matters which can be taken into account under Articles 31 and 32 of the Vienna Convention in accordance with which Australian courts interpret treaties: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265; *Commonwealth v Tasmania* (1983) 158 CLR 1, 93, 177; and *Applicant A* at 251-2, 255 and 277. The Vienna Convention is an authoritative statement of customary international law: *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595, 622. The principles enshrined in the Vienna Convention can be seen to be the 'broad principles of general acceptation' referred to earlier.[6]

The real difference between the modern principles governing the interpretation of statutes and those governing the interpretation of international instruments may be seen to arise from a recognition of the subject of the task. An international treaty will generally be the product of negotiation and agreement; and its words will be chosen sometimes to paper over differences and to avoid specificity. The task of interpretation, therefore, calls for a broad and flexible approach with a clear, and sometimes detailed, knowledge of the competing views compromised.

The main type of extrinsic material for international agreements is what is called preparatory work or *travaux préparatoires*.

International agreements are usually the culmination of meetings, discussions, drafting and sometimes the contribution of professional bodies. The term *travaux préparatoires* covers material which records such matters as the proceedings of a conference, records of discussion, drafting at the conference and committees reports, including drafting committee reports. In *Fothergill v Monarch Airlines* Lord Scarman said at 294-95:

> Working papers of delegates to the conference, or memoranda submitted by delegates for consideration by the conference, though relevant, will seldom be helpful; but an agreed conference minute of the understanding on the basis of which the draft of an article of the convention was accepted may well be of great value.

Recourse to the *travaux* is limited to the circumstances identified in Art 32, as secondary material. However, though in Art 31 context is arguably exhaustively defined (see the word 'comprise' in Art 31(2)), there is also the 'object and purpose' of the treaty (Art 31(1)) to be considered. An understanding of the circumstances leading to the conclusion of a treaty in question is not gained merely by reading, literally, the text of either the convention or what was said and written by delegates at the various meetings and conferences leading up to the making of the instrument. The relevant legal, practical and jurisprudential context and history may need to be understood in order that the compromises inherent in these international agreements be appreciated. This can be seen as very close to the proper approach in relation to the appreciation of context in respect of domestic statutes under municipal law: *Newcastle City Council v GIO; CIC Insurance and Network Ten Pty Limited*.

Care, however, must be taken not to accept too literally or overwhelmingly any particular words by one delegate (however eminent he or she may be or have been) without understanding the context of such words in the preparatory work and in the circumstances of the conclusion of the relevant agreement: cf *Applicant A* at 231 and 254-56; and *Fothergill v Monarch Airlines* at 276, 278 and 294. In the end, to the extent there were compromises, it was the text of the agreement that embodied such compromises. There is a related danger in forgetting the task of interpreting the words chosen (in the statute or convention) in their context and slipping into the irrelevant task of interpreting the extrinsic material itself. An interesting illustration of the danger of taking too literally the words of the *travaux* concerns the negotiation of the amendments to Art IV Rule 5 of the Hague Rules in 1967 and 1968 that led to the Hague-Visby Rules dealing with the carriage of goods by sea under bills of lading and other similar documents of title. The package limitation in connection with the use of containers was an important subject of negotiation. One American delegate, who thought that he and like-minded negotiators from 'cargo interest countries' had got the better of the English delegation (then still a 'shipowning country') in the drafting committee sessions, was angry, distraught, but impotent, as he stood at the back of the conference hall in the final plenary session and heard the chairman of the drafting committee describe the 'intent' of the words that had been agreed on (which were a tad ambiguous). The chairman was Sir Kenneth Diplock (then a lord justice of appeal and head of the English delegation) and the 'intent' expressed by him in one small, but important, respect was, in the view of the American delegate, the very opposite of what had been agreed on the night before in the final drafting committee meeting. So, the English gave in on the words decided on, but wrote the *travaux*. (See DeGurse (1970-1971) 2 Jo Mar Law and Commerce 131)

To the extent that there exist persuasive and considered authorities in jurisdictions administering cognate laws based on internationally adopted conventions, it is appropriate to give weight to such decisions in order to strive for international uniformity.[7] For similar reasons, the work of foreign jurists (la doctrine) may also be considered: *Fothergill v Monarch Airlines*.

Some cases in England appear to stand for the proposition that unless the *travaux préparatoires* clearly point to a definitive legislative intention they do not assist.[8] Professor Tetley has described this as a cautious approach: see (2004) 10 Jo of International Maritime Law 30. It may be no less correct for that. Nevertheless, some care needs to be taken in its application. It may perhaps best be seen as a sensible judicial control on diverse material which is not always freely available or easy to divine. However, with the utmost respect, it is possible that putting the matter that way may mislead. It is no doubt true that *travaux préparatoires* (or, indeed, any extrinsic material) should not be viewed as an open cut mine from which to extract helpful tonnage of verbiage. But the *travaux* can be an invaluable source of understanding the bargaining and the compromises which are incorporated in, often general, language. The *travaux* may not point directly to the answer; but they may clearly reveal the ebb and flow of debate which was compromised by the words in question. As such, they may not themselves point to a definite intention, but they may give depth to any understanding of the foundation of any compromise involved in the words of the convention, and in that way help confirm or determine the meaning for Art 32.

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Where do you find *travaux préparatoires*? The Attorney-General's Department can assist. They are often collected and published by international professional societies. Scholars sometimes prepare them. Your librarian can help. If they are not publicly available, they may not be seen as part of the public corpus of material legitimately available for use.

(g) extrinsic material and enactment history

Section 15AB(2) in terms incorporates material which may be seen to be both pre-enactment as well as enactment history.

Enactment history is not, however, only accessible through s15AB(2). It can be viewed, as Bennion says (4th Edn p 520), as one aspect of the 'informed interpretation rule' (reflected in Australia by *CIC Insurance*) being the 'surrounding corpus of public knowledge relative to [the Act's] introduction into parliament as a Bill, subsequent progress through, and ultimate passing by, parliament' (ibid).

In one sense, one of the most obvious and often helpful pieces of assistance is the second reading speech: s15AB(2)(f). This may demonstrate, often with some clarity, the aim of the promoter. But it is not to be forgotten that the promoter is also likely to be a senior member of the executive. On occasions, the courts have refused to take as determinative the words of the minister in setting out the meaning or intent of the provision. In speaking of controversial proposed amendments to the *Migration Act 1958* (Cth) to introduce a privative clause based on earlier High Court authority (*R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 and *R v Murray; Exparte Proctor* (1949) 77 CLR 387), the relevant minister stated, with some clarity, the government's aim in using words, in effect as a code that had been used in earlier High Court cases, to bring about a result (so stated) which conformed with one

interpretation of what the court had earlier done. The High Court (in *Plaintiff S 157 v Commonwealth* (2004) 211 CLR 476) did not feel constrained by this, and read the Act as a whole to reach a different conclusion as to the words chosen by parliament in the whole context of the Act. The constitutional considerations of an over-reliance on what the executive says should be understood by the proposed words of parliament can be seen. This is so even if (and perhaps especially so) another Act of parliament purports to require that course.

This case raises, importantly, the principle of legality discussed by the chief justice in his paper.[9] In *Plaintiff S 157* Gleeson CJ (at [37]) refused to accept the coded method of parliamentary language and meaning. If, as appeared to be the case, the government's aim in the provision was to have parliament authorise the executive to exercise powers in a way which could be unreasonable, capricious and arbitrary (as long as it was bona fide and apparently bearing a relationship with the posited power) or to remove the common law right of procedural fairness, then that needed to be stated explicitly. Parliament needed to confront, within the democratic process, in an explicit way by the use of the *words of the parliament* not the words of the executive, any proposed change to important aspects of fundamental legal rights. This mechanism may be seen to deal with the notion of limiting or constraining parliament's legislative power by the operation of the democratic process itself, rather than by seeking to identify, through a *priori* reasoning, a stated limit to parliament's power in the absence of a concrete posited piece of legislation. In the reasons of Gaudron, Gummow, Kirby and Hayne JJ in *Plaintiff S 157* a question was raised whether any statute so explicitly framed would be a law of the parliament: see [102]-[104]. It is unnecessary to discuss these enormously important questions, save to say that integral to each approach is the process of statutory interpretation and the underlying principle of legality discussed by the chief justice in his paper.

In a more recent case *(NAGV v Minister* [2005] HCA 6) the High Court, in a close examination of the textual amendments to the Migration Act, solved an interpretation problem that had divided the Federal Court, where the debate had proceeded at a more general level of analysis. The High Court divined the meaning of the relevant provision after a close analysis of its amendment history.

The effect of statutes always speaking

Time passes and statues remain, amended or unamended. Unless an Act is intended to speak in a fixed and unchanging way, the usual presumption is that an Act is 'always speaking'. This may mean, in any given case, with changing circumstances and the passage of time, that the need to understand the original context or mischief becomes less critical or more attenuated. This is not to change its meaning but to recognise that parliament intended the Act to be applied in the future so as to give effect to its original intention. One approach to construction which is both accommodated and encouraged by this approach is to perceive legislative acceptance of judicial exegesis of a statute. If courts have ascribed a meaning to a statute, parliament may be seen to have adopted or approved of that interpretation in the way it has later amended or not amended the Act.

As to statutes always speaking see Bennion (4th Edn) pp 762 ff and Pearce and Geddes (5th) pp 93-97, 168-72.

1 Pearce, DC & Geddes, RS, *Statutory interpretation in Australia*, (5th ed) (Sydney, Butterworths, 2001) pp. 53-5 and *Wacando v Commonwealth* (1981) 148 CLR 1.

2 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 187 CLR 384, 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1. (It is a development reflected in similar terms in the construction of contracts: *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35 at [22].)

3 Pearce, DC & Geddes, RS, *Statutory interpretation in Australia*, (5th ed), pp.77-80.

4 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230 (per Brennan CJ, agreeing with McHugh J), 240 (per Dawson J), 251-56 (per McHugh J), 277 (per Gummow J, also agreeing with McHugh J); and *Morrison v Peacock* (2002) 210 CLR 274 at [16] (per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

5 *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, 350; *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152; *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281-2, 285, 293; *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628, 656 at [78]; *Shipping Corporation of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142, 159; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 412-3; *Applicant* A at 255; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* (1998) 196 CLR 161 [19]-[24]; and *Morrison v Peacock* at [16].

6 see *CMA CGM S.A. v Classica Shipping Co Ltd* [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460 at [10]. See generally *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co* SA [2004] FCAFC 202; [2004] 2 Lloyd's Rep 537 [139] to [148].

7 *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The' Muncaster Castle')* [1961] AC 807, 840 and 869; *Brown Boveri (Aust) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448, 453, 468; and *Effort Shipping Co Ltd v Linden Management* SA [1998] AC 605, 615.

8 See Lord Wilberforce in *Fothergill* and Lord Gill in *Landcatch Ltd v IOPCF* [1998] 2 Lloyd's Rep 552, 566-7 (C of S); Lord Steyn in *Effort Shipping Co Ltd v Linden Management SA* at 623 and in *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Company Jordan Inc* [2005] UKHL 49.

9 'The principle of legality and the clear statement of principle', Opening address by the Hon JJ Spigelman AC, Chief Justice of New South Wales, New South Wales Bar Association's 'Working with statutes' conference, Sydney, 18 March 2005. A copy of the speech may be obtained from the Supreme Court's web site at www.lawlink.nsw.gov.au/sc