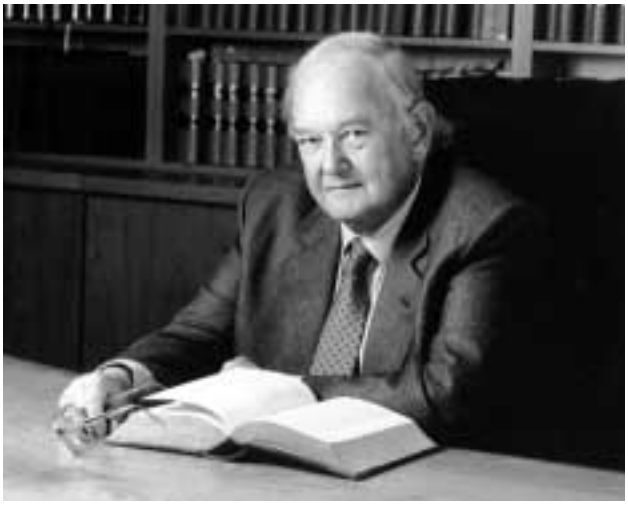
The 2005 Sir Maurice Byers Lecture

Statutes

Delivered by the Hon Justice W M C Gummow AC in the Banco Court, Queens Square, Sydney on 17 March 2005.[#]



Sir Maurice Byers

What of Sir Maurice?

Sir Maurice, whose service to the law and public life we mark tonight, served as solicitor-general of the Commonwealth between 1973 and 1983. In that time, there were administrations headed by three prime ministers, Messrs Whitlam, Fraser and Hawke, from different sides of politics. Byers QC advised them all, with the objectivity of a leading counsel. This independence (and thus added value) of the office had been an aim of the *Law Officers Act 1964* (Cth).

Sir Maurice Byers, to my observation, was interested in statute law. He spent a good deal of his time as solicitor-general considering existing and proposed legislative measures.

Much of this activity was in preparation of submissions for High Court litigation. The written outline which emerged was always a model of sequential reasoning, designed to point clearly to the desired and apparently inevitable destination. The outline was succinct, with a citation of the minimum compelling authority where it existed. How different from the diffuse position papers which the High Court now receives.

At the heart of much of this litigation was the construction of a law of the Commonwealth as the first step to supporting validity, or of a law of a state as a first step in showing its invalidity, whether for lack of state legislative power or for inconsistency by operation of s109 of the Constitution.

The necessity to connect each law of the Commonwealth sufficiently to at least one head of federal legislative power required a particular skill in drafting. Sir Maurice admired what was then the preferred methods exemplified in the work of Mr Ewens QC during the 1940s, a time of great legislative initiative by the Commonwealth.[1] Mr Ewens had become parliamentary draftsman in 1948. Sir Maurice was struck by what he identified as the crab-wise movement apparent in the structure of a Ewens Bill, as the Commonwealth edged sideways into legislative power.

One example of such a technique will suffice. The power to legislate with respect to trade and commerce with other countries supports a law prohibiting the export of a mineral, with a provision for relaxation of the prohibition by the executive government if there be satisfied criteria (such as the environmental effects of the extraction processes used) which have little or no apparent relevance to the topic of international trade and which themselves are not a head of federal legislative power. The example is taken from *Murphyores Incorporated Pty Ltd v The Commonwealth*,[2] in which Sir Maurice led (successfully) for the Commonwealth.

Policy into statute

Judges and counsel tend insufficiently to appreciate the great difficulties encountered in the reduction of government policy into legislative form.

Several matters should be borne in mind here. One is the relatively recent emergence of the offices of parliamentary counsel. It all began in the United Kingdom as late as 1869, but even then it was Chalmers, a practising barrister, who drafted the *Sale of Goods Act 1893* (UK).[3]

Thirty years ago there were still to be found judges whose first and controlling response to remedial legislation was to set out uncovering difficulties in expression which frustrated the otherwise evident scope and purpose of remedial legislation... All that has changed.

The New Zealand chief parliamentary counsel, Mr Tanner QC, well observed that the drafting of legislation is quite unlike the writing of judgments. He remarked that, whereas legislation has a single objective, the changing of the law, the process of developing the common law involves moving from one precedent to the next and 'a reader sees into the mind of the Judge working through the legal issues before the court'.[4] These thoughts are encapsulated in the observation by Professors Eskridge, Frickey and Garrett[5] that, unlike judge-made law, statute law 'resides in canonical, not discursive form'.

Much is now said in judgments about 'purposive' construction. Certainly there has been a marked change apparent in judicial approaches to statutory construction. Thirty years ago there were still to be found judges whose first and controlling response to remedial legislation was to set out uncovering difficulties in expression which frustrated the otherwise evident scope and purpose of remedial legislation. These judges were encouraged in their efforts by the then understood restraints upon examination of supporting legislative materials. All that has changed, assisted by changes made in the various interpretation statutes.

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But 'purposive' construction does not release the draftsman from the requirements of precision of thought and expression. The editor of *Craies on Legislation*[6] is parliamentary counsel in the United Kingdom. Of reliance on purposive construction as an excuse for imprecision, Mr Greenberg writes:

> First, the main cause of imprecision in drafting is not that the draftsman cannot find or does not wish to trouble to find a precise way of expressing the concept in his mind, but rather that the concept in his mind is not sufficiently precise to admit of clear expression. That principal task in drafting is to refine and analyse the policy to the state of clarity in which the words for its expression suggest themselves naturally. When the draftsman struggles to find the words or structure to express a thought, it is generally time to abandon the struggle and return to analysis or refinement of the thought. All that being so, it is not sufficient to draft imprecisely and hope that the courts will supply the draftsman's deficiencies by adopting a purposive construction... [7]

Secondly, prediction of the likely results of a purposive construction is not a precise science. It will rarely be appropriate for the executive to substitute the certainty provided by a clear and precise provision for the hope that the courts' understanding of the general principles and purpose of the legislative scheme will correspond to the understanding of the executive.'

Further, 'purposivism' cannot provide determinative answers where different purposes, perhaps cross-purposes, are apparent. Professors Eskridge, Frickey and Garrett add:

> Even if there were agreement as to which purpose should be attributed to a statute, the analysis in the hard cases might still be indeterminate. Often an attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, because its application will depend heavily upon context and the interpreter's perspective. [8]

Finding the statute

In his judgment in *Watson v Lee*[9], Barwick CJ stressed the importance of the principle that the citizen should not be bound by a law the terms of which the citizen has no means of knowing. Thereafter, when dealing with the provisions for prosecution by the Commonwealth director of public prosecutions of offences against what, at that stage, was the national scheme of corporations laws, four members of the High Court said in *Byrnes v The Queen*:

> Bentham viewed with disfavour 'the dark Chaos of Common Law', favouring the prescription of rules of conduct by statute.[10] This, Bentham, said, would 'mark out the line of the subject's conduct by visible directions, instead of turning him loose into the wilds of perpetual conjecture'[11]. By that criterion, the legislative scheme, the subject of these appeals, is a failure. It does not go so far as to bind the citizen by a law, the terms of which the citizen has no means of knowing. That, as Barwick CJ put it in *Watson v Lee*,[12] 'would be a mark of tyranny'. However, the legislative scheme does require much cogitation to answer what, for the citizen, should be simple but important questions respecting the operation of criminal law and procedure. [13]

The court then had to set about revealing what it called the threads leading through the complexity of federal and state (there, South Australian), laws.[14]

More recently, in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*,[15] four members of the High Court, after some puzzling over the reprint of the *Migration Act 1958* (Cth) which appeared to be the relevant one, discovered that an amendment had miscarried by reason of the misidentification of the provision to be amended. Another instance of this appears from Note 2 to Reprint No 4 of the *Civil Aviation Act 1988* (Cth).

There has been an attitude, which daily life in the courts indicates still strongly persists, that statute law is not only less interesting but also of an intrinsically inferior importance to 'purely' judge-made law... There are few cases that come into the High Court which turn upon, say, tort or contract untouched by statute.

But at least in these instances a close enough examination of the reprint disclosed what had gone wrong in the law-making processes of the Commonwealth, if not why this had occurred.

It now appears (from recent correspondence with the Office of Legislative Drafting within the Attorney-General's Department, which was initiated by Professor Lindell and others, and is reported in the *Australian Law Journal*[16]) that, while statutes such as the *Superannuation Act 1976* (Cth), the *Patents Act 1990* (Cth), and the *Corporations Act 2001* (Cth), among others, authorise amendments and modifications thereof by subordinate legislation, there is no practice of alerting the reader of reprints, whether by note or other means, to changes so made. Something, surely, needs to be done here.

Second class law?

In his consideration of the process of statute-making in New Zealand, the chief parliamentary counsel remarks:

> It is inherently more interesting to read a judgment of a court than a statute – or, at least, I find it so. Statutes are limited in the amount of context that they can contain. They represent the outcome of policy decisions. The reasons or policy considerations to which the statute gives effect are seldom explained in the statute. That is in part because, of themselves, they do not create rights or impose legal obligations. A judgment, on the other hand, can discuss the policy underlying the court's decision. While it may be only the decision or legal principle that matters in the end, a judgment contains both elements. [17]

There has been an attitude, which daily life in the courts indicates still strongly persists, that statute law is not only less interesting but also of an intrinsically inferior importance to 'purely' judge-made law. By the latter is meant that case law which is not concerned with statutory construction and which is concerned with legal rights and duties derived and presently applied solely by reference to case law. That, in any event, is a diminishing area. There are few cases that come into the High Court which turn upon, say, tort or contract untouched by statute.

But the old attitude persists. Perhaps its most striking manifestation is in appeals on points of construction of the Criminal Codes in jurisdictions which continue to apply or have adopted Sir Samuel Griffith's Code. Almost invariably counsel take the High Court to the common law on general questions of criminal responsibility, with which the Codes deal specifically and apparently exhaustively.

There is an irony in this. Griffith framed his Code at the end of the nineteenth century. The general questions of criminal responsibility with which he dealt thereafter received considerable attention in common law jurisdictions. Codes tend to freeze further development of principle. In 1935, it was established in *Woolmington v The Director of Public Prosecutions*[18] that, contrary to previous understandings of the common law, on a trial for murder the prosecution bears the burden of proving that the death resulted from an act that was conscious and voluntary (or, in the terms of the Code, 'willed'). Some agility then was required for the High Court to read the Code in a consistent fashion with *Woolmington*. [19]

An attitude to statute law as second class law begins in the law schools. It has a pedigree. Let us take the case of Sir Frederick Pollock, for so long, among other things, editor of the *Law Quarterly Review*. Pollock's recent biographer writes:

> His perspective on legislation is that of the classic Burkean Whig: although 'forced to acknowledge the necessity of legislation, for him the common law – that cautious, organic, accretion of slow-won judicial wisdom – remains the true bedrock of English law.'[20] The common law is a good thing because it nourishes principles where legislation is more likely to stifle them. It is also a good thing because, unlike legislation, it is more likely to promote and protect rather than impede and neglect the liberties of citizens. ... Too often, in short, legislators impose duties on individuals and groups – landlords, mortgagees, whomever – without realizing that the initiative may diminish the liberty of those whose liberty is supposed to be protected. '[M]ost of the grievances of particular individuals or groups can be removed only by measures which create new grievances elsewhere.'[21] The words are Hayek's, but they might easily have been Pollock's. [22]

In 1911, on one of his visits to the United States, Pollock told an audience at Columbia University that they were there 'to do homage to our lady the common law';[23] the secretary of the Editorial Board of the *Columbia Law Review* dubbed Pollock's lectures 'the love story of the common law'.[24]

Sir Maurice would have none of this. What was there to revere in a system which devised the doctrines of common employment and of contributory negligence as absolute defences, allowed no remedy in cases of wrongful death, denied appearance of counsel in many criminal trials, subjected the property rights and contractual capacity of married women to those of their husbands, and in many ways (and unlike equity) preferred form to substance? It was statute which had been needed to place the law in these and other respects upon an acceptable basis.

Writing his addition notes to the second edition of Sedgwick's treatise,[25] published in 1874, Pomeroy (it must be said, an equity lawyer of note) wrote:

> It is a demonstrable proposition, that there is hardly a rule or doctrine of positive practical jurisprudence in England or in the United States to-day, which is not the result, in part at least, of legislation; hardly a rule or doctrine of the original common law which has not been abolished, or changed, or modified by statute. Furthermore, it is conceded that the ancient conception as to the perfection of the common law was absurdly untrue. The great mass of its practical rules as to property, as to persons, as to obligations, and as to remedies, were arbitrary, unjust, cumbersome, barbarous. For the last generation the English Parliament and our state legislatures have been busy in abolishing these common-law rules, and in substituting new ones by means of statutes. That all this remedial work, all this benign and necessary legislative endeavor to create a jurisprudence scientific in form and adapted to the wants of the age, should be hampered, and sometimes thwarted by a parrot-like repetition and unreflecting application of the old judicial maxim that statutes in derogation of the common law are to be strictly construed is, to say the least, absurd. [26]

Moreover, the creation in the United States and Australia of federal bodies politic, with legislatures of enumerated heads of power, encouraged (sooner in the history of Australia than in that of the United States) the notion that in these new societies, fed by large-scale immigration, improvement was to be brought about by legislation to change not replicate the *status quo*.

In 1876, the Supreme Court of the United States declared in *Munn v Illinois*[27] that: 'the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.'

How did this sit with the constitutional guarantees respecting the taking or acquisition of private property for public use or purposes? The answer given in *Munn v Illinois*[28] was that '[a] person has no property, no vested interest, in any rule of the common law.' The distinction was drawn by the Supreme Court as follows:

> Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. [29]

A modern Australian example is the legislative declaration in s6 of the *Diplomatic Privileges and Immunities Act 1967* (Cth) that the statute operates to the exclusion of any rule of the common law that deals with a matter dealt with by the statute.

In this fashion there developed a view of statute law which reflected the importance of federal constitutionalism. But how is it that in *Coco v The Queen*,[30] and numerous other cases, the common law is invoked as part of reasoning that plain words are required for a construction of a statute which abrogates or diminishes what the courts see as basic immunities and fundamental rights of the citizen? The answer was given by Pomeroy in a further passage to that quoted above from his additional notes to Sedgwick. Pomeroy wrote:

> With all the gross imperfection of the common law, it did contain certain grand principles, and these principles had been worked out into many practical rules both of primary right and of procedure, which protected personal rights, – rights of property, of life, of liberty, of body and limb, – against the encroachments both of government and of private individuals. This was the great glory of the common law. Any statutes which should take away, change, or diminish these rights should be strictly construed. To this extent the rule is in the highest degree valuable, not because such statutes 'are in derogation of the common law,' but because they oppose the overwhelming power of the government to the feeble power of resistance of the individual, and it is the duty of courts under such circumstances to guard the individual as far as is just and legal, or, in other words, to preserve the individual from having his personal rights taken away by any means that are not strictly legal. [31]

Federal constitutionalism

Federalism, with the division of legislative competence, denied the omnipotence of any one legislature at any one time. This also was a brake on too adventurous efforts at legislative improvement. Sir Maurice as solicitor-general was, of course, closely involved in the defence (in very large measure successful) of the legislation of the Whitlam government. Decisions tending to advance federal legislative power, at the time seen as radical, are more or less today taken by federal governments of all complexions as matters of course.

That brings me to the focus of the balance of this paper. My concern is not with the large questions of federal legislative power. Rather, consideration is given to the many ways in which the presence of a written federal constitution influences the form and interpretation of statute law.

I do so with reference to several United States constitutional doctrines and their Australian analogues.

Extrinsic materials

The first matter concerns the use of extrinsic materials. Speaking of the United States, Professor Eskridge writes:[32]

> During the last one hundred years judicial invocation of extrinsic legislative sources to interpret statutes has bloomed like azaleas in April. For most of the nineteenth century, American courts focused on statutory text, policy, and canons of interpetation. But by the turn of the century a number of American judges and commentators had come to believe that the proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing it. Reliance on such materials grew more widespread in the twentieth century and was well entrenched in the federal and some state courts by World War II. By 1983 Judge Patricia Wald could observe that '[n]o occasion for statutory construction now exists when the [Supreme] Court will *not* look at the legislative history.'[33] (original emphasis)

Since that high-water mark, there has been something of a retreat. The exteme manifestation of this is the attitude of Justice Scalia. His Honour emphasises that the only constitutionally mandated role of the federal courts is to interpret the language used by the legislature, something that does not involve attempted reconstructions of the intentions of legislators. Justice Scalia stresses that par (2) of Art 1 §7 of the United States Constitution provides for the presentation to the president of Bills which have passed the House of Representatives and the Senate and specifies procedures whose operation depends upon the response of the president of their presentation for his signature. The paragraph uses such expressions as 'it shall become a law' and 'shall be a law'.

Section 58 of the Australian Constitution likewise provides for the presentation of 'a proposed law', after its passage through both houses of parliament, for the giving by the governor-general of the queen's assent. No one has, I should think, suggested that this forecloses any particular method of interpetation which may be applied by federal courts and courts exercising federal jurisdiction in dealing with matters arising under laws so made (ss76(ii), 77(i), 77(iii)). However, the conclusion drawn by Justice Scalia from the constitutional text is that legislative history is necessarily irrelevant to the interpretation of the laws made by Congress.

Justice Scalia expresses his position in *Green v Bock Laundry Machine Co:*

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated – a compatibility which, by the benign fiction, we assume Congress always has in mind. [34]

However, in Australia, since amendments made in 1984 to the *Acts Interpretation Act 1901* (Cth), detailed provision is made for the use of extrinsic materials in the interpretation of federal legislation to confirm that the meaning of a provision is the ordinary meaning conveyed by the text and to determine the meaning of ambiguous or obscure provisions (s15AB). It is

assumed that such a provision is a law with respect to matters incidental to the execution of the legislative powers vested in the parliament and thus supported by s51(xxxix) of the Constitution.

In the *Native Title Act Case*[35], there does appear some affinity with Justice Scalia's view of the effect of the separation of powers upon the interpretative role of the courts. Section 12 of the *Native Title Act 1993* (Cth) stated:

> 'Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.'

The High Court held that provision invalid. The kernel of its reasoning was as follows:

> If the 'common law' in s12 is understood to be the body of law which the courts create and define, s12 attempts to confer legislative power upon the judicial branch of government. That attempt must fail either because the parliament cannot exercise the powers of the courts or because the courts cannot exercise the powers of the parliament. [36]

Chevron

The second matter concerns the *Chevron* doctrine. In Australia, we tend to look on statutes as commands directed to citizens whereas much modern regulatory legislation also is directed to those who, over time, will be charged with the administration of the regulatory scheme. In so doing, administrators may develop formal (for example, by taxation 'rulings') or informal interpretations of the relevant law. There is then what Professor Eskridge has called an issue of 'institutional competence'.[37]

In the era of the New Deal, it appeared that agencies charged with administration of the new legal order and endowed with delegated law-making powers should be allowed a wide leeway to pursue dynamic interpretations of their mandate. This thinking later became associated particularly with its apparent acceptance in *Chevron USA Inc v National Resources Defense Council Inc.*[38] Interpretation of provisions conferring discretionary powers may well involve policy making choices, interpretations may have to change as times change, and the agency, here the Environment Protection Agency ('the EPA') with technical expertise and political accountability was best equipped to make such distinctions. Moreover, to 'reasonable' agency determinations, the courts should display 'deference'.

It is inappropriate here to trace the subsequent development of *Chevron* by the United States Supreme Court. But it is fair to say that there may have been a growing appreciation of the strains *Chevron* places upon the constitutional structure. In *Enfield City Corporation v Development Assessment Commission*,[39] the High Court, in a joint judgment of four members, turned its face against the adoption of Chevron reasoning in Australia.[40] The court referred to the caution by Professor Schwartz[41] that misapplication of its statute by an agency may involve jurisdictional error. The court also referred to the writing of Professor Werhan.[42] He made the point that, before *Chevron*, interpretation of ambiguous laws was classed as a matter of law whereas, after *Chevron*, the task was reconceptualised as a 'policy choice';43 the legal was transformed into the political and so interpretative authority was conceded to the agencies.

The High Court also referred to the detailed discussion by Brennan J in *Attorney-General (NSW) v Quin*.[44] Brennan J stressed that *Marbury v Madison*[45] was concerned not just with questions of constitutional validity of legislation but that the 'grand conception' therein included judicial control over administrative interpretation of legislation. The significance of this notion is considered by Mr Keane QC in his paper, 'Judicial power and the limits of judicial control',[46] which merits close study.

In Australia, any 'deference' reflects different considerations to those expressed in *Chevron*, primarily the basic principles of administrative law respecting the exercise of discretionary powers. Particular provision for judicial review of decision-making under Commonwealth enactments, to be made by the Federal Court, was established by the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Distinct provision for 'merits review' is made by the *Administrative Appeals Tribunal Act 1975* (Cth). There is then an 'appeal' to the Federal Court on a question of law.

Indeed, there is a long history in federal law of legislation in specialist areas of revenue law and intellectual property law which provides for an 'appeal' to a court from decisions within the remit of an administrative body or officer such as the registrar of trade marks and the commissioner of taxation. Questions then arise in the court as to the side of the line on which a particular case falls. In *Enfield*, the court concluded that in such cases:

> [t]he weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning. [47]

Conclusions

Lawyers tend to look backwards to a past time when the law, particularly that in the statute book, was simpler. They pine for the uniform companies legislation of 1961, the income tax legislation before flow charts and plain English, and even for the *Copyright Act 1968* (Cth), the *Trade Practices Act 1974* (Cth) and the *Family Law Act 1975* (Cth) in their original, much briefer, form.

The truth is that there is not now, and never has been, a golden age in statute law or in anything else pertaining to the legal system. Certainly Sir Maurice, ever an optimist, did not look backwards in that way.

Sir Maurice was admitted to the New South Wales Bar in 1944. He came to occupy a position of pre-eminence at the Bar. Many barristers were (and are) adept at the exercise of mental agility. For them, that was enough. Sir Maurice had that agility, of

course, but was distinguished by an intellectual curiosity and productive intellectual speculation. These attributes were put to good use in what, rather misleadingly, has been described as his conversational advocacy before the High Court.

Sir Maurice, speaking late in his career, observed that it was only when he began to obtain briefs to appear before the High Court,

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then dominated by Sir Owen Dixon, that he felt that he had reached a level where substantial intellectual debate might take place. Sir Maurice put it in more modest terms but that was what he meant.

But he would have thought it pointless and ridiculous to attempt to locate any 'golden age' of the High Court. How could that be, for example, of the Dixon era with its legacies of *Koop v Bebb*[48] *and Dennis Hotels Pty Ltd v Victoria*?[49] For decades, the one bedevilled the Australian choice of law rules in tort and the other the operation of the critical excise provision in s90 of the Constitution. Relief came respectively only with *John Pfeiffer Pty Ltd v Rogerson*[50] and *Ha v New South Wales*.[51]

So it is with statute law. Legislators react to new situations and old solutions require qualification. What is needed more than ever, and what still is lacking in Australia, is a better understanding of statute law, its purposes and processes of creation, coupled with closer analytical skills in working with the results of those creative processes.

1 See Obituary, Mr J Q Ewens, CMG, CBE, QC, (1992) 66 *Australian Law Journal 870*.

2 (1976) 136 CLR 1.

3 Renton, 'The evolution of modern statute law and its future', in Freeman (ed), *Legislation and the Courts*, (1997), 9.

4 Tanner, 'Confronting the process of statute-making', in Bigwood (ed), *The Statute – Making and Meaning*, (2004), 49 at 72.

5 In their excellent joint work, *Legislation and Statutory Interpretation*, (2000) at 3.

6 8th ed (2004).

7 *Craies on Legislation*, 8th ed (2004) at 304 (footnote omitted).

8 *Legislation and Statutory Interpretation*, (2000) at 222.

9 (1979) 144 CLR 374 at 381.

10 Burns and Hart (eds), *A Comment on the Commentaries and A Fragment of Government*, (1977) at 198.

11 Burns and Hart (eds), A Comment on the *Commentaries and A Fragment of Government*, (1977) at 95. See also Schofield, 'Jeremy Bentham: Legislator of the world', (1998) 51 *Current Legal Problems* 115 at 122.

12 (1979) 144 CLR 374 at 379.

13 (1999) 199 CLR 1 at 13 [11].

14 (1999) 199 CLR 1 at 13 [12].

15 (2004) 79 ALJR 94 at 101-102 [38]-[40]; 210 ALR 190 at 200.

16 (2004) 78 *Australian Law Journal* 221-228.

17 Tanner, 'Confronting the process of statute-making', in Bigwood (ed), *The Statute – Making and Meaning*, (2004), 49 at 72.

18 [1935] AC 462.

19 See *Murray v The Queen* (2002) 211 CLR 193 at 206-207 [39]-[40].

20 Munday, 'The common lawyer's philosophy of legislation', (1983) 14 *Rechtstheorie* 191 at 193. See also Burrow, A Liberal Descent: *Victorian Historians and the English Past*, (1981) at 138; also at 105 (on 'the Burkean Whig's conception' of the common law as 'the slow, anonymous sedimentation of immemorial custom').

21 *Hayek, Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, (1982) at i, 144.

22 Duxbury, *Frederick Pollock and the English Juristic Tradition*, (2004) at 173.

23 Pollock, 'The genius of the common law', (1912) 12 *Columbia Law Review* 190 at 191.

24 Black, 'From the archives (such as they are)', (2000) 100 *Columbia Law Review* 1 at 15. See generally, Cosgrove, *Our Lady The Common Law: An Anglo-American Legal Community 1870-1930*, (1987).

25 *A Treatise on the rules which govern the Interpretation and Construction of Statutory and Constitutional Law*.

26 Sedgwick, A *Treatise on the rules which govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed (1874) at 270-271.

27 94 US 113 at 134 (1876).

28 94 US 113 at 134 (1876).

29 94 US 113 at 134 (1876), applied in the *Second Employers' Liability Cases* 223 US 1 at 50 (1912).

30 (1994) 179 CLR 427 at 435-438.

31 A *Treatise on the rules which govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed (1874) at 271.

32 *Dynamic Statutory Interpretation*, (1994) at 207.

33 Wald, 'Some observations on the use of legislative history in the 1981 Supreme Court term', (1983) 68 I*owa Law Review* 195.

34 490 US 504 at 528 (1989).

35 *Western Australia v The Commonwealth* (1995) 183 CLR 373.

36 (1995) 183 CLR 373 at 485.

37 *Dynamic Statutory Interpretation*, (1994) at 161.

38 467 US 867 (1984).

39 (2000) 199 CLR 135.

40 (2000) 199 CLR 135 at 151-155.

41 *Administrative Law*, 3rd ed (1991), §10.36.

42 *'Delegalising administrative law'*, [1996] *University of Illinois Law Journal* 432 at 457.

43 *Chevron USA Inc v* 467 US 837 at 844-845 (1984).

44 (1990) 170 CLR 1 at 35-36.

45 1 Cranch 137 at 177 [5 US 87 at 111] (1803).

46 Published in Cane (ed), *Centenary Essays for the High Court of Australia*, (2004) at 295.

47 (2000) 199 CLR 135 at 154-155 [47].

48 (1951) 84 CLR 629.

49 (1060) 104 CLR 529.

50 (2000) 203 CLR 503.

51 (1997) 189 CLR 465.