Statutory Interpretation and the Use of Overseas Jurisprudence

Stephen Gageler

Controversy over the citation of foreign case law has gripped the United States for most of this century. The legal philosopher, Professor Frederick Shauer, has remarked that a curious feature of that controversy is that it is largely a debate about citation. In a country where legal realism has long been assimilated into mainstream legal culture, those engaged in sophisticated legal argumentation and adjudication had generally tended to relegate citation of authority to little more than a decorative afterthought. They had not generally stopped to dwell on the geographical provenance of a particular authority that might get cited[1].

In Australia, the legacy of legal formalism is still strongly felt. Under the shadow of our quite rigid constitutional structure, those engaged in sophisticated legal argumentation and adjudication for a long time adhered to a home-grown strain of formalism called legalism. Part of the legacy of legalism has been a tendency to take comfort in the citation of authority, from almost any source and for almost any proposition. Examples of that tendency abound.

An amusing, if trivial, illustration is a citation to be found in a decision of the High Court of Australia on an appeal on a question of practice and procedure in 1993. The lower court had described the contents of an affidavit filed in support of an application for an adjournment as "humbug". The conclusion of the lower court that the contents of the affidavit were "humbug" was held not to have been open on the evidence "given the general and judicial understanding of [that] term". The citation was to a passage in a decision of the Supreme Court of Illinois in 1895 which was noted to have been adopted in a decision of the Supreme Court of New York in

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1 Schauer, "Authority and Authorities" (2008) 94 *Virginia Law Review* 1931.

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1906. "Humbug", it was accepted on the authority of that decision of the Supreme Court of Illinois, "is an imposition; imposture; deception; and as a verb signifies to impose upon; to cozen; to swindle - all implying intention to misrepresent by the assertion of what is not the actual condition, or the suppression or concealment of what is"[2].

A more serious illustration from the more recent past is to be found in a decision of the High Court on a question of statutory interpretation in 2014. The question related to the power of a registrar of births, deaths and marriages to register a change of sex of a person who had undergone a sex affirmation procedure. The unanimous judgment of five members of the Court begins with the statement: "[n]ot all human beings can be classified by sex as either male or female". The statement is supported by a citation to a decision of a single judge of the Probate Division of the English High Court of Justice in 1971, to a decision of the House of Lords in 2003 and to a paragraph in a previous decision of the High Court addressed to a different question of statutory interpretation in 2011[3]. The proposition that not all human beings can be classified by sex as either male or female, it might well be thought, is incapable of being proved or disproved by anything previously said by any court, whether domestic or foreign.

There is in Australia much room for conversation about the use of foreign authority in the interpretation of domestic statutes. But the conversation to be had is not a conversation about whether it should be done; it is done all the time. The conversation most usefully to be had is about when it should be done and for what purpose. That conversation is less about citation than it is about the nature of authority, and it is more likely to be meaningful if it is

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2 *Sali v SPC Ltd* (1993) 116 ALR 625 at 635 footnote 9.

3 *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490 at [1].

conducted with one eye to the history of our inherited common law methodology and the other eye to the contemporary challenges to the continuing application of that methodology[4].

Unlike continental or civil law methodology with which it is most often contrasted, common law methodology can for present purposes be broadly defined as that approach to the discernment and administration of legal principle which began to develop in England around the twelfth century and which had come to exist in its early modern form in the United Kingdom by the last quarter of the eighteenth century: the beginning of the industrial revolution, the time of the American and French political revolutions, and the beginning of European settlement in Australia and New Zealand. Common law methodology is founded on the existence of a structural separation between the legislative function of laying down general rules and the judicial function of deciding individual cases. It is also founded on an understanding that the exercise of the judicial function of deciding an individual case is characteristically to be accompanied by the judicial elaboration of reasons for the decision that is made in that case.

Common law methodology has long posited the existence of two principal kinds of authoritative legal texts: those produced by the legislature in the form of statutes; and those produced by the courts in the form of reasons for judgment in decided cases. The main difference between the two principal kinds of authoritative legal texts lies, of course, in the nature of the authority which they carry. The coercive authority of the state makes a statute binding on all to whom the statute is addressed. The coercive authority of the state similarly makes binding the actual judgment or order made by a court in a decided case, albeit that the judgment or order is ordinarily binding only on those who are actually in dispute in that case. The authority accorded to the reasons for judgment in a decided case is of a different nature.

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4 Elements of what follows have appeared in Gageler, "What is Information Technology Doing to the Common Law?" (2014) 39 *Australian Bar Review* 146 and Gageler, 'Legislative Intention' (2015) 41 *Monash University Law Review* 1. The plagiarism is of my own work.

The nature of the authority that the common law has accorded to reasons for judgment has not always been the same.

If we go back to the last quarter of the eighteenth century, when Sir William Blackstone was writing his influential treatise on the laws of England and when Lord Mansfield was presiding over the Court of Kings Bench in England, reasons for judgment in decided cases, to the extent they were even available to courts deciding subsequent cases, were generally not regarded as sources of positive law in their own right. They were regarded instead as evidence (of variable veracity) as to the way in which the content of the law existing in custom and reason had been elaborated and applied in other cases.

Professor Gerald Postema has explained that the view of precedent which prevailed in common law courts at that time had three salient features: [5]

> First, past judicial decisions claim[ed] judicial respect and attention not in virtue of merely having been decided – laid down or posited – but in virtue of having been taken up by subsequent courts and thereby having found a place within that body of common experience. … Secondly, while individual cases [were] not regarded as establishing authoritative rules, they are taken to illustrate the operation of proper legal reasoning, to exemplify the process of reasoning within the body of experience. Thirdly, past cases [did] not preclude deliberation and reasoning in subsequent cases but rather they invited and focused that reasoning.

According to Blackstone, the common law was "unwritten law", the decisions of courts were evidence of that unwritten law, and "*the law* and *the opinion of the Judge*, [were] not convertible terms, or one and the same thing; since it may happen that the Judge may *mistake* the law".'[6] According to Mansfield, "[t]he law does not consist of particular cases, but of general principles,

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5 G J Postema, 'Philosophy of the Common Law' in J L Coleman and S J Shapiro (Eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press, Oxford, 2002, p 588 at 597.

6 William Blackstone, *Commentaries on the Laws of England*, Vol 1, Clarendon Press, Oxford, 1765, pp 63, 71.

which are illustrated and explained by these cases"[7], "precedent, though it be evidence of the law, is not the law itself, much less the whole law"[8], rather "[t]he reason and the spirit of cases make law; not the letter of particular precedents"[9].

Professor Postema is just one of a number of eminent legal historians to have noted that the notion of reasons for judgment in decided cases themselves being treated as sources of positive law by virtue of having been decided came to prominence only in the first half of the nineteenth century[10]. In the course of that transition from regarding precedent as "evidence of the law" to regarding precedent as "the law itself", Justice Parke uttered in 1833 what was later to be regarded as a classical exposition of common law methodology. Melding legal principles with judicial precedents, he said[11]:

> Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

The emergence of the understanding that reasons for judgment in decided cases were themselves sources of positive law was assisted in the United Kingdom in the second half of the nineteenth century by the establishment in 1865 of an Incorporated Council of Law Reporting.

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7 *R v Bembridge* (1783) 3 Douglas 327 at 332.

8 *Jones v Randall* (1774) Lofft 383 at 385.

9 *Fisher v Prince* (1762) 3 Burrow 1363 at 1364. See also A W B Simpson, 'The Common Law and Legal Theory' in A W B Simpson (Ed) *Oxford Essays in Jurisprudence*, Clarendon Press, Oxford, 1973, p 77.

10 See generally: Duxbury, *The Nature and Authority of Precedent* (2008); P M Tiersma, 'The Textualisation of Precedent' (2007) 82 *Notre Dame Law Review* 1188.

11 *Mirehouse v Rennell* (1833) 1 CL & F 527 at 546; 6 ER 1015 at 1023, quoted in A Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93 at 93.

That emergence was then consolidated by the establishment in the last quarter of the nineteenth century of a clear-cut three-tier court structure providing for appeals from the various divisions of the newly created High Court of Justice to a newly established Court of Appeal with the possibility of further appeals to a newly established Judicial Committee of the House of Lords.

With the emergence of the understanding that reasons for judgment in decided cases were themselves sources of positive law, came the development of a distinction between reasons for judgment in decided cases that were "binding" authorities (needing to be "followed" by a court in deciding the case at hand unless able to be "distinguished" by that court) and reasons for judgment in decided cases that were merely "persuasive" authorities (which a court might choose to follow in deciding the case at hand, not because the court was bound to do so, but because the court was persuaded that those reasons were good reasons). The status of an authority, either as binding or as persuasive, came to turn not on the quality of the reasoning but entirely on the place in which the court which had decided the case stood within the judicial hierarchy in relation to the court deciding the case at hand. Decisions of the same court or of a court at a higher level in the appellate structure came to be thought of as binding; other decisions as persuasive.

Against the background of bedding down that newer and more structured conception of the authority of case law by the last quarter of the nineteenth century in the United Kingdom, the Judicial Committee of the Privy Council took an important step in the course of deciding an appeal from a colonial court in 1879. The appeal was from the Supreme Court of New South Wales and it was about the meaning of a New South Wales statute. The text of New South Wales statute was based on the text of a United Kingdom statute. A majority of the Supreme Court of New South Wales had given a meaning to the text of the New South Wales statute which accorded with the meaning earlier given to the text of the United Kingdom statute by the

English Court of Common Pleas. The majority gave reasons for preferring that meaning to the meaning given by the English Court of Appeal in a decision which had overruled the decision of the Court of Common Pleas. The Privy Council was unimpressed by such antipodean upstartery, making plain that the same new discipline that had then very recently been cemented by the statutory restructure of the courts of the United Kingdom was to be imposed by judicial fiat on the courts of the colonies. Of the decision of the Court of Appeal, the Privy Council said this[12]:

> Their Lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in *England* are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it. The Judges of the Supreme Court … might well have yielded to the high authority of the Court of Appeal ... as the English Court which decided [the earlier case] would have felt bound to do if a similar case had again come before it.

The Privy Council concluded by saying that it was "of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same"[13].

The policy so laid down by the Privy Council in 1879 was to be maintained throughout the British Empire and its successor, the Commonwealth of Nations, for the best part of a century afterwards. The policy was to survive the enactment of the *Commonwealth of Australia Constitution Act* 1901 (Imp). Although the High Court, established in 1903, was given jurisdiction concurrently with the Privy Council to hear appeals from the Supreme Courts of the Australian States, a further appeal to the Privy Council lay by leave from a decision of the High Court in all but a relatively narrow category of constitutional cases. With the ever-present prospect of an

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12 *Trimble v Hill* (1879) 5 App Cas 342 at 344-345.

13 *Trimble v Hill* (1879) 5 App Cas 342 at 345.

appeal to the Privy Council looming over it, the High Court for much of the twentieth century treated itself as constrained to follow decisions of the English Court of Appeal and the House of Lords against its better judgment. There were some notable exceptions, but they were very few. The policy of treating the decisions of the English Court of Appeal and the House of Lords as authoritative was removed only with the statutory abolition of appeals to the Privy Council. That occurred in tranches beginning in 1966. It came to completion only with the enactment by the Parliaments of both Australia and United Kingdom of the Australia Acts in 1986[14].

The Australia Acts came into force in March 1986. The general mood of the judiciary in Australia was that it was none too soon. Four members of the High Court, with the wholehearted concurrence of the fifth, took the opportunity in reasons for decision delivered in December of that year to declare that, despite numerous earlier statements of the High Court itself to the contrary, decisions of English courts were henceforth no longer to be binding on Australian courts. They then said[15]:

> Whatever may have been the justification for such statements in times when the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal for this country, those statements should no longer be seen as binding upon Australian courts. The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.

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14 See generally: Mason, "The Break with the Privy Council and the Internationalisation of the Common Law" in Cane (ed), *Centenary essays for the High Court of Australia* (2004) at 66-81.

15 *Cook v Cook* (1986) 162 CLR 376 at 390.

The decade following the Australia Acts saw the High Court embrace the understanding that there exists a common law of Australia, which is applicable subject to statutory modification throughout each Australian State and Territory[16] and which includes common law principles of statutory interpretation. The same decade also saw the High Court embrace a more general understanding that there is a single integrated Australian judicial system administering a single body of Australian law. The embracing of that more general structural understanding was heralded by the High Court laying down the principle that an Australian intermediate appellate court, whether State or federal - and all the more so a single judge of a State or federal court - should not depart from an interpretation placed on uniform national legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong[17].

By the beginning of the twenty-first century, unlike the beginning of the twentieth century, it could therefore be said that a decision of an Australian court was quite different from the decision of a foreign court. According to the methodology of the common law of Australia, a decision of an Australian court was either binding or persuasive according to rules of precedent applicable within a single integrated Australian judicial system having the High Court at its apex. Foreign case law, including case law emanating from the United Kingdom, was not binding. The extent to which a decision of a foreign court was useful was said to depend on the persuasive force of its reasoning.

That, at least, was the theory. Old habits die hard. In practice, decisions of the English Court of Appeal and the House of Lords still tended to be followed unless there appeared to be

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16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563; *Lipohar v R* (1999) 200 CLR 485 at 509.

17 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

particular reason for departing from them. They were accorded the de facto status of being presumptively persuasive. Decisions of other foreign courts tended to be more critically examined by an Australian court when relied on in argument to establish some novel proposition. When discovered through the researches of the Australian court itself, decisions of foreign courts tended to be cited when their reasoning was thought persuasive and more often than not simply ignored when their reasoning was not thought persuasive.

By the beginning of the twenty-first century, there was another sweeping development afoot within the Australian legal system: the relentless march of the statute. By the last quarter of the twentieth century, statute law was rapidly supplanting the common law in many fields of substantive law. It was also modifying the methodology of the common law in fields of adjectival law. In no field was that more apparent than statutory interpretation. Two significant legislative innovations were introduced at the federal level in the early 1980s which were later replicated in interpretation legislation in most States and Territories.

The first was the introduction in 1981 of a statutory requirement for a court to adopt a purposive approach to construction. The provision then introduced laid down the unqualified general rule that "[i]n the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object"[18]. As the provision has been most recently amended in 2011, the unqualified general rule is now that "[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation".

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18 Section 15A of the *Acts Interpretation Act* 1901 (Cth).

That requirement for a court construing a provision of a Commonwealth statute to adopt a purposive construction was supplemented by the introduction in 1984 of a provision to the effect that a court construing a provision of a Commonwealth statute was thenceforward permitted to consider any extrinsic material capable of assisting in the ascertainment of the meaning of the provision. The court could do so for the purpose of confirming the ordinary meaning of the provision, or for the purpose of determining the meaning of the provision if ambiguous or obscure or if the ordinary meaning was manifestly absurd or unreasonable[19].

By the end of the twentieth century, those statutory innovations had been so much assimilated into mainstream legal reasoning that they had come to have a profound effect on the Australian common law of statutory interpretation even where they were not in terms engaged. By 1997, the High Court was able to declare the "modern approach" to statutory interpretation to be to insist that the statutory text is in every case to be interpreted in its "context", using that word "in its widest sense"[20].

That, in short form, is the historical context which informs any conversation about the use of foreign authority in the interpretation of domestic statutes in Australia. The contemporary challenges which also inform the discussion stem broadly from two sources. One is the impact of globalisation. The other is the impact of technological change.

Part of the impact of globalisation has been to expand the range of legal influences on the framing of domestic legislation. In the nineteenth century and for much of the twentieth century, legislation in Australia was by and large either the product of local innovation or copied from the United Kingdom statute books with adaptations thought necessary to meet local

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19 Section 15AB of the *Acts Interpretation Act 1901* (Cth).

20 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

conditions. There were exceptions, notably the Criminal Code enacted first in Queensland in the 1890s which drew on Italian and Indian sources. But they were very much exceptions. Until the last quarter of the twentieth century, the Australian statute book, like the Australian case law, remained distinctly anglo-centric.

From the last quarter of the twentieth century, and escalating into this century, the sources of inspiration for Australian statute law have expanded. More and more, the sources are international agreements which have been implemented in slightly different ways in numerous other national jurisdictions. In some cases, of which the national goods and services tax legislation enacted in 2000 and the national personal property security legislation enacted in 2011 are examples, the inspiration has been domestic legislation in one or more other national, sub-national or even supra-national jurisdictions.

The impact of technological change has been no less dramatic: it has been to expand exponentially the range of sources of information about the content and implementation of foreign law. Central to that expansion was the advent of the internet in the early 1990s bringing with it the international push towards access to law on-line spearheaded by the establishment of the Australian Legal Information Institute in 1995. Last year, when AUSTLII celebrated its 20th anniversary, it boasted of being linked to 700 databases worldwide. Each database contained a separate body of information on legislation, case law, legal scholarship or law reform. More than 250 of them were case law databases. AUSTLII boasted of receiving 600,000 hits each day.

To walk into a judge's or barrister's chambers in Sydney in 1976 would have been to walk into a room lined with books. The books typically would have been the New South Wales Law Reports, the Commonwealth Law Reports and the so-called "rainbow series" of soothingly colour-coded authorised reports of courts of the United Kingdom. The case law of some other

common law jurisdictions would have been available from a law library, although quite some effort would have been required to locate it through digests and then to retrieve it from the stacks. Those jurisdictions would have included New Zealand, Canada, and parts of the United States. The case law of most other jurisdictions would have been practically inaccessible.

To walk into a judge's or barrister's chambers in Sydney in 2016 is to walk into a room with a computer on the desk. Accessible by means of that computer, in fully word searchable form, is almost all of the legislation and case law of almost every national and sub-national jurisdiction in the world. Case law emanating from the United Kingdom is longer particularly familiar and case law emanating from other jurisdictions is no longer particularly exotic.

The combination of globalisation and technological change has had the effect that the the information available to be sifted through in the quest for potentially persuasive foreign authority can be voluminous. And foreign authority when found can require a vast amount of further contextual information in order for its persuasive value to be evaluated. Taking the costs as well as the benefits into account, there can be such a thing as too much information.

An interesting legislative recognition of the problem is to be found in the Human Rights Act of the Australian Capital Territory. Enacted in 2004, that Act specifically provides that "[i]nternational law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting [a] human right". The Human Rights Act immediately goes on to provide, however, that, "[i]n deciding whether [that material] or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account: ... the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the

Act as a whole; ... the undesirability of prolonging proceedings without compensating advantage; ... the accessibility of the material to the public"[21].

If attention is confined too narrowly to how and when the decisions of foreign courts should be considered in a domestic court the question begged is: why are they considered at all? To adapt the earlier and more extreme of the examples with which I started, why should an Australian court deciding the meaning of the word "humbug" in a hypothetical modern Australian statute place any weight at all on the meaning given to that word by a foreign court? Should it make any difference that the foreign court is the Supreme Court of Illinois or the Supreme Court of New York? What of the persuasive value of such meaning as might have been given to the same word by the Supreme Court of India or the Supreme Court of Pakistan?

The same questions can be asked at a more general and abstract level. In what sense, if any, is it meaningful to refer to a decision of a foreign court as an authority? What do we mean when we describe a decision of a foreign court as persuasive? If a decision of a foreign court contains a useful idea, why not just use the idea? Should, and if so why should, the fact that the idea has been formulated or adopted by a foreign court make that idea more worthy of adoption by a domestic court?

Those questions will sometimes be answered in the context of the construction of the domestic statute simply by the need to adopt a construction that promotes the purpose of that statute. There will be times when the purpose of the statute when considered in its context can be seen to be to give domestic effect to principles expounded by foreign courts. To examine the expositions by foreign courts will then be to examine the principles themselves. There will be other times when the purpose of the statute can be seen to be a purpose which would be

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21 Section 31 of the *Human Rights Act* 2004 (ACT).

promoted by adopting a construction that is in harmony with the construction of similar legislation in other jurisdictions. A particular example is where the statute implements an international agreement. The Full Court of the Federal Court has observed in that context that "as a broad principle, it is obviously desirable that expressions used in international agreements should be construed, so far as possible, in a uniform and consistent manner by both municipal courts and international courts and panels to avoid a multitude of divergent approaches in the territories of the contracting parties on the same subject matter"[22]. The same must ordinarily be so where the statute implements a model law.

Where the purposive approach to construction does not provide a reason to look to a decision of a foreign court as an authority, then such justification as might exist for treating the decisions of foreign courts as authorities needs to be found in a consideration of why our according to our common law methodology reasons for judgment in an earlier case should ever be taken into consideration by a court deciding a subsequent case. There is no single justification. There are rather a number of overlapping and often complementary justifications. One justification is that it promotes fairness or equality before the law (ensuring so far as possible that like cases are decided alike). Another is that it promotes efficiency (avoiding having to recreate the wheel in every case). Another is that it contributes to coherence, stability and predictability. Other justifications might apply in particular cases.

What is apparent is that the strength of the various justifications for looking to authority will vary from case to case. Sometimes, for a domestic court to give weight to the fact of a decision by a foreign court will be for the domestic court to enhance fairness, equality, efficiency, coherence, stability or predictability. Sometimes it will have quite the opposite effect.

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22 *Rocklea Spinning Mills Pty Limited v The Anti-dumping Authority and Fraser* (1995) 129 ALR 401 at [54].

Sometimes, as the High Court not so long ago put it, "[t]he international authorities tend to muddy the waters rather than to illuminate them"[23].

23 *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29; (2006) 227 ALR 398 at [28].