

FEDERALIZING THE CONFLICT OF LAWS: SOME LESSONS FOR AUSTRALIA
FROM THE CANADIAN EXPERIENCE

by

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ABSTRACT

“Federalizing the Conflict of Laws: Some Lessons for Australia from the Canadian Experience”

Traditionally, the High Court of Australia has regarded the States of Australia as being “separate countries” for conflict of law purposes and has applied, in a rather formalistic manner, the English common law rules of private international law to resolve intrafederation conflict of laws problems. This paper argues that this approach to intrafederation conflict of laws is inappropriate. Instead, this paper argues that the High Court should follow the approach of the Supreme Court of Canada as exemplified by its decision in *Morguard Investments Ltd v De Savoye*. That is, the High Court should forsake its formalistic reasoning and instead approach intrafederation conflict of laws rules in a purposive way *i.e.* identify the purposes of the conflict of laws rules and ensure that the rules operate in a manner that meets these purposes. The purposes and operation of the intrafederation conflict of laws rules can only be understood in the context of the Australian federal environment. Aspects of this environment, such as a unified national legal system and a constitutional “full faith and credit” requirement, point to the conclusion that Australia is “one country and one nation.” The States of Australia should be regarded as partners in federation and the conflict of laws rules that mediate the relationship between the laws of the different States should reflect this overall unity. Applying this purposive, contextual approach to the three major questions of the conflict of laws, this paper suggests the following features of an Australian intrafederation conflict of laws:

1. Unified substantive jurisdiction and broad judicial jurisdiction for Australian courts with effective transfer mechanisms to ensure litigation is heard in the most appropriate court;
2. The elimination, to the extent possible, of the “homeward trend” in choice of law rules so that uniform legal consequences will attach throughout Australia to any particular set of facts; and
3. The effective, unqualified enforcement of sister-State judgments throughout Australia.

TABLE OF CONTENTS

Abstract.....	ii
Introduction.....	1
Chapter 1.....	15
Australia.....	15
Canada.....	24
Chapter 2.....	27
Formalism and the High Court.....	27
The Purposive Approach.....	32
The Purposes of the Conflict of Laws.....	33
Conclusion.....	40
Chapter 3.....	42
Chapter 4.....	57
Legislative Jurisdiction.....	57
Substantive Jurisdiction.....	60
Judicial Jurisdiction.....	64
Chapter 5.....	71
The Effect of the Constitution.....	71
Torts.....	77
Public Policy and Contracts.....	83
Procedure and Substance.....	86
Chapter 6.....	89
Conclusion.....	98
Bibliography.....	101

Introduction

It may, perhaps, surprise many Australians to learn that, despite almost one hundred years of federation, the prevailing view of the High Court of Australia with respect to the position of the States in intrafederation conflict of laws¹ is that they are “separate countries...and are to be so regarded in relation to one another.”² To describe the States in any context as “separate countries” is certainly jarring and even the High Court accepts that this description is “anachronistic.”³ An average Australian on hearing this description might well accept the point that, like countries, the States are distinct law areas yet object that the description is hardly an accurate one insofar as it suggests that the relationship between the States within the Australian federation is analogous to the relationship between countries on the international plane. Australia is, after all, “one country and one nation.”⁴ The States are bound together under the Constitution in “one indissoluble

¹ Kahn-Freund describes the problems of conflict of laws as being “created by the elementary fact that at the same time and in a given geographical area (which may be the Globe or a single country) there are in force a number of systems of law and that in any given situation someone must choose the system or systems from which to take the rule or rules of decision” (O. Kahn-Freund, *General Problems of Private International Law* (Leydon: A.W. Sitjhoff, 1976) at 2). The very nature of a federation (what Kahn-Freund calls a “composite unit” (Kahn-Freund, *ibid.* at 60), is that it is made up of a number of constituent units that represent distinct law areas. In the case of Australia, there are nine constituent units or law areas: the six States, the two self-governing internal territories (the Northern Territory and the Australian Capital Territory), and the Commonwealth. (For the purposes of this paper, I ignore Australian external territories as they are *sui generis*). Throughout this paper, I will refer to the “intrafederation conflict of laws” as the body of rules which seeks to address the conflicts problems arising within Australia between these nine constituent units. It may be contrasted with the term “international conflict of laws” by which I mean the body of rules which seeks to address the conflicts problems arising on the international plane (*i.e.* between an Australian law area and a law area outside Australia). It should also be noted that unless otherwise stated, throughout this paper all references to “States” include references to the Northern Territory and the Australian Capital Territory.

² *Pedersen v Young* (1964) 110 CLR 162 at 170 per Windeyer J. This statement was approved by a majority of the High Court (Brennan, Dawson, Toohey and McHugh JJ) in *McKain v R.W. Miller & Co. (S.A.) Pty Ltd* (1991) 174 CLR 1 at 36 [hereinafter *McKain*]. See also the earlier comment of Williams J in *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 at 396, that, “for the purpose of private international law, South Australia is a foreign country in the courts of New South Wales.”

³ *McKain*, *ibid.* at 36. See also *Breavington v Godleman* (1988) 169 CLR 41 at 160 [hereinafter *Breavington*] where Toohey J states the description strikes a “somewhat discordant note.”

⁴ *Breavington*, *ibid.* at 78 per Mason CJ.

Federal Commonwealth.”⁵ Whatever the context, therefore, be it intrafederation conflict of laws or anything else, the relationship between the Australian States must be something more intimate and more constructive, than the relationship between countries on the international plane.⁶

There is, I submit, much force in this view. Yet, in the intrafederation conflict of laws area, the High Court has singularly failed to develop rules which reflect the nature of the environment in which they must operate (*i.e.* an environment marked by the fact that the States exist under the Constitution in an intimate and constructive relation with one another). With respect to choice of law rules, for example, the High Court has simply applied the traditional English rules to resolve intrafederation conflicts problems.⁷ Until recently, little thought was given by the High Court to the question of how suitable such rules might be to the Australian environment (although there was acknowledgment at various times over the years that these rules provided a “less than ideal” solution to intrafederation conflict of laws problems).⁸ The English rules had, after all, been developed in quite a specific political, social and intellectual context in order to resolve

⁵ Preamble to the Commonwealth of Australia Constitution Act 1900 (Imp.) 63 & 64 Vict. c.12.

⁶ See, Australian Law Reform Commission, Report No 58, *Choice of Law* (Sydney: Commonwealth of Australia, 1992) at 4 [hereinafter *ALRC Choice of Law Report*]. See also *Breavington*, *supra* note 3 at 166 per Toohey J and *Stevens v Head* (1993) 176 CLR 433 at 466 [hereinafter *Stevens*] per Gaudron J (“[T]he States are not separate and independent nation-states, but constituent parts of a Federal Commonwealth”). See also W.M.C. Gummow, “Full Faith and Credit in Three Federations” (1995) 46 S. Car. L. Rev. 979 at 1000 who states: “A federal constitution addresses the task of creating a body politic, the state integers of which will not have international personality. The states will, in terms of the federal constitution, hardly be treating each other as foreign bodies politic.”

⁷ See below at 44.

⁸ See, for example, *Breavington*, *supra* note 3 at 70 per Mason CJ and *Anderson v Eric Anderson Radio & T.V. Pty Ltd* (1965) 114 CLR 20 at 46 [hereinafter *Anderson*] per Windeyer J.

international conflicts problems.⁹ The Australian federal environment is clearly quite a different context.¹⁰

A majority of the High Court recognised this point in the 1988 landmark case of *Breavington v Godleman*.¹¹ In *Breavington*, the High Court was considering the appropriate choice of law rule for torts committed within Australia. Up to that time, Australian courts had used the rule in *Phillips v Eyre*¹² as the intrafederation tort choice

⁹ See, for example, *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 76 DLR (4th) 256 at 267 – 270 [hereinafter *Morguard* cited to DLR] where LaForest J points out that the English rules regarding enforcement of judgments were developed in the 19th Century at a time when communications and travel were relatively difficult, English courts displayed doubts about the quality of foreign justice (and a converse belief in the superiority of English justice) and England was an economic and imperial superpower. It may also be noted that Austinian positivism was an influential jurisprudential philosophy at this time (see generally H. McCoubrey and N.D. White, *Textbook on Jurisprudence* (London: Blackstone Press, 1993), chapter two). These various political, social and intellectual factors may help explain the “homeward trend” in English conflict of laws rules (see P.E. Nygh, *Conflict of Laws in Australia*, 5th ed. (Sydney: Butterworths, 1991) at 16 [hereinafter *Conflict of Laws in Australia*]) and the exaggerated regard these rules display for territorial sovereignty (see *Morguard*, *ibid.* at 268).

¹⁰ See Chapter 2 for the unique characteristics of the Australian federal environment. There is a question about the extent to which intrafederation conflict of laws rules should differ from international conflict of laws rules. In the *ALRC Choice of Law Report*, *supra* note 6 at 27, it is noted in the context of choice of law rules that ideally the rules for intrafederation and international conflicts should be the same wherever possible: “the difficulty and artificiality in particular areas such as tort, contract and succession, of defining a wholly Australian dispute, the dangers of parochialism, and the unnecessary complication of having parallel rules to cover the same area are compelling reasons to aim for rules to be universal rather than interstate” [footnote omitted]. While as an ideal it is undoubtedly correct to try and ensure that intrafederation and international conflict of laws rules are the same wherever possible, it must be accepted that differences between the Australian federal environment on the one hand and the international environment on the other may mean that differences between the conflict of laws rules pertaining to each may of necessity exist (for example, there would appear to be a need for Australian forums to exercise in international conflict of laws matters a public policy discretion that would be constitutionally impermissible in intrafederation conflict of laws matters). See Gummow, *supra* note 6 at 1000 who makes the point that, “choice of law rules in their international dimension require more flexibility than those in the domestic sphere. They must cope with the lack of a shared federal legal system, common culture, and political structure.” See also the comment of Dawson J in *Breavington*, *supra* note 3 at 147 that, “The federation binds together the one country and makes inappropriate an approach which may have some validity in the case of conflict between the laws of different countries.” See also M. Pryles, “The Law Applicable to Interstate Torts: Farewell to *Phillips v Eyre*?” (1989) 63 Aust. L. J. 158 at 160 [hereinafter “Farewell to *Phillips v Eyre*?”]; and generally S. Coakeley, P. Finkle, L. Barrington, “*Morguard Investments Ltd: Emerging International Implications*” (1992) 15 Dal. L. J. 629.

¹¹ *Supra* note 3.

¹² *Phillips v Eyre* (1870) L.R. 6 Q.B. 1 [hereinafter *Phillips v Eyre*]

of law rule.¹³ This rule was subjected to some trenchant criticism by certain of the High Court justices in *Breavington*. The rule in *Phillips v Eyre* was said, amongst other things, to permit disparate legal consequences to attach to the one set of facts and to encourage forum-shopping.¹⁴ For this and other reasons the *Phillips v Eyre* rule was not regarded by the majority as a suitable choice of law rule for intrafederation torts.¹⁵ Instead, in the majority's view, the Australian federal environment suggested that the appropriate choice of law rule for intrafederation torts was the application of the *lex loci delicti*.¹⁶ Such a rule should ensure that wherever in Australia a matter is litigated uniform legal consequences will follow.¹⁷

Breavington seemed to foreshadow a new approach by the High Court to the articulation of intrafederation conflict of laws rules. This approach would be marked by a critical questioning of the suitability of the traditional rules given the context of the Australian

¹³ See, for example, *Koop v Bebb* (1951) 84 CLR 629; *Anderson*, *supra* note 8. See 76-77 below, for a description of the *Phillips v Eyre* rule and its application by the High Court prior to *Breavington*.

¹⁴ *Breavington*, *supra* note 3 at 73 (per Mason CJ), 91-92 (per Wilson and Gaudron JJ), and 125-127 (per Deane J). It may be observed at this point that the High Court frequently expresses strong views about the evils of forum-shopping. (Toohey J, for example, endorsed a description of the plaintiff in *Breavington* as engaged in a "blatant example of forum-shopping" (*Breavington*, *supra* note 3 at 161) even though the plaintiff was a resident of the State, Victoria, in which proceedings were commenced; and Mason CJ in *McKain*, *supra* note 2 at 23 described forum-shopping as an "objectionable practice"). The High Court's practice, however, falls some way short of its rhetoric. It has articulated a less liberal doctrine of *forum non conveniens* (i.e. more pro-plaintiff) than say the Supreme Court of Canada – see below at 65-67. It appears in any event to prefer dealing with forum-shopping at the choice of law level (perhaps because statutory transfer mechanisms largely deal with the problem at the jurisdictional level – see below at 64-65; or perhaps because of its attachment to a less effective *forum non conveniens* doctrine means it needs to – see A. Briggs, "Tort in the Conflict of Laws" (1989) 105 L. Q. Rev. 359). As is discussed in Chapter 5, however, the High Court's choice of law rule in tort and its characterisation of certain laws (such as limitation statutes) as "procedural" are not exactly disincentives to forum-shopping (see P.E. Nygh, "Choice of Law Rules and Forum-Shopping in Australia" (1995) 46 S. Car. L. Rev. 899 at 912-913 [hereinafter Nygh (1995)]). There is much to be said for the view that forum-shopping should be controlled at the front line by a sensitive application of *forum non conveniens* principles – B. O'Brien, "Choice of Law in Torts" (1990) 12 Adel. L. R. 449 at 474-475 [hereinafter O'Brien (1990)]. This should, however, be supported by ensuring that, to the extent possible, choice of law rules create uniform consequences – "Farewell to Phillips v Eyre?", *supra* note 10 at 180; O'Brien, *ibid.* at 474-475.

¹⁵ *Breavington*, *ibid.*

federal environment. *Breavington*, however, proved to be a false dawn. Three years later, in *McKain v R.W. Miller & Co. (S.A.) Pty Ltd*, a different majority of the High Court went out of its way to state that a reformulated version of the rule in *Phillips v Eyre* was the choice of law rule for torts occurring within Australia.¹⁸ The majority also held that limitation statutes were to be regarded as procedural.¹⁹ There was little examination by the majority as to how these two traditional rules actually operated in the Australian federal environment (indeed with the characterisation of limitation statutes as procedural the majority simply and unreflectively applied precedent).²⁰ In the two subsequent cases of *Stevens v Head*²¹ and *Goryl v Greyhound Australia Pty Ltd*,²² the High Court continued to follow what one may call its traditional approach to intrafederation conflict of laws.

¹⁶ *Ibid.* at 77-79 (per Mason CJ), 98 (per Wilson and Gaudron JJ), and 129-130 (per Deane J).

¹⁷ *Ibid.* at 98 (per Wilson and Gaudron JJ), and 134-135 (per Deane J).

¹⁸ *Supra* note 2. I say "out of the way" because the articulation of the rule was not necessary for the decision and is strictly *obiter dicta*. See P.E. Nygh, "The Miraculous Raising of Lazarus: *McKain v R. W. Miller Co. (South Australia) Pty Ltd*" (1992) 22 U.W.A.L.R. 386 at 393 [hereinafter "The Miraculous Raising of Lazarus"]; and M. Moshinsky, "Choice of Law in Torts" (1993) 1 Torts L. J. 169 at 175. (It may be noted that McHugh J during the course of argument in *John Pfeiffer Pty Ltd v Rogerson* (C14/1998) stridently insisted that the *Phillips v Eyre* issue had been the subject of argument in *McKain* and therefore it had been proper for the majority to deal with the issue – transcript of the hearing in the High Court of Australia of *John Pfeiffer Pty Ltd v Rogerson*, (C14/1998), 1 December 1999, www.austlii.edu.au/cgi-bin/disp.pl/other/hca/transcripts/1999/C14 [hereinafter *John Pfeiffer*]. See below at 78-79 for a discussion of the rule articulated in *McKain*.)

¹⁹ *McKain*, *ibid.* at 44.

²⁰ *Ibid.* To be fair to the majority they do state that the rule has in practice operated without injustice. They provide no basis for this assertion, however, and the statement may be questioned by the facts of *McKain* itself. It does not seem particularly just to the defendant, for instance, that it could be held liable in another jurisdiction (NSW) under a cause of action barred in its own jurisdiction (SA) in relation to facts which occurred within that jurisdiction. The defendant might have justly expected to be protected against claims which South Australian law regarded as stale. See below at 85-88 for further discussion of the substance-procedure distinction. See also B.R. Opeskin, "Choice of Law in Torts and Limitation Statutes" (1992) 108 L.Q.R. 398 [hereinafter Opeskin(1992)].

²¹ *Supra* note 6.

²² *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 [hereinafter *Goryl*].

This “traditional approach” can be characterised as “formalist” in nature.²³ That is, the High Court has tended in its reasoning in this area to stick closely to the rules established by precedent and given little consideration to how these rules might operate in practice; its decisions have frequently been little more than formal applications of the “rule-book.”²⁴ If the rule-book contains the English conflict of laws rules (as it does) then it is perhaps not surprising that one consequence of the formalist approach is the characterisation of the States as “separate countries” for conflict of laws purposes. After all, on the international plane on which the English conflict of laws rules largely operate, it is “countries” (*i.e.* non-national jurisdictions) which give rise to the extraterritorial element that brings the conflict of laws rules into play.²⁵ The use of the English conflict of laws rules may, therefore, make it seem natural to describe the States as “separate countries.”²⁶ This is not only rhetorically significant²⁷ but also, as will be discussed

²³ See below at 27.

²⁴ See, for example, *Anderson; McKain and Stevens*. For criticism of the High Court’s approach see Moshinsky, *supra* note 18 at 177.

²⁵ The term “country” is a term of art in the conflict of laws being understood as synonymous with “law area.” So, Scotland, Northern Ireland and the Isle of Man, for example, are regarded as “countries” for conflict of law purposes even though they are units of the United Kingdom (see L. Collins ed., *Dicey and Morris on the Conflict of Laws* (London: Sweet & Maxwell, 2000) at 26-27 (which interestingly describes the Australian States and the Canadian provinces as being “separate countr[ies] in the sense of the conflict of laws, though not one of them is a State known to public international law”)). Be that as it may, within a federation like Australia, the use of the term “country” to describe constituent units tends to obscure the true relationship the constituent units have with each other.

²⁶ There may, of course, be other reasons for the High Court’s description of the States as “separate countries.” For example, if the Court adheres to what I call the “separateness” vision of federalism, this description may appear quite apt – see below at 43.

²⁷ The rhetorical significance of describing the States as “separate countries” should not be underestimated. *Breavington* and the cases which have come after it have been typified by a heightened, at times emotional, use of language, particularly by the minority for whom the “separate countries” description has been, to coin a phrase, a “red rag to a bull”:

...if s118 does not have constitutional significance of the kind I have indicated, we are not a united Federal Commonwealth but an alliance which can at any stage be revealed as an alliance of “separate countries in private international law.” It follows that I not only differ from the contrary view of the majority in *McKain*, I also consider that view is wrong and fundamentally so. (*Stevens, supra* note 6 at 464 per Gaudron J).

Indeed, one gets a sense in the minority judgments that a deeply held chord of Australian nationalism is being struck. This may explain why the minority fail to adhere to the principle of *stare decisis* and recant their views:

below, significant in the effect it has on the content of the intrafederation conflict of laws rules.²⁸

An examination of the position in Canada provides some interesting insights into the High Court's approach. Like Australia, Canada imported the English conflict of laws rules to deal with intrafederation conflict of laws problems.²⁹ Just as in Australia, these rules tended to be applied by Canadian courts in a rather formalistic manner.³⁰ In a striking echo of the High Court's "separate countries" description of the States, Canadian provinces were described as being "foreign countries" to each other for conflict of laws purposes.³¹ Unlike the High Court, however, the Supreme Court of Canada has now rejected such a description of the Canadian provinces. The Supreme Court has also begun, in a series of cases commencing with its landmark 1990 decision in *Morguard Investments Ltd v De Savoye*,³² to apply a new approach to at least some aspects of the Canadian intrafederation conflict of laws rules.³³

...I have given careful consideration to the question whether I should abandon the views I expressed in my judgments in *Breavington v Godleman and McKain*. The perception that this country is a single nation with a unitary system of law...lies at the heart of my understanding of the structure and working of the Constitution. Any denial of that perception seems to me to be flawed by an unjustifiable underestimation of the extent of the compact between the Australian people and a mistaken denial of the fundamental imperative embodied in s118 of that compact. I am fully conscious of the weight of the considerations which support the view that a decision of the Court which still enjoys majority support should be treated by an individual member of the Court as being binding upon him or her...however...in matters of fundamental constitutional importance, the members of this Court are obliged to adhere to what they see as the requirements of the Constitution... (*Stevens, supra* note 6 at 461-462 per Deane J).

While neither the heightened use of language or the failure to adhere to the principle of *stare decisis* is without precedent, it is unusual.

²⁸ See Chapter 3 below.

²⁹ See, for example, *Morguard, supra* note 9 at 265.

³⁰ See J. Herbert, "The Conflict of Laws and Judicial Perspectives on Federalism: A Principled Defence of *Tolofson v Jensen*" (1998) 56 U. T. Fac. L. Rev. 3 at 7.

³¹ *Morguard, supra* note 9 at 265.

³² *Supra* note 9. For an appreciation of the "landmark" nature of *Morguard* see, for example, V. Black and J. Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd v De Savoye*"

The first point to note about the current Australian and Canadian approaches to intrafederation conflict of laws is the different type of reasoning used respectively by the High Court and the Supreme Court. As has already been mentioned, the High Court has in general used a very formalistic type of reasoning, applying conflict of laws rules with little consideration as to how those rules operate in practice. By contrast, the Supreme Court has used a purposive type of reasoning. That is, it has identified the purposes which a particular rule seeks, or should seek, to achieve, measured the rule against these purposes and, where the rule falls short, articulated a new rule to meet the identified purposes.³⁴ The use of the different types of reasoning, namely, formalist and purposive, is arguably one explanation for the difference in the intrafederation conflict of laws rules articulated in Australia and Canada in recent years.

In this paper, the first point I want to argue is that the High Court should abandon its formalistic approach to intrafederation conflict of laws and instead follow the example of the Supreme Court of Canada and adopt a purposive approach. The High Court's present formalistic approach is unsatisfactory on several grounds: it tends to prevent examination of the effectiveness within the Australian federal environment of the traditional conflict

(1991) 12 Advocates' Q. 489; and J.Blom, "Conflict of laws – enforcement of extra-provincial default judgments – real and substantial connection" (1991) 70 Can. Bar Rev. 733 [hereinafter Blom (1991)]

³³ The cases decided by the Supreme Court since *Morguard* in which it has considered various conflict of laws rules are *Hunt v T&N plc* [1993] 4 SCR 289, 109 DLR (4th) 16 [hereinafter *Hunt* cited to DLR] ; *Amchem Products Inc. v Workers Compensation Board (British Columbia)* [1993] 1 SCR 897, 102 DLR (4th) 96 (international conflict of laws case but has relevance to domestic *forum non conveniens* issues); and *Tolofson v Jensen* [1994] 3 SCR 1022, 120 DLR (4th) 289 [hereinafter *Tolofson* cited to DLR]. See below at 43-44 for discussion as to why Canada and Australia may be undergoing this reevaluation exercise approximately simultaneously.

³⁴ The classic example of this is *Morguard*. Black and Swan, *supra* note 32 at 494 refer to the Supreme Court's "pragmatic, rational orientation" in *Morguard*.

of laws rules; it tends to mask the policy or ideological choices made by the court; and it tends to inhibit the development of modern intrafederation conflict of laws rules. A purposive approach would be less likely to suffer from these deficiencies. The Canadian experience shows that with a purposive approach courts make efforts to ensure that the rules are practically effective (*i.e.* meet the purposes they should be seeking to satisfy), that policy choices are articulated and that rules are developed where appropriate.

So, what, then, would be the hallmarks of a purposive approach by the High Court? As has been discussed in relation to the Supreme Court of Canada and its use of the purposive approach, one could expect the High Court to examine critically intrafederation conflict of laws rules in the context in which they operate in order to ensure that they satisfy their intended purposes. In engaging in this critical examination the High Court would need to spell out in its reasons the objectives of the conflict of laws it believes a particular rule must meet and where these objectives are conflicting explain how the competing objectives are to be balanced. In this way, the High Court will make plain in its judgments its policy and ideological preferences. Where a conflict of laws rule fails to meet the identified purposes then the High Court should rearticulate the rule so that it does so.

The second point to note in comparing the present Australian and Canadian approaches to intrafederation conflict of laws is the manner in which each approach engages with their respective federal environments. As has been stated above, traditionally the High Court has not given much thought to the relevance of the Australian federal environment to

intrafederation conflict of laws rules. Instead, it has treated the States as though they were “separate countries” and has applied within Australia the same conflict of laws rules as it has on the international plane (except to the extent there is positive law to the contrary). The Supreme Court of Canada, on the other hand, has emphasised the importance of the federal context in understanding intrafederation conflict of laws. Indeed, it can be said that the Supreme Court’s decisions in *Morguard*, *Hunt* and *Tolofson* are primarily motivated by federal factors. Underpinning the respective Australian and Canadian approaches are different visions of federalism. Federalism, as an organizing principle, seeks to accommodate “diversity with unity.”³⁵ Classically, federal systems have been classified according to how they have balanced “diversity with unity”: those systems which have emphasised unity over diversity by having powerful centres being described as “centralised”, and those systems which have emphasised diversity over unity by having powerful constituent units being described as “decentralised.” The federalist visions underpinning the Australian and Canadian approaches to intrafederation conflict of laws map onto this “centralised/decentralised” dichotomy. On the one hand, there is a vision of “separateness.” This vision sees a federation as a collection of diverse units that should be free to decide for themselves the legal consequences within their territory of acts with an extraterritorial element. On the other hand, there is a vision of “unity.” This vision sees a federation as primarily a single entity and considers that as a consequence the various constituent units should coordinate their responses so within the federal entity a coherent, harmonious legal system exists. Speaking generally, Australia, with its continuing use of the “separate countries” epithet, appears to be attached to the

³⁵ *Reference re Secession of Quebec* [1998] 2 SCR 217, 161 DLR (4th) 385 at 407 [hereinafter *Secession Reference* cited to DLR].

“separateness” vision, whereas Canada, in rejecting it, appears to be attached to the “unity” vision.³⁶

In this paper, the second point I want to argue is that the Australian intrafederation conflict of laws should be “federalised.” That is, the intrafederation conflict of laws rules should conform with, and reflect the structure of, the Australian federal environment. For reasons I will elaborate in chapter three, I believe that the Australian federal environment supports what I have called the “unity” vision. Shortly, this is because I believe “unity” is a necessary inference from Australia’s constitutional arrangements which establish a unified national court system with the High Court at its apex, establish or encourage the establishment of uniform national legal regimes (such as a national common market) and which establish Australia as one nation. In a context where so much of the substantive law (including the common law) is uniform, it seems incongruous that conflict of laws rules should operate in a way that is counter to the overall unity.³⁷ Instead, conflict of

³⁶ The reason why Australia and Canada should be attached to these federalist visions is uncertain (especially as it appears contrary to the traditional characterisation of their federal systems: Australia being regarded as a very centralised system and Canada being regarded as a comparatively decentralised system). In the case of Canada, one possible explanation may lie in the existence of provincial separatist tendencies, particularly in Quebec. In a political and legal environment in which the break-up of Canada appears as a real threat, the Supreme Court may be concerned to emphasise Canadian unity where it is possible to do so (although ironically by constitutionalising conflict of laws rules, the Supreme Court may not be helping the cause of unity because this cuts across Quebec’s civil law approach). In the case of Australia, there may be a concern by the High Court to protect State sovereignty from further central encroachment. If this is the case it is intriguing why the High Court should choose to make its stand for the States here. In the recent *Ha* case (*Ha v New South Wales* (1997) 189 CLR 465), for example, the High Court had no compunction in knocking down one of the few remaining significant sources of State revenue raising namely, franchise fees *contra* however, the Incorporation case (*New South Wales v Commonwealth* (1990) 169 CLR 482). See Chapter 3 below for a more detailed discussion of the competing federalist visions in Canada and Australia.

³⁷ See P.E.Nygh, “Private International Law: Full Faith and Credit: a constitutional rule for conflict resolution” (1991) 13 Syd. L. Rev. 415 at 434 [hereinafter Nygh(1991)] who expresses the view that conflict of laws rules with a “homeward trend” have no place in a federation.

laws rules should play their part in ensuring the efficient and harmonious operation of a unified national legal system.³⁸ Such a system should be characterised by:

1. complementary nationwide substantive and judicial jurisdiction for courts in order that all Australian courts are able to hear any matter;
2. effective mechanisms to prevent forum-shopping;
3. to the extent possible, uniformity of legal consequences throughout Australia to a particular set of facts arising anywhere in Australia;³⁹
4. predictable results;⁴⁰ and
5. effective mechanisms for the enforcement of foreign judgments.

It may be said that the creation of such a system is not just the responsibility of courts but also of legislatures.

This paper is divided into six chapters. In the first chapter, I briefly describe the relevant aspects of Australia's constitutional arrangements that touch on the area of intrafederation conflict of laws and place these arrangements in historical context. I also briefly describe relevant aspects of Canada's constitutional arrangements. In the second

³⁸ In this paper, I primarily focus on the political community aspect of federalism but it is well to remember that there are other aspects of federalism including in particular an economic aspect. A unity vision insofar as it points to certain, predictable results, simple and generous enforcement of judgments, an absence of jurisdictional complications etc has the effect of lowering transaction costs and thus is of economic benefit to the federation. LaForest J emphasises the economic importance of the rules he articulates in *Morguard* and *Tolofson*. See generally Herbert, *supra* note 30.

³⁹ This ideal is unlikely to ever be perfectly attained given that courts will still apply their own procedural rules (unless, of course, the procedural rules throughout Australia are substantively unified – see, for example, the Evidence Act 1995 (Cth) which while only applicable in federal matters could be mirrored at State level). Still, uniformity remains an important goal. On the international plane, Kahn-Freund has referred to differences in legal outcome to the same fact situation as being “a patent scandal in a world in which distances have shrunk and communications become so close. International disharmony becomes less tolerable the more international intercourse becomes extensive and intensive. But, on the other hand, internal consistency of decision becomes more urgent the greater the impact of the law on the welfare of the citizen, the greater the felt need for a public regulation of economic and social conduct” (Kahn-Freund, *supra* note 1 at 15). How much more so in the one country! Wilson and Gaudron JJ in *Breavington*, *supra* note 3 at 88 comment that, “It is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought.”

⁴⁰ “Most of the life of the law is outside the courts” (Kahn-Freund, *supra* note 1 at 184). It is accordingly very important that persons are able to identify the likely legal consequences of a particular fact situation prior to, and without the need for, litigation. To do this, rules must be simple, clear and easy of application.

chapter, I illustrate the formalist thinking of the High Court in the intrafederation conflicts of law area and consider the purposive approach. In the third chapter, I discuss the competing federalist visions and explain why I believe the appropriate federalist vision for Australia is the “unity” vision. In the next three chapters, I deal respectively with the three fundamental questions of the conflict of laws, namely:

1. what courts should hear a particular matter? (*i.e.* jurisdiction)
2. what law should be applied by the relevant court to resolve the particular matter? (*i.e.* choice of law)
3. in what circumstances should another court recognise a judgment given by the court? (*i.e.* enforcement of foreign judgments)

I apply the purposive approach I have described in chapter two and the federalist vision of unity I have described in chapter three to each of these three questions and attempt to elucidate briefly some of the conflict of laws rules that may be articulated, and some of the systemic features that arguably should exist, as a consequence. It should be noted that there is relatively little case law on questions one and three. This is no doubt because the Constitution and various statutes appear to have comprehensively dealt with these questions in a way that leaves little scope for uncertainty.⁴¹ By contrast, there is a relatively large amount of case law on question two. This is because Australia mostly still uses the common law choice of law rules. The choice of law rule which has been the subject of most litigation is, of course, the choice of law rule for tort. By necessity, I will refer frequently to the tort choice of law rule cases in what follows, but it is worth stating that this paper is only incidentally interested in the tort choice of law rule. Throughout this paper, I will refer where relevant to the position in Canada in order to illustrate the

See also P. Kincaid, “Justice in Tort Choice of Law” (1996) 18 Ade. L. Rev. 191 at 193-194 [hereinafter Kincaid(1996)].

⁴¹ See Gummow, *supra* note 6 at 993, note 57 who states that the “paucity [of cases] is a measure of the success of the legislation.”

points I am making. As LaForest J noted in *Tolofson*, “so much of the history and the social, practical and constitutional environment” of Canada is “akin” to that of Australia.⁴² For this reason, and because Canadian courts have already adopted a purposive approach to intrafederation conflict of laws, Canada provides a useful exemplar.

⁴² *Tolofson*, *supra* note 33 at 314.

Chapter 1

A. Australia

On 26 January 1788, Captain Arthur Phillip, commander of the First Fleet and first governor of New South Wales, landed at Sydney Cove and in accordance with his Commission proclaimed the establishment of the new British colony of New South Wales.⁴³ However this act may now be regarded from a political perspective, its effect from an Australian, English and international legal perspective is clear: it evidenced the creation, or at least the incipient creation, of a new law area, namely that of New South Wales.⁴⁴ At that moment, this new law area covered over a third of the Australian continent⁴⁵ and the law within that area was English law.⁴⁶

During the next hundred years a number of relatively rapid constitutional developments led to the “fracturing” of this initially unified Australian law area. Three separate colonies were split off from New South Wales: Van Diemen’s Land (Tasmania) in 1825;⁴⁷ Victoria in 1851;⁴⁸ and Queensland in 1859.⁴⁹ Western Australia was formally

⁴³ See A. Castles, *An Australian Legal History* (Sydney: Law Book Co, 1982) at 24-25.

⁴⁴ See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 77-79 [hereinafter *Mabo*]. NSW began its existence as a penal settlement. Its law was English law. The date of reception for English law in NSW was later fixed as 25 July 1828 – s24 of the Australian Courts Act 1828 (Imp.) 9 Geo. IV, c.83.

⁴⁵ See Castles, *supra* note 43 at 25.

⁴⁶ See *Cooper v Stuart* (1889) 14 App Cas 286; *Mabo*, *supra* note 44 at 79-80. It should be noted that it was only in 1992, in *Mabo* that the High Court of Australia rejected the hitherto accepted legal position that Australia was on settlement *terra nullius*. This opens up the possibility that Australian law will accept that on settlement Aboriginal laws existed on the Australian continent. The decision in *Mabo* acknowledges that on settlement Aborigines had a customary attachment to particular areas of land. So, while on settlement the law area of NSW was filled with English law, some form of Aboriginal law also continued to exist in this law area.

⁴⁷ Section 44 of the New South Wales Act 1823 (Imp.) 4 Geo. IV, c.96 empowered the Crown to constitute Van Diemen’s Land as a separate colony to New South Wales (performed by an Order in Council dated 14 June 1825). See also J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901) at 59.

⁴⁸ Australian Constitutions Act No2 1850 (Imp.) 13 &14 Vict., c.59. See also Quick and Garran, *ibid.* at 52-54.

established as a separate British colony in 1829⁵⁰ and South Australia in 1836.⁵¹ The six Australian Colonies were granted responsible self-government.⁵² Subject to Imperial enactments that extended to the Colonies, the Colonial legislatures had a wide power to make laws for the peace, order and good government of their respective Colonies.⁵³ Each Colony also had a Supreme Court with general and appellate jurisdiction.⁵⁴ The net result of these constitutional developments was that in 1890 at the time of the Melbourne Conference, the first of the Conferences and Conventions which were to lead to Federation, Australia comprised six separate law areas,⁵⁵ namely the Colonies of New South Wales, Tasmania, Victoria, Queensland, South Australia and Western Australia.⁵⁶

⁴⁹ Order in Council relating to the Constitution of Queensland, 6 June 1859. See also Quick and Garran, *ibid.* at 73.

⁵⁰ Western Australia Colonization Act 1829 (Imp.) 10 Geo. IV, c.22. See also Quick and Garran, *ibid.* at 67-68.

⁵¹ South Australia Colonization Act 1834 (Imp.) 4 & 5 Will. IV, c.95. See also Quick and Garran, *ibid.* at 63.

⁵² This was granted by 1854 in Tasmania, 1855 in New South Wales and Victoria, 1856 in South Australia, 1859 in Queensland and 1890 in Western Australia. See generally R. D. Lumb, *The Constitutions of the Australian States*, 4th ed. (St Lucia, Qld: University of Queensland Press, 1977).

⁵³ See, for example, s1 of the NSW Constitution Act (being a schedule to the New South Wales Constitution Statute 1855 (Imp.) 18 & 19 Vict., c.54) which provided that the NSW legislature had power "to make law for the peace, welfare and good government of New South Wales in all cases whatsoever." The Colonies (and after Federation, the States) were subject to the Colonial Laws Validity Act 1865 (Imp.) 28 & 29 Vict., c.63, which provided that Colonial laws which were repugnant to an Imperial enactment extending to the Colony expressly or by necessary intendment were void to the extent of the repugnancy. This restriction was finally removed by s3 of the Australia Act 1986 (Cth & UK).

⁵⁴ See, for example, the Third Charter of Justice (proclaimed 1824) establishing the NSW Supreme Court (authorised by the New South Wales Act 1823 (Imp.)). Appeals from the Colonial Supreme Courts could be brought to the Judicial Committee of the Privy Council – see the Judicial Committee Act 1833 (Imp.) 3 & 4 Will. IV, c.41.

⁵⁵ "Prior to federation, the legal systems of the Australian Colonies were independent one of another": *Breavington*, *supra* note 3 at 107 per Brennan J.

⁵⁶ Mention should be made of the Federal Council of Australasia. This body had been established by the Federal Council of Australasia Act 1885 (Imp.) 48 & 49 Vict., c.60. The Council was a mere law-making body (with a scanty list of powers at that). The Council did pass several laws including laws with respect to the intercolonial service of civil process and the enforcement of judgments (*viz.* The Australasian Civil Process Act 1886 and The Australasian Judgments Act 1886). Overall, however, the Council was not a successful institution. Not all the Australian Colonies were members of it (notably New South Wales was absent) and interest in the working of the Council fell away as the movement for Federation gained pace during the 1890s. The Federal Council of Australasia Act was repealed by Covering Clause 7 of the Commonwealth of Australia Constitution Act 1900 (Imp.). Its laws continued in force with respect to the Colonies (States) to which they applied until they were repealed by the Commonwealth. See generally Quick and Garran, *supra* note 47 at 109-115.

The period 1890 – 1901 may be described as the period of Federation. Throughout this decade, the Colonies participated in a series of Conferences and Conventions to discuss the creation of a federal union. “Federation” was supported by those who believed the Colonies should join together to deal with matters of mutual Colonial interest such as defence and the abolition of inter-Colonial tariffs. A draft Constitution was prepared and approved at referendum by the people of each Colony. This draft Constitution was forwarded to London and after some slight modifications was enacted on 9 July 1900 by the Imperial Parliament as part of the Commonwealth of Australia Constitution Act.⁵⁷ Under this Act the six Australian Colonies were united in “one indissoluble Federal Commonwealth.”⁵⁸ The new Commonwealth of Australia came into existence on 1 January 1901.⁵⁹ For the purposes of this paper there are several points about the Commonwealth Constitution that should be noted:

1. The Constitution establishes a federation. This federation is composed of a national, federal government called the Commonwealth of Australia,⁶⁰ and the six former colonies that continue to exist under the Constitution as States.⁶¹ The Constitution distributes legislative power over particular subjects between the Commonwealth and the States. From a conflict of laws perspective, at least three important consequences flow from the fact that Australia is a federation:

⁵⁷ For a general account of Federation see P.H. Lane, *An Introduction to the Australian Constitutions*, 6th ed. (Sydney: Law Book Co, 1994) at 237-254.

⁵⁸ Preamble to the Commonwealth of Australia Constitution Act 1900 (Imp.).

⁵⁹ Proclamation of Queen Victoria, 17 September 1900, made pursuant to Covering Clause 3 of the Commonwealth of Australia Constitution Act 1900 (Imp.), Commonwealth of Australia Gazette, No 1, 1 January 1901.

⁶⁰ Covering Clause 3 of the Commonwealth of Australia Constitution Act 1900 (Imp.).

- a) There is a potential for the Commonwealth and the States to pass conflicting or inconsistent legislation over the same subject matter. Most of the powers conferred on the Commonwealth by the Constitution are not exclusive and may, therefore, be concurrently exercised by the States.⁶² In the event that a “vertical conflict” occurs, that is, a State law and a Commonwealth law purport to govern in an inconsistent manner the one set of facts, s109 of the Constitution provides that the Commonwealth law is to prevail to the extent of the inconsistency.⁶³
- b) The continued existence of the six States as separate law areas means that conflict of laws can occur within Australia between the States. As will be discussed below, the prevailing view is that the Constitution does not contain a provision analogous to s109 that might be used to resolve such “horizontal conflicts.”⁶⁴ Such conflicts have instead been traditionally resolved by reference to the English (now Australian) common law conflict of laws rules (to the extent these have not been displaced by statute).⁶⁵
- c) As the Commonwealth is able to pass legislation which binds all courts and persons throughout Australia⁶⁶ and which by virtue of s109 prevails over inconsistent State legislation, the Commonwealth can eliminate conflicts in

⁶¹ Section 106 of the Commonwealth Constitution.

⁶² The legislative power of the Commonwealth is limited to specific, enumerated subjects, principally those found in s51 of the Constitution. Except to the extent the situation has been modified by the Constitution, the States retain their general legislative powers to make laws for the “peace, order and good government” of their particular States. See generally Lane, *supra* note 57 at 1-2, 210-211.

⁶³ There are two types of inconsistency: 1. direct inconsistency (where it is impossible to obey both laws or where a right is granted by Commonwealth law but the exercise of that right is prohibited by State law: see *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237); and 2. inconsistency arising where the Commonwealth has expressed an intention to exclusively “cover the field” with a particular piece of legislation: see *Ex Parte McLean* (1930) 43 CLR 472.

⁶⁴ See below at 70-76. See also *Breavington*, *supra* note 3 at 83; *McKain*, *supra* note 2 at 35-37.

particular subject areas by creating one national, unified law in that subject area in place of disparate State laws. A good example of this is found in the area of marriage and divorce – an area that has proven to be a rich source of conflict in the international sphere and in a country like the United States. Within Australia, conflict no longer arises in this area as all marriages are solemnised pursuant to the Marriage Act 1961 (Cth) and all divorces, and property settlements, are made pursuant to the Family Law Act 1975 (Cth).⁶⁷ (In addition, it might be noted in passing, that nearly all disputes in the family law area are adjudicated by a specialised federal court called the Family Court). Of course, the ability of the Commonwealth to create a national, unified law over a particular subject area is limited to the extent that it has power under the Constitution to legislate in respect of that subject area. It is important to note, however, that the Commonwealth has power under s51(xxxvii) of the Constitution to legislate on any matters referred to it by any of the parliaments of the States.⁶⁸ This opens up the possibility, therefore, of the States referring to the Commonwealth matters presently within State legislative competence so that the Commonwealth could create a national, unified law on the matter.⁶⁹ Further, in a spirit of co-operative federalism, the

⁶⁵ See below at 44.

⁶⁶ Covering Clause 5 of the Commonwealth of Australia Constitution Act 1900 (Imp.).

⁶⁷ See Gummow, *supra* note 6 at 991.

⁶⁸ See, for example, *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas); Ex Parte Australian National Airways Proprietary Limited* (1964) 113 CLR 207.

⁶⁹ Two possibilities which spring readily to mind for such uniform, national treatment are motor vehicle accidents and defamation. A brief survey of intrafederation conflict of laws cases reveals that many of them arise out of motor vehicle accidents (see, for example, *Breavington*; *Perrett v Robinson* (1988) 169 CLR 172; *Stevens*; and *Goryl*) and defamation (see the *ALRC Choice of Law Report*, *supra* note 6 at 57). National legislation in these two areas should eliminate a great deal of the conflict of laws cases that arise within Australia. See also Nygh (1995), *supra* note 14 at 900.

States and the Commonwealth may agree to enact uniform laws in a particular area.⁷⁰ Whether through cooperative federalism or through national legislation passed by the Commonwealth, the unifying of substantive private law rules has the effect of reducing the scope for conflicts to occur within Australia.⁷¹

2. The Constitution established a new court with original and appellate jurisdiction called the High Court of Australia.⁷² Section 75 of the Constitution describes the matters in which the High Court has original jurisdiction. These matters include those in which the Commonwealth is a party and those arising between residents of different States.⁷³ With the abolition of appeals to the Judicial Committee of the Privy Council, the High Court of Australia now sits at the apex of the Australian judicial hierarchy.⁷⁴ The High Court hears appeals from State Supreme Courts without limitation as to subject matter.⁷⁵ Unlike the Supreme Court of the United States, therefore, the High Court's appellate jurisdiction is not limited to matters containing a federal element.⁷⁶ Perhaps the most important consequence of the High Court's general appellate jurisdiction is that it is able to ensure that there is one uniform,

⁷⁰ See, for example, the Corporations Law and the Domicile Acts.

⁷¹ See, Kahn-Freund, *supra* note 1 at 61 where he notes that where the substantive private law of a "composite unit" has been unified, internal conflicts should tend to disappear.

⁷² Section 71 of the Commonwealth Constitution.

⁷³ Sections 75 (iii) and (iv) of the Commonwealth Constitution. These sections, and their interaction with the Judiciary Act 1903 (Cth), raise difficult conflict of laws issues. For example, to what court should the High Court remit an action commenced in its original jurisdiction? what law is applicable to an action commenced in the High Court's original jurisdiction? Fortunately, it is not necessary for the purposes of this paper to enter into this complex area (although I would say that the approach I argue for in this paper is equally applicable in this area).

⁷⁴ Privy Council (Limitation of Appeals) Act 1968 (Cth) and Privy Council (Appeals from the High Court) Act 1975 (Cth); Australia Act 1986 (Cth & UK). See generally M. Crock and R. MacCallum, "Australia's Federal Courts: Their Origins, Structure and Jurisdiction" (1995) 46 S. Car. L. Rev. 719 at 729-736.

⁷⁵ Section 73 (iii) of the Commonwealth Constitution.

⁷⁶ As to the appellate jurisdiction of the Supreme Court of the United States see T. E. Baker, "A Catalogue of Judicial Federalism in the United States" (1995) 46 S. Car. L. Rev. 835 at 838.

national common law. As a matter of doctrine there is only one common law in Australia and that is the common law of Australia as declared by the High Court.⁷⁷ There is no separate State common law – the common law applied by the Supreme Court of Victoria is not the common law of Victoria but the common law of Australia.⁷⁸ In the event any local variations in the common law arise, these variations will be resolved by the High Court whose decision will then bind all the courts in the Australian judicial hierarchy.⁷⁹ As the common law is uniform throughout Australia it does not, therefore, give rise to conflicts. Conflicts can only be caused in Australia by the different effects produced by respective State statutes.⁸⁰

3. Section 118 of the Constitution provides:

Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

⁷⁷ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563 per curiam: “There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.”; *Commonwealth v Mewett* (1997) 191 CLR 471 at 526 per Gaudron J: “...there is one common law, the common law in Australia, which may be modified in its operations in the States and Territories by Commonwealth, State or Territory legislation.” See also s80 of the Judiciary Act 1903 (Cth) which provides that insofar as Commonwealth laws are not applicable, courts exercising federal jurisdiction must apply the “common law in Australia.” See generally L.J. Priestley, “A Federal Common Law in Australia?” (1995) 46 S. Car. L. Rev. 1043.

⁷⁸ *Ibid.* See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 113 per McHugh J: “...that there is a common law of Australia as opposed to a common law of individual States is clear.”

⁷⁹ *Ibid.* It is submitted that while “local variations” in the declaration of the common law may exist from time to time in Australia, it is not possible for a conflict to arise between “the common law of Victoria” and “the common law of New South Wales.” This is because of the uniform nature of the common law throughout Australia. It would be incumbent on a court to apply to an issue the common law of Australia as declared by the High Court. Some support for this view is found in the comment of Brennan J in *Breavington*, *supra* note 3 at 111 that, “If the legislatures of the several States and Territories had not enacted laws affecting [civil liability in tort] the two conditions of *Phillips v Eyre* would have had little work to do for the uniformity of the common law would have ensured that, wherever the tort was committed and wherever the action was brought, the *lex fori* and the *lex loci* would determine in precisely the same way the question whether civil liability exists and the nature of it.” See also Gummow, *supra* note 6 at 990; *contra* Priestley, *supra* note 77 at 1066-1067 who is of the view that until the High Court imposes uniformity different common laws may exist in two States.

⁸⁰ See Nygh (1991), *supra* note 37 at 415, and Gummow, *supra* note 6 at 983.

Amongst the powers conferred on the Commonwealth by s51 of the Constitution are powers to make laws with respect to:

- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.

There was little debate on these provisions at the Federation conventions and conferences.⁸¹ They appear in the 1891 draft of the Constitution in substantially the form they appear in the enacted Constitution.⁸²

Clearly, s118 and s51(xxv) were modelled on Article IV, Section 1 of the United States Constitution⁸³ which provides:

Full faith and credit shall be given in each State to the public Acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof.

Section 51(xxiv) appears to derive its source from s15 of the Federal Council of Australasia Act 1885 (Imp.).⁸⁴ To the extent that it is possible to glean the intention of the Australian founding fathers in including these provisions in the Constitution, it appears that these provisions were intended to ensure interstate judicial comity.⁸⁵

There is some evidence that difficulties arose in the colonial period, for example, because judgments given in one colony would not be recognised in another colony.⁸⁶

⁸¹ See M.Pryles and P. Hanks, *Federal Conflicts of Law* (Sydney: Butterworths, 1974) at 63-66.

⁸² *Ibid.* See also Quick and Garran, *supra* note 47 at 614, 620 and 961.

⁸³ *Ibid.*

⁸⁴ See Quick and Garran, *ibid.* at 615.

⁸⁵ *Ibid.*

⁸⁶ See, for example, *Elkon v De la Juvenay*, Full Court of Victoria, 10 August 1900 (cited in Quick and Garran, *ibid.* at 615). In that case, the Full Court of Victoria refused to enforce a South Australian judgment (for a debt owing to a South Australian resident) against a Victorian resident who had not submitted to the jurisdiction of the South Australian court.

An effective judicial comity amongst the States would be a necessary underpinning of the economic union the Constitution sought to create.⁸⁷ It would seem that recourse was had to Article IV, Section 1 of the United States Constitution as this seemed to be the clause that performed this task in that Constitution.⁸⁸ Little attention was given to the implications of the wording used.⁸⁹ Some appeared to think that the provisions would only have evidentiary effect – so, for example, allow courts to “take judicial notice of the laws, acts, and records of the States, without the necessity of requiring them to be proved by cumbrous evidence.”⁹⁰ On the other hand, Sir Isaac Isaacs, a future chief justice of the High Court, appeared to contemplate the possibility that the provisions could have a more substantive effect.⁹¹ In any event, no clear view as to the operation of the provisions emerges from the Convention and Conference debates.

4. Above all else it should be stressed that the Constitution establishes a new nation, Australia. The Constitution sought to unite the people of the six Colonies into one country and to replace a narrow parochialism with a national outlook. Going forward, all the people of Australia would need to work together to maximise their collective wealth and opportunities. To facilitate this the Constitution establishes a single Australian common market.⁹² It provides that Australians are to be free to move between the States⁹³ and prevents the States discriminating against the residents of

⁸⁷ See, for example, the statement of Sir Alfred Deakin, a future prime minister of Australia, at the 1890 Melbourne Conference (quoted in Pryles and Hanks, *supra* note 81 at 64) to the effect that “mercantile men” wished for a system that facilitated recovery from debtors residing in other States.

⁸⁸ Pryles and Hanks, *ibid.* at 66.

⁸⁹ *Ibid.*

⁹⁰ Sir Edmund Barton quoted in Quick and Garran, *supra* note 47 at 621.

⁹¹ See Pryles and Hanks, *supra* note 81 at 65.

⁹² *Cole v Whitfield* (1988) 165 CLR 360.

⁹³ Section 92 of the Commonwealth Constitution.

other States.⁹⁴ It gives the Commonwealth wide powers to direct the national economy and act on matters of national interest. Any examination of the Constitution's impact on intrafederation conflict of laws needs to be placed against this larger backdrop of what the Constitution seeks to achieve.

B. Canada

It is useful to briefly describe the relevant Canadian constitutional arrangements in order that the discussion of the Canadian cases that follows may be placed in context. These constitutional arrangements are similar in many ways with those I have described in relation to Australia, but there are also some significant differences that need to be noted.

Canada, like Australia, is a federation. It is composed of a national, federal government and ten provinces.⁹⁵ Importantly, one of these provinces, Quebec, is quite different from the other nine provinces in that its language and culture is predominantly French-based.⁹⁶

Quebec has a civil law system whereas the rest of Canada has a common law system.

Apart from any other factors, the presence of Quebec in Canada makes Canada less homogenous than Australia.⁹⁷

⁹⁴ Section 117 of the Commonwealth Constitution.

⁹⁵ Unlike the Australian States which all joined the Federation at the same time (1901), the Canadian provinces joined Canada at different times. At Confederation in 1867 there were four initial provinces: Ontario, Quebec, Nova Scotia and New Brunswick. Manitoba joined Canada in 1870, British Columbia in 1871, Prince Edward Island in 1873, Alberta and Saskatchewan in 1905 and Newfoundland in 1949. It should also be noted that within Canada there also exist three self-governing territories: the Yukon, the North-West Territories and Nunavut.

⁹⁶ See *Secession Reference*, *supra* note 35 at 413.

⁹⁷ See Crock and MacCallum, *supra* note 74 at 720: "Of the [United States, Canada and Australia], Australia stands apart for the homogeneity of its laws and legal institutions and for the central focus of its governments in the federal capital of Canberra. While there are regional differences in culture and outlook, these are subtle in comparison with the variety that exists among the Canadian provinces or American

The Constitution Act, 1867 distributes legislative authority between the federal government and the provincial governments. Unlike the Australian Constitution, the Constitution Act, 1867 enumerates the specific heads of legislative power for both the federal and provincial governments.⁹⁸ “Vertical conflicts”, that is, conflicts between federal and provincial legislation, are resolved in favour of the federal government.⁹⁹

Just as the High Court of Australia sits at the apex of the Australian judicial hierarchy, the Supreme Court of Canada sits at the apex of the Canadian judicial hierarchy.¹⁰⁰ Like the High Court, the Supreme Court has a general appellate jurisdiction. This means that the Supreme Court is able to ensure a uniform Canadian common law throughout the nine common law provinces.¹⁰¹

The existence of the ten provinces means that conflict of laws can occur within Canada between the provinces. Such conflicts can occur not only as a result of the effects of different provincial statutes but also between the common law and Quebec’s Civil Code. “Horizontal conflicts” within Canada have traditionally been resolved by reference to the

states. Indeed, in some respects, Australia is more a unitarian system than a confederation of different states and territories.”

⁹⁸ Sections 91 and 92 of the Constitution Act, 1867.

⁹⁹ See generally P.W.Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), chapter 16. See also *Provincial Court Judges Case* [1997] 3 SCR 3, 150 DLR (4th) 577 at 623. Only provincial legislation directly inconsistent with federal legislation is constitutionally invalid, unlike Australia there is no “covering the field” inconsistency – see *Multiple Access v McCutcheon* [1982] 2 SCR 161.

¹⁰⁰ See *R v Gardiner* [1982] 2 SCR 368.

¹⁰¹ See Herbert, *supra* note 30 at 29 and Hogg, *supra* note 99 at ch. 8.5. Hogg notes that: “The Supreme Court of Canada does not tolerate divergences in the common law from province to province, or even divergences in the interpretation of similar provincial statutes. Such divergences do develop from time to time, of course, but they are eventually eliminated by the Supreme Court of Canada. The assumption of the Court...is that, wherever variations can be avoided, Canadian law, whether federal or provincial should be uniform.”

English (now Canadian) conflict of laws rules¹⁰² or, in Quebec, the conflict of laws rules contained in the Quebec Civil Code (or Code of Civil Procedure).¹⁰³

The Canadian Constitution contains no provision equivalent to s118 of the Australian Constitution. The Supreme Court of Canada has, however, implied into the Constitution, a “full faith and credit” obligation.¹⁰⁴ The Canadian Constitution also does not contain express heads of legislative power equivalent to ss51(xxiv) and (xxv) of the Australian Constitution. Traditionally, conflict of laws rules have fallen within the purview of the provinces, although the Supreme Court has indicated that the federal government may have some ability to legislate in this area.¹⁰⁵

In *Morguard*, LaForest J referred to “the obvious intention of the Constitution to create a single country.”¹⁰⁶ Much more than in Australia, however, this “nation-building” intention has been tempered by a need to accommodate the diversity of the constituent units, in particular Quebec.¹⁰⁷ The operation of the conflict of laws within Canada needs to be understood in this context.

¹⁰² See J-G Castel, *Canadian Conflict of Laws*, 4th ed. (Butterworths: Toronto, 1997) at 8.

¹⁰³ See J.Woods, “Recognition and Enforcement of Foreign Judgments Between Provinces: the Constitutional Dimension of *Morguard Investments Ltd*” (1993) 22 Can. Bus. L. J. 104.

¹⁰⁴ See *Hunt*, *supra* note 33 at 40-41. See also *Provincial Court Judges Case*, *supra* note 99 at 622-623.

¹⁰⁵ See *Hunt*, *ibid.* at 42.

¹⁰⁶ *Morguard*, *supra* note 9 at 271.

¹⁰⁷ See *Secession Reference*, *supra* note 35 at 407, 413.

Chapter 2

In this chapter, I will sketch out what I have referred to in the Introduction as the

“purposive approach.” The purposive approach asks courts to:

1. identify the purposes an intrafederation conflict of laws rule seeks, or should seek, to satisfy;
2. examine critically how the rule in practice meets those identified purposes; and,
3. where the rule falls short, articulate a new rule to ensure the purposes are met.

Before examining the purposive approach, however, it is first necessary to look at what I have referred to as the High Court’s present formalistic approach to intrafederation conflict of laws.

Formalism and the High Court

For the purposes of this paper, formalism might be simply described as a judicial approach in which existing rules are adhered to without regard to their substantive import. It is an approach in which precedent is favoured over general principle, the law is sought to be refined rather than rationalised and the law is applied as it is and not as it ought to be. It is an approach that generally eschews any examination of practical context, emphasising instead the importance of rules rationally interlocking with other rules. With respect to statutory interpretation, it is an approach that adheres to the literal meaning of words.¹⁰⁸ As I have indicated above, I consider the High Court in its approach to intrafederation conflict of laws to have a tendency towards formalism in the sense just mentioned. I wish to illustrate this by means of two recent examples.

¹⁰⁸ See A. Paterson, *The Law Lords* (London: Macmillan, 1982) at 132-133. He describes the prevailing judicial philosophy of the House of Lords in the 1950s as formalist in the sense I have specified.

The first example, I have already referred to in passing, namely the upholding by a majority of the High Court in *McKain* of the rule that limitation statutes are to be characterised as procedural. *McKain* arose out of an injury suffered by a merchant seaman on a motor vessel in South Australia in 1984. In 1990 the seaman commenced proceedings in New South Wales against the charterer of the motor vessel alleging that the 1984 injury was caused by the charterer's negligence. The charterer, in its defence, sought to rely on the South Australian Limitation of Actions Act. If this act applied then the claim was statute barred, as the act required an action for damages arising out of physical injury to be commenced within three years of the accrual of the cause of action. In New South Wales the relevant limitation period was six years, so if the New South Wales Limitation Act applied the charterer's limitation defence would be unsuccessful. The majority of the High Court characterised the South Australian Limitation of Actions Act as a "procedural" law. This meant that it had no effect on the claim brought by the seaman in New South Wales. The majority's holding is supported entirely by reference to precedent. The majority first note that:

For the purposes of applying conflict of law rules, English courts have long adopted the distinction that a true statute of limitation, which does no more than to cut off resort to courts for enforcement of a claim, is a procedural law, while a statute which extinguishes a civil liability and destroys a cause of action is a substantive law.¹⁰⁹

For this proposition, the majority cite a string of English precedent commencing with an 1830 case. The majority then go onto discuss various High Court precedents to the same effect. The majority conclude:

But, whether or not a distinction between a statute extinguishing a right and a statute barring an action to enforce the right be thought desirable, it is firmly and

¹⁰⁹ *McKain*, *supra* note 2 at 41

clearly established as a principle of law. As the distinction has operated in practice free of injustice, there is no warrant for discarding it.¹¹⁰

What is striking about the majority's judgment is its complete lack of engagement with how the rule actually operates in practice within Australia and with how the rule sits with underlying principles. The majority do not, for example, address questions such as: does characterising a limitation act as procedural encourage forum-shopping and frustrate the operation of choice of law rules? to what extent is it fair to defendants that they may be sued in other jurisdictions on claims that are stale in their own? The majority instead adhere unreflectingly to precedent and ignore practical context.¹¹¹

The second example is provided by *Stevens*. *Stevens* is another motor vehicle case. In *Stevens*, the plaintiff was struck by a motor vehicle while crossing a road in Tweed Heads, New South Wales. The plaintiff was a New Zealand tourist who had come to Australia to attend the Brisbane Expo and was staying in Tweed Heads. The defendant was a Queensland resident who was driving a motor vehicle registered and insured in Queensland. The plaintiff commenced proceedings in Queensland. At trial, the defendant admitted liability but argued that damages should be assessed according to Part 6 of the Motor Accidents Act 1988 (NSW) which relevantly limited the amount of damages recoverable for non-economic loss. The plaintiff contended that damage should be assessed according to Queensland law which retained the common law rules for assessment of damages. The question before the High Court was whether the relevant

¹¹⁰ *Ibid.* at 44.

¹¹¹ See P.Kincaid, "Jensen v Tolofson and the Revolution in Tort Choice of Law" (1995) 74 Can. Bar. Rev. 537 at 551[hereinafter "Revolution in Tort Choice of Law"] who criticises the majority in *McKain* for adopting a tort choice of law rule "without discussion of principle." The same criticism can be leveled at the majority's characterisation of limitation statutes as procedural.

provisions of the Motor Accidents Act were properly characterised as procedural or substantive. If the provisions were characterised as substantive then under the reformulated *Phillips v Eyre* rule the plaintiff's damages would be limited to those that would be assessed in New South Wales; if characterised as procedural the plaintiff would recover common law damages in accordance with Queensland law. The same majority as in *McKain* held the New South Wales provisions to be procedural. They first referred to precedent for the proposition that the quantification of damages is a procedural matter for the *lex fori*. They then interpreted the relevant provisions of the Motor Accidents Act as "govern[ing] the quantification of damages for non-economic loss by directing the court not to award any amount" except in specified circumstances.¹¹² The provisions "operate in much the same way as a statute of limitations, that is to say, by acknowledging the cause of action but barring its enforcement."¹¹³ It followed that the provisions were to be characterised as procedural. Just as in *McKain*, there is no examination of the purpose behind the procedure-substance distinction and whether the characterisation of matters relating to the quantification of damages as procedural accords with that purpose. There is no attempt to address questions such as: what is the practical difference between eliminating a particular head of damage (substantive) and fixing the amount of damages for a particular head of damage as zero (procedural)? does characterising rules regarding quantification of damages as procedural encourage forum-shopping? is it fair for defendants to be exposed to a liability greater than that arising under the *lex causae*?

¹¹² *Stevens, supra* note 6 at 459.

¹¹³ *Ibid.* at 460.

It is submitted that the majority's reasoning in *McKain* and *Stevens* is unsatisfactory. It is unsatisfactory not because the majority follow precedent. It is, of course, perfectly legitimate for a common law court to follow precedent. This creates certainty and predictability in the law. Rather, the majority's reasoning is unsatisfactory because they apply precedent *unreflectingly*, they do not consider whether the application of precedent continues to be consistent with underlying principles and they do not consider the substantive effects in the modern Australian context of the rules reflected in precedent. According to Dworkin, "propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice."¹¹⁴ That is, courts should articulate those rules which fit best with the principles regarding social outcomes, political structure and procedural fairness valued by the community as reflected in the rules contained in the legal system as a whole. In order for a "proposition of law", such as an intrafederation conflict of law rule, to remain "true" (*i.e.* relevant and appropriate in a contemporary context) that "proposition" must "figure in or follow from" the underlying principles of the present-day Australian legal system. This requires courts to consider the purposes of the rule and the context in which the rule operates. In failing to do this, the High Court's formalist approach risks the perpetuation of rules that are no longer "true" and this may in turn stultify the principled and progressive development of the law. It may, of course, be the case that a purposive and contextual analysis of a rule may lead to the conclusion that the rule continues to be "relevant and appropriate in a contemporary context." If the Court fails to engage in such an analysis, however, one can not be confident that this is the case. It should also be borne in mind that formalism is not a

¹¹⁴ R.Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986) at 225.

neutral methodology, it merely masks the policy choices of the Court. A purposive and contextual analysis is more likely to bring these policy choices to light by requiring a court to expressly articulate what purposes it thinks a rule should serve and what effect it believes the rule has in practice. This has the merit of allowing the public and legislators to engage with the Court on a policy level over the content of rules.

The Purposive Approach

In *R v Big M Drug Mart*,¹¹⁵ the Supreme Court of Canada described the manner in which courts should approach the interpretation of the Canadian Charter of Rights and Freedoms:

The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect...the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be...a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, philosophic and historical contexts.¹¹⁶

This is regarded as a classic description of the purposive approach to interpretation.

Generalising from this passage, it can be said that it is the ascertainment of a rule's meaning or context by reference to the purpose the rule seeks to advance that is the principal aspect of the purposive approach. In identifying the relevant purpose, regard should be had to the wider context in which the rule operates including the particular

¹¹⁵ *R v Big M Drug Mart* [1985] 1 SCR 295.

body of law of which the rule forms part, the historic origins of the rule and the general social, political, economic and legal environment (*i.e.* the purpose of the rule should be drawn from the underlying principles of the legal system as a whole).

Unlike the formalist approach, therefore, the purposive approach requires a court to reflect on how rules sit with underlying principles and how the rule actually operates in the modern Australian context. This allows for the law to be progressively developed so that it remains "true" in the Dworkinian-sense mentioned above. In identifying the purposes which the court believes a rule should meet, the court will also bring into the open (or at least make more clear) its policy choices. It may be said that a purposive approach is not foreign to the High Court. Indeed, in recent years, the High Court has frequently taken a purposive approach when interpreting the Constitution. For example, it famously used such an approach to definitively settle (after 85 years of convoluted jurisprudence) the meaning of s92 of the Constitution.¹¹⁷ It has also used a purposive approach from time to time in the private law area.¹¹⁸

The Purposes of the Conflicts of Law

The first, and perhaps most important, part of the purposive approach is to identify the purposes of the rules under consideration. The conflict of laws is, of course, a discrete

¹¹⁶ *Ibid.* at 344.

¹¹⁷ Section 92 guarantees that interstate trade shall be "absolutely free." This rather opaque wording had been subject to a variety of interpretations over the years including an interpretation which effectively privileged interstate trade as a regulation-free zone. In *Cole v Whitfield*, *supra* note 92 the High Court went back to the Conference and Convention debates, examined the general historical context and looked again at s92's place in the Constitution and its interaction with other provisions to determine that the purpose of s92 was to keep interstate trade "free" of protectionist burdens.

¹¹⁸ See, for example, *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

and coherent body of law in its own right.¹¹⁹ As such it has its own objectives that exist regardless of whether it is operating within a federation or within an international community of sovereign states. The purposive approach is looking at these objectives of the conflict of laws and how the intrafederation conflict of laws rules fit with these objectives.

What then are some of the objectives of the conflict of laws? Yntema suggests the following:¹²⁰

1. uniformity of legal consequences;
2. minimization of conflicts of law;
3. predictability of legal consequences;
4. satisfying the reasonable expectations of the parties;
5. uniformity of social and economic consequences;
6. validation of transactions;
7. balancing the relative significance of contacts;
8. recognition of the "stronger" law;
9. cooperation among states;
10. respect for interests of other states;
11. justice of the end result;
12. respect for policies of domestic law;
13. internal harmony of the substantive rules to be applied; and
14. private utility.

This is obviously quite a compendious list of objectives and it may be doubted whether any one rule of the conflict of laws will satisfy all of them (although any one rule will no doubt meet many of them to a greater or lesser degree). Yntema goes on to suggest that these objectives can be subsumed under two heads: security and comparative justice.¹²¹ Security stresses the importance of disputes being settled in accordance with general rules

¹¹⁹ For a brief account of the history of the conflict of laws see P.M. North and J.J. Fawcett, eds, *Cheshire and North's Private International Law*, 12th ed. (London: Butterworths, 1992) at 14 – 40. See also J.O'Brien, *Smith's Conflict of Laws*, 2nd ed. (London: Cavendish, 1999) at 7-10.

¹²⁰ H.E. Yntema, "The Objectives of Private International Law" (1957) 35 Can. Bar Rev. 721 at 734-735.

¹²¹ *Ibid.* at 735.

that provide a uniform and predictable result. Comparative justice, on the other hand, stresses the importance of rules operating for both plaintiffs and defendants in a manner which provides substantive justice in their given situation. For present purposes, the concepts of security and comparative justice (or to use LaForest J's nomenclature, order and fairness) provide a useful shorthand way to describe the basic objectives of the conflict of laws.¹²²

Perhaps the best case to use to explicate the purposive approach is *Morguard*. This case concerned the recognition in one province, British Columbia, of a default judgment obtained in another province, Alberta. A mortgagee of certain lands in Alberta had obtained the default judgment after the mortgages in respect of those lands had fallen into default. At the time the proceedings were commenced, the mortgagor was a resident of British Columbia. The mortgagor was served with the relevant process in accordance with Alberta's rules for service *ex juris*. The mortgagor failed to appear or defend the action. The mortgagee obtained a default judgment against the mortgagor for the deficiencies arising from the mortgage sale. The question for the Supreme Court of Canada was whether the mortgagee could enforce the default judgment in British Columbia.¹²³

LaForest J, speaking for a unanimous Supreme Court, commences his analysis of the common law rules regarding the enforcement of foreign judgments by looking at the traditional rationale for those rules. He notes that English courts in the 19th Century took

¹²² It may be noted in passing that in my view these purposes clearly accord with the underlying principles of the Australian legal system as a whole.

a rigorous approach to the concept of territorial jurisdiction, that is, they held strictly to the view that as states have exclusive jurisdiction within their own territory other states should be reluctant to exercise jurisdiction over matters arising within that territory.¹²⁴ One consequence of this strict territorial approach was that English courts refused to enforce judgments that they regarded as falling outside the jurisdiction of the foreign court.¹²⁵ LaForest J suggests this may have been regarded as suitable by English courts at the time given the then state of travel and communications, which would have made it difficult for English defendants to defend proceedings brought outside England, and given English doubts about the quality of foreign justice.¹²⁶ In the modern world, however, this traditional rationale was an unsatisfactory justification for rules that appeared, amongst other things, to make certain transactions insecure (*i.e.* transactions carried out in foreign jurisdictions by defendants who subsequently left that jurisdiction) and to be unfair to foreign plaintiffs who were unable to have their judgments enforced.¹²⁷

The significance of *Morguard* lies in LaForest J's attention to the idea of comity, which LaForest J describes as "the informing principle of private international law."¹²⁸ LaForest J notes that the traditional rationale for the rules regarding the enforcement of foreign judgments "misapprehends" the "real nature" of the idea of comity.¹²⁹ Comity is not simply based on "respect for the dictates of a foreign sovereign but on the convenience,

¹²³ *Morguard*, *supra* note 9 at 258 – 261.

¹²⁴ *Ibid.* at 267 – 268.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at 269 – 270.

¹²⁷ *Ibid.* at 268 – 270.

¹²⁸ *Ibid.* at 268.

¹²⁹ *Ibid.*

may necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.”¹³⁰ LaForest J goes on to adopt the definition of comity given by the United States Supreme Court in *Hilton v Guyot*:

“Comity” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹³¹

Whilst the idea of comity exemplified in the traditional rules for the enforcement of foreign judgments is based on a rather narrow appreciation of the common interest of states, LaForest J’s reformulation of the idea of comity is “grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.”¹³² In short, LaForest J is emphasising the importance of looking at conflict of laws rules in the context of the underlying reality in which they operate.¹³³ The reality of the modern world, with its modern means of communications and travel and its globalised economy, suggests the articulation of more generous rules for the enforcement of foreign judgments so as to provide, among other things, more security to transactions, greater uniformity of the legal, social and economic consequences of transactions, and better justice for plaintiffs.¹³⁴

Morguard is a good case to illustrate the purposive approach because in it, LaForest J expressly measures both the traditional rules and his proposed rules relating to the

¹³⁰ *Ibid.*

¹³¹ *Ibid.* at 268 – 269 (citing *Hilton v Guyot*, 159 US 113 (1895) at 163-4).

¹³² *Ibid.* at 269.

¹³³ See *Tolofson*, *supra* note 33 at 303: “It is to the underlying reality of the international legal order...that we must turn if we are to structure a rational and workable system of private international law.”

enforcement of foreign judgments against a number of the objectives for a conflict of laws rule which I have described above (*i.e.* in brief, the principles of order and fairness).¹³⁵ In interpreting these objectives, LaForest J refuses to take a rigid, formalistic, doctrinaire approach but instead takes an approach that is practical and aware of context. If, going forward, Canadian courts follow LaForest J's emphasis on the practical convenience of the particular rules given the context of the underlying reality, this may mean, as it did in *Morguard*, that the substantive content of those conflict of laws rules will change.

An example of this is provided in *Tolofson*. Here, the Supreme Court of Canada was faced with the issue of what should be the choice of law rule for tort. Picking up the point he emphasised in *Morguard*, LaForest J, speaking for a majority of the Supreme Court of Canada, commences his analysis by describing the underlying reality in which the choice of law rules must operate:

On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a by-product of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be reflected and accommodated in private international law.¹³⁶

¹³⁴ See *Morguard*, *supra* note 9 at 270.

¹³⁵ It is somewhat ironic that *Morguard* has not necessarily contributed to order. Uncertainty now exists, for example, as to when a default judgment will be enforced.

¹³⁶ *Tolofson*, *supra* note 33 at 303.

This reality suggests that “the law to be applied in torts is the law of the place where the activity occurred, *i.e.*, the *lex loci delicti*.”¹³⁷ LaForest J, therefore, rejects the traditional *Phillips v Eyre* rule which gave a controlling role in the determination of claims based on extraterritorial torts to the *lex fori*.¹³⁸ He criticises the rule in *Phillips v Eyre* for violating the “territoriality principle”, for allowing disparate consequences to attach to the one wrong and for encouraging forum-shopping.¹³⁹ According to LaForest J, in contrast to the *Phillips v Eyre* rule:

[The *lex loci delicti*] rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly...If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well-grounded legal expectations must be respected.¹⁴⁰

As in *Morguard*, therefore, LaForest J expressly measures the existing rule and the proposed rule against the objectives of a conflict of laws rule. Following on from *Morguard*, LaForest J takes a practical, context-aware approach to the interpretation of these objectives emphasising the underlying reality in which the choice of law rule must

¹³⁷ *Ibid.* at 305. LaForest J’s emphasis on the importance of the territory in which the “rights” arise and his “axiomatic” conclusion that this points to the *lex loci delicti* is rather ironic as under the “vested rights theory” prevailing in the United States in the early part of the 20th Century, the *lex loci delicti* was also the choice of law rule for tort (see *Slater v Mexican National Railroad Co.*, 194 US 120 (1904)). It was precisely because of the perceived harshness and unfairness of such a rule that the “American revolution” in choice of law techniques arose (see P. North, *Private International Law Problems in Common Law Jurisdictions* (Dordrecht: Martinus Nijhoff, 1993) at 172).

¹³⁸ See below at 76-78 for a discussion of the *Phillips v Eyre* rule.

¹³⁹ *Tolofson*, *supra* note 33 at 306 – 307.

¹⁴⁰ *Ibid.* at 305 – 306.

operate. This *Morguard*-inspired approach leads LaForest J to the conclusion that the *lex loci delicti* should be the inflexible choice of law rule for intrafederation torts.¹⁴¹

Conclusion

It can be seen that the Supreme Court of Canada in *Morguard* and *Tolofson* has expressly engaged with the objectives those rules seek, or should seek, to satisfy. As has been indicated above, the approach of the High Court of Australia in its conflict of laws judgments has been quite different. Generally speaking, the High Court's judgments in *Breavington* and subsequent cases have failed to analyse expressly the purpose of the relevant conflict of laws rules. Perhaps an explanation for this failure can be found in the fact that most of the High Court's conflicts cases since *Breavington* have dealt with the question of what should be the choice of law rule for tort within Australia. As will be discussed below, the answer to this question has divided the Court on constitutional/federalism grounds.¹⁴² It is these constitutional/federalism differences that have been the main focus of the Court's attention. Whether or no this is the explanation for the High Court's failure to make use of the purposive approach, the fact remains that the High Court has not emphasised the importance of examining conflicts rules in the context of the underlying reality in which they operate or with an eye to their practical utility.

¹⁴¹ See below at 80-82 for discussion of the *lex loci delicti* rule. See "Revolution in Tort Choice of Law", *supra* note 111 at 542-552 for an approving analysis of LaForest J's method of reasoning in *Tolofson*: "LaForest J's principled, analytical and rational approach to the formulation of choice of law rules is...to be welcomed. It will serve as an important example to judges seeking to adhere to the rule of law in the development and application of principles of law." (at 542).

¹⁴² See below at 71-75.

As stated at the beginning of this chapter, the purposive approach looks at how a particular conflict of laws rule satisfies, or seeks to satisfy, the objectives of the conflict of laws (*i.e.* to what extent does the rule meet, or fail to meet, the principles of order and fairness?). In *Morguard*, the Supreme Court of Canada expressly addressed the objectives of the conflicts rule there under consideration in its reasons. In doing so, it emphasised that the objectives of the conflict of laws had to be understood in the context of the underlying reality of the modern world. It is, in my view, to be regretted that the High Court of Australia has yet to similarly engage with the objectives of the conflict of laws rules. An effective conflict of laws that is responsive to the needs of current times is not built by the largely unreflecting application of ancient precedents or through a rigidly doctrinaire approach to new issues. It is built, rather, by being sensitive to modern realities and by rigorously questioning the utility of conflict of laws rules in the context of those modern realities. The High Court is, I believe, much more likely to develop an effective conflict of laws by adopting a purposive approach in its judgments.

Chapter 3

In this chapter, I look at how conflict of laws rules are or should be effected by the federal environment in which they operate. Some might say that if the purposive approach is appropriately applied, the separate consideration of federalism issues is not really necessary. Certainly, there is much to be said for the view that where possible international and intrafederation conflict of laws should be the same; they are after all performing essentially the same function, namely, mediating the interactions between different law areas. The fact is, however, that there is one fundamental distinction between international and intrafederation conflict of laws. That is, obviously, that intrafederation conflict of laws occur within a specific and mandatory constitutional order. Such an order does not exist, or at least does not exist in the same way, on the international plane. The fact that intrafederation conflict of laws occur within a specific and mandatory constitutional order has at least two noteworthy consequences: firstly, intrafederation conflict of laws may be affected by particular constitutional provisions which do not affect the international conflict of laws; secondly, it may be possible, given that all the relevant law areas are subject to the specific and mandatory constitutional order, for intrafederation conflict of laws to attain more perfectly the objectives of the conflicts of law than it is for the international conflict of laws.¹⁴³

Speaking generally then, what effect should a federal environment have on intrafederation conflict of laws? The answer to this question depends on what vision of federalism one has in the intrafederation conflict of laws area. (For ease of discussion, I posit a dichotomy; in reality, however, the visions followed by courts are not so stark and

contain a mixture of elements, although I do believe that courts will have a tendency to one or other vision). The first, which I will call the “separateness vision” stresses the importance of allowing the constituent elements of the federation the freedom to prescribe for themselves the legal consequences within their territory of acts with an extraterritorial element. Imbued with this vision is the idea that federations exist to accommodate, even encourage, different social, legal and economic orderings between their various constituent elements. The fact that specific constituent elements may treat a particular set of facts differently is consistent with this idea. Such a vision would tend to support the view that a federal environment (absent positive provisions to the contrary) should have no effect on intrafederation conflict of laws, that is, intrafederation and international conflict of laws should be the same and the constituent units should be regarded as “separate countries.” The second federalist vision, which I will call the “unity vision”, stresses the importance of constituent elements coordinating their responses to acts with an extraterritorial element so that the federation as a whole has a coherent, harmonious legal system. Imbued with this vision is the idea that diversity within federations should be subordinated to broader federal goals of unity. The possibility that disparate consequences can attach to the one set of facts is regarded by this vision as anathema. Such a vision would tend to support the view that a federal environment (regardless of the existence of positive provisions) should have a substantive effect on intrafederation conflict of laws, that is, intrafederation conflict of laws is different from the international conflict of laws.

¹⁴³ See also above note 10.

Traditionally, the Australian and Canadian approach to intrafederation conflict of laws has tended to emphasise separateness over unity. This in large measure followed from both countries wholesale, and perhaps largely unthinking, adoption of the English conflict of laws rules to resolve intrafederation conflict of laws problems.¹⁴⁴ The English conflict of laws rules were largely developed by English courts in the 19th Century and were designed to resolve conflicts on an international plane.¹⁴⁵ Transplanted into the Australian and Canadian federations, the English conflict of laws rules did not always resolve intrafederation conflict of laws problems in a way that seemed appropriate to their respective national circumstances.¹⁴⁶

Within the last fifteen years or so the High Court of Australia and the Supreme Court of Canada have begun to look again at the appropriateness of the traditional English conflict of laws rules in the context of their respective federations.¹⁴⁷ It is interesting to speculate as to what has prompted this approximately simultaneous exercise in judicial re-evaluation. Relevant factors may include: the existence of an activist High Court and

¹⁴⁴ See *Morguard*, *supra* note 9 at 265, *Breavington*, *supra* note 3 at 69, *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 69. See also P. Finkle and C. Labreque, "Low Cost Legal Remedies and Market Efficiency: Looking Beyond Morguard" (1993) 22 Can. Bus. L. J. 58 at 62; *contra* H.P. Glenn, "Foreign Judgments, the Common Law and the Constitution: *De Savoye v Morguard Investments Ltd*" (1992) 37 McGill L. J. 537 at 539, who is of the view that it is "too harsh" to say the common law courts "unthinkingly" adopted the English conflict of laws rules. He points out that there were structural reasons in 19th Century Canada to adopt such an approach (e.g. the great distances in the country).

¹⁴⁵ Gaudron J rather bitingly comments on the application of such rules in *Stevens*, *supra* note 6 at 463 that, "It is curious that [despite the coming into existence of the Commonwealth, liability for interstate torts is] to be determined by rules which reach back to the common law of England of the seventeenth century and which were developed to determine the legal consequences of acts and events in foreign countries."

¹⁴⁶ See, for example, the rules for the enforcement of foreign judgments discussed in *Morguard*.

¹⁴⁷ This is not to say that the High Court of Australia and the Supreme Court of Canada had not occasionally looked at the appropriateness from a federalism perspective of certain intrafederation conflict of laws rules prior to *Breavington* and *Morguard*.

Supreme Court prepared to look afresh at old rules;¹⁴⁸ the persuasive influence of overseas judicial developments such as the liberalisation by the English courts of their conflict of laws rules¹⁴⁹ and the creation of various treaties and conventions to facilitate international cooperation in the conflict of laws area;¹⁵⁰ the phenomenon of “globalisation” with its concomitant attributes of increasingly mobile economic elements and a growing recognition that conflict of laws rules should facilitate rather than hinder this mobility;¹⁵¹ and, in Australia, the abolition of appeals to the Judicial Committee of the Privy Council,¹⁵² the implementation of significant changes to the judicial system¹⁵³ and the rise of “cooperative federalism.”¹⁵⁴

In Australia, the leading case re-evaluating the traditional approach to intrafederation conflict of laws is *Breavington*. Like many of the intrafederation cases that have been heard by the High Court in recent years, this case arose out of a motor vehicle accident. The plaintiff, Breavington, was injured in a collision between a motor vehicle in which he was a passenger and a motor vehicle driven by Godleman, the first defendant. The

¹⁴⁸ The “activism” of particular courts is obviously relative but there have been some notable examples of such activism in the last twenty years: the watering down of the doctrine of privity (*Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107); the subsuming of the rule in *Rylands v Fletcher* into the general tort of negligence (*Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520); the overthrow of the rule against recovery for pure economic losses in negligence (*Canadian National Railway v Norsk Pacific Steamship Co.* [1992] 1 SCR 1021); the allowing of recovery of equitable damages (*Canson Enterprises Ltd v Boughton & Co.* [1991] 3 SCR 534).

¹⁴⁹ See, for example, *Chaplin v Boys* [1971] AC 356; *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460.

¹⁵⁰ See, for example, the UNICTRAL treaties and the European Convention on the Enforcement of Judgments.

¹⁵¹ See, for example, *Morguard*.

¹⁵² See the Australia Acts 1986 (Cth & UK). See also *Breavington*, *supra* note 3 at 73 per Mason CJ.

¹⁵³ In the last thirty years the Commonwealth has established the Federal Court of Australia and the Family Court of Australia which respectively hear general federal matters and family law matters. In 1987 the Commonwealth and the States entered into a scheme under which they respectively cross-vested the jurisdiction of their courts into each other Australian court. See also *Breavington*, *supra* note 3 at 166 per Toohey J.

¹⁵⁴ See, for example, the Corporations Law, the Domicile Acts, the Fair Trading Acts/Trade Practices Act.

collision occurred in the Northern Territory. At the time of the collision both Breavington and Godleman were residents of the Northern Territory. Breavington subsequently brought an action in the Supreme Court of Victoria claiming that the collision was caused by the negligence of the defendants. The issue before the High Court was whether Breavington's claim for damages should be determined by reference to Victorian law (where the common law principles governing the assessment of damages ordinarily applied) or Northern Territory law (where a partial no-fault compensation scheme operated to preclude or limit the recovery of damages).

All seven justices found that the damages Breavington could recover in his action in the Supreme Court of Victoria were limited to those he would have been able to recover under the law of the Northern Territory. While reaching the same conclusion, the six judgments that were delivered differed significantly in their reasoning.¹⁵⁵ For example, Brennan J applied a reformulated version of the double-barrelled *Phillips v Eyre* tort choice of law rule whereas Deane J, in a judgment that has been described as "possibly the most original and interesting Australian judgment on the Federal aspects of the conflict of laws",¹⁵⁶ articulated a new constitutional tort choice of law rule that required the application of the *lex loci delicti*. The respective judgments of Brennan and Deane JJ actually manifest completely opposite federalist visions. This difference in vision arguably accounts in large part for the different choice of law rules they each

¹⁵⁵ There is, in fact, no clear *ratio decidendi*. See generally "Farewell to Phillips v Eyre?", *supra* note 10.

¹⁵⁶ "Farewell to Phillips v Eyre?", *ibid.* at 158.

articulate.¹⁵⁷ It is interesting to look at the Brennan and Deane JJ judgments in some detail as they help to explicate the separateness vision and the unity vision.

Near the beginning of his judgment Brennan J makes the following statement of his views regarding the effect of Federation on the independence of the States:

Prior to federation, the legal systems of the Australian Colonies were independent one of another. The preservation of the Constitutions of the several States by s106 of the Constitution ensured that, inter se, the mutual independence of the States was maintained except to the extent...that the Constitution affected their mutual independence or exposed that independence to affection by federal law. Therefore each State is “a distinct and separate country or law area”: *Laurie v Carroll* [(1958) 98 CLR 310 at 331]. Subject to the Constitution, the legislature of each “law area” is free to prescribe the rules to be followed by the courts of that area in resolving conflict of laws affecting private rights. The Constitution contains no provision which expressly prescribes such rules...¹⁵⁸

This statement clearly illustrates Brennan J’s attachment to the separateness vision. As a matter of substance, Brennan J understands the States to be “mutually independent” and hence free, subject to the Constitution and federal law, to prescribe for themselves the rules to be applied to (and hence the legal consequences of) acts brought before their courts. His jarring description of the States as “distinct and separate countries” emphasises the point that in his vision of the Australian federal structure what is

¹⁵⁷ Gummow, *supra* note 6 at 1002-1012 analyses the different approaches of Brennan and Deane JJ and concludes (at 1011) that, “The selection in the High Court judgments of rather different starting points has led to a different destination in determining the relationship between full faith and credit in the Australian Constitution and the choice of law rules of the common law.” Gummow does not analyse the different “starting-points” in terms of the justices’ vision of federalism but rather their “opinions as to the nature of the common law in the federal system” (at 1011-1012) He describes Brennan J’s approach as starting with the common law (which has primacy as the bedrock of the Australian legal order) to determine the effect of the Constitution whereas Deane J’s approach is to start with the Constitution (as the instrument creating a new legal order) to determine its effect on the common law. I agree with this analysis but would rather place the discussion in federalist terms. As has been discussed above at 6 the common law favours an approach which regards the States as “separate countries” whereas as I have suggested in chapter 1 the Constitution favours an approach which sees Australia as having a unified legal system. For Brennan J to give primacy to the common law and Deane J to give primacy to the Constitution has the consequence of forwarding these respective federalist perspectives.

¹⁵⁸ *Breavington*, *supra* note 3 at 107.

important is the ability of the States to be free, subject to the Constitution and federal law, to act as they see fit. It is only after Brennan J has articulated this vision that he turns to the Constitution and rejects the argument that s118 has any substantive effect noting that to interpret s118 in this way “would severely qualify the mutual legislative independence of the States.”¹⁵⁹

Brennan J favours as the choice of law rule for tort the rule in *Phillips v Eyre* with its requirement that civil liability exist both under the *lex loci delicti* and the *lex fori*. As explained by Brennan J this rule recognises an appropriate role for the forum:

Far from disturbing the Australian federation, the common law rules applicable in respect of extraterritorial wrongs appropriately reflect the mutual legal independence of the several Australian States and Territories. They accord to the law of the State or Territory where the alleged tort occurred the authority to define the kind of civil liability imposed on the tortfeasor, and reserve to the law of the State or Territory in which the action is brought the function of determining whether the kind of civil liability imposed on the tortfeasor by the *lex loci* is enforceable in the local courts...[T]he practical importance of the two conditions is that they allocate the areas in which the statute law of the respective States and Territories should prevail in the resolution of a particular case.¹⁶⁰

One reason why Brennan J accepts the rule in *Phillips v Eyre* as being the choice of law rule for tort is because it is consistent with the vision of separateness *i.e.* it recognises the “independence” of the States to prescribe the legal consequences within their territories of an act with an extraterritorial element.¹⁶¹

¹⁵⁹ *Ibid.* at 116.

¹⁶⁰ *Ibid.* at 111. Brennan J accepts (at 112) that, “[b]y attributing to the statutes of the *lex fori* a power to regulate what kinds of civil liability arising under the *lex loci* are enforceable in the forum, the common law opens the way to the possibility that some torts occurring in one part of Australia will not give rise to a civil liability in some other part or parts of Australia.”

¹⁶¹ See the comment of Mason CJ in *Stevens*, *supra* note 6 at 442: “The approach by the majority in *McKain* [which was the approach of Brennan J in *Breavington*]...is founded expressly upon the view that the States are, “separate countries in private international law.””

Like Brennan J, Deane J commences his judgment with a statement of his views regarding the effect of Federation on the independence of the States:

The provisions of the Constitution must be construed in the general context that, while the Federation was intended to preserve the existence of the former Colonies as States, the compact between the people of those Colonies was to unite in one indissoluble Commonwealth under a new system of law to which all within its territory...were thenceforth to be subject. The compact itself was that new system of law, incorporating by assumption the substratum of the common law upon which it was built. Under it, the constitutions and the laws (both inherited and statutory) of the States continued to the extent to which the Constitution and valid Commonwealth laws enacted pursuant to it allowed...To that extent, the constitutions and the laws of the States were not diminished. They were enhanced as part of a new national structure.¹⁶²

This statement provides a striking contrast with the corresponding statement made by Brennan J. There is no mention by Deane J, for example, of the States being “distinct and separate countries.” Instead, Deane J, while recognising the continued existence of the States, stresses the unity of the Australian federal system: the States are “unite[d] in one indissoluble Commonwealth”; there is a “compact” between the peoples of the States; and the States form part of a “new national structure.” Deane J, therefore, clearly holds to the unity vision. His vision of the Australian federal structure is one in which the independence of the States is qualified or, in his words, “enhanced”, so that their laws and powers complement each other to create a unitary, national system of law, that is “a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent or reconcilable.”¹⁶³ At the centre of Deane J’s vision is the Constitution:

When, in the context mentioned in the [statement quoted above], one turns to consider the general nature and particular aspects of the Constitution, it appears to me to be manifest that the comprehensive system of law which the Constitution established was intended to be a unitary one [in the sense quoted]. The

¹⁶² *Breavington*, *supra* note 3 at 120 – 121.

¹⁶³ *Ibid.* at 121.

fundamental provisions of that system of law were the terms of the Constitution itself. The purpose of those fundamental provisions was to federate the former Colonies into a single nation. They subjected colonial legislative powers and colonial laws, which they continued and incorporated as State legislative powers and State laws, completely to their terms, including their specified procedures for amendment (s128). It is reasonable to infer that it was intended that valid Commonwealth and State substantive laws, made or continued under the authority of the federal compact, would be integrated in the sense that they were internally consistent or reconcilable.¹⁶⁴

Deane J goes on to discuss five other aspects of the Constitution, or the legal system established by the Constitution, which in his view go to show an intention to create “a unitary system of law”:¹⁶⁵

1. The conferral by s75(iv) of the Constitution of an original jurisdiction on the High Court in “all matters...between residents of different States” assumes the existence of a national law which the High Court could apply to such matters;
2. The separation of powers established by the Constitution assumes “the independent existence of laws by reference to which the lawfulness of particular conduct can...be objectively and contemporaneously ascertained.”¹⁶⁶ It would run counter to this assumption if the State law applicable to a certain fact or circumstance was indefinite unless and until a particular court was chosen in which to litigate;
3. The uniform nature of the common law throughout Australia;
4. The principle that an “individual should not be exposed to the injustice of being subjected to the requirements of contemporaneously valid but inconsistent laws”;¹⁶⁷ and
5. The role of the High Court as a final court of appeal at the apex of the Australian judicial hierarchy which serves to unify each of the distinct court systems that make up that hierarchy.

In contrast to Brennan J, Deane J’s reasoning therefore follows a sort of “top down” analysis: he starts with the Constitution and establishes that it creates a unitary system of law and then turns to look at what choice of law rule for tort would be consistent with that unitary system. Unsurprisingly, he does not regard the rule in *Phillips v Eyre* as

¹⁶⁴ *Ibid.* at 121 – 122.

¹⁶⁵ *Ibid.* at 122 – 124.

¹⁶⁶ *Ibid.* at 122. Gummow, *supra* note 6 at 1006 expresses the view that this proposition is “too widely expressed.”

¹⁶⁷ *Ibid.* at 123.

being appropriate and instead formulates a constitutional rule requiring the application of the *lex loci delicti*.¹⁶⁸ Such a rule eliminates the “bedlam of Babel” where legal results attaching to the one set of facts vary with the court system.¹⁶⁹ The rule instead conforms with the national unitary system of law by always indicating the one law that will apply to a particular set of facts. Very clearly then the choice of law rule for tort articulated by Deane J follows from his attachment to the unity vision.

In Canada, the leading case re-evaluating the traditional approach to intrafederation conflict of laws is *Morguard*. In *Morguard*, LaForest J, speaking for a unanimous Supreme Court, held that the Alberta default judgment could be enforced in British Columbia.¹⁷⁰ In doing so, he criticised the traditional English rules as to the enforcement of foreign judgments that had hitherto been followed exclusively in Canada. Amongst other things, LaForest J stated that:

...the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction.¹⁷¹

Unlike Brennan J in *Breavington* with respect to the Australian federation, LaForest J was not, therefore, prepared to endorse the description of the constituent elements of the Canadian federation as being, for conflict of laws purposes, “foreign countries” to each other.¹⁷² Rather, his vision of the Canadian federal structure resembles that of Deane J’s in the Australian context in that it is essentially a vision of unity, that is, LaForest J sees

¹⁶⁸ *Ibid.* at 128 – 130. One may ask the question whether the *lex loci delicti* rule necessarily follows from the unitary system envisaged by Deane J. Could, for example, another rule which points to only one law, say the “proper law of the tort”, also conform with the unitary system? (See A.Apps, “Breavington v Godleman: A New Choice of Law Rule for Torts” (1990) 12 Syd. L. Rev. 625 at 634).

¹⁶⁹ *Ibid.* at 135.

¹⁷⁰ *Morguard*, *supra* note 9 at 277.

¹⁷¹ *Ibid.* at 271.

the “integrating character of [Canada’s] constitutional arrangements”¹⁷³ as necessitating cooperation and mutual respect between the provinces so as to “facilitate the flow of wealth, skills and people across [provincial boundaries] in a fair and orderly manner.”¹⁷⁴

Like Deane J, the Constitution is at the centre of LaForest J’s vision. He describes several factors arising from the Constitution which in his view demonstrate why intrafederation conflict of laws rules should be approached from the perspective of the unity vision:

1. The existence of a common citizenship which ensures the mobility of Canadians between provinces;¹⁷⁵
2. The creation of a Canadian common market;¹⁷⁶
3. The fact that all superior court judges are appointed and paid by the federal government;¹⁷⁷
4. The position of the Supreme Court as a final court of appeal with supervisory authority over the entire Canadian legal system.¹⁷⁸

Accordingly:

...the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.¹⁷⁹

As is clear from this statement, the value of unity to which LaForest J expresses attachment, feeds into the substantive rules he chooses to articulate regarding the enforcement of extraprovincial judgments.

¹⁷² *Ibid.* at 265, 271.

¹⁷³ *Ibid.* at 272.

¹⁷⁴ *Ibid.* at 269.

¹⁷⁵ *Ibid.* at 271.

¹⁷⁶ *Ibid.* LaForest J refers to ss 91(2), 91(29), 92(10) and 121 of the Constitution Act, 1867 in support of this proposition. See E. Edinger, “The Constitutionalization of the Conflict of Laws” (1995) 25 Can. Bus. L. J. 38 at 55-56 [hereinafter “Constitutionalization of the Conflict of Laws”] who points out that the existence of this common market has not always been apparent from Canadian constitutional jurisprudence.

¹⁷⁷ *Morguard, ibid.* at 271.

¹⁷⁸ *Ibid.*

Arguably, the reason why *Breavington* and *Morguard* appear to be such radical and important judgments is because they represent a shift from an underlying vision of separateness to an underlying vision of unity. The decisions signalled, or in Australia's case seemed to signal,¹⁸⁰ an approach to intrafederation conflict of laws that was not based on the constituent elements of the federation being regarded as "distinct and separate countries" from each other but instead on a vision that the constituent elements formed part of one single, national, cooperative system. The consequence of this shift in visions was the articulation, or the prospect of articulation, of new non-traditional intrafederation conflict of laws rules (i.e. *federalised* intrafederation conflict of laws rules).

What then can one make of the present difference between the visions prevailing in Australia and Canada? I would like to suggest that this difference is a temporary aberration. It seems to me that in the long-term the High Court of Australia's continued adherence to the separateness vision is unsustainable.¹⁸¹ This is because the separateness vision is, in my view, inconsistent with the currently accepted principles underpinning the Australian federal structure. The fundamental principle underpinning this structure is that

¹⁷⁹ *Ibid.* at 272.

¹⁸⁰ The separateness vision made a comeback in *McKain* where a bare majority of the High Court held that a reformulated version of the *Phillips v Eyre* rule was the choice of law rule for torts occurring within Australia. The separateness vision continued to hold the support of a majority of the High Court in the subsequent cases of *Stevens* and *Goryl*.

¹⁸¹ As stated in the previous footnote, the separateness vision only had the support of a bare majority of the High Court in *McKain* and subsequent cases. Since *Goryl* there have been a number of changes to the composition of the High Court and it is unclear whether a majority of the High Court continues to support the separateness vision. The position of the current bench should be known sometime this year when the decision in *John Pfeiffer* is handed down. *John Pfeiffer* raises once again the question of what should be the choice of law rule for torts occurring within Australia.

“Australia is one country and one nation.”¹⁸² The relationship of the States to each other is not that between “separate and distinct countries” but rather that between partners united under the Constitution in “one indissoluble Commonwealth.” Support for the unity vision can be drawn from various aspects of the Australian legal system (some of which have already been mentioned in chapter one or in the discussion above of Deane J’s judgment in *Breavington*):

1. The uniform nature of the common law throughout Australia;¹⁸³
2. The establishment by the Constitution of an Australian common market;¹⁸⁴
3. The existence of a common Australian citizenship along with the free mobility of Australians between States;¹⁸⁵
4. The existence of a national court system unified by the position at its apex of the High Court of Australia as a final court of appeal;¹⁸⁶ and
5. The widespread existence of uniform national legal regimes either enacted solely by the Commonwealth under its legislative powers or in concert with the States as part of cooperative federalism endeavours.¹⁸⁷

In contrast it is difficult to find aspects of the Australian legal system that support the separateness vision apart from precedent (which in and of itself does not seem a sufficient justification to continue to adhere to the separateness vision given the weight of the countervailing principles).

It is interesting that the Supreme Court of Canada has expressed attachment to the unity vision despite the fact that the Canadian legal system provides a weaker base to ground such a vision than the Australian legal system. Of the five aspects of the Australian legal system I have mentioned above, only the third (free mobility of citizens) and the fourth

¹⁸² *Breavington*, *supra* note 3 at 78 per Mason CJ.

¹⁸³ See above at 20-21.

¹⁸⁴ See above note 92 and accompanying text.

¹⁸⁵ See Australian Citizenship Act 1948 (Cth) and s92 of the Commonwealth Constitution.

¹⁸⁶ See above at 20-21. See also the comment of Toohey J in *Breavington*, *supra* note 3 at 166 that the courts are the “courts of one nation, administering the same common law.”

¹⁸⁷ See above at 19-20.

(national, integrated court systems) applies *mutatis mutandis* to Canada. The presence of Quebec with its civil law system means there is not a uniform common law throughout all of Canada, the Canadian common market is somewhat less than LaForest J's rhetoric suggests and there are comparatively few uniform national legal regimes. It may also be said that Canada lacks an explicit "full faith and credit" constitutional requirement (although it does have an implied "full faith and credit" requirement as a justiciable constitutional principle). While I do not suggest that this means that the Supreme Court has been wrong to express attachment to the unity vision (indeed, quite the contrary, I agree with the view that Canada is "a single country"¹⁸⁸ and that the provinces are not "foreign countries" to each other), I do believe that these factors, in particular, the presence of Quebec with its civil law system, may require the Supreme Court to allow more provincial freedom of action in the intrafederation conflict of laws area than would be necessary in Australia.¹⁸⁹

In conclusion, it is well to re-emphasise the point that the federal environment provides the context of courts' articulation or interpretation of intrafederation conflict of laws rules. As I have attempted to illustrate above, the federalist vision of a court given this federal environment influences the substantive conflict of laws rules applicable within the federation. The adherence by the High Court of Australia to the separateness vision has led it to readopt the rule in *Phillips v Eyre* as the Australian tort choice of law rule

¹⁸⁸ See *Morguard*, *supra* note 9 at 271 where LaForest J describes Canada as "a single country."

¹⁸⁹ See Woods, *supra* note 103 for a Quebec perspective on *Morguard*. He does not share LaForest J's view regarding the importance of the unifying factors contained in the Canadian Constitution. He emphasises the distinct approach Quebec takes, through its Civil Code and Code of Civil Procedure, to the conflict of laws. See also Blom(1991), *supra* note 32 at 747 and Herbert, *supra* note 30 at 27 who states that it is "clearly not legitimate" for the Supreme Court "to homogenize the civil law of Quebec with the common law of the other provinces."

whereas the adherence by the Supreme Court of Canada to the unity vision has led it to reject the rule in *Phillips v Eyre* as the Canadian tort choice of law rule. I have stated my view that the unity vision best fits with the principles found in the overall Australian legal system. Accordingly, I believe that the High Court of Australia should abandon its present adherence to the separateness vision and instead adopt again the unity vision that found favour with a majority in *Breavington*. It is important to recognise that the unity vision does not in and of itself provide the substantive content of the intrafederation conflict of laws rules. It does not, for example, mandate that a particular rule should have constitutional status or another rule be a common law rule.¹⁹⁰ It simply requires that any rule be articulated or interpreted in the context of the values inherent in the unity vision.

¹⁹⁰ Neither, it should be said, does the separateness vision although it is more likely that the separateness vision would point against a constitutional rule.

Chapter 4

In this chapter, I will attempt to apply the purposive approach I have sketched in the previous two chapters to the concept of jurisdiction. In doing so, I will attempt to elucidate briefly some of the conflict of laws rules that may be articulated as a consequence. Speaking generally, one might expect the purposive approach to favour the minimisation (if not elimination) of jurisdictional disputes, the effective allocation of litigation to the most appropriate court in the national court system and the prevention of forum-shopping. As will be seen, it has been the legislatures of Australia that have done the most to achieve these goals.

At the outset, it is well to describe what I mean by the term “jurisdiction”. For the purposes of the present discussion, “jurisdiction” is used in three different senses:¹⁹¹

- (a) Legislative Jurisdiction *i.e.* a legislature’s general sphere of authority to enact laws;
- (b) Substantive Jurisdiction *i.e.* a court’s power to hear a case of a particular nature or subject-matter;
- (c) Judicial Jurisdiction *i.e.* the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.

I will deal with each of these three different types of jurisdiction in turn.

Legislative Jurisdiction

It is clear that the States have plenary power to enact laws on all matters arising within their territory subject to the Constitution.¹⁹² What has been uncertain is the extent of the States’ power to legislate on extraterritorial matters, that is, in relation to acts or things occurring or existing outside the States’ respective territorial limits. At one time, a quite

¹⁹¹ See, *Black’s Law Dictionary*, 7th ed. (St Paul, Minn.: West Group, 1999) at 855 – 857.

restrictive approach was taken by the courts to a State's power to legislate extraterritorially (at times so restrictive as to deny the States any extraterritorial competence at all).¹⁹³ This restrictive approach was gradually replaced by a more liberal approach so that by the time s2(1) of the Australia Acts 1986 (Cth & UK) recognised the power of the States to enact laws having an extraterritorial operation, the High Court had already held that State "legislation should be held valid if there is any real connexion – even a remote or general connexion – between the subject matter of the legislation and the State" and that this test should be "liberally applied."¹⁹⁴ This remains the current test for the validity of extraterritorial State legislation.¹⁹⁵

The fact that States may pass laws with an extraterritorial operation gives rise to the possibility that an act or thing occurring or existing in another State could be subject to two contemporaneously valid but inconsistent laws, namely the laws of the State in which the act or thing occurs or exists and the extraterritorial laws of another State. Examples spring readily to mind. One could imagine, for example, a scenario where a Victorian employee is injured while performing work in New South Wales. The New South Wales workmen's compensation act applies to all injuries to workers occurring within the State and the Victorian workmen's compensation act applies in relation to all Victorian

¹⁹² See, for example, *Hodge v The Queen* (1883) 9 App Cas 117 and *Gould v Brown* (1998) 193 CLR 346 at 394 [hereinafter *Gould*].

¹⁹³ See, for example, *MacLeod v A-G (NSW)* [1891] AC 455.

¹⁹⁴ *Pearce v Florenca* (1976) 135 CLR 507 at 518 per Gibbs J (reaffirmed unanimously in *Union Steamship Co of Australia v King* (1988) 166 CLR 1 [hereinafter *Union Steamship*]).

¹⁹⁵ See, *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340.

employees no matter where they are injured. In such a scenario, the injury would *prima facie* be covered by two sets of contemporaneously valid laws.¹⁹⁶

It might be thought that the purposive approach would support a restrictive approach to the extraterritorial competence of the States. Overlapping legislation is, after all, hardly conducive to certainty or to the establishment of a coherent, harmonious national legal system. If all States were only able to legislate strictly within their own territorial areas then there would only be one law in relation to a particular matter.¹⁹⁷ This appears to be the situation in Canada where the provinces are prevented directly from legislating extraterritorially (but may pass legislation that has incidental extraterritorial effects).¹⁹⁸

I accept that it is preferable that instances of overlapping legislation be minimised.

Canons of construction such as a rule that where the territorial application of a statute is not specified, the statute should be read as being limited to the territory of the enacting State, may be helpful in this regard.¹⁹⁹ As too, may the enactment of uniform national legal regimes and cooperation amongst States as to how extraterritorial problems should be dealt with. However, I do not believe it is necessary or appropriate to go the further

¹⁹⁶ This hypothetical scenario is inspired in part by the facts of *Mynott v Barnard* (1939) 62 CLR 68 [hereinafter *Mynott*].

¹⁹⁷ Deane J in *Breavington*, *supra* note 3 advocates this position stating (at 135): "The Constitution resolves [inconsistency between laws of different States] by the confinement of the operation of State laws by reference to territorial (or predominant territorial) nexus..."

¹⁹⁸ See *Reference Re Upper Churchill Water Rights Reversion Act* [1984] 1 SCR 297. It should be noted that there are special constitutional issues in Canada, namely that s92 of the Constitution Act, 1867 limits provincial power to legislate to matters "in the province." It may be that in practice the extraterritorial competence of the Australian States and the Canadian provinces is not significantly different despite the different legal tests applied to extraterritorial legislation. I would say, however, that in my view an Australian court would be unlikely to follow the approach to extraterritoriality found in *Interprovincial Co-operatives Ltd v The Queen* [1976] 1 SCR 477, 53 DLR (3d) 321 – see *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78.

¹⁹⁹ See *Mynott*, *supra* note 196.

step and place strict limitations on the extraterritorial competence of the States. As a practical matter, such a step would seem strange given that the States have only just been formally emancipated from the shackles of extraterritorial limitations.²⁰⁰ As a matter of principle, too, such a step would be retrograde. The States do have important interests existing outside their respective territories in relation to which they should be able to legislate.²⁰¹ A strict extraterritorial incompetence may create lacunae in the law.²⁰²

In the event a statute does not apply of its own terms to a particular extraterritorial fact situation and to the extent that it exists after the application of the minimisation techniques I have mentioned above and on the assumption that the extraterritorial legislation is constitutionally valid, the problem of overlapping legislation should be resolved by an appropriate choice of law rule which points to the statute that is applicable in the circumstances. The choice of law rules may be the ordinary choice of law rules such as for tort or contract (if the statute can be interpreted as falling within these areas)²⁰³ or an *ad hoc* choice of law rule peculiar to that statute.²⁰⁴

Substantive Jurisdiction

Section 71 of the Constitution vests the “judicial power of the Commonwealth” in the High Court of Australia “and such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.” Until the 1970s, the “judicial

²⁰⁰ See s2(1) of the Australia Acts 1986 (Cth & UK).

²⁰¹ For example, in relation to injuries to resident workers injured outside the State – see *Union Steamship supra* note 194.

²⁰² For example, if one State did not have worker’s compensation laws and a worker from another State was injured in that State, the worker would be unable to obtain statutory compensation because the first State does not have the necessary law and the second State is incompetent to extend its law to injuries arising outside its territory.

²⁰³ See *Barcelo v Electrolytic Zinc Company (Australia) Limited* (1932) 48 CLR 391.

power of the Commonwealth” was exercised largely by the High Court and the State Supreme Courts.²⁰⁵ There was little in the way of a federal judicature (apart from the High Court). With increasing case-loads in the High Court and the increasing enactment of complex and wide-ranging federal regulatory regimes, however, the Commonwealth decided to create a system of federal courts to deal with federal matters.²⁰⁶ These federal courts included the Family Court of Australia (established 1976) and the Federal Court of Australia (established 1977).²⁰⁷

Leaving aside the appellate jurisdiction of the High Court,²⁰⁸ the “judicial power of the Commonwealth” is limited to the matters referred to in sections 75 and 76 of the Constitution. Essentially, this means that the substantive jurisdiction of federal courts is constitutionally limited to matters arising under federal laws. Federal courts are unable, therefore, to hear matters arising under the common law or under State laws (unless such matters are not severable from a federal matter).²⁰⁹ This gives rise to problems. “Arid jurisdictional disputes” are litigated.²¹⁰ Multiplicity of proceedings result as single actions comprising federal and State claims are split.²¹¹

²⁰⁴ See *Mynott*, *supra* note 196.

²⁰⁵ See *Gould*, *supra* note 192 at 469 per Kirby J. State courts could have federal jurisdiction conferred on them pursuant to s77(iii).

²⁰⁶ See generally Crock and MacCallum, *supra* note 74 at 745–756.

²⁰⁷ See, respectively, the Family Law Act 1975 (Cth) and the Federal Court of Australia Act 1976 (Cth).

²⁰⁸ The appellate jurisdiction of the High Court is specified in s73 of the Constitution.

²⁰⁹ See *Phillip Morris Inc. v Adam P. Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.

²¹⁰ *Re Wakim: Ex Parte McNally* (1999) 163 ALR 270 at 326 per Kirby J [hereinafter *Re Wakim*].

²¹¹ *Ibid.* See also preamble to the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) which relevantly reads:

Whereas inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts, and whereas it is desirable –

...
(b) to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which, apart from this Act and any law of a State relating to cross-vesting of jurisdiction, would be entirely or substantially within the jurisdiction

To overcome these and other problems, the Commonwealth and the States entered into a cooperative cross-vesting scheme.²¹² Under the scheme the Commonwealth vested federal jurisdiction in each State Supreme Court, and the States vested their respective jurisdictions in each other's Supreme Court and in the federal courts of the Commonwealth. As a consequence of the cross-vesting scheme, each superior court of Australia had, along with its own inherent jurisdiction, the jurisdiction of each other Australian superior court. In short, each superior court of Australia had the same substantive jurisdiction.

In *Re Wakim*, the High Court struck down as constitutionally invalid, the central feature of the cross-vesting scheme, namely the vesting by the States of their respective jurisdictions in the federal courts of the Commonwealth.²¹³ The majority held that ss75 and 76 of the Constitution were an exhaustive description of the jurisdiction of federal courts. It followed that as the matters arising under State jurisdiction were not included in the list of the matters described in ss75 and 76, federal courts had no jurisdiction to hear or decide State matters.

(other than any accrued jurisdiction) of the Federal Court or Family Court or the jurisdiction of a Supreme Court of a State or Territory are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases.

²¹² For a general outline of the scheme see K.Mason and J.Crawford, "The Cross-Vesting Scheme" (1988) 62 Aust. L. J. 328.

²¹³ *Re Wakim*, *supra* note 210 at 301-309 per Gummow and Hayne JJ (Gleeson CJ and Gaudron J in short concurring judgments agreed with these reasons).

The decision in *Re Wakim* is unfortunate.²¹⁴ It ends a scheme that had been beneficial to the administration of justice in Australia and heralds a return to the jurisdictional uncertainties and inconveniences that existed before the scheme's introduction. Once again, as a practical matter, substantive jurisdiction in Australia is fragmented.²¹⁵ This is not a result consistent with the purposive approach. Only Kirby J, who dissented, follows the purposive approach.²¹⁶ He notes that:

...it is important to approach [the Constitution's] meaning with a full appreciation of its function as an enduring instrument of democratic and effective government...The Constitution is to be read by today's Australians to meet, so far as its text allows, their contemporary governmental needs.²¹⁷

The Constitution does not expressly forbid the conferral of State jurisdiction in federal courts and Kirby J notes that the majority base their decision on a negative implication to this effect. However, in drawing an implication:

...the court must address the provisions in Ch III [Judicature], read within the document taken as a whole. Also relevant are the purposes which may be attributed to the provisions for the federal judicature in a Commonwealth in which it is envisaged that there will be States having their own courts and particularly Supreme Courts as well as Territories, the government of which will necessarily involve the existence of courts and the exercise of judicial power. All such courts are to operate within a nation of continental size, with a relatively small and scattered population which is to be governed, so far as the Constitution permits, with its component parts cooperating in a rational, harmonious and generally efficient way.²¹⁸

In such a context:

...there would not seem to be any reason of constitutional principle or policy to forbid the [cross-vesting] scheme...the politics constituting the Australian

²¹⁴ For a harsh analysis of the decision see D.Rose, "The Bizarre Destruction of Cross-Vesting" (1999) 11 Aust. J. of Corp. L. 1.

²¹⁵ Of course, federal jurisdiction can still be vested in State Supreme Courts but this does not resolve the problem of the limited jurisdiction of the federal courts.

²¹⁶ The majority's reasoning has been described as "deeply and pervasively flawed" and "bizarre" – see Rose, *supra* note 214 at 1. It certainly displays formalist tendencies in its strict literal reading of ChIII of the Constitution and failure to contextualise precedent and the provisions of ChIII.

²¹⁷ *Re Wakim*, *supra* note 210 at 323 – 324.

²¹⁸ *Ibid.* at 324 – 325.

Commonwealth are [not], in relation to each other, foreign states. All of them are parts of an integrated federal nation which the Constitution itself summoned forth...In the Australian federation, there is nothing obviously offensive in the adoption of sensible cooperative arrangements between the courts and the executive governments of the Commonwealth, the States and the Territories to achieve objectives such as those [in the cross-vesting scheme].²¹⁹

Like LaForest J in *Morguard*, therefore, Kirby J contextualises the specific issues under discussion. He examines how the rival interpretations of the Constitution operate within this context and chooses the interpretation which advances certainty, unity and efficiency.

Judicial Jurisdiction

Under the common law, a State court only had *in personam* jurisdiction over persons who were served within the territory of the State.²²⁰ It was, therefore, necessary for statute to describe the specific circumstances in which service *ex juris* (*i.e.* service out of the jurisdiction) could be effected. Within Australia, service outside a State is governed by the Service and Execution of Process Act 1992 (Cth).²²¹ Section 15(1) of this Act provides that, “An initiating process issued in a State may be served in another State.” Consequently, every court in Australia has judicial jurisdiction over a person located anywhere in Australia.²²²

The broad judicial jurisdiction of Australian courts raises the prospect of matters being litigated in inappropriate forums to the general detriment of defendants and the administration of justice. Theoretically, for example, proceedings could be commenced in

²¹⁹ *Ibid.* at 325.

²²⁰ *Flaherty v Girgis* (1987) 162 CLR 574 at 599.

²²¹ It is to be noted that *Flaherty v Girgis*, *ibid.* held in relation to the old Service and Execution of Process Act 1901 (Cth) that it was possible to serve process outside a State either under that Act or under the service *ex juris* rules of the court. Under the 1992 Act, concurrent operation is no longer possible as that Act operates to the exclusion of any State laws – s8(4) of the Service and Execution of Process Act 1992.

the Supreme Court of Tasmania by a resident of Queensland against another resident of Queensland in relation to a car accident that occurred in Queensland. In such a situation, it is obviously not fair that the Queensland defendant should be forced into litigation in Tasmania and the Tasmanian court is unlikely to be happy having its time taken up with a matter connected in every respect with Queensland. To resolve such problems, therefore, the broad judicial jurisdiction of Australian courts is tempered by procedures that facilitate the transfer of proceedings to the most appropriate forum.

Section 5 of the Jurisdiction of Courts (Cross Vesting) Act 1987 (Vic), for example, provides, amongst other things, that where there is a proceeding before the Victorian Supreme Court and it appears to the Victorian Supreme Court that it is “in the interests of justice” that the proceeding be determined by the Supreme Court of another State or Territory, the Victorian Supreme Court shall transfer the proceeding to that other Supreme Court.²²³ The phrase “in the interests of justice” has been interpreted as importing the *forum non conveniens* test articulated by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*²²⁴ i.e. a proceeding should be transferred if there is a more appropriate forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.²²⁵ Proceedings may be transferred either on the application of a party to the proceeding or on the court’s own motion.²²⁶

²²² See B.R. Opeskin, “Federal Jurisdiction in Australian Courts: Policies and Prospects” (1995) 46 S. Car. L. Rev. 765 at 784 [hereinafter Opeskin (1995)]; and Nygh (1995), *supra* note 14 at 903-904.

²²³ Identical provisions are found in the cross-vesting legislation of the other States and the transfer mechanism operates irrespective of whether the action invokes cross-vested jurisdiction.

²²⁴ *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 [hereinafter *Spiliada*].

²²⁵ *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711.

²²⁶ See, for example, section 5(7) of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Vic). There is no appeal from a transfer decision – s.13(a) of the Jurisdiction of Courts (Cross-Vesting) Act (reflecting the

Where proceedings have been served pursuant to the Service and Execution of Process Act 1992, a person served may apply under s20 of the Act to the court of issue for an order staying the proceeding. The court may order the proceeding to be stayed if it is satisfied that a court of another State is the appropriate court to determine those matters.²²⁷ In determining whether a court of another State is the appropriate court for the proceeding, the following factors must be taken into account.²²⁸

- (a) the place of residence of the parties and likely witnesses;
- (b) the place where the subject matter of the proceeding is situated;
- (c) the financial circumstances of the parties;
- (d) any agreement between the parties about the court or place in which proceedings should be instituted;
- (e) the law that would be most appropriate to apply in the proceeding; and
- (f) whether a related or similar proceeding has been commenced.

This appears in essence to be a statutory codification of the *Spiliada* test of *forum non conveniens*.

In the absence of an applicable statutory transfer procedure, the common law rules of *forum non conveniens* may apply.²²⁹ Unlike the Supreme Court of Canada in *Amchem Products Inc v Worker's Compensation Board (British Columbia)*, the High Court has declined to follow the *Spiliada* test of *forum non conveniens*. In *Voth v Manildra Flour Mills Pty Ltd*²³⁰ the High Court held that a stay should only be granted by an Australian court if that court "is a clearly inappropriate forum, which will be the case if continuation

view that parties should be discouraged from "litigat[ing] in order to determine where they shall litigate" (*Spiliada*, *supra* note 224 at 464 per Lord Templeman)).

²²⁷ Section 20(3) of the Service and Execution of Process Act 1992.

²²⁸ Section 20(4) of the Service and Execution of Process Act 1992.

²²⁹ There would appear to be few, if any, circumstances where it would be necessary to resort to the doctrine of *forum non conveniens* in domestic matters given the statutory transfer procedures.

²³⁰ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 [hereinafter *Voth*].

of the proceedings in that court would be oppressive, in the sense of “seriously and unfairly burdensome, prejudicial or damaging”, or vexatious, in the sense of “productive of serious and unjustified trouble and harassment.”²³¹ Whatever may be the merits of the *Voth* test on the international plane (and one may entertain some doubts as to its relative merits compared with the *Spiliada* test),²³² it arguably is not a suitable test for intrafederation stays. Concerns about ascertaining and weighing up the comparative appropriateness of a “foreign tribunal”²³³ are simply not relevant in the Australian context where there is a relatively homogenous judiciary, similar procedural and substantive laws, and an integrated national court system with the High Court exercising supervisory authority at its apex. Concerns about the breadth of judicial discretion conferred by the *Spiliada* test²³⁴ also seem misplaced especially given the statutory discretion to this effect conferred on courts by the legislation referred to above. Having a test like the *Voth* test, with an in-built bias towards upholding a plaintiff’s choice of forum, does not assist the “ruthless” attack on forum-shopping made by the statutory transfer procedures.²³⁵ On the intrafederation level, what is important is ensuring that proceedings are litigated in the most appropriate court in the national legal system. This should be a robust practical

²³¹ *Henry v Henry* (1996) 185 CLR 571 at 587. The High Court in *Voth*, *ibid.* at 558 expressed the view that the *Voth* test was likely to lead the same result as the *Spiliada* test in a majority of cases (and this was accepted by Sopinka J in *Amchem*, *supra* note 33 at 108-109). While this may be the case, it doesn’t change the fact that the *Voth* test is more pro-plaintiff in its inclination than the *Spiliada* test and it may result in litigation proceeding in a forum that is not the “most appropriate” one for the trial of the action.

²³² See M. Pryles, “Judicial Darkness on the Oceanic Sun” (1988) 62 Aust. L. J. 774. Pryles is very critical of the High Court’s decision in *Oceanic Sun Line Special Shipping Company Inc. v Fay* (1988) 165 CLR 197 in which a majority of the Court rejected the *Spiliada* test. (In *Voth* the Australian doctrine of *forum non conveniens* was drawn from certain of the judgments in *Oceanic Sun* and articulated in a manner that commanded the acceptance of a majority of the High Court). Pryles does not believe the objections to the *Spiliada* test stand up to scrutiny. He lists several reasons in favour of the adoption of the *Spiliada* test in Australia including: it would bring Australian law into harmony with that in other legal systems; it provides better justice to defendants, it better tempers broad jurisdictional rules and it facilitates international cohesion and integration.

²³³ *Voth*, *supra* note 230 at 559.

²³⁴ *Voth*, *ibid.* at 559 – 560.

enquiry.²³⁶ The purposive approach suggests, therefore, that the *Spiliada* test should be the test for intrafederation stays as this test better meets the goal of ensuring the operation of a harmonious and efficient national legal system where litigation is effectively allocated to the most appropriate court and forum-shopping is appropriately dealt with.

The question may be asked whether the *forum non conveniens* doctrine (within which I include the statutory transfer procedures) is a sufficient check on the inappropriate exercise by courts of their broad judicial jurisdiction. In the United States, the Due Process Clause provides a constitutional check on the exercise of judicial jurisdiction by requiring that “minimum contacts” exist between a particular forum and a cause of action.²³⁷ In Canada, the Supreme Court in *Morguard* appeared to imply that there was an equivalent “due process” requirement under the Canadian Constitution. The Supreme Court held that a court only has “properly restrained jurisdiction” if there is a “real and substantial connection” between the court and the cause of action.²³⁸ Such a limitation on jurisdiction is necessary in order to protect defendants “against being pursued in jurisdictions having little or no connection with the transaction or the parties.”²³⁹ In short, the limitation is necessary to provide “fairness” to defendants.²⁴⁰ The Supreme Court speculated that such a limitation on jurisdiction may flow from the restriction of provincial legislative power to matters “in the province” or possibly s7 of the Canadian

²³⁵ *Conflict of Laws in Australia*, *supra* note 9 at 76.

²³⁶ It needs hardly to be said that if a similar action is already on foot in another State, a court should not be shy about transferring those proceedings to the other State as being the “more appropriate” forum – see, for example, s5(2)(i) of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Vic).

²³⁷ *International Shoe Co. v State of Washington*, 326 US 310 (1945).

²³⁸ *Morguard*, *supra* note 9 at 274 – 278.

²³⁹ *Ibid.* at 278.

²⁴⁰ *Ibid.* at 274. Mention is also made in *Morguard* of the need for a court to act through “fair process.” Within Canada, however, one may assume “fair process” to exist.

Charter of Rights and Freedoms.²⁴¹ In *Hunt*, the Supreme Court held that the requirement that Canadian courts only exercise “properly restrained jurisdiction” was a “constitutional imperative” which was “inherent in the structure of the Canadian federation.”²⁴²

There seems little need to read into the Australian Constitution a due process requirement. As a matter of doctrine, the Australian Constitution contains no equivalent provision to the Due Process Clause of the United States Constitution or to s7 of the Canadian Charter of Rights and Freedoms. In addition, as has been discussed above,²⁴³ the States of Australia are not subjected to the same restrictions on legislative power extraterritorially as are the Canadian provinces. Indeed, it would be somewhat incongruous to limit narrowly judicial jurisdiction by means of a “real and substantial connection” test yet accept that legislative jurisdiction only required any “real connexion – even a remote or general connexion – between the subject matter of the legislation and the State.”²⁴⁴ As a practical matter, too, there seems little need for a due process requirement. While Australia is a large country physically, it has a relatively small population and relatively few constituent units. There accordingly seems less risk of defendants being dragged into courts with “little or no connection with the transaction or the parties.” Where this does happen, however, the existing transfer procedures would seem to provide suitable protection for defendants. These procedures already look in a

²⁴¹ *Ibid.* at 278 – 279. See also J.Swan, “The Canadian Constitution, Federalism and the Conflict of Laws” (1985) 63 Can. Bar Rev. 271 [hereinafter Swan (1985)]. Swan, writing before *Morguard*, argues that judicial jurisdiction in Canada should be subject to a “due process” requirement in order to protect defendants against the burden of litigating in an inappropriate forum and to prevent provinces reaching out beyond the limits imposed upon them as coequal sovereigns in a federation.

²⁴² *Hunt*, *supra* note 33 at 41. See also generally “The Constitutionalization of the Conflict of Laws”, *supra* note 176.

²⁴³ See above at 58-59.

²⁴⁴ See note 194 above.

practical way at the factors connecting an action to a particular forum. A due process requirement would only be duplicative of this and raise the complication of an additional test to be satisfied (and a constitutional test at that).²⁴⁵

²⁴⁵ It may also be pointed out that the actual application of a constitutional due process test is not always easy as American experience shows – see Blom(1991), *supra* note 32 at 752.

Chapter 5

In this chapter, I will briefly examine the application of the purposive approach to certain intrafederation choice of law rules, namely the choice of law rule for tort, the application of the overriding policy of the forum in contract, and the characterisation of a law as substantive or procedural. Speaking generally, one might expect the purposive approach to favour the minimisation (if not elimination) of any “homeward trend” tendency in the choice of law rules²⁴⁶ and, to the extent possible, the attainment by the choice of law rules of uniform legal consequences throughout Australia for a particular fact situation.²⁴⁷

Before proceeding further, however, it is first necessary to consider the question of the extent to which the Constitution has a role to play in determining the content of the intrafederation choice of law rules.

The Effect of the Constitution

Whenever this question has arisen, attention has primarily been focussed on s118 of the Constitution which, it will be recalled, reads as follows:

Full faith and credit shall be given, throughout the Commonwealth, to the laws, public Acts and records, and the judicial proceedings of every State.

Until *Breavington*, the High Court had considered s118 to have a limited substantive operation. As will be discussed in chapter six, s118 was thought to have some role to play in the recognition and enforcement of sister-State laws and judgments. In *Anderson v*

²⁴⁶ See the *ALRC Choice of Law Report*, *supra* note 6 at 6-7 which describes the forum “bias” of certain common law choice of law rules as “a particular problem in Australia.”

²⁴⁷ The ideal is for all courts to apply the same law to the same situation – see Kahn-Freund, *supra* note 1 at 323: “This is to prevent a party from gaining advantages and to protect him from suffering disadvantages owing to his or his opponent’s ability to invoke a particular jurisdiction.”

Eric Anderson Radio & TV Pty Ltd, however, the High Court had cursorily rejected an argument that s118 had a substantive effect on intrafederation choice of law rules.²⁴⁸

In *Breavington* the defendants, who were seeking the application of Northern Territory law (*i.e.* the *lex loci delicti*), sought to challenge the holding in *Anderson* that s118 had no substantive effect on intrafederation choice of law rules. There was a divergent range of responses from the High Court justices to this argument. At one end of the spectrum were the views of Brennan and Dawson JJ who held that s118 had nothing to say in relation to the content of intrafederation choice of law rules. In the words of Dawson J:

...the requirement that full faith and credit be given to the laws of a State, statutory or otherwise, throughout the Commonwealth, affords no assistance where there is a choice to be made between conflicting laws. Once the choice is made, then full faith and credit must be given to the law chosen but the requirement of full faith and credit does nothing to effect a choice...Section 118 of the Constitution is not directed to a conflict of laws; where there is a conflict it makes no choice or, to put it another way, does not require the application of a law which is not otherwise applicable.²⁴⁹

Mason CJ also held that s118 had no substantive effect on the content of intrafederation choice of law rules. He adverted to the American experience under the Full Faith and Credit clause of the United States Constitution. He noted that the United States Supreme Court has interpreted the Full Faith and Credit clause “so that it does not stand in the way of judicial development of appropriate conflicts of law principles.”²⁵⁰ That is, the Full Faith and Credit clause does not dictate particular choice of law rules (although it might invalidate a choice of law rule that chooses the law of a State that has no significant

²⁴⁸ See “Farewell to Phillips v Eyre?”, *supra* note 10 at 160.

²⁴⁹ *Breavington*, *supra* note 3 at 150.

²⁵⁰ *Ibid.* at 82. See also, *Allstate Insurance Co. v Hague*, 449 US 302 (1981).

contact with a cause of action).²⁵¹ Given this, Mason CJ rhetorically asked, “Why then should we give to the facsimile an interpretation denied to the original?”²⁵²

Wilson and Gaudron JJ rejected the Brennan and Dawson JJ interpretation of s118 because “it would achieve nothing in relation to the laws and public Acts of a State not achieved by the common law choice of law rules.”²⁵³ They took the view that s118 had a “wider operation”, analogizing that just as s109 resolved “vertical conflicts”, s118 provided the solution to “horizontal conflicts.”²⁵⁴ In their words:

The problem of the one set of facts giving rise to one legal consequence by operation of one State law and another legal consequence by operation of another State law was resolved by the requirement in s118, to which the Constitutions, the powers and the laws of the States are by ss106, 107 and 108 made subject, that “full faith and credit... be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.” By the constitutional subjection of the Constitutions, the powers and the laws of the States to s118, the consequence was effected that the one set of facts occurring in a State would be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication.²⁵⁵

According to Wilson and Gaudron JJ, “s118 provides no formula for the ascertainment of the one applicable body of law.”²⁵⁶ Instead, it requires that any choice of law rule or “formula” accord with the requirement they adduced from s118, namely that it ensures that throughout Australia only one legal consequence attaches to a particular set of facts.

²⁵¹ *Ibid.* Swan (1985), *supra* note 241 argues that in Canada choice of law rules should be subject to an American-type “full faith and credit” constitutional requirement *i.e.* “minimum contacts” should exist between the law chosen and the particular action. In *Tolofson*, *supra* note 33, LaForest J (at 316-317) did not go so far as to expressly hold that the Canadian Constitution has some such effect on choice of law rules but he did advert to possible constitutional limitations on choice of law rules. For a brief discussion of the American experience with the Full Faith and Credit clause and choice of law rules see Gummow, *supra* note 6 at 1012-1023.

²⁵² *Breavington*, *supra* note 3 at 82 – 83.

²⁵³ *Ibid.* at 96.

²⁵⁴ *Ibid.* at 97. See also above at 18.

²⁵⁵ *Ibid.* at 98.

As has been described in chapter three, Deane J held that the Constitution establishes a “unitary system of law” (*i.e.* “a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent or reconcilable”).²⁵⁷ In this “unitary system of law” there is no place for the common law choice of law rules.²⁵⁸ Intrafederation conflicts problems are to be resolved constitutionally. The constitutional solution is to strictly limit the territorial application of a State’s laws to the territory of the State.²⁵⁹ In the words of Deane J:

...the constitutional solution of competition and inconsistency between purported laws of different States as part of the national law must, where the necessary nexus for *prima facie* validity exists, be found either in the territorial confinement of their application or, in the case of multi-State circumstances, in the determination of predominant territorial nexus.²⁶⁰

Section 118 confirms this conclusion by decreeing that State laws, “must be accepted *throughout the Commonwealth* as the national law applicable to regulate, and define the consequences or attributes of, conduct, property or status within that particular part of the national territory.”²⁶¹ Along with other elements of the Constitution, s118, therefore, displaces the common law choice of law rules and mandates the application to a

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.* at 121.

²⁵⁸ *Ibid.* at 128.

²⁵⁹ *Ibid.* at 129. Deane J’s emphasis on the strict territorial application of laws carries overtones of the “vested rights” theory – see Apps, *supra* note 168 at 636. Given the passage of the Australia Acts 1986 (Cth & UK), freeing the States from ostensible restrictions on their power to legislate extraterritorially, it would be “odd” if s118 had the effect of limiting State legislative power territorially – see Nygh (1991), *supra* note 37 at 428-432; and O’Brien (1990), *supra* note 14 at 460-462.

²⁶⁰ *Ibid.* at 129.

²⁶¹ *Ibid.* at 130. It may be said that the full ramifications of Deane J’s approach are unclear – what effect, for example, would it have on the choice of law rule for contract? See O’Brien (1990), *supra* note 14 at 460-462.

particular set of facts of the law of the State in which the facts occurred or to which there exists a predominant territorial nexus.

In the succeeding cases of *McKain*, *Stevens* and *Goryl*, a clear majority of the High Court held that s118 had no substantive effect on the intrafederation choice of law rules.

Gaudron and Deane JJ remained "impenitent" in their views to the contrary.²⁶²

It is submitted that the view that s118 does not positively mandate specific choice of law rules is to be preferred.²⁶³ The bare words of s118 do not provide a fruitful base for developing a comprehensive system of choice of law rules. American experience shows the difficulties inherent in attempting to constitutionalise choice of law rules.²⁶⁴ While toying with the idea in *Tolofson*, the Supreme Court of Canada has not constitutionalised Canadian choice of law rules.²⁶⁵ There is a risk that constitutional choice of law rules will not be able to adequately deal with all the complexities choice of law cases can throw up.²⁶⁶ Such rules may, for example, be relatively rigid and inflexible in nature and so difficult to apply and adapt to complex choice of law issues.²⁶⁷ It is also difficult to reconcile a system of constitutional choice of law rules with the fact that the Commonwealth Parliament has been granted the power under s51(xxv) of the

²⁶² See also note 27 above.

²⁶³ See F.K.Juenger, "Tort Choice of Law in a Federal System" (1997) 19 Syd. L. Rev. 539; and *Conflict of Laws in Australia*, *supra* note 9 at 17.

²⁶⁴ See Breavington, *supra* note 3 at 81-82.

²⁶⁵ The need for the Supreme Court to do so has been doubted – see H.P.Glenn, "Conflict of Laws - tort liability and choice of law - role of private international law and constitutional law" (1989) 68 Can. Bar Rev. 586 at 590.

²⁶⁶ *ALRC Choice of Law Report*, *supra* note 6 at 20.

²⁶⁷ *Breavington*, *supra* note 3 at 83 per Mason CJ.

Constitution to enact national choice of law rules.²⁶⁸ If choice of law rules are constitutional then this power may be effectively otiose. A legislative solution is in any event preferable as it has the advantage of creating uniform, national clearly spelt out rules which have been subject to consideration by all interested parties. A legislative solution also retains a degree of flexibility.

Where s118 may have a substantive effect on intrafederation choice of law rules is not in positively mandating specific rules but in negatively preventing the enactment of choice of law rules which offend intrafederation judicial comity.²⁶⁹ To that extent s118 may have an effect which goes beyond merely circumventing the evidentiary rules relating to proof of another State's statutes or the prevention of a forum court refusing to recognise another State's statutes or court judgments on the grounds of public policy. I have argued that intrafederation conflict of laws rules (including the choice of law rules) should be "federalised" (*i.e.* conform with the requirements of the Australian federal environment as understood by the unity vision). In the case of common law choice of law rules, if they are inconsistent with the federal environment so understood they must be adapted so they conform. In the case of legislation embodying choice of law rules which are inconsistent with the federal environment, however, s118 may be the basis on which the legislation is

²⁶⁸ *Ibid.* at 79. See also the *ALRC Choice of Law Report*, *supra* note 6 which recommends the enactment of national choice of law legislation and Nygh (1991), *supra* note 37 at 434.

²⁶⁹ This principle is not necessarily grounded just in s118. See Nygh (1991), *ibid.* at 426-428 who proffers the view that there is an implication of federal comity arising from the Constitution as a whole which "militates against the 'homeward trend' implicit in many common law rules which allow the forum to avoid the application of foreign law." Other constitutional provisions may also be relevant. Section 117, for example, prevents a State discriminating against residents of other States. A State that passed one set of choice of law rules for residents and another set for non-residents could contravene s117 (see *Goryl*, *supra* note 22 where a Queensland law that limited the damages recoverable by non-resident plaintiffs in motor vehicle accident claims brought in Queensland to the amount available in their place of residence was unanimously held to contravene s117).

held invalid. In their judgment in *Breavington*, Wilson and Gaudron JJ suggest this possibility, indicating that s118 may, “operate as a limitation upon the power of the states to legislate with respect to the law to be applied in the courts of that state in matters involving an interstate aspect.”²⁷⁰ Section 118 may also have a role to play in the event that a State passes a law which, like the blocking statute in *Hunt*, interferes with the judicial process of another State.

Torts

One hesitates to enter into an area of the law that has recently been described by a High Court judge as a “veil [sic] of tears.”²⁷¹ As this comment implies, the choice of law rule for tort continues to be the source of much judicial and scholarly angst. A major reason for this is that agreement on the content of the rule remains elusive.

Until *Breavington*, the High Court accepted that the choice of law rule for torts committed within Australia was the rule in *Phillips v Eyre*. That is:

...an action of tort will lie in one State for a wrong alleged to have been committed in another State, if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in the State in which the action is brought; and secondly, it must not have been justifiable by the law of the State where it was done.²⁷²

²⁷⁰ *Breavington*, *supra* note 3 at 99. See also *Goryl*, *ibid.* at 476 per Deane and Gaudron JJ: “States cannot legislate contrary to the command of s118.” (In *Goryl*, Deane and Gaudron JJ held that a Queensland law (referred to in the previous footnote) was also inconsistent with s118 because it required damages to be calculated in accordance with the law of a plaintiff’s place of residence and not the law mandated by the Constitution, namely the *lex loci delicti*). *Contra* Nygh (1991), *supra* note 37 at 428-432 who denies that s118 “withdraw[s] legislative power from a State” and argues that States remain free to enact their own conflicts laws.

²⁷¹ See *John Pfeiffer*, *supra* note 18 per Gummow J.

²⁷² *Koop v Bebb* (1951) 84 CLR 629 at 642 (per Dixon, Williams, Fullagar and Kitto JJ).

The rule in *Phillips v Eyre* was interpreted as meaning that once it was determined that some sort of civil liability was attached by the *lex loci delicti* in relation to the particular facts, the *lex fori* applied.²⁷³ As has been mentioned, in *Breavington* the majority appeared to take the view that the applicable law in relation to intrafederation torts should be the *lex loci delicti*.²⁷⁴ In *McKain*, the majority articulated a reformulated version of the *Phillips v Eyre* rule as the choice of law rule for intrafederation torts:

A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if – 1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and 2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.²⁷⁵

The *McKain* formulation imposes a strict double-actionability requirement.²⁷⁶ If this is satisfied it appears that the *lex fori* applies.²⁷⁷

It is well to begin by restating specifically the purpose of the choice of law rule for tort: it is to determine the rights of parties arising in relation to a tort occurring outside the

²⁷³ See *Anderson*, *supra* note 8 and M. Goode, "Dancing on the Grave of *Phillips v Eyre*" (1984) 9 *Ade. L. Rev.* 348 at 358.

²⁷⁴ See above at 4.

²⁷⁵ *McKain*, *supra* note 2 at 39. This appears to be similar to Lord Wilberforce's formulation of the *Phillips v Eyre* rule in *Chaplin v Boys* [1971] AC 356. See "Farewell to *Phillips v Eyre*?", *supra* note 10 at 162.

²⁷⁶ See *ALRC Choice of Law Report*, *supra* note 6. See also "The Miraculous Raising of Lazarus", *supra* note 18 at 392; Kincaid (1996), *supra* note 40 at 191; and Moshinsky, *supra* note 18 at 170.

²⁷⁷ See *Gardner v Wallace* (1995) 184 CLR 95 at 98 where Dawson J was clearly of the view that on the *McKain* formulation being met, the *lex fori* applied. This would mean the second limb was acting as a sort of jurisdictional test. Alternatively, the majority in *McKain* did not expressly disclaim the applicability of the *lex loci delicti* (see *McKain*, *supra* note 2 at 38) in which case the first limb may be acting as a sort of filter. The one thing that is clear from the argument in *John Pfeiffer*, *supra* note 18 is that there is widespread confusion as to how the *McKain* rule actually works. See also Juenger, *supra* note 263 at 532.

forum.²⁷⁸ The prevailing choice of law rule fails to satisfactorily meet this purpose. The rule places an “unjustifiably heavy burden” on a plaintiff by requiring a plaintiff’s claim to be successful according to both the *lex fori* and the *lex loci delicti*.²⁷⁹ The elusive content of the rule makes its application uncertain.²⁸⁰ The rule may be difficult to apply in relation to a statutory cause of action.²⁸¹ Deane J criticises the rule for “going a long way towards converting the Australian legal system into a national market in which forum shoppers are encouraged to select between competing laws imposing different legal consequences in respect of a single occurrence.”²⁸² The rule is unworkable where civil liability has been abolished in either the State in which the “tort” occurred or the proposed forum State with the consequence that a plaintiff will be effectively confined to commencing proceedings in the State where the tort occurred (even if that State is otherwise an inappropriate forum).²⁸³ Both of the last mentioned consequences have the effect of segmenting and undermining the unified national legal system.²⁸⁴ It may also be said that to the extent the first limb of the rule is acting as a “filter” to prevent causes of

²⁷⁸ See Kincaid (1996), *supra* note 40 at 198: “[A forum] applies a foreign system’s dispositive rules of tort instead of its own because it thinks there is something in the circumstances that would make it unjust to the parties to apply any other than a particular foreign law.”

²⁷⁹ See the *ALRC Choice of Law Report*, *supra* note 6 at 43. The Report goes on to say that: “The application of the rule therefore means that the plaintiff can never succeed to a greater extent than is provided for by the less generous of the two systems. The standard of neither system is properly met.” See also “Farewell to Phillips v Eyre?”, *supra* note 10 at 174.

²⁸⁰ See the *ALRC Choice of Law Report*, *ibid.* at 44: “[A]ny rule which gives a controlling influence to the forum is uncertain. Until the plaintiff has chosen the forum, the defendant does not know what case to meet.”

²⁸¹ See the *ALRC Choice of Law Report*, *ibid.* at 43. There may be questions, for example, as to when a statutory claim is “of the same kind” as a common law claim.

²⁸² *Stevens*, *supra* note 6 at 462. This is subject to the qualification that “forum shopping is confined to those cases where the requirements of the narrower statement of the rule in *Phillips v Eyre* are satisfied in at least one State (or Territory) other than the locus State.” See also “Farewell to Phillips v Eyre?”, *supra* note 10 at 174.

²⁸³ See the *ALRC Choice of Law Report*, *supra* note 6 at 43. See also the comment of Deane J in *Stevens*, *ibid.* at 462: “Where actionability exists only in the locus State, however, the approach adopted in *McKain* seems to me to undermine the national legal system in an even more fundamental way in that it effectively precludes proceedings in other than the courts of the locus State regardless of how clearly inappropriate as a forum those courts might otherwise be.”

action not recognised by the forum from being litigated in the forum's courts (presumably on public policy grounds), there is a question about whether "full faith and credit" is being provided to the *lex loci delicti*.²⁸⁵

Given that the rule in *Phillips v Eyre* is unsatisfactory, what should be the choice of law rule for torts occurring within Australia? In *Tolofson*, the Supreme Court of Canada decided that for intra-Canadian torts the *lex loci delicti* should be applied without exception.²⁸⁶ It is submitted that such a choice of law rule is attractive in that it appears to better satisfy the purposes of the conflict of laws in a federal environment.²⁸⁷

Specifically:

- it does not suffer from the pro-forum bias of the rule in *Phillips v Eyre* (i.e. the *lex fori* cannot prevent the application of the *lex loci delicti*);
- it provides for uniform consequences to attach to a particular set of facts no matter where in the federation a matter is litigated;²⁸⁸
- as a corollary of the above point, it discourages forum-shopping;

²⁸⁴ *Ibid.*

²⁸⁵ See John Pfeiffer, *supra* note 18 and Moshinsky, *supra* note 18 at 170. See below at 96 for discussion of why it is against "full faith and credit" for one State not to apply the laws of another State on public policy grounds. On the international plane, a public policy "filter" may, of course, be necessary. Briggs, *supra* note 14, for instance, argues for the retention of the first limb of the rule in *Phillips v Eyre* in order to screen out from domestic courts novel torts (he gives the example of a tort of invasion of privacy or dignity existing in say France but unknown in England – an English court in his view should not entertain an action based on that tort). On the domestic plane, such concerns must give way to "full faith and credit" requirements.

²⁸⁶ *Tolofson*, *supra* note 33 at 307 – 308, 314.

²⁸⁷ This is not to say that other choice of law rules for tort may not exist which are consistent with the purposes of the conflict of laws and with federalism concerns – for example, the "proper law of the tort" (see Kahn-Freund, *supra* note 1 at 264-265 and Apps, *supra* note 168 at 625). In Commonwealth countries, however, focus has primarily been on the *lex loci delicti* as an alternative to the rule in *Phillips v Eyre* – see Kincaid (1996), *supra* note 40 at 192-193.

²⁸⁸ This, of course, assumes that all courts would locate the tort in the same State – as to the possible difficulties of this see note 289 below.

- it provides predictability and certainty as to which law applies to a particular set of facts;²⁸⁹
- it removes the “heavy burden” from the plaintiff of having to show identical liability under two sets of laws;
- it is easy of application insofar as it simply requires the application of the law prevailing in one jurisdiction (and so does not require an assessment of whether a cause of action under the *lex loci delicti* is “of the same kind” as a cause of action under the *lex fori*). There may still, of course, be difficulties in locating the place where a tort has occurred;
- it does not skewer the national legal system by forcing particular litigation into certain courts but rather allows litigation to be heard in what would otherwise be the most appropriate forum; and
- to the extent that parties involved in a tort have reasonable expectations regarding the legal consequences that might result, it would appear to accord in many cases with those reasonable expectations.

There is one aspect of this choice of law rule, however, about which reservations may be expressed and that is the requirement that the *lex loci delicti* be applied *without exception*.

This reservation is really a concern over the way various objectives of the conflict of laws are balanced and in particular the competing grounds of order and fairness. In *Tolofson*,

LaForest J stated that, “there is little to gain and much to lose in creating an exception to

²⁸⁹ This statement should be qualified. While it might be “predictable and certain” that the law to be applied is the law of the place where the tort occurred, there may be somewhat less predictability and certainty regarding the identification of the location of the tort. Certain tortious situations, like those involving product liability, may have contacts with multiple jurisdictions which may make the search for the location of the tort quite complex and may mean that different issues are governed by different laws – see Moshinsky, *supra* note 18 at 180.

the *lex loci delicti* in relation to domestic litigation.”²⁹⁰ According to LaForest J, having a flexible exception to the *lex loci delicti* undermines certainty.²⁹¹ LaForest J also suggests that it might operate as a means by which forum courts can decline to apply the *lex loci delicti* on public policy grounds.²⁹² While these points are valid, it must also be recognised that the inflexible application of the *lex loci delicti* to the endless variety of tortious situations can lead to arbitrary and unjust results.²⁹³ Such a rigid rule, for example, proved unsuccessful in the United States²⁹⁴ and it is unlikely to be attractive to trial courts seeking to ensure the attainment of justice.²⁹⁵ Given this, a flexible exception to the primary *lex loci delicti* rule is arguably appropriate.²⁹⁶ In *Breavington*, Mason CJ expresses the view that on the international plane the *lex loci delicti* should be applied,

²⁹⁰ Tolofson, *supra* note 33 at 314. Ironically, Brennan J in *Breavington*, *supra* note 3 at 113 also opposed a flexible exception to his version of the tort choice of law rule on the basis that it is not conducive to the uniform enforceability of torts within Australia (but neither is the rule in *Phillips v Eyre*! See “Farewell to Phillips v Eyre?”, *supra* note 10 at 174) it creates uncertainty and it is contrary to principle to allow judges to create a common law liability for extraterritorial torts where none had hitherto existed (which last point seems to beg the question). See “Farewell to Phillips v Eyre?”, *supra* note 10 at 165 where Brennan J’s criticism of a flexible exception is described as “remarkable.”

²⁹¹ Tolofson, *ibid.* at 313. LaForest J comments that: “While, no doubt, as was observed in *Morguard*, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.” In this view, La Forest J is following Yntema who states that the first purpose of conflicts law is to introduce order (Yntema, *supra* note 120 at 736).

²⁹² *Ibid.* at 310 – 311.

²⁹³ See the *ALRC Choice of Law Report*, *supra* note 6 at 48, and Kahn-Freund, *supra* note 1 at 265 (citing the facts of *Babcock v Jackson*, 12 NY 2s 473 (1963) and commenting that it would be “simply ludicrous” to apply Ontario law). For a particularly harsh example of the injustice which may be caused by an inflexible application of the *lex loci delicti* see the Scottish case of *M’Elroy v M’Allister*, 1949 SC 110. See also *Breavington*, *supra* note 3 at 76 per Mason CJ.

²⁹⁴ See P.North, *Private International Law Problems in Common Law Jurisdictions* (Dordrecht: Martinus Nijhoff, 1993) at 173 and *Breavington*, *supra* note 3 at 151 per Dawson J.

²⁹⁵ See Juenger, *supra* note 263 at 539 and Goode, *supra* note 273 at 347: “Combine a recovery-oriented (plaintiff oriented) system policy with an archaic anti-recovery defence and sensible courts will do whatever they reasonably can to give effect to the policy rather than the archaism.”

²⁹⁶ See “Farewell to Phillips v Eyre?”, *supra* note 10 at 175; Briggs, *supra* note 14 at 360 and Kincaid (1996), *supra* note 40 at 202. It may also be mentioned in passing that the choice of law rule should also apply to torts occurring within the forum. So, if a New South Wales driver has a car accident just inside the Victorian border injuring a New South Wales passenger and the passenger commences litigation in Victoria, the Victorian court should be willing to apply the choice of law rule which may mean that, under the flexible exception, New South Wales law is the applicable law. The correctness of this approach may be tested by asking if the action had commenced in New South Wales, what law would the New South Wales court have chosen? In order to ensure uniform legal consequences, both courts should apply the same law –

“subject to an exception involving the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connexion.”²⁹⁷

This formulation of the exception would also appear to be appropriate on the domestic plane.

To conclude, therefore, I suggest that the application of the purposive approach supports the *lex loci delicti* with a flexible exception as a possibly appropriate choice of law rule for intrafederation torts.

Public Policy and Contracts

Within Australia, the common law choice of law rule for contracts is the so-called “proper law of the contract.”²⁹⁸ The “proper law of the contract” is either:

- the law expressly or impliedly chosen by the parties to govern the contract; or
- in the absence of an express or implied choice, the law with which the contract has the “closest and most real connection.”²⁹⁹

Applying the purposive approach to this rule, it appears that the “proper law of the contract” is an appropriate choice of law rule with respect to contracts. It:

- points to only one law and so results in uniform legal, social and economic consequences attaching to the contract;
- fulfils the reasonable expectations of the parties and accords with the principle of freedom of contract by allowing parties to choose their own law; and

see s9(6) of the Private International Law (Miscellaneous Provisions) Act 1995 (UK) and Moshinsky, *supra* note 18 at 183.

²⁹⁷ *Breavington*, *supra* note 3 at 74. Mason CJ actually leaves open the question of whether a flexible exception should exist on the domestic plane.

²⁹⁸ See *Conflict of Laws in Australia*, *supra* note 9 at 271-279.

- provides certainty and predictability.³⁰⁰

One issue, however, and this may also be raised in relation to other choice of law rules, is the effect of “mandatory provisions” of the *lex fori*. Where a State has enacted legislation which mandatorily applies to all contracts regardless of the “proper law” of that contract, forum courts must apply that law.³⁰¹ This, of course, means that the legal consequences attaching to a contract may vary depending on the State in which the action in relation to the contract is brought.

Ideally, only one law, and in the case of contract this means the “proper law”, should apply to a particular set of facts. This is consistent with the view that within Australia uniform legal consequences should attach to a particular set of facts. One could argue that the intrafederation judicial comity created by the federal compact means that the interests of the forum State should defer to an applicable law of another State in order that the national legal system works as a unified and coherent whole. It may also be stated that on a practical level, too, the “basic homogeneity or similarity” of the law in force in the various States makes it unlikely that the “proper law” would ever be significantly inconsistent with the public policy of the forum.³⁰² On the other hand, it needs to be recognised that the States do have legitimate interests in seeing their courts apply particular policies of the forum. States, for example, have passed legislation (such as

²⁹⁹ *Bonython v Commonwealth of Australia* [1951] AC 201 at 219.

³⁰⁰ It should be noted that it may at times be a complex and difficult task to identify the objective proper law of a particular contract – see, for example, *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50. This may militate somewhat against certainty and predictability.

³⁰¹ For a recent example on the international plane, see *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

³⁰² *Breavington*, *supra* note 3 at 77 – 78.

Credit Acts) to protect the interests of their citizens and in order for this legislation to achieve its purposes it is required to be applied by forum courts regardless of the “proper law.”³⁰³ As I indicated in chapter two, the specific purposes of conflict of laws rules are manifold and particular purposes may point to different rules. The purposive approach requires a court to balance the relevant purposes in order that the pertinent rule remains relevant and appropriate in the modern Australian context. So, while “order” would be advanced by having Australian courts only apply the “proper law” (in that there would be uniform legal consequences and hence greater certainty and predictability) this would be at the expense of “fairness” (in that persons would not be able to rely on remedial legislation enacted for their benefit). The sole application of the proper law would also cut across the legitimate interests of States to regulate certain matters. Arguably, the weighing up of the competing purposes supports the conclusion that “mandatory provisions” of the forum should continue to apply to contracts regardless of the “proper law” of those contracts. This runs against uniformity of legal consequences but in practice few discrepancies will probably arise given the “basic homogeneity or similarity” of protective legislation throughout Australia.

To conclude, I suggest that the application of the purposive approach supports the position that the application of the “proper law of the contract” should not be subject to “mandatory provisions” of the *lex fori*.

³⁰³ See, for example, in a Canadian context, *Avenue Properties Ltd v First City Development Corp Ltd* (1986) 32 DLR (4th) 40 (BC court likely to apply provision in BC law requiring issuance of prospectus for real estate investment although under the “proper law” (being Ontario) such a prospectus was not required).

Procedure and Substance

It is axiomatic that matters of procedure are governed by the *lex fori* and that matters of substance are governed by the *lex causae*.³⁰⁴ But, what exactly is a “matter of procedure”? This is an important question as “rules typically classified as procedural have the potential to affect substantive rights.”³⁰⁵ The classic example of this is provided by limitation statutes. Limitation statutes that deny a remedy while leaving the underlying right intact have traditionally been characterised as procedural.³⁰⁶ This has meant that proceedings could be commenced in a forum, even though under the *lex causae* the proceedings were statute-barred. It will be recalled that this is what occurred in *McKain*. There, the plaintiff was able to commence proceedings in New South Wales (which had a three year limitation period) even though in South Australia where the cause of action arose the proceedings were statute-barred (the limitation period in South Australia being three years). The characterisation of the limitation statutes as procedural, therefore, had a substantive effect on the rights of the parties (*i.e.* it meant the defendant could maintain proceedings in New South Wales).

What is the purpose of distinguishing between procedure and substance? In *McKain*,

Mason CJ described the distinction as “soundly based in common sense”:

That the courts of the forum should apply their rules of procedure is both sensible and legitimate by reason of the judge’s practical familiarity with those rules and because those rules, no doubt developed and refined over time, are designed to facilitate the process of litigation in a particular jurisdiction and to ensure that cases are heard efficiently and expeditiously. The fact that one party has chosen and the other party has submitted to a forum’s jurisdiction indicates a willingness

³⁰⁴ *McKain*, *supra* note 2 at 18.

³⁰⁵ *Ibid.* at 25.

³⁰⁶ *Ibid.* at 21.

on the parties' part to litigate their cause in the courts of that forum, according to the ordinary way in which litigation in that forum is conducted.³⁰⁷

Given the validity of the distinction, what rules should be characterised as procedural?

Traditionally, English law has had a tendency to give a wide scope to the concept of procedure. So, for example, limitation statutes of the type mentioned above and rules regarding the measure of damages have traditionally been characterised as procedural.

Within Australia (and arguably on the international plane as well), the tendency to give procedure a wide scope is I believe unsuitable.³⁰⁸ It serves to frustrate the operation of the choice of law rules.³⁰⁹ The integrity of the unified national legal system is undermined because differing legal consequences may attach to a particular set of facts depending on the forum in which the matter is litigated and because it may encourage forum-shopping.³¹⁰ The purposive approach instead suggests that the concept of procedure should be confined as narrowly as possible.³¹¹ I submit that the criterion suggested by Mason CJ in *McKain* to determine what laws of the forum should be characterised as procedural is appropriate, namely that, "the essence of what is procedural may be found in those rules which are directed to governing or regulating the mode or conduct of court

³⁰⁷ *Ibid.* at 22.

³⁰⁸ For a contrary view see R. York, "Let It Be: The Approach of the High Court of Australia to Substance and Procedure in *Stevens v Head*" (1994) 16 Syd. L. Rev. 103. While accepting York's point that there will always be the possibility of differing results between jurisdictions given the continuance of the substance-procedure distinction, it does not follow in my view that traditional conceptions of procedure should continue to hold sway. The law may be developed in order to minimise to the extent possible occurrences of disparate results. It may be said too that the "procedural" laws giving rise to problems (e.g. those regarding limitations of damages) are not difficult for other courts to apply as part of the substantive *lex causae*. I also disagree with York's claim that the majority's approach in *Stevens* leads to "fairer results" (York, *ibid.* at 411). It does not seem to me noticeably fair for plaintiffs to recover more or less in a particular forum than they would get under the *lex causae*. See also Opeskin (1992), *supra* note 20 who supports the approach of the minority in *McKain*.

³⁰⁹ *McKain*, *supra* note 2 at 23.

³¹⁰ See, for example, *Stevens*, *supra* note 6.

³¹¹ See "The Miraculous Raising of Lazarus", *supra* note 18 at 395.

proceedings.”³¹² The application of such a criterion would mean that limitation statutes of the type mentioned above are substantive.³¹³ With respect to the rules regarding the measure of damages, some of these should be seen as procedural (such as the method to be used in assessing the damages) and some as substantive (such as limitations placed on the amount of damages recoverable).³¹⁴ No real hindrance could be caused to courts dealing with intra-Australian matters by narrowing the scope of procedure.³¹⁵

To conclude, therefore, I suggest the application of the purposive approach supports confining what is characterised as procedural within a narrow scope, namely to what is essential to govern or regulate the mode or conduct of the forum courts’ proceedings.

³¹² *McKain*, *supra* note 2 at 26 – 27. *Opeskin* (1992), *supra* note 20 also supports Mason CJ's approach.

³¹³ *Ibid.* at 27. This was the view of the legislatures of Australia which following *McKain* passed complementary legislation (see, for example, the Choice of Law (Limitation Periods) Act 1993 (Vic)) which provides that a limitation period of another State is to be regarded as part of the substantive law. See *Gardner v Wallace* (1995) 184 CLR 95 for a consideration of the legislation.

³¹⁴ *Stevens*, *supra* note 6 at 449.

³¹⁵ See *Opeskin* (1992), *supra* note 20.

Chapter 6

In this chapter I will examine the rules regarding the intrafederation enforcement of sister-State judgments (and as it is conceptually related, the rules regarding the intrafederation recognition of sister-State laws) from the perspective of the purposive approach. One might expect the purposive approach to favour the ready recognition of sister-State laws and the generous, simple and effective enforcement of sister-State judgments. As will be discussed, the relevant rules are by and large consistent with this expectation. It should be noted that there is not a lot of Australian case-law in this area (from which fact one might conclude that the relevant rules are fairly widely and clearly understood and/or this area has not proven in practice to be too problematic).

Any examination of the rules regarding the intrafederation enforcement of sister-State judgments should begin with the position at common law. The common law rules for the recognition of foreign (including sister-State) judgments were analysed by the Supreme Court of Canada in *Morguard*. Essentially, under the common law, a foreign *in personam* judgment would be recognised or enforced by a court within the forum if:

1. the defendant was a subject of the foreign law area where the judgment was obtained;³¹⁶
2. the defendant was resident in the foreign law area when the action began;
3. the defendant had in the character of plaintiff selected the foreign law area in which the defendant was afterwards sued;
4. the defendant voluntarily appeared to defend the action in the foreign law area; and
5. the defendant had contractually agreed to submit to the jurisdiction of the foreign law area.³¹⁷

³¹⁶ It appears this proposition may be open to doubt having never been applied in practice – see J.Blom, “The new common law on the enforcement of Foreign Judgments: Federal Deposit Insurance Corp v Vanstone” (1993) 8 B.F.L.R. 265 at 266.

³¹⁷ See, *Emanuel v Symon* [1908] 1 KB 302 (cited in *Morguard*, *supra* note 9 at 262).

Whatever may be the utility of these common law rules on the international plane,³¹⁸ their application within a federation is, to say the least, problematic. This can be illustrated by the facts in *Morguard* itself. There, it will be remembered, an Albertan mortgagee was attempting to enforce an Alberta judgment for deficiencies arising on the sale of mortgaged Alberta land against a mortgagor who had been resident in Alberta when the mortgage was taken out but who had subsequently moved to British Columbia. As the defendant mortgagor had been served outside Alberta and had not filed an appearance to the Alberta action, under the common law rules the mortgagee could not enforce the Alberta default judgment in British Columbia (where the mortgagor lived and had assets). This is a patently unsatisfactory result. British Columbia and Alberta are, after all, neighbouring provinces not distant countries and it might be thought that a judgment given in one should be accorded due respect and attention in the other as a matter of course.³¹⁹ In addition, the effect of the rules is to encourage plaintiffs to litigate matters in the law area where the defendant resides regardless of whether this is an appropriate forum.³²⁰ This undermines the coherent and harmonious working of the national legal system.

As has been mentioned in chapter one, the problems caused by the common law rules for the enforcement of foreign judgments appear to have been one of the reasons why the

³¹⁸ These rules are still followed in Australia in relation to the enforcement of non-Australian foreign judgments. In Canada, the rules regarding the enforcement of domestic and international foreign judgments are the same – see *Moses v Shore Boat Builders Ltd* (1994) 106 DLR (4th) 654 and J. Blom, “The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World” (1997) 28 Can. Bus. L. J. 373 [hereinafter Blom(1997)] (although as Blom points out there may be differences of application between the domestic and international planes).

³¹⁹ See *Morguard*, *supra* note 9 at 272.

³²⁰ *Ibid.* at 273-274. Of course, there is a silver lining to this in that the defendant will presumably have assets in the law area against which the domestic judgment may be enforced.

framers of the Commonwealth Constitution included provisions which attempted to ensure that judgments from one State in Australia could be enforced anywhere else in Australia.³²¹ The key provision in this regard was, of course, s118 which, modelled in large part on the Full Faith and Credit Clause in the United States Constitution, provided that:

Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

This provision has been amplified by s18 of the State and Territorial Laws and Records Recognition Act 1901 (Cth) which provides:

All public acts records and judicial proceedings of any State or Territory, if proved or otherwise authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.³²²

Both section 118 of the Constitution and s18 of the State and Territorial Laws and Records Recognition Act therefore require the courts of one State to give “faith and credit” to the laws, and judgments of courts, of another State. What is meant, however, by the term “faith and credit”? Does it exclude the operation of the common law conflict of laws rules in this area?

The application of the purposive approach to the “faith and credit” provisions suggests that “faith and credit” should be understood as directing the recognition of sister-State laws and the enforcement of sister-State judgments without any qualification. Such an

³²¹ See above at 22-23. It may be noted in passing that “full faith and credit” to the laws and judgments of Territories is achieved not by operation of s118 but through Covering Clause 5. Territory laws and judgments have the character of Commonwealth law or a federal judgment and so must be recognised throughout Australia pursuant to Covering Clause 5 – see *Breavington*, *supra* note 3 at 115-116 per Brennan J.

understanding is consistent with the purposes of the “faith and credit” provisions. As has been mentioned above, one of the purposes of the “faith and credit” provisions appears to have been the overcoming of the disruptive effects within the federation of the common law rules regarding the enforcement of foreign judgments. Some of these disruptive effects are noted by LaForest J in *Morguard*: the unfairness to plaintiffs of perhaps not being able to have their judgments enforced or being forced to chase the defendant and litigate in potentially inappropriate forums; and hindering the complete economic integration of the federation.³²³ As LaForest J goes on to point out, within the one country more generous rules for the enforcement of foreign judgments should be expected.³²⁴ The constituent units should be expected to act in harmony as partners in federation rather than be “standoffish”, viewing the laws and judgments of other constituent units suspiciously as though they were the laws and judgments of “separate countries.” The meaning of “faith and credit” should be guided therefore by the twin purposes of enhancing intrafederation judicial comity and facilitating the efficient and just operation of the unified national legal system. These twin purposes point to the meaning of “faith and credit” I have suggested (*i.e.* the unqualified recognition and enforcement of sister-State laws and judgments). This is a simple rule which appropriately gives effect to the legislative and judicial actions of sister-States. There is, therefore, no scope for the operation of the common law defences in this area.

³²² In *Breavington* some judges indicated that they believed s18 had some substantive operation – see also *Harris v Harris* [1947] VR 44.

³²³ See *Morguard*, *supra* note 9 at 269, 273-274.

³²⁴ *Ibid.* at 270. In fact, the Supreme Court has said that an implied constitutional obligation of “full faith and credit” is “inherent in the structure of the Canadian federation” – *Hunt*, *supra* note 33 at 41.

This conclusion clearly accords with the view of the Commonwealth in respect to the intrafederation enforcement of sister-State judgments. Part 6 of the Service and Execution of Process Act 1992 (Cth) establishes a simple mechanism by which judgments given by courts or tribunals in one State can be registered in an appropriate court of another State.³²⁵ A sealed copy of the judgment merely has to be lodged with the prothonotary, registrar or other proper officer of the appropriate court in the other State.³²⁶ The prothonotary, registrar or other proper officer must then register the judgment in that court.³²⁷ A registered judgment has the same force and effect and may give rise to the same proceedings by way of enforcement as if the judgment had been made by the court in which it is registered.³²⁸ The court in which the judgment is registered may order that enforcement proceedings be stayed pending an application by the defendant in the State of rendition to set aside, vary or appeal against the judgment.³²⁹ The common law conflict of law rules regarding the enforcement of foreign judgments are expressly excluded.³³⁰

The practical effect of the enforcement mechanism contained in Part 6 of the Service and Execution of Process Act is that sister-State judgments are registered in the courts of other States without qualification. There is no requirement for the plaintiff to show that the court rendering the judgment had jurisdiction “in the international sense” (*i.e.* that the defendant had been served in, or submitted to, the forum). This means that a default judgment given in one State can be enforced in another State without problem (so if the

³²⁵ The Service and Execution of Process Act covers most but not all judgments. See also Opeskin (1995), *supra* note 222 at 785.

³²⁶ Section 105(1) of the Service and Execution of Process Act 1992.

³²⁷ *Ibid.*

³²⁸ Section 105(2) of the Service and Execution of Process Act 1992.

³²⁹ Section 106 of the Service and Execution of Process Act 1992.

³³⁰ Section 109 of the Service and Execution of Process Act 1992. See also Gummow, *supra* note 6 at 999.

facts in *Morguard* happened in Australia no question about the ability of the plaintiff mortgagee to enforce its default judgment would arise). Further, defendants are not able to raise common law defences to resist enforcement (such as that the rendering court lacked substantive jurisdiction or the judgment is of a penal or revenue nature or that the judgment contravenes the public policy of the forum).³³¹

Arguably, the enforcement mechanism contained in Part 6 of the Service and Execution of Process Act is facultative only. As I have suggested above, the enforcement of sister-State judgments without qualification is something that already flows from the "faith and credit" provisions. Certainly, there is some case-law to the effect that as a matter of "faith and credit" Australian courts should enforce sister-State judgments (including orders) even though the court may be of the view that the rendering court, for example, lacked jurisdiction³³² or had not complied with the principles of natural justice.³³³ In this regard, it may be noted that the position in Australia is somewhat different to that prevailing in Canada. According to *Morguard*, a court in one province must enforce the judgment of a court of another province provided that the rendering court had "properly restrained jurisdiction" (*i.e.* there was a real and substantial connection between the rendering court and the cause of action).³³⁴ I have already indicated my view that there is no need for a "due process requirement" to be implied into the Australian legal system.³³⁵ I also do not

³³¹ See below note 340.

³³² See *Harris v Harris*, *supra* note 322.

³³³ See *Bond Brewing Holdings Pty Ltd v Crawford* (1989) 92 ALR 154.

³³⁴ See *Morguard*, *supra* note 9 at 276-278. The determination of whether a real and substantial connection exists is "not a mechanical counting of contacts or connections" but rather is "guided by the requirements of order and fairness" - *Hunt*, *supra* note 33 at 42. There is some uncertainty as to what exactly constitutes "properly restrained jurisdiction" - see Blom (1997), *supra* note 318 at 377-378; "The Constitutionalization of the Conflict of Laws", *supra* note 176 at 58-61; and Black and Swan, *supra* note 32 at 500.

³³⁵ See above at 69-70.

believe it is necessary to qualify the "faith and credit" obligation on Australian courts by making the enforcement of sister-State judgments contingent on the rendering court having "properly restrained jurisdiction." In principle, I do not believe the enforcing court should go behind the judgment and try and second-guess the rendering court's decision regarding jurisdiction.³³⁶ I think in Australia it can be assumed that a rendering court has "properly restrained jurisdiction." As a consequence of the cross-vesting scheme, each superior State court has the substantive jurisdiction of each other superior State court and through the provisions of the Service and Execution of Process Act, Australia-wide judicial jurisdiction.³³⁷ Each superior State court therefore has the necessary jurisdiction to hear any matter arising within Australia.³³⁸ If there are practical reasons why it is more appropriate for a particular court to hear a matter then a defendant can apply to the court out of which process has been issued for the matter to be transferred under the relevant transfer procedures to that more appropriate court (or the court on its own initiative could effect such a transfer).³³⁹ By the time a judgment has issued it is too late for a defendant to complain about the jurisdiction of the rendering court.³⁴⁰

³³⁶ For a strong contrary view in the Canadian context see J.Swan, "The Uniform Enforcement of Canadian Judgments Act" (1993) 22 Can. Bus. L. J. 87. Swan argues that it is entirely appropriate for the enforcing court to review the jurisdiction of the rendering court. In the case of default judgments, it is likely the rendering court will not have considered the jurisdictional question (so nothing for the enforcing court to "second-guess"). Permitting no jurisdictional review would be "unfair" to defendants.

³³⁷ See above at 62 and 64.

³³⁸ Blom (1991), *supra* note 32 at 753 points out that, "With jurisdiction effectively coordinated in such a way, the problem of recognizing sister state judgements disappears. Jurisdiction is subject to nationally agreed standards, so all judgments can be recognized."

³³⁹ See above at 65.

³⁴⁰ I recognize that this places an obligation on defendants to always respond to legal process with which they are served otherwise they risk having a default judgment enforced against them. Defendants must appear at the court out of which legal process has been issued and accept the jurisdiction of the court (and so argue the case on the merits in that court) or apply to the court for the proceedings to be transferred to a more appropriate court (or dismissed in the event there is a lack of jurisdiction). This is what a Victorian defendant must now do if proceedings are issued out of the Federal Court in Western Australia. This is, of course, because the Federal Court is a court with national jurisdiction but so now are the State courts (under the cross-vesting legislation). State courts, like the Federal Court, are also part of the unified, national court structure. I fail to see why in the modern world of communications and travel and national law firms there

“Faith and credit” should also be seen as negating the common law defences to the recognition and enforcement of foreign laws and judgments.³⁴¹ The High Court has indicated, for example, that the “faith and credit” obligation in s118 would prohibit a court from declining to apply a law of another State, which according to the choice of law rules should be applied, on the grounds of public policy.³⁴² There is also some authority to the effect that a court should not decline to apply another State’s laws because they are of a revenue or penal character.³⁴³ The position with respect to the enforcement of sister-State judgments should logically be the same as for the recognition of sister-State laws (*i.e.* the common law defences should not be applicable).³⁴⁴ It would be contrary to the judicial comity created by the “faith and credit” provisions for one State to decline selectively to apply the laws, or enforce the judgments, of another State. The concerns underlying the common law defences to the recognition and enforcement of foreign laws and judgments are not compelling in the intrafederation environment. Public policy considerations, for example, are likely to be broadly identical throughout Australia and it is unlikely any Australian legislature would pass laws, or an Australian court make a

is any “unfairness” or difficulty for defendants to respond to legal process issued out of any court in Australia. It should also be borne in mind that if plaintiffs commence proceedings in forums that are not the most appropriate then they may be subject to an adverse costs ruling - see, for example, Federal Court Rules, O62, r36A(2).

³⁴¹ In the Canadian context, see the contrary view of E. Edinger, “Morguard v De Savoye: Subsequent Developments” (1993) 22 Can. Bus. L. J. 29 at 41 that in principle defendants should not be deprived of the opportunity to raise a defence in appropriate circumstances. As a matter of principle, I would not foreclose the possibility of courts in exceptional circumstances granting a stay with respect to the enforcement of a judgment that is impugned for fraud, denial of natural justice etc in order to allow a defendant to challenge the judgment on these grounds in the rendering court. Of course, as a practical matter this is provided for under the Service and Execution of Process Act.

³⁴² See *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565 (approved by a majority of the High Court in *Breavington*, *supra* note 3).

³⁴³ See *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1967) 9 FLR 424.

³⁴⁴ It would be incongruous to apply laws of this character but nevertheless decline to enforce judgments of this character.

judgment, contrary to public policy.³⁴⁵ As well, assisting a partner in federation to enforce its revenue and penal laws is a different question to assisting a foreign government.³⁴⁶

³⁴⁵ In any event, courts should not be sitting in judgment of whether or not a statute is or is not against public policy. Provided the statute is constitutional, it is the law and should be given faith and credit. In the Canadian context see Swan(1993), *supra* note 336 who categorically rejects the idea that Canadian courts should ever need to decline to enforce an inter-provincial judgment on grounds of public policy.

³⁴⁶ See *Huntington v Attrill* [1893] AC 150.

Conclusion

On 1 January 2001, Australia will celebrate its centenary of federation. Imagine, if you will, that on this occasion some legal genie allows us to wish away the entire intrafederation conflict of laws that has developed over the previous one hundred years and in its place permits us to build a new intrafederation conflict of laws from scratch. What would be the characteristics of this new system of intrafederation conflict of laws?

In this paper, I have argued that any system of intrafederation conflict of laws needs to be built in the light of the purpose those rules should seek to achieve given the context of the Australian federal environment. Shortly put, the purpose of conflict of laws rules is to ensure order and fairness. That is, the rules should operate in a manner that provides uniform and predictable results and provides justice to plaintiffs and defendants in any particular situation. Within Australia, the conflict of laws rules may more perfectly attain this purpose than is possible on the international plane. This is because the States of Australia are not "separate countries" to each other but rather partners in federation. They are part of "one country and one nation" and their legal systems form part of the one national, unified legal system with the High Court of Australia at its apex. The essential unity embodied in the Constitution, with its creation of an "indissoluble Federal Commonwealth", is supported by the uniform nature of the common law in Australia and the basic homogeneity of Australian society.

Given this approach, I suggest that a new system of intrafederation conflict of laws should have the following characteristics:

1. All courts to have national jurisdiction. This comprises two elements. First, each court should have the same substantive jurisdiction as each other court. Second, each court should have judicial jurisdiction over a person anywhere in Australia. In a national system of courts, it is submitted that all courts should be able to hear all matters. In order to prevent injustice to defendants, robust transfer mechanisms should exist to ensure litigation is heard in the most appropriate court in the national court system.
2. Choice of law rules should operate, to the extent possible, so as to ensure that uniform legal consequences attach to a particular fact situation no matter where in Australia litigation occurs. It would be absurd that in the one country different legal results could attach to the one fact situation depending on where an action is brought. This means that the *lex fori* should play as small a role as possible in choice of law rules. For example, what is characterised as procedural (and thus governed by the *lex fori*) should be narrowly confined to those rules necessary to govern the mode and conduct of court proceedings.
3. Laws of and judgments from one State should be recognised and enforced without qualification in other States. Within the one country and one national court system there is simply no reason for one State to not give "full faith and credit" to the laws and judgments of another State. Federal comity suggests States should be readily assisting each other in this regard.

It is submitted that a system of intrafederation conflict of laws with these characteristics, a "federalised" system, appropriately reflects Australian circumstances. It provides an

effective, efficient system - there are no jurisdictional issues (other than those that may arise in the context of transfers to more appropriate courts), the relevant law to a particular fact situation is uniformly applied and judgments are simply enforced. Of course, there is no legal genie to conjure such a system into being. Instead, it will be up to the courts, through a purposive, contextualised approach to the intrafederation conflict of laws rules, and the legislatures, to bring such a system into being.

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