Annual Survey of Recent Developments in Australian Private International Law 2000-2003

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I. Introduction

The rubric of international law is broader than some would lead you to expect.[1] Beyond state-to-state matters and the more recently recognised individual-to-state issues embodied in international human rights, the international law umbrella covers foreign individual-to-foreign individual relationships. Simply put, private international law – or conflict of laws in traditional English common law parlance – is a vital part of the greater corpus of international law.

This article is the rebirth of the annual survey of developments in Australian private international law. This journal recognised the importance of conflicts to the greater endeavour from the start. *The Australian Year Book of International Law*'s mission statement covers the private side of the family as well as the public. Further, from volume 2 in 1966 to volume 8 in 1983 the *Year Book* published a Recent Developments in Private International Law update. These articles pre-date the current reviews of cases in public international law, Australian legislation concerning international law, and Australian practice in international law. The authors of the private international law updates included some of the most recognised names of Australian conflicts research including Professor E I Sykes (1966, 1967), Professor Alastair Bissett-Johnson (1968), Professor Michael Pryles (1970-1972), Professor P E Nygh (1974-1975), and Professor J L R Davis (1976-1977, 1978-1980).

By reintroducing the annual update we hope to encourage more conflicts scholarship in Australia and support those already doing so. Unfortunately, private international law has been somewhat neglected of late in Australia. For example, despite three recent important High Court cases in the area,[2] Australian journals published fewer than 40 articles on private international law since 2000 while publishing over 400 on public international law.[3] Australia

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1 For example, textbooks seemingly covering all of international law fail to mention the subject. See eg J P Fonteyne, A McNaughton and J Stellios, *Harris: Cases and Materials on International Law: An Australian Supplement* (2003); D J Harris, *Cases and Materials on International Law* (5th ed, 1998).

2 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

3 Generalisations based on searches of Attorney General Information Service (AGIS)

does have a handful of well-regarded conflict treatises;[4] however, these suffer from the gap between publishing of new editions and the post-publication developments in the law. Thus, we hope this annual update will be a catalyst to further research in the area and play a role as research output itself that brings texts up-to-date, as well as contributing substantively to the field.

The methodology of this review is selective and personal. It is not a comprehensive account of every single reported decision in Australia involving a conflicts issue. Rather, we reviewed the cases identified through searches of computer databases and other traditional means to focus on decisions that we think will have an impact in the area. Our qualitative approach can be compared to the British model[5] and distinguished from the quantitative American model.[6] For the *Year Book*'s inaugural restart, we cover cases or appeals decided between 1 January 2000 and 31 December 2003.[7] We select this timeframe to capture some important cases from 2000 and because of the obvious historical marker, while not attempting to cover all developments since the last update in 1980.

This update is organised in traditional conflicts fashion. Thus, after this introduction, in section II we examine developments in Australian jurisdictional law. Section III covers choice of law questions focusing on contract and tort issues, but briefly mentioning developments in other areas of law. Section IV introduces new developments in enforcement of foreign judgments. We conclude by identifying two trends emerging from the field in light of these recent cases.

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database for the period between 1 January 2000 and 31 December 2003.

4 See eg P E Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002); M Tilbury, G Davis and B Opeskin, *Conflict of Laws in Australia* (2002) (casebook); M Davies, S Ricketson and G Lindell, *Conflict of Laws: Commentary and Materials* (1997) (casebook). Importantly, the chief private international law resource in the common law, L Collins (ed), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000), diligently and carefully includes a selection of Australian conflicts cases.

5 See eg A Briggs, 'Decisions of British Courts during 2002, B. Private International Law' (2003) 73 *British Yearbook of International Law* 453; W Kennett, 'Current Developments: Private International Law' (2001) 50 *International and Comparative Law Quarterly* 187.

6 See eg S Symeonides, 'Choice of Law in the American Courts 2002: Sixteenth Annual Survey' (2003) 51 *American Journal of Comparative Law* 1. We also differ from Symeonides' approach that focuses on choice of laws to include those traditional conflict issues of jurisdiction and enforcement of foreign judgments.

7 We do try to note where an appeal has been lodged or decided in 2004; these developments will be reviewed in the next survey of case law.

II. Jurisdiction

(a) Generally

(i) Jurisdiction over parties outside Australia: negligence

Handed down on 14 March 2002, *Regie National des Usines Renault SA v Zhang*[8] is one of the three important High Court cases on conflicts at the turn of the century. The case has the most to say on choice of law in tort, however, it also contains a straightforward but important finding regarding jurisdiction over parties outside Australia in negligence cases. *Zhang*'s facts are twisted in the typically private international law way. While in New Caledonia for the purpose of lodging his Australian permanent residence application, the plaintiff suffered injuries in a rented Renault car. Upon return to Australia, the plaintiff commenced proceedings in New South Wales alleging negligent design and manufacture against Renault. Because Renault was a French company with no presence in Australia, the plaintiff invoked the 'long-arm jurisdiction' rules for service on parties outside of Australia.[9] One of the 24 heads of jurisdiction contained in these rules allows a court to take jurisdiction 'where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring'.[10] For the last 20 years, Australian courts have read this requirement broadly to allow, in effect, tort victims with any subsequent damage to bring their suits with them into the forum.[11] In *Zhang*, the High Court confirmed this wide reading simply by noting that it was 'common ground' that the requirement had been satisfied by the plaintiff when he returned to New South Wales.[12] It is worth noting that this liberal finding of jurisdiction over foreigners for torts that occur overseas where the plaintiff brings the injuries home is balanced theoretically by the stricter Australian *forum non conveniens* approach discussed below and pragmatically by the difficulty in enforcing abroad judgments based on such jurisdiction.

(ii) Jurisdiction over parties outside Australia: defamation

The second of the trio of significant High Court conflict cases in recent years is *Dow Jones & Co Inc v Gutnick*.[13] *Gutnick* raised the question of when an Australian court could exercise jurisdiction over a claim of defamation committed on the internet. The High Court's pronouncement on the issue has particularly broad resonance as it appears to be the only court of final appeal

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8 (2002) 210 CLR 491.
9 Supreme Court Rules 1970 (NSW) Pt 10 r 1A.
10 Ibid Pt 10 r 1A(1)(e).
11 The Federal Court, the Northern Territory, Queensland, South Australia, and Victoria (but not the High Court, Australian Capital Territory, Tasmania or Western Australia where the traditional head of the place of the tort is required) follow this approach. See Nygh and Davies, above n 4, [4.51].
12 Zhang (2002) 210 CLR 491, 498.
13 (2002) 210 CLR 575.

worldwide to hear this obvious issue.[14] In *Gutnick*, *Barron's* magazine of New York published an allegedly defamatory article on its website hosted in New Jersey and available to subscribers worldwide including a few hundred in Victoria. Gutnick sued the publisher's parent company, Dow Jones, in Victoria for defamation under Victorian law and in respect of the injury to his reputation in Victoria alone. In response, Dow Jones defended that it was not susceptible to jurisdiction in Victoria and the Court should create a new *lex internet* rule to locate internet defamation cases. In essence, the internet publisher argued for a narrow rule allowing jurisdiction only at the place of upload, while the alleged defamed argued for a broad rule allowing jurisdiction in any place where the material was downloaded. Drawing an analogy from traditional publication rules, the High Court affirmed the Victorian trial court's conclusion that jurisdiction existed, under Victorian service rules, both in the place of the tort, which was Victoria as the point of publication, and the place of damage, which was also Victoria as that was where Gutnick was located.[15] Simply put, the Court ruled that publishing material anywhere in the world on the internet will subject one to jurisdiction in Australia if the possibly defamable material is about someone in Australia and downloaded there.

This case has received significant commentary, much of which bemoans the High Court's holding as casting a parochial wet blanket on internet publication.[16] However, in evaluating the practical impact of the decision, a few points are important to keep in mind. First, though jurisdiction was established, the substantive case for defamation – a notoriously difficult cause of action to win – still must be fought. Second, assuming the case is made, any damages the defamed might win will be limited to the amount of the dissemination in the forum – that is, to the few hundred subscribers in Victoria.[17] Third, as any good conflicts lawyer will have calculated before initiating the case, enforcement of the damages awarded will be limited to the defendant's assets within Australia or by the ability to enforce the judgment abroad. Given the priority that American courts place on freedom of speech protections under the First Amendment of its Constitution, it is very possible a foreign internet defamation award such as Gutnick's will not be enforced there.[18] In short, while *Gutnick* is an important decision regarding Australian courts taking jurisdiction over defamation cases, it does not forebode that the sky is falling for internet publication.

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14 See F Barringer, 'Internet Makes Dow Jones Open to Suit in Australia' *New York Times* (11 December 2002) C.

15 *Dow Jones v Gutnick* (2002) 210 CLR 575, 608 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 610 (Gaudron J), 640 (Kirby J).

16 See eg N W Garnett, 'Dow Jones & Co v Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?' (2004) 14 *Pacific Rim Law and Policy Journal* 61, 74-5.

17 See *David Syme & Co Ltd v Grey* (1992) 38 FCR 303, 309.

18 See *Matusevitch v Telnikoff*, 877 F Supp 1 (D DC 1995), aff'd without comment, *Matusevitch v Telnikoff*, 159 F 3d 636 (D C Cir, 1998) (English defamation judgment (see *Telnikoff v Matusevitch* [1992] 2 AC 343) not recognised because the cause of action on which it was based was repugnant to US public policy and would deprive the plaintiff of his First and Fourteenth Amendment rights).

(iii) Jurisdiction over parties outside Australia: misleading or deceptive conduct

As in defamation cases, Australian courts have also been willing to find jurisdiction at the place where a misleading or deceptive statement is received for the purpose of claims made under section 52 of the Trade Practices Act 1974 (Cth).[19] In 2000, *Ramsey v Vogler*[20] extended this principle to cover violations of state fair-trading acts as well. In *Ramsey*, the New South Wales Court of Appeal found that a defendant outside the state who made telephone calls and sent letters to the plaintiff in New South Wales that allegedly were misleading and deceptive under the Fair Trading Act 1987 (NSW) 'acted' in New South Wales.[21] Thus, the foreign defendant was susceptible to the New South Wales court's jurisdiction. Again, this supports the Australian trend towards liberally granting jurisdiction over foreign parties on the front end of lawsuits.

(b) *Forum non conveniens* and anti-suit injunctions

(i) Forum non conveniens

Australia follows a restrictive, 'clearly inappropriate forum standard' for granting *forum non conveniens* stays.[22] This generally is satisfied where there is a case filed earlier in a foreign forum and all the connecting factors are in favour of that court.[23] However, in the 2003 case of *Reinsurance Australia Corporation Ltd v HIH Casualty and General Insurance Ltd (in liquidation)*, the Federal Court found that where all connecting factors suggested the Australian case was wholly vexatious or oppressive, except for the fact of the legitimate juridical advantage in being able to bring a claim in Australia under the Trade Practices Act 1974 (Cth), the Court would not stay the local proceeding.[24] In a factually complicated case, with pleasing succinctness, the Court unequivocally laid down its holding: 'The Federal Court cannot be a clearly inappropriate forum if it is the only forum in which the cause of action [for misleading or deceptive conduct under the Trade Practices Act] can be fully and properly entertained.'[25]

This ruling was underpinned by the Court's finding that pursuant to the English Private International Law (Miscellaneous Provisions) Act 1995 the Australian Trade Practices Act claim would be construed in England as a tort

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19 See eg *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (No 2)* (1993) 44 FCR 485, 493.

20 [2000] NSWCA 260 (unreported, Mason P, Stein and Heydon JJA, 13 October 2000) [46]-[48].

21 Ibid [47]-[48].

22 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197. Cf *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460.

23 *Henry v Henry* (1996) 185 CLR 571, 590. See further Nygh and Davies, above n 4, 130-31.

24 [2003] FCA 56 (unreported, Jacobson J, 7 February 2003) [289].

25 Ibid [293].

action.[26] This finding involved a fantastic characterisation debate – that is, whether a section 52 violation of the Australian Trade Practices Act would be construed as a tort or contract claim in England – between two of England's leading conflicts lawyers, Adrian Briggs and Michael Crane.[27] However, we leave the details and analysis of that foreign question to the English sources where surely Briggs, at least, will treat us to insight in the next edition of *Dicey & Morris* or the annual update in the *British Yearbook of International Law*.[28]

Consistent with the *Reinsurance* holding that availability of Trade Practices Act claims in Australia is a trump-card blocking all *forum non conveniens* applications, the Victorian courts refused to grant a stay in favour of litigation previously commenced in England on the ground that Trade Practices Act remedies would not be available there, even though the plaintiff had expressly agreed to the exclusive jurisdiction of the English courts. In a case straddling our self-imposed timeframe, *Commonwealth Bank v White; Ex parte Lloyd's*,[29] the Supreme Court of Victoria held that the strategic advantage of being able to pursue Trade Practices Act claims not available abroad prevented an action before the local Australian courts from becoming vexatious or oppressive even where there was a clear exclusive foreign-jurisdiction clause. The central rationale was, in the Court's words: 'It is undesirable that parties should, by entering into an exclusive jurisdiction agreement, be able to circumvent a legislative scheme established by Parliament to protect investors purchasing interests or prescribed interests.'[30]

The decision was upheld on appeal to the Victorian Court of Appeal[31] and the High Court of Australia refused special leave to appeal.[32] In further litigation, said to be based on new facts, the Victorian Court of Appeal continued to deny applications for a stay of the proceedings.[33] It is decisions such as these where the true differences between the Australian standard and the English standard begin to emerge.[34]

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26 Ibid [318].
27 Ibid [295]-[317].
28 Briggs is an editor of *Dicey & Morris*, above n 4, and author of the annual update in the *British Yearbook*. See above n 5. It may be noted that in Australia judicial opinion is divided on the characterisation of claims under the Trade Practices Act. In *Williams v Society of Lloyd's* [1994] 1 VR 274, 311-2, McDonald J held that such a claim was *sui generis*, whereas Byrne J, in *Commonwealth Bank of Australia v White* [1999] 2 VR 681, 698-99, held that the claim was to be classified as a tort for jurisdictional purposes, a view shared by Holmes J in *Borch v Answer Products Inc* [2000] QSC 379 [20].
29 [1999] 2 VR 681.
30 Ibid 704.
31 See *Society of Lloyd's v White* [2004] VSCA 101 (unreported, Winneke P, Buchanan and Eames JJA, 4 June 2004) [5].
32 *Society of Lloyd's v White* (M101/1999) [2000] High Court Bulletin No 1 (11 February 2000).
33 *Society of Lloyd's v White* [2004] VSCA 101.
34 Cf *The Pioneer Container* [1994] 2 AC 324.

(ii) Anti-suit injunctions

Not only do the Australian and English approaches to *forum non conveniens* diverge, but in 2001 Gummow and Hayne JJ of the High Court suggested in *dicta* that the countries diverge over the standard for anti-suit injunctions as well[35] (albeit their statement was before the now leading House of Lords anti-suit injunction decision in *Turner v Grovit*[36]). The distinction that the Justices sought to draw was not obvious. They submitted that Australian courts have both an interlocutory, but in effect final, power to prohibit 'unconscionable exercise of a legal right' and an equitable power to grant injunctions in aid of legal rights asserted. In contrast, the English courts had recognised the first type of power but not the second. The practical effect of this 'doctrinal' distinction is not readily apparent, but presumably it means that an Australian court may grant an anti-suit injunction 'to protect the integrity of its processes' even when not faced with unconscionable behaviour.[37]

(c) Cross-vesting jurisdiction within Australia

(i) Generally

Cross-vesting, as a matter of domestic jurisdiction, might be side-stepped in our review of private *international* law, but it has many interesting lessons for the Australian conflicts lawyer. While it is slightly outside our self-imposed timeframe and deals with a domestic conflict issue rather than private international law, the surprising 1999 High Court case of *Re Wakim*[38] deserves mention. From 1988 until *Wakim*, the cross-vesting scheme enacted nation-wide empowered federal, state and territorial courts of general jurisdiction to try any cases that could be heard by their sister courts.[39] This proved popular and practical, particularly when contrasted against the option of the confusing mess of federal jurisdiction in the United States of America. Nevertheless, in *Wakim* the High Court ruled that the federal courts were not empowered to hear 'state matters'.[40] This seemed to leave state and territorial courts still able to cross-vest with each other as well as hear federal matters, but limited the federal courts' jurisdiction to Commonwealth and territorial issues.

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35 *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

36 [2002] 1 WLR 107.

37 *Australian Broadcasting Corp* (2001) 208 CLR 199, 244 (Gummow and Hayne JJ).

38 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (Kirby J dissenting).

39 Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 4; Jurisdiction of Courts (Cross-vesting) Act 1993 (ACT) s 4; Jurisdiction of Courts (Cross-vesting) Act 1987 (NT) s 4; Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) s 4; Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld) s 4; Jurisdiction of Courts (Cross-vesting) Act 1987 (SA) s 4; Jurisdiction of Courts (Cross-vesting) Act 1987 (Tas) s 4; Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic) s 4; Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) s 4.

40 *Re Wakim* (1999) 198 CLR 511.

(ii) Transfers under cross-vesting scheme

The cross-vesting scheme's equivalent of *forum non conveniens* is found in the rules for transfer of cases to other Australian courts.[41] Just as with *forum non conveniens*, application of these standards has caused much confusion. The central issue is whether the cross-vesting standard for transfer when 'otherwise in the interests of justice'[42] is either: (1) the same as the stricter Australian common law rules of *forum non conveniens* or (2) a new standard that more liberally asks which court is more appropriate.[43] In many ways this is a return to the now classic debate between the advantages of the narrow Australian *Voth v Manildra Flour Mills Pty Ltd* approach (the 'clearly inappropriate forum' test) versus the more pliant English *Spiliada Maritime Corp v Cansulex Ltd* standard (the 'more appropriate forum' test). However, the transfer situation is distinguished by the new statutory language and the fact that these tussles are intra-national, rather than international.

In 2001 with *World Firefighters Games Brisbane v World Firefighters Games Western Australia Inc*,[44] the Queensland Supreme Court decided to take the newer, more liberal approach. In doing so, it joined all the other jurisdictions with the exception of Western Australia.[45] Adopting the more appropriate forum test, the court referred back to *Spiliada*'s non-exclusive list of factors for weighing interests between the courts including (1) the applicable law, (2) advantages derivative of procedural rules, (3) plaintiff's choice of forum, (4) connections with the forum, (5) convenience of the parties and witnesses, (6) comparative costs, and (7) convenience of the court.[46] Balancing these factors and in particular an exclusive jurisdiction clause, the Queensland court transferred the case to Western Australia.[47]

In contrast, the Supreme Court of Western Australia refused the opportunity to join this approach in the 2003 case of *Anderton v Enterprising Global Group*.[48] The Western Australian Court acknowledged that 'it is undoubtedly desirable that courts throughout Australia follow a consistent approach' when dealing with the uniform legislation of the cross-vesting regime.[49] Furthermore, the Western Australian Court recognised the powerful persuasive pull[50]

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41 Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 5(2).
42 Ibid 5(2)(b)(ii)(C), (2)(b)(iii).
43 *James Hardie & Co v Barry* (2000) 50 NSWLR 357.
44 (2001) 161 FLR 355.
45 *Mullins Investments Pty Ltd v Elliot Exploration Co Pty Ltd* [1990] WAR 531; *Platz v Lambert* (1994) 12 WAR 319; *Air Attention WA Pty Ltd v Seeley International Pty Ltd* (unreported, Supreme Court of Western Australia, Walsh J, 3 September 1996); *Douglas v Philip Parbury & Associates* [1999] WASC 15 (unreported, McKechnie J, 14 May 1999); *Whyalla Refiners Pty Ltd v Grant Thornton* (a firm) (2001) 182 ALR 274. See further Nygh and Davies, above n 4, [6.13].
46 (2001) 161 FLR 355, 363.
47 Ibid 370.
48 *Anderton v Enterprising Global Group* [2003] WASC 67 (unreported, Hasluck J, 4 April 2003) [33]-[36].
49 Ibid [33].
50 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 ('[U]niformity of decision in the interpretation of uniform national

emanating from a three-judge panel of the New South Wales Court of Appeal in the 2000 case of *James Hardie & Co Pty Ltd v Barry*.[51] The *James Hardie* Appeal Court had urged Western Australia to join the group.[52] Nonetheless, the Western Australian Court remained unswayed in following the single judge, trial-level Western Australian precedent in favour of the stricter rule.[53] Thus, the situation remain that all states and territories apply a more appropriate forum test for transfers intra-Australia, with the exception of Western Australia, which continues with the clearly inappropriate forum standard.

III. Choice of Law

(a) Characterisation of substance and procedure

Two of the important High Court cases – *Zhang* and *Pfeiffer v Rogerson*[54] reviewed below – also give guidance on that constant conflict question of the choice of law for procedural questions. Procedural questions are of course resolved by *lex fori*, but the issue that always arises is the characterisation problem of deciding what is procedural and what is substantive. *Pfeiffer* found for intra-national conflicts in tort that matters of limitations periods and all aspects of damages were substantive issues to be resolved by the place of the tort.[55] *Zhang* confirmed this for international cases though qualified it slightly by noting that, until an appropriate case arose, the court would refrain from deciding whether *all* aspects of damages would be resolved by *lex loci delicti*.[56]

One of the specific areas the *Zhang* court left for later resolution was the substantive-procedural distinction for maritime torts. The opportunity to answer this came soon enough in December 2003 with *Blunden v Commonwealth*.[57] In *Blunden*, the plaintiff filed suit in 1998 in the Supreme Court of the Australian Capital Territory for injuries allegedly suffered as a result of the Commonwealth's negligence in the *Voyager* disaster in 1964, when two Royal Australian Navy ships collided on the high seas.[58] The central and obvious question in the suit was what statute of limitations should apply. Following *Pfeiffer* and the Limitations Act 1985 (ACT) section 56,[59] there was no doubt

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legslation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court – and all the more so a single judge – should not depart from an interpretation placed on such legislation by another Australian appellate court unless convinced that that interpretation is plainly wrong.').

51 (2000) 50 NSWLR 357.

52 Ibid 361 (Spigelman CJ) 377 (Mason P).

53 *Anderton v Enterprising Global Group* [2003] WASC 67 (unreported, Hasluck J, 4 April 2003) [33].

54 *Zhang* (2002) 210 CLR 491; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

55 *Pfeiffer* (2000) 203 CLR 503, 544.

56 *Zhang* (2002) 210 CLR 491, 537.

57 (2003) 203 ALR 189.

58 Ibid 190 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

59 S 56 provides: 'If the substantive law of another place being a State, another Territory or New Zealand, is to govern a claim before a court of the Territory, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly

that the limitation period was substantive law for conflicts purposes. The problem was what was the substantive law for a tort committed on the high seas between two non-commercial vessels? The plaintiff submitted that the applicable law was the pristine common law without modification by any limitation period, while the defendant (the Commonwealth) argued for, in effect, a proper law of the tort.[60] Rejecting both approaches, the Court concluded that the answer was to be found in section 80 of the Judiciary Act 1903 (Cth). That section provides that the common law in Australia, as modified by the statute law in the state or territory that has jurisdiction, should apply. Thus, the ACT's statutory limitations' rule applied to the extent that it modified the common law in this case, as *lex loci delicti* not *lex fori*.

The 2000 New South Wales Court of Appeal case *Brear v James Hardie & Coy Pty Ltd*[61] also addressed the procedural-substantive divide for choice of law purposes. The issue there was the effect on special tribunals, such as the Dust Diseases Tribunal, of a law in New South Wales that specifically prescribed how foreign limitations periods were to be characterised. The Choice of Law (Limitation Provisions) Act 1993 (NSW) provided that limitations periods were to be construed as substantive law.[62] However, the Dust Diseases Tribunal Act 1989 (NSW) provided that no limitations periods were applicable to cases heard by the special tribunal.[63] In *Brear*, the plaintiff brought suit before the New South Wales Dust Diseases Tribunal for, *inter alia*, asbestos injuries suffered in Queensland, after expiration of the Queensland limitation period.[64] Construing just the Choice of Law Act would seem to bar the plaintiff's claims because that Act prescribed limitations as substantive law and therefore *lex loci delicti* applied.[65] On the other hand, the special tribunal legislation allowed any claims to proceed despite an expired limitation period. The Court of Appeal concluded that the Choice of Law Act applied to out-of-state claims, while the no-limitations-period-section of the Dust Diseases Tribunal Act applied to in-state causes. Thus, the Queensland claim was barred.

(b) Choice of substantive law

(i) Torts

Probably the most interesting question over the past half century of private international law has been what should the choice of law be for torts. Though the issue had been percolating at the edges for centuries, Morris really initiated the present debate in 1951 when he published his arguments for a 'proper law of tort' in the *Harvard Law Review*.[66] The Englishman's arguments converted

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by the court.'

60 (2003) 203 ALR 189, 192 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

61 (2000) 50 NSWLR 388.

62 Choice of Law (Limitation Provisions) Act 1993 (NSW) s 5.

63 Dust Diseases Tribunal Act 1989 (NSW) s 12A.

64 Limitation of Actions Act 1974 (Qld) s 11.

65 *Brear v James Hardie & Coy Pty Ltd* (2000) 50 NSWLR 388, 390 (Spigelman CJ) 392,395, 396 (Mason P), 399 (Priestly JA).

66 J H C Morris, 'The Proper Law of Tort' (1951) 64 *Harvard Law Review* 881.

the majority of American jurisdictions,[67] but had only indirect relevance in England.[68] For Australia, the mess of case law building on the 130-year-old *Phillips v Eyre*[69] precedent resulted in confusion and the indirect influence of the sentiment of the proper law approach.[70]

That was until 2000 and 2002 when the High Court of Australia unequivocally rejected the proper law approach leaving no doubt that the only applicable choice of law rule in tort for Australia is where the tort occurred (*lex loci delicti*) – no exception. In *John Pfeiffer Pty Ltd v Rogerson,*[71] the High Court first considered what law to apply in an intra-state tort conflict. In *Pfeiffer*, a carpenter from the ACT, employed by a company with its principal business office in the ACT, was injured while working on a job just over the border in Queanbeyan, NSW. If New South Wales law applied to the injury claim, the New South Wales compensation act would limit damages, but if ACT law was applied no limit under the common law would constrain the remedy. The case was brought in the ACT where a Master of the ACT Supreme Court heard the matter.[72] Applying the traditional rule in *Stevens v Head*,[73] the Master held that because all connectors except the happenstance of the place of the accident and the advantage to the defendant of the law at the place of the tort were within the ACT, ACT law should apply. This was confirmed by the Full Court of the ACT Supreme Court[74] and the Full Court of the Federal Court.[75]

Accepting the lower Courts' determination on the application of the facts to the standard, the issue for the High Court boiled down to whether it should abrogate the *Stevens* rule and its indirect allowance for proper law of the tort considerations in favour of a strict place of the tort rule. The case contains a plethora of other interesting points and *dicta*,[76] but the choice of law holding was wonderfully simple: for intra-state conflicts the choice of law rule in tort is *lex loci delicti* without exception.[77] The *Pfeiffer* decision left open the question

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67 See Symeonides, above n 6.

68 *Chaplin v Boys* [1971] AC 356.

69 (1870) LR 6 QB 1.

70 See eg *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.

71 (2000) 203 CLR 503.

72 *David Rogerson v John Pfeiffer Pty Limited* [1997] ACTSC 26 (unreported, Master Connolly, 24 April 1997).

73 (1993) 176 CLR 433.

74 *John Pfeiffer Pty Ltd v Rogerson* (1997) 142 FLR 183.

75 *John Pfeiffer Pty Ltd v Rogerson* (unreported, Federal Court of Australia, O'Connor, Higgins, Cooper, Finn and Merkel JJ, 9 July 1998).

76 See eg Jim Davis, 'Is There Still Scope for Forum Shopping after John Pfeiffer v Rogerson?' (2000) 20 *Australian Bar Review* 107; R McCallum, 'Conflicts of Laws and Labour Law in the New Economy' (2003) 16 *Australian Journal of Labour Law* 50; J Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247; G Taylor, 'The Effect of the Constitution on the Common Law as Revealed by John Pfeiffer v Rogerson' (2002) 30 *Federal Law Review* 69.

77 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 540 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 562 (Kirby J).

of whether the choice of law rule for torts in international cases was the same,[78] but this was resolved shortly thereafter. In the *Zhang Case* outlined above, the High Court held that the *lex loci delicti* rule without exception should apply to international conflicts as well.[79]

The seemingly straight-forward *Pfeiffer* and *Zhang* rules were applied in *Neilson v Overseas Projects Corporation of Victoria*.[80] In *Neilson*, the plaintiff was the wife of a lecturer under contract with a Victorian company to teach in Wuhan, China. While in China at the apartment provided under the contract, the plaintiff fell down the stairs and was injured. She sued the employer in contract and tort. The contract had an express choice of law provision in favour of Victorian law; the employer argued that the applicable law in tort should be Chinese law as the place of the tort. In response, the plaintiff argued that the employer's duty of care arose in Australia and, thus, Australian tort law should apply.

Accepting that the duty did arise in Australia, the Supreme Court of Western Australia still found that as the duty was breached and the injury incurred in China, Chinese law was the applicable law under the strict *lex loci delicti* rules.[81] In short, relying on *Voth v Manildra Flour Mills Pty Ltd*[82] and *Distillers Co (Biochemicals) Ltd v Thompson*,[83] the Court found that the tort for choice of law purposes crystallised at the infliction of damage, which was in China in this case. This decision was appealed to the Full Court in Western Australia by the employer's insurer.[84] The Full Court affirmed the trial Court's finding regarding the applicable tort law, but reversed the lower Court concerning its subsequent findings on Chinese conflict of laws, Australian *renvoi*, and the Chinese statute of limitations period.[85] As the Full Court's decision was in 2004 and appears to be under appeal to the High Court, we will refrain from reviewing that interesting *renvoi* holding until next year.

(ii) Contract

One of the clearest rules of private international law is that a court will not enforce a contract that involves violating a foreign nation's law. So simple is the rule that the precedents are rare. The Court of Appeal of the Supreme Court of Western Australia has kindly added to the list with *Fullerton Nominees Pty Ltd v Darmago*.[86] The plaintiff in *Fullerton* entered an agency contract with the defendant to assist in securing a contract for the construction of an abattoir in Indonesia. An element of the agreement was for the defendant to cover the plaintiff's 'invisible costs', which meant his bribes of Indonesian officials in pursuit of the abattoir agreement. After a dispute, the agent-plaintiff sued the

78 Ibid 514 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
79 *Zhang* (2002) 210 CLR 491, 520.
80 [2002] WASC 231 (unreported, McKechnie J, 2 Oct 2002).
81 Ibid [122].
82 (1990) 171 CLR 538.
83 [1971] AC 458 (Australian '*Thalidomide Case*').
84 *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206.
85 Ibid 216, 217, 220 (McLure J), 222 (Johnson J and Wallwork J).
86 [2000] WASCA 4 (unreported, Kennedy, Ipp and Wallwork JJ, 21 January 2000).

defendant for reimbursement of the bribes as well as an agency commission. Following the classic decisions of *Foster v Driscoll*[87] and *Regazzoni v KC Sethia (1944) Ltd*,[88] the Court found:

> Firstly, … the principle that a contract that provides for the commission of a criminal offence in a foreign country with which Australia is not at war is illegal. Secondly, … the principle that the consequence of illegality (and unenforceability) follows even though the parties do not implement the contract and no criminal offence is in fact committed.

The Court also held that the agency-commission portion of the agreement could not be severed from the bribe-reimbursement portion, leaving the plaintiff with no claims. Importantly, Justice Kennedy in his concurring comments reminded that the Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999 (Cth) now makes bribery of foreign officials punishable by up to ten years' imprisonment.[89]

(iii) Corporations law

One subsidiary impact of the cross-vesting challenging case of *Re Wakim* discussed above was that it undermined the Federal Court's ability to hear cases involving the national Corporations Act 1989 (Cth).[90] Further, because the Constitution's power over corporations does not extend so far as to allow the Commonwealth to legislate for the incorporation of companies,[91] a uniform, national corporations' law proved difficult. Thus, relying on the Constitution's referral power and references from the states and territories,[92] the Commonwealth enacted the new Corporations Act 2001. For conflict of laws purposes, the moral is that there is no choice of corporate law issue intra-nationally as the Commonwealth legislation occupies the entire area.

(iv) Family law

The most emotionally difficult conflict of laws cases are without a doubt those involving children crossing borders. To try to create some international order in this area, the Hague Conference on Private International Law has drafted a number of international conventions concerning family law matters.[93] Australia has adopted a number of these conventions, as noted in previous updates of Australian legislation concerning matters of international law in this *Year Book*. For example, in 2002, Parliament enacted the Family Law Amendment (Child Protection) Act 2002, which gave effect to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in

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87 [1929] 1 KB 470.
88 [1958] AC 301.
89 [2000] WASCA 4 (unreported, Kennedy, Ipp and Wallwork JJ, 21 January 2000) [2].
90 *Re Wakim* (1999) 198 CLR 511.
91 *New South Wales v Commonwealth* (1990) 169 CLR 482 ('*Incorporation Case*').
92 See further H A J Ford, *Ford's Principles of Corporations Law* (11th ed, 2003) [2.310].
93 See Hague Conference on Private International Law, *Areas of Private International Law* (2004) 'International Protection of Children, Family and Property Relations' <http://hcch.e-vision.nl/index_en.php?act=text.display&tid=10#family>.

respect of Parental Responsibility and Measures for the Protection of Children 1996.[94] Similarly, numerous regulations have been promulgated in support of the various family conflict conventions including Child Support (Assessment) (Overseas-Related Maintenance Obligations) Regulations 2000;[95] Child Support Registration and Collection (Overseas-Related Maintenance Obligations) Regulations;[96] Family Law Amendment Regulations 2000 (No 4);[97] Family Law (Child Abduction Convention) Amendment Regulations 2000 (No 2);[98] Family Law (Hague Convention on Intercountry Adoption) Amendment Regulations 2000 (No 1);[99] and Family Law (Child Abduction Convention) Amendment Regulations 2002 (No 1).[100]

Australia has also adopted the Hague Convention on the Civil Aspects of International Child Abduction.[101] This convention creates an international system for returning wrongfully removed children to their habitual residence for determination regarding custody by the courts of that jurisdiction. In effecting this policy, Australian courts may order the return of Australian citizen children to another country.[102] In the 2000 High Court case of *DJL v The Central Authority*, a mother of an Australian child ordered by the Family Court of Australia to return her Australian citizen daughter to the United States argued exercise of such power was unconstitutional.[103] The Court, however, having concluded earlier[104] that the convention was constitutional in application, refused to revisit the issue.[105]

(v) Insolvency

Cross-border insolvencies give rise to a variety of conflict issues, but in contrast to cross-border family law there has been little success with international agreements.[106] The most recent effort in the area is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency 1997.[107] In late 2002, the government through the

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94 (19 October 1996), [2003] ATS 19.
95 SR 2000 No 79.
96 SR 2000 No 80.
97 SR 2000 No 254.
98 SR 2000 No 275.
99 SR 2000 No 312.
100 SR 2000 No 110.
101 (25 October 1980), 1343 UNTS 89; Family Law Act 1975 s 111B; Family Law (Child Abduction Convention) Regulations 1986 reg 2, sch 1.
102 Family Law (Child Abduction Convention) Regulations 1986 reg 14.
103 (2000) 201 CLR 226.
104 *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640.
105 (2000) 201 CLR 226, 240 (Gleeson CJ, Gaudron , McHugh , Gummow and Hayne JJ), 279 (Kirby J).
106 Kent Anderson, 'Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency' (2004) 23 *Aust YBIL* 1, 3.
107 UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency, Report of UNCITRAL on the Work of Its Thirtieth Session, UN GAOR (52nd Sess) Annex I, 68-78, UN Doc A/52/17 (1997), <http://www.uncitral.org/english/texts/insolven/

Treasury introduced a proposal to adopt the model law as part of its Corporate Law Economic Reform Program (CLERP).[108] There is little opposition to adoption[109] and the effort has gained support from New Zealand's likely adoption of the model law.[110] Assuming Parliament does eventually enact the proposal, needless to say, it will modify fundamentally the conflict of laws rules for insolvency in Australia. We refrain from that discussion pending its actual adoption.

(c) Exclusion of foreign law

Even where the choice of law rules unambiguously indicate the law applicable to a dispute, Australian courts may still refuse to enforce the otherwise applicable foreign law. The classical formulation of this rule provides that Australian courts will not directly or indirectly enforce foreign penal, revenue or other public laws.[111] There has been an interesting debate for a number of years, particularly following the various *Spycatcher Cases*,[112] regarding whether that reference to 'other public laws' is to a specific kind of law or to an encompassing general category.[113] In other words, whether this rule should be interpreted narrowly to exclude the fewest laws possible, or whether it should be interpreted broadly to exclude more foreign laws.

In the 2003 case of *Evans & Associates v Citibank Ltd*, the New South Wales Supreme Court construed the exclusion of the foreign law rule broadly in refusing to enforce a United States commercial law that enabled a court-appointed receiver to disgorge funds obtained through fraudulent credit transactions.[114] Again, in the best conflicts tradition, the facts were fabulously twisted. The plaintiff was a receiver appointed by a United States court pursuant to the Federal Trade Commission Act (US) to collect all the assets of a credit-card fraudster. The fraudster in the United States had transferred over US$7 million of his illicit proceeds to a Vanuatu entity that he wholly

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insolvency.htm>.

108 Commonwealth Department of the Treasury, *Cross-Border Insolvency: Promoting International Cooperation and Coordination*, Corporate Law Economic Reform Program Proposals for Reform Paper No 8 (2002) (CLERP 8), <http://www.treasury.gov.au/documents/448/RTF/CLERP8.rtf>.

109 See R F Mason, 'Cross-border Insolvency: Adoption of CLERP 8 as an Evolution of Australian Insolvency Law' (2003) 11 *Insolvency Law Journal* 62.

110 New Zealand Ministry of Economic Development, 'Draft Insolvency Reform Bill' (2004) <http://www.med.govt.nz/ri/insolvency/review/draft-bill/index.html> at 14 July 2004.

111 *Dicey & Morris*, above n 4, R 3.

112 See *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; *Attorney-General (UK) v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 174; *A-G In and For the United Kingdom v South China Morning Post Ltd* [1988] HKLR 143; *Attorney-General v Observer Newspapers Ltd*, *The Guardian and Others* [1990] 1 AC 109. See generally F A Mann, 'Spycatcher in the High Court of Australia' (1988) 104 *Law Quarterly Review* 497.

113 See eg F A Mann, *Studies in International Law* (1973) 514. Cf P B Carter, 'The Role of Public Policy in English Private International Law' (1993) 42 *International and Comparative Law Quarterly* 1.

114 [2003] NSWSC 204 (unreported, Palmer J, 27 March 2003).

controlled. The subsidiary deposited the money with the European Bank, a Vanuatu company. The European Bank then invested the funds in an interest-bearing deposit with Citibank Limited, an Australian company. Because the funds were in United States dollars, Citibank Limited in fact held the money in an account at Citibank NA, a New York company. Subsequently, the American Federal Bureau of Investigation seized the funds from Citibank NA, and a court case was commenced in the United States to distribute the money to the fraudster's victims. Given this, the New South Wales Court pointed out it was not clear why the receiver/plaintiff sought to capture the funds via Australia rather than direct participation in the United States case. On the jurisdictional issue the Court noted:[115]

> All parties say, correctly, that this Court has jurisdiction to hear the proceedings because the subject matter of the dispute is said to include property in New South Wales, namely a debt owed by Citibank Limited to European Bank … No party has sought a stay or dismissal of the proceedings on the basis of forum non conveniens or abuse of process; all parties say they wish this Court to hear the case. Accordingly, I must accede to the parties' right to have the proceedings determined in this Court, although the effect of orders of this Court on the proceedings in Vanuatu and in the United States and their utility in general have not been made clear to me.

The exclusion of foreign law issue boiled down to whether the New South Wales Court should construe the foreign receiver's pursuit of the fraudster's funds in Australian proceedings as a direct or indirect enforcement of a foreign penal, revenue or other public law, in which case the court would not assist. Citibank and the other defendants argued that the Federal Trade Commission Act under which the United States receiver was operating was a penal or public statute. The receiver responded that in the United States it would be construed as civil. The New South Wales Court in answering this question set out the details of the exclusion rule with such clarity that it is worth quoting in full:

> a) whether a claim brought in an Australian court is one which involves the assertion of the governmental interests of a foreign State and, therefore, directly or indirectly involves the enforcement of a foreign public law is a question to be decided according to Australian law;
>
> b) in deciding that question the Australian court will pay regard to the characterisation of the foreign law placed upon it by the courts of the foreign State; that characterisation will always receive serious attention and may, on occasions be decisive;
>
> c) the characterisation of an action brought in an Australian court as one which seeks to enforce a foreign public law or, in contradistinction, a foreign private right will depend upon the right asserted, the party in whose favour the right is said to have been created, the purpose of the foreign law upon which the right asserted is based, and on the general context of the case as a whole;
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> d) the fact that the right asserted in the claim is penal in nature will not prevent a person who asserts a personal claim based on that right from enforcing the claim in Australian courts;

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115 Ibid [8].

> e) on the other hand, if the purpose of the claim is the direct or indirect enforcement of a right asserting the governmental interests of the foreign State, the claim is unenforceable in Australian courts regardless of the way in which the cause of action is framed and no matter what principle of Australian law is also called in aid;
>
> f) the fact that in the foreign jurisdiction the right asserted may be enforced in a civil court or in a civil action will not necessarily affect the categorisation of the claim sought to be enforced in the Australian court.[116]

Thus, finding in *Evans* that the receiver was acting for a United States government commission and that the enabling foreign law was for regulating commerce and penal in nature, the New South Wales Court held that the receiver's claim was based on an unenforceable foreign penal and public law.[117] The receiver appealed against this decision to the New South Wales Court of Appeal. In 2004, the Appeal Court upheld the lower Court's ruling, but we will leave for next year a discussion of the extensive reasons provided by the three justices in that decision.[118]

IV. Enforcement of Foreign Judgments

(a) Exception: foreign court's lack of jurisdiction

The final stage of a conflicts problem is whether an Australian court will enforce a judgment rendered by a foreign court. The rules in this area have been largely codified in the Foreign Judgments Act 1991 (Cth), but some room still remains for interesting questions to develop. In the 2001 Queensland Court of Appeal case of *de Santis v Russo*, the Court reviewed a lower court decision refusing to apply section 7(2)(a)(i) of the Foreign Judgments Act 1991 to set aside an Italian judgment against a Victorian resident for lack of jurisdiction.[119] The legislation provides that if a party appears in foreign litigation only to contest the jurisdiction of that court, then the appearance will not be considered a voluntary submission to the foreign jurisdiction.[120] In *de Santis*, an Australian resident received from the Italian Consulate-General in Melbourne notice of an Italian lawsuit in which she had been named a defendant. In response, the defendant sent a letter through her Australian lawyer to the Italian Court and the plaintiff's Italian lawyers. The letter included a declaration by the Australian defendant, which explained that she had no presence in Italy, her husband had died insolvent, and under Australian law there were no assets to pass to anyone. The Queensland Court noted that what happened in Italy after this was unclear, but the Italian Court eventually entered a default judgment against the Australian defendant that suggested it had not considered or received the defendant's declaration. Based on this finding and referring to

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116 Ibid [60].
117 Ibid [82]-[91].
118 *Evans v European Bank Ltd* [2004] NSWCA 82 (unreported, Spigelman CJ, Handley and Santow JJA, 25 March 2004).
119 [2002] 2 Qd R 230.
120 Foreign Judgments Act 1991 (Cth) ss 7(3)(a)(i), 7(5)(d).

Canadian and New Zealand decisions,[121] the Queensland Court held that the defendant's letter, in effect, contested jurisdiction, and the substantive defences included in the letter did not amount to a voluntary submission to the Italian Court's jurisdiction.[122] Thus, concluding that there was no submission to the foreign jurisdiction and no other basis for the Italian Court to exert control over the Australian defendant, the Queensland Court set aside the lower Court's order permitting enforcement of the Italian judgment.[123]

(b) Exception: judgment not final and conclusive

In the February 2002 case of *Schnabel v Lui*,[124] the defendants asked the New South Wales Supreme Court to refuse to enforce a foreign judgment invoking another of the limited exceptions to enforcement – viz, the foreign judgment was not final and conclusive. Because the judgment was from a United States court, which is not listed in the Schedule to the Foreign Judgments Regulations 1992, the common law controlled.[125] In the underlying action, the United States District Court for California had struck out the Australian defendant's answer and counter-claim with prejudice for failure to participate in the litigation. Subsequently, the Australian defendant attended and participated in the damages hearings and final submissions, which resulted in both compensatory and punitive/exemplary damages being awarded. While there was no stay of execution in the United States, the defendant argued that United States procedural rules still allowed 'final judgments' to be set aside for a limited number of reasons (such as newly discovered evidence, fraud in procuring the judgment, et cetera)[126] and, thus, the United States judgment was not 'final and conclusive' for Australian enforcement purposes. In response, the Court found that 'the test of finality is how the foreign jurisdiction treats the judgment' and in this case it was clear that the United States courts would treat the judgment as final despite there being some opportunity to set it aside on limited specific grounds.[127] Therefore, after rejecting general public policy arguments, the Court recognised the United States judgment allowing the plaintiff to proceed against the defendant's assets in Australia.[128]

The court in *Schnabel* also took up the question of whether the multiple damages awarded to the plaintiff in the United States as 'punitive/exemplary damages' were enforceable given the rule discussed above in *Evans*, namely that Australian courts will not directly or indirectly enforce foreign penal,

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121 *Von Wyl v Engeler* [1998] 3 NZLR 416; *Re Overseas Food Importers & Distributors Ltd and Brandt* (1981) 126 DLR (3d) 422 (BC CA).
122 [2002] 2 Qd R 230, 239.
123 Ibid 240.
124 [2002] NSWSC 15 (unreported, Bergin J, 1 February 2002). There is a series of cases in the New South Wales Supreme Court between these parties reported in 2002.
125 The Foreign Judgments Act contains a similar exception. See Foreign Judgments Act 1991 (Cth) s 7(2)(b).
126 See Federal Rules of Civil Procedure R 60(b) (US).
127 *Schnabel v Lui* [2002] NSWSC 15 (unreported, Bergin J, 1 February 2002) [133]).
128 Ibid [155], [181].

revenue or public laws.[129] After reviewing the authorities, the court found that because the exemplary damages were a matter of either penal or public law, it could not enforce them. However, it did allow those damages to be severed to allow the remainder of the judgment to be enforced.[130]

(c) Exception: judgment obtained by fraud

In the 2000 case of *Yoon v Young Dung Song*,[131] the New South Wales Supreme Court addressed the exception to enforcement of foreign judgments where the underlying judgment was obtained by fraud. The Court used the opportunity to assess the appropriateness of the classic 1882 English approach of *Abouloff v Oppenheimer & Co*[132] in contemporary Australia. The much criticised *Abouloff* rule allows the local court to reopen the underlying case if fraud resulting in the foreign court making the wrong conclusion is alleged, even if this approach requires examining the exact issues decided by the foreign court. This contrasts with the domestic rule where new discovery of material evidence must be shown to reopen a case for alleged fraud in the procurement of a judgment.[133] In 1990 the New South Wales Supreme Court, persuaded by the academic writers and the Canadian approach, had held in *Keele v Findley* that the domestic rule should apply for enforcement of foreign judgments as well.[134] After examining these cases, the Court in *Yoon* simply stated: 'Notwithstanding the various criticisms that have been made of the *Abouloff* rule, I am satisfied that it correctly states the law in relation to foreign judgments and that if such law is to be changed, it should be by Parliament and not by the Courts.'[135] It might parenthetically be argued that when Rogers J decided *Keele v Findley*, the Australian common law was thereby changed, and that when the Commonwealth Parliament subsequently enacted the Foreign Judgments Act 1991 its use of the word 'fraud' in section 7(2)(a)(vi) did not make any change to the (recently amended) common law rule. If that argument were to be accepted, Parliament had already changed the law before the issue arose in *Yoon*.

The Court in *Yoon*, having expressed itself satisfied with the *Abouloff* rule, continued by saying, 'Indeed the facts of this case demonstrate in my mind good reason for applying a different test of fraud in respect of foreign judgments' and then went on to take evidence from the parties on the original claim.[136] But in that case, all the parties were ethnically Korean, the events occurred in Korea and involved a Korean contract to be performed in North Korea. Further, the Court admitted that it could not understand the original judgments, that it did not trust the evidence given by either side, which it heard through a translator, and that it was facing 'cultural differences [that] can often

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129 *Dicey & Morris,* above n 4, R 3.
130 *Schnabel v Lui* ,[177]-[180].
131 (2000) 158 FLR 295.
132 (1882) 10 QBD 295.
133 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 538.
134 *Keele v Findley* (1990) 21 NSWLR 444 (citing *Jacobs v Beaver* (1908) 17 OLR 496).
135 *Yoon v Young Dung Song* (2000) 158 FLR 295 at [22].
136 Ibid.

lead to misunderstanding'.[137] Nevertheless, the Australian judge not only found himself better able to make factual determinations on the substantive issues in this case than a Korean judge who would be linguistically and culturally better able to understand the context and veracity issues, but he was so confident in these determinations that he used it as his rationale for returning to the nineteenth-century rule of *Abouloff* grounded as it was in a sense of British cultural superiority. Decisions of this sort are what have long motivated academics to call for the revision of this antiquated approach.[138]

V. Conclusion

Two identifiable trends emerge from Australia's private international case law between 2000 and 2003. First, the courts appear very willing to recognise the broadest extent of the grab by the states and territories for jurisdiction through their long-arm statutes. The first part of this equation is that the states and territories have set up the statutory authority for reaching beyond matters traditionally within their borders. The Supreme Court Rules involved in such cases as *Zhang* and *Gutnick* allowing service on parties out of the jurisdiction for nearly all claims are a clear example. Indeed, the High Court in *Zhang* accepted as 'common ground' the right of a Chinese national to sue a French car-maker for a New Caledonian accident in New South Wales courts. Similarly in *Gutnick*, the Court, while spending more time on the novel issue of jurisdiction over defamation claims committed on the internet, still found that of course an Australian court had jurisdiction to hear the complaint.

Historically, such jurisdictional hubris was not of much concern when viewed holistically because of Australian *forum non conveniens* and the practical reality that Australian judgments based on excessive jurisdiction might not be enforceable in foreign countries. The practical foreign enforcement limit remains, and given the traditionally significant onus for a defendant of satisfying the Australian *forum non conveniens* standard, it never has been a comprehensive counterweight. However, the decisions in *Reinsurance Australia* and *White* suggest that the *forum non conveniens* balance has now been almost completely displaced in certain situations. Namely, these cases denied *forum non conveniens* stays where the Australian courts were clearly inappropriate but for the unavailability of Australian Trade Practices Act claims in the foreign forum.

The practical message being that with the recent trend of liberally finding jurisdiction, as long as a Trade Practices Act claim can be added to the suit, then a lawyer can shop a lawsuit into Australian forums. The need to enforce Australian judgments abroad and foreign courts' unwillingness to abide by Australian notions of jurisdiction will continue to contain Australian jurisdictional overreach. However, it makes the Australian criticisms of the United States' excessive jurisdiction that resulted in the Foreign Proceedings

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137 Ibid 297, 300-01.

138 See eg P North and JJ Fawcett, *Cheshire & North's Private International Law* (13th ed, 1999) 444.

(Excess of Jurisdiction) Act 1984 (Cth) [139] not that long ago begin to seem hollow and disingenuous.

The second observable trend is the move towards clearly elucidated and often bright-line rules for choice of law questions. This is not new. The codification of many common law conflict rules such as the Supreme Court jurisdictional rules, cross-vesting transfer rules, characterisation of limitation rules, enforcement of foreign judgment rules, and so forth all occurred before the turn of the twenty-first century. The last three years have added to that codifying trend: family law rules, corporate law rules, and, very likely, insolvency rules in the near future. Moreover, the High Court unequivocally created a bright-line *lex loci delecti* rule with no exceptions for choice of tort law in *Pfeiffer* and *Zhang*. In the same decisions, the Court also decisively drew the line for characterisation of substance and procedure in almost all limitation and damage issues in tort. The codification and clear statement of the applicable rules is a welcome trend, especially when the vagaries of globalisation and internet communication increase the occasions for conflicts to arise.

The Australian perspective on private international law painted by Professor Sykes in the first survey of this *Year Book* in 1966, building as it did on the English common law lead, departs widely in places from the present, bold Australian-specific trends. In other places, such as New South Wales' confirmation of the English *Abouloff* rule, the past three years are directly linked to that earlier tradition reviewed by those who wrote previously for this *Year Book*. It is our hope that this year's update is the first step in returning to the traditional annual consideration of developments in private international law, as well as a step towards defining the future direction of the law.

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139 Foreign Proceedings (Excessive Jurisdiction) Act 1984 (Cth) s 9.