

The importance of private international law in Australia¹

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Introduction

- 1 Australia is a federal nation. It comprises (relevantly, for present purposes) six states and two internal territories. There is a national legislature – the Commonwealth Parliament. Each state has its own legislature. Each of the internal self-governing territories likewise has its own legislature. Each of those nine legislatures has the constitutional power to make laws that govern the rights and liabilities of people subject to them.
- 2 As one would expect, there are constitutional allocations and demarcations of legislative power. Although they are of extreme importance (as is reflected by the number of High Court decisions involving them), they have nothing to do with the topic of these remarks. There are some constitutional limitations on the legislative powers of the state and territory parliaments. Again, they can be put to one side for today's purposes.
- 3 That multiplicity of sources of legislative activity is mirrored by the multiplicity of courts in this country. There is a Federal judiciary, headed by the High Court of Australia. The High Court occupies a unique place, as it is the ultimate appellate court for the whole of Australia (and thus an important unifying source for Australian common law and for the interpretation of Commonwealth and uniform state legislation) and, as well, the ultimate authority on the interpretation and application of the Australian *Constitution*. There are other federal courts. In addition, state courts may be invested with federal jurisdiction: the jurisdiction to hear and determine causes (or “matters”) arising under a law of the Commonwealth. Those state and territory courts include the Supreme Court of each State and Territory and a range of other courts.

¹ A speech given on 30 September 2016 to a discussion group at Parliament House, Macquarie Street, Sydney.

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- 4 In those circumstances, it is inevitable that questions arise as to the power of a state or territory court to hear a matter; (if it has that power) the body of law that it is to apply; and (if it hears and decides the matter) the enforcement of its decision. Those matters were of considerable concern at the time of federation, over 100 years ago. That concern reflected the independence, as separate polities and legal systems, of the colonies before federation, and the extent to which the legislatures and courts of each colony sought jealously to protect its rights and revenues.
- 5 Thus, private international law, which is at its heart a system of conflict rules (hence the alternative title, “conflict of laws”), has always been of central importance in Australia. For example, at common law, the supreme court of a state would have jurisdiction over someone not ordinarily resident there simply by virtue of service of its process on that person within the territorial jurisdiction of the court. Conversely, absent some enabling provision, that supreme court might not have jurisdiction over someone ordinarily resident there if that person could not be served within the territorial jurisdiction of the court.
- 6 Almost from the beginning of federation, there were legislative attempts to rationalise this somewhat strange situation. *The Service and Execution of Process Act 1902*, a statute of the Commonwealth Parliament, sought to facilitate the service of process issued out of one state court in the territory of another state, or of a territory of Australia. Perhaps not surprisingly, that legislative scheme was much amended over the years³. At the same, the statutes and rules of court that to a greater or lesser extent governed proceedings in individual courts sought to define the circumstances in which there was a sufficient connection between a cause of action and the particular court, so as to justify service outside the jurisdiction, or what is sometimes called “long-arm” jurisdiction.
- 7 As Australians became more familiar with the fact of federation, and accustomed to think of themselves as “Australians” rather than as residents of a particular state or territory, there were increasing legislative efforts to facilitate the work of the courts, in dealing with disputes that were properly before them. Likewise, as trade and commerce grew (specifically, having regard to s 92 of the *Constitution*, free trade and commerce between the states), intranational

³ See now the *Service and Execution of Process Act 1992* (Cth)

disputes flourished, and the legislatures of the Commonwealth, the states and the territories responded. In part, no doubt, those developments reflected s 118 of the *Constitution*, which requires that full faith and credit be given throughout the Commonwealth to the laws, the public acts and records and the judicial proceedings over every State. Section 118 has been given a limited interpretation – *Anderson v Eric Anderson Radio and Television Pty Ltd*⁴; *Breavington v Godleman*⁵ – but that is beside the point.

- 8 One important legislative device for managing conflicts problems has been the uniform scheme for cross-vesting of proceedings in the courts of one state or territory to a court of another state or territory where it is in the interests of justice to do so.⁶ The requirement that it be in the interests of justice has been interpreted by the High Court as meaning that the case should be heard by a court of the jurisdiction that is the most (or more) appropriate, or natural, forum for the resolution of the dispute.⁷ A decision on that question involves a “nuts and bolts” analysis of the connecting factors between the litigation and the jurisdiction in which it has been commenced, and between the litigation and the jurisdiction to which it is sought to cross-vest it.
- 9 The way in which conflicts problems may arise in Australia can be illustrated by looking at the facts of a reported case, *Perrett v Robinson*⁸; the companion case to *Breavington v Godleman*. Mr Perrett, a resident of the Northern Territory, was injured in a motor vehicle accident near Mataranka in the Northern Territory. He was driving a car registered in the Northern Territory. The other vehicle in the collision was driven by the defendant Mr Robinson, who also lived in the Northern Territory. However, that car was registered in

⁴ (1965) 114 CLR 20

⁵ (1988) 169 CLR 41)

⁶ See for example the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW); there is mirror legislation in the other states and territories, and of the Commonwealth. It should be noted however that although there is no relevant constitutional limitation on the ability of the legislature of one state or territory to confer jurisdiction on the courts of another state or territory, there is a problem with doing so where the reciprocal courts are federal courts. That problem was exposed by the decision of the High Court in *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511. The High Court held in substance that where the reciprocal court was a Chapter 3 court under the *Constitution*, the jurisdiction cross-vested in it must be a “matter” of a kind that, apart from the relevant *Cross-Vesting Act*, would be within the jurisdiction of the court. That excursion into constitutional theory has no present application.

⁷ *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400

⁸ (1986) 169 CLR 172

Queensland and covered by a “third party insurance” policy issued in accordance with Queensland legislation.

- 10 Mr Perrett sued Mr Robinson in the Supreme Court of Queensland. He had good reason to do so. The Northern Territory had in place a “no-fault” compensation scheme for motor vehicle accidents, as part of which the common law right of plaintiffs to sue for damages for personal injury suffered as a result of motor vehicle accidents within the Territory were abolished. However, in Queensland, the common law remained in force.
- 11 Had the accident occurred in Queensland, Mr Perrett could have recovered common law damages. It is likely that the value of those damages would have exceeded substantially the value of his rights under the no-fault compensation scheme of the Northern Territory.
- 12 In those circumstances, there was a question as to the law that should be applied to decide Mr Perrett’s entitlement. The action was brought in the Supreme Court of Queensland. Mr Robinson was amenable to the jurisdiction of that Court, because he had been served with process in Queensland. The law of Queensland would have allowed full recovery of damages. However, the law of the Northern Territory – the place of the wrong – would not.
- 13 The ultimate decision of the High Court was that Mr Perrett’s rights were those under the law of the place where the wrong occurred: the Northern Territory. It is clear that this decision had a substantial policy basis, namely preventing “forum shopping”. Forum shopping is a rather derogatory term given to the practice of commencing proceedings in the jurisdiction most likely to produce a favourable outcome, regardless of the strength (if any) of the connection between that jurisdiction and the wrong for which damages are sought.
- 14 The result is rather strange, in one sense. Mr Robinson’s insurer had admitted liability on his behalf. It had received a premium for insuring Mr Robinson’s car, no doubt calculated on the basis of its possible exposure to common law damages. Indeed, it had gone further and arranged for Mr Robinson to travel to Queensland specifically to be served with process. However, whether the outcome represented some sort of windfall for the insurer is not the point. The point is, rather, that in a federation such as Australia, there should be a rational

basis for resolving conflicts of laws that seeks to ensure that plaintiffs get no additional benefit simply by selecting one forum rather than another as the venue of their litigation.

15 I do not wish it to be thought that I am saying that litigation in this country is beset by conflicts of laws problems. It is not. But, despite the best efforts of the legislatures to ensure that such problems are minimised, they do exist. The historical causes to which I referred earlier have diminished in significance with the passage of time. However, the influx of immigrants, particularly since the Second World War, has provided fresh opportunities for conflicts problems to arise, particularly in relation to succession, and to property rights more generally.

16 So far, I have talked only of conflicts problems within Australia. But of course Australia is an island nation, and one that has close trading ties with many countries around the world. Inevitably, trade and commerce being what they are, disputes will arise between trading partners. Thus, conflicts problems can arise at the transnational level. Does a court of a state or territory in this country (or a federal court) have jurisdiction? How can it assert that jurisdiction? How can any decision in favour of the domestic plaintiff be enforced? Similar questions will arise where litigation is commenced in the courts of another jurisdiction, and the successful plaintiff seeks to recover the fruits of its success in Australia.

17 Those problems, and others, were addressed in the courts of another island trading polity: the United Kingdom. From the 18th to the 20th century, English (as mostly they were) judges grappled with the problems of transnational trade disputes. They developed an extensive body of rules. Those rules addressed each of the three stages at which conflicts of laws arise: service; choice of law for resolution of the dispute; and enforcement. That body of law has, in equal degree, fascinated scholars and tormented students over the decades.

18 Now, many aspects of transnational conflicts problems are the subject of international conventions, arising out of the work of the Hague Conference. We are fortunate to have someone of Dr Bernasconi's eminence to address us today on the Hague Conference and its work. I shall not embarrass myself by seeking to summarise the themes that he will address. For myself, I am very grateful to have the opportunity to hear him speak.