Current Developments in Australian Private International Law:

Divergences from England and Notes regarding New Zealand

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I. Introduction

As a trading-dependant nation, federal state and (former) colony, private international law or, more commonly, conflict of laws has long been at the forefront in Australia, perhaps even more so than for many more insular or unitary countries. Until relatively recent times, however, a discussion of *Australian* conflicts would have differed very little from *English* conflicts. Yet, over the past two decades, a combination of Australia asserting its distinctiveness from English common law(1) and England becoming more involved with its European neighbours as co-signatories to the EU's Brussels Regulation on Jurisdiction and the Enforcement of Judgments and the Rome Convention on the Law Applicable on Contracts(2) has resulted in a growing bifurcation between the two countries' conflict rules.(3) Thus, it is important not to make the assumption possible a generation ago that Australian private international law is in essence English law. Keeping that caution in mind, the two countries' law in this area is related. They build from a unified tradition, and the theory and conceptualisation of the subject in the two countries are fundamentally the same.

This Essay, therefore, rather than try to describe all of Australia's private international law, builds upon the foundation laid by the writer on English conflict of laws in this same volume(4) and focuses on highlighting those areas where Australian law has diverged from England. Because New Zealand has

tracked English law much more closely than Australia, and indeed retains the Privy Council of the English House of Lords as its highest court,[5] there has been less divergence between New Zealand and England. Correspondingly, this Essay does not focus on the law in New Zealand though it occasionally refers to New Zealand's treatment of a few discrete issues.

In traditional conflict of laws fashion, this Essay begins with a discussion of jurisdiction, particularly focusing on Australia's new jurisdictional rules for internet based claims and forum non conveniens. I then turn to the choice of law rules looking specifically at tort and contract cases and considering exclusions of foreign law. The Essay next briefly considers the Australian rules on the enforcement of foreign judgments and awards. I conclude by briefly summarising some of the fundamental differences between Australian and English private international law.

II. Jurisdiction

A. Generally

Without jurisdiction nothing happens. From a common law perspective, whether a court has jurisdiction over a matter and the parties is the starting point to any law suit, let alone private international law issue. Regarding jurisdiction for cases concerning property within the forum[6] or where a party can be served in the forum,[7] there is little dispute and Australian courts will take jurisdiction. The more difficult questions, and where Australia has diverged in part from England, relate to when Australian courts will take jurisdiction over matters concerning foreign land and parties served outside of Australia.

1. Jurisdiction over Foreign Land

The common law approach to the issue of jurisdiction over foreign land is found within the so-called *Mocambique* Rule whereby courts will not accept jurisdiction regarding title to land abroad or regarding torts over foreign land.[8] The majority of states and territories within Australia continue to follow both branches of this traditional rule.[9] However, English courts while continuing to refuse jurisdiction on issues of title, now will take jurisdiction over cases raising trespass to foreign land issues.[10] Similarly, Australia's most populous state, New South Wales, and its capital territory, the Australian Capital Territory (ACT),

have enacted statutes that seemingly abrogate the *Mocambique* Rule.

The New South Wales statute was drafted specifically to avoid the limiting effect of the traditional approach. Thus, section 3 of its *Jurisdiction of Courts (Foreign Land) Act 1989* expressly provides that "jurisdiction of any court is not excluded or limited merely because the proceedings relate to, or may otherwise concern, land or immovable property". The ACT law shadows New South Wales's sweeping language, but adds the qualification that its courts are not authorised to hear cases relating to title of land outside of the territory.(11) In both cases, however, the authority to hear foreign land disputes does not necessarily mean that courts in those jurisdictions will do so. Both laws provide for implicit incorporation of forum non conveniens to displace local jurisdiction where appropriate.(12) In summary, it might be said that the majority of Australian courts follow both branches of the traditional *Mocambique* Rule, however, England and the ACT have used statutes to avoid the second portion of that rule concerning jurisdiction for property torts while New South Wales seems to have abrogated the rule completely.

2. Jurisdiction over Parties Outside of Australia

Like England, taking jurisdiction over a person outside of Australia is a two-part process. First, a court must, either beforehand or after the fact, determine that it is appropriate to serve a party located outside its province. Second, the court will hear challenges to assertion of jurisdiction based on that service. When Australian courts will grant leave to serve abroad is largely a matter of statute. Because of the federal nature of Australia, each of the states and territories as well as the Federal Court and High Court has its own statutory rule for granting leave to serve outside its territory.(13) Nonetheless, some general principles may be extracted from the various rules. For example, all of the statutes are structurally alike in finding jurisdiction based on specific "heads of jurisdiction" that suggest a connection between the cause and the forum. It is beyond the scope of this Essay to discuss all of these heads and sub-heads, therefore, the following only considers jurisdiction based on contractual and tortious heads and uniquely Australian approaches within those.

The New South Wales' rule for contract based jurisdiction is typical and provides "where the subject matter of the proceeding is a contract" and the

contract is made or breached in the state, governed by state law or the contracting party's agent is in the state, the court may allow service outside of Australia.[14] Generally speaking, Australian courts have interpreted these provisions broadly to include most actions that sound in contract.[15] One interesting point under this head is that the Commonwealth as well as New South Wales and Victoria have adopted rules for e-contracting largely consistent with the *UNCITRAL Model Law on Electronic Commerce*.[16] Thus, for contracts where either the offer or acceptance was via the internet or e-mail, both the sender's and receiver's places of business are deemed to be a place of contracting.[17]

Australia also has more developed jurisdiction rules for internet-based torts than most other countries. The general guideline for taking jurisdiction over a tort is that the tort must be "committed within" the forum.[18] In application, the courts take a look at the whole of the events constituting the tort to find "where in substance ... the cause of the action arose".[19] In addition, half of the Australian courts also allow jurisdiction to be based on tortious damages suffered "wholly or partly" in the territory.[20] Something that by itself is generally insufficient to support jurisdiction under the primary test.[21] It is also practically very important since it means plaintiffs can, in effect, bring tortious jurisdiction with them into a forum.

Application of these tests has caused much consternation and discussion in relation to defamation committed on the internet.[22] In one of the first definitive statements on the issue in the world,[23] Australia's High Court ruled in *Dow Jones v Gutnick* in November 2002 that the ability to download defamatory material within the forum was sufficient to anchor jurisdiction under the place of the tortious damage test and, arguably, the place of the tort test (ie, the place of publication).[24] In *Gutnick, Barron's* magazine of New York published an allegedly defamatory article on its website located in New Jersey and available to a few hundred subscribers in Victoria, Australia. Gutnick sued *Barron's* parent company, Dow Jones, in Victoria for defamation under Victorian law. While Dow Jones argued for a new internet-specific rule for conflicts purposes, the Victoria Supreme Court of Appeals extended the traditional rationale and found on the interlocutory point of tortious jurisdiction that it had jurisdiction both in the

place of the tort, which was Victoria as the point of publication, and the place of damage, which was also Victoria where Gutnick was located.[25] The High Court affirmed, rejecting any sui generis *lex internet* rule.[26]

Similar to the defamation scenario, jurisdiction over misrepresentation in Australia and England has historically been founded at the place where the representation was received and acted upon.[27] The High Court has added subtlety to this rule in Australia, however, by providing in *Voth v Manildra Flour Mills Pty Ltd* that if the representation is made abroad but acted upon domestically it will not be sufficient to find the tort was committed in Australia.[28] Thus, while Australia's general rules for jurisdiction do not diverge radically from England, it has added nuanced differences for property outside the forum, and internet tort and contract cases.

B. Cross-Vesting within Australia

This Essay does not focus on the conflict of laws questions raised among the various federal entities within Australia. Nonetheless, it is worth noting that in contrast to the stricter form of federalism found in the United States, Australia has innovatively developed a "cross-vesting" scheme whereby intra-Australia jurisdictional conflicts are largely avoided. Under the cross-vesting legislation enacted by the Commonwealth and each of the states and territories, and effective in 1988, each federal court and the state or territorial courts of general jurisdiction were empowered to try any case that could be heard by its sister courts.[29] In other words, the Supreme Court of New South Wales could rely on the Commonwealth jurisdictional rules to sit as a Federal Court and vice-versa. In practical terms, this meant that looking merely to the jurisdictional rules of the forum was insufficient and instead the broader question of whether the matter could be heard by any court based on its jurisdictional rules had to be asked. It also necessitated a detailed set of venue guidelines so that each case was directed to a single, appropriate forum.[30]

The scheme proved sensible, popular, successful, and unfortunately in 1999 partially unconstitutional.[31] As a result, the state and territorial courts are still able to cross-vest with each other as well as hear federal matters, but the federal courts may no longer entertain cases on state matters, which are noted below

(though they may still hear cases on territorial matters).[32] While a setback for simplicity within Australia, the development has brought about at least one simplification from a conflicts standpoint by spurring the complete unification of corporations law into the single *Corporations Act 2001* (Cth) which thereby completely side-steps any choice of laws issue for most company cases.

C. Forum Non Conveniens and Anti-Suit Injunctions

One of Australia's greatest divergence from England is its approach to declining jurisdiction where more than one court may hear a case. As is well-known, England has adopted the Scottish and American doctrine of forum non conveniens culminating in *Spiliada Maritime Corp v Cansulex Ltd.*[33] Under the *Spiliada* rule English courts, and similarly New Zealand courts, will decline jurisdiction when there is another court that has jurisdiction and is a more appropriate forum considering the most real and substantial connections of the suit.[34] Thus, in application, courts conduct a balancing of sorts among available forums considering factors such as the place of the acts and parties, the governing law and the availability of evidence, and to a lesser degree litigation advantages available for the plaintiff in the selected forum.[35]

In contrast, the Australian High Court in the *Voth* case noted above expressly rejected this type of search for the most appropriate forum for a cleaner presumption in favour of the plaintiff's selected court unless the defendant shows it to be "clearly inappropriate".[36] That is, based essentially on the same factors considered under the *Spiliada* rule, an Australian court may decline jurisdiction only where it is "so inappropriate a forum ... [that] continuation would be oppressive and vexatious".[37] In practical terms, the difference between the *Spiliada* and *Voth* tests is very real with the Australian approach being much more difficult to satisfy and correspondingly forum non conveniens stays more exceptional.

Australian courts also have the power to grant the inverse of forum non conveniens stays-so-called anti-suit injunctions which prevent persons within the court's jurisdiction from pursuing suits elsewhere. This is an interesting area where the English and Australian approaches seem to have converged despite different routes and rationales. Given the more drastic nature of preventing a

person from pursuing a suit abroad, as opposed to declining to hear a domestic case in favour of another forum, Australia's stricter approach to forum non conveniens has been better placed to address the situation. Thus, in *CSR Ltd v Cigna Insurance Australia Ltd*, the High Court applied a vexatious and oppressive standard similar to its forum non conveniens test for when it would allow an anti-suit injunction.[38] On the other hand, the English courts have had to work up to this standard from their laxer "more appropriate forum" rule for forum non conveniens.[39] In short, English courts are more willing than Australian courts to dismiss for forum non conveniens though they have indirectly become equally reluctant as Australian courts in granting anti-suit injunctions.

III. Choice of law

After an Australian court establishes that it has jurisdiction and will not decline the matter for discretionary reasons, the next private international law issue is what law the court should apply.[40] Again, this is complicated by the federal system in Australia; thus, "Australian law" might be any one of nine state, territorial or commonwealth laws.[41] As a very rough guide with innumerable exceptions and overlaps, commonwealth law covers those matters arising under the Commonwealth Constitution including foreign affairs, defence, taxation, family law, and much of commercial law, while the laws of the six states and two territories cover areas such as obligations, property, and criminal law.[42] Thus, law suits in Australia might face internal choice of law questions as well as international ones. There has been much debate over the years regarding whether intra-Australian conflicts should be resolved in the same manner as international conflicts, particularly in light of section 118 of the Australian Constitution which provides for "full faith and credit" of laws throughout the Commonwealth.[43] While it is still debatable in many aspects, this Essay proceeds on the basis of the recent High Court decision *Regie Nationale des Usines Renault SA v Zhang* that intra-Australian and international conflicts will be resolved in a like manner.[44] Due to space considerations, this Essay only considers the choice of laws issue in contracts and torts as well as briefly looking at exclusion of foreign laws.

A. Choice of Contract Law

Despite not being eligible for the European Union's Rome Convention on choice of contract law, Australia's approach to selection of contract law is very similar to England's under that agreement.[45] As a general principle, Australia follows the freedom of choice of contract law rule. However, like England, this is slightly restricted in that the choice must be bona fide and legal, which in practice means courts will not read evasive selection clauses to allow for avoidance of mandatory laws.[46] Some weight is added to this exception in Australia by the *Trade Practices Act 1974* (Cth) which governs most consumer contracts and is a mandatory law of the forum that provides unconscionable choice of law clauses will be avoided.[47]

In applying this freedom of choice principle, there are essentially three alternative steps. First, if there is an express choice of contract law then courts will (except for the rare exception noted above) recognise it.[48] Second, if there is not an affirmatively declared selection, but the court may infer the parties' choice from the terms of the contract and the surrounding circumstances, the court will find that to be the proper law of the contract.[49] This examination generally focuses the court on the four corners of the contract with certain contractual clauses, such as *inter alia* place of performance and choice of forum, influencing that determination.[50] Thus, in the High Court case of *Akai Pty Ltd v People's Insurance Co Ltd*, the Court found that an exclusive forum clause would be a very strong presumption of the inferred choice of contract law.[51]

Third, if no choice of law has been expressly made or can be inferred, the court will look to the law with which the contract has the "closest and most real connection".[52] In application, this means courts will consider equally any number of a variety of factors including the places of contracting, performance and payment; the currency of the contract; the parties' residences; and so forth.[53] While this general approach suggests some ambiguity around the edges, it is submitted that much like the Rome Convention it produces predictable and clear results in the overwhelming majority of cases.

B. Choice of Tort Law

It is often said that there are three alternative approaches a state migh pursue regarding choice of tort law: *lex fori, lex loci delicti*, or some "proper law of the tort".[54] England through statute has adopted a hybrid test based, in part, on its seminal *Chaplin v Boys*.[55] Thus, the general English rule might be described as *lex loci* unless there is a substantially more appropriate law considering all the circumstances.[56] In two relatively recent High Court cases—*Pfeiffer v Rogerson* and *Renault v Zhang*—Australia has expressly rejected this approach in favour of the predicability of a strict law of the place of the tort rule.[57] In short, simple *lex loci delicti* is the law in Australia without exception. Thus, it was held in *Renault* that New Caledonian law should apply without exception to an accident by an Australian resident in a French car while in Nouméa, even though a New South Wales court had jurisdiction, was an appropriate forum, and all legal remedies available under New South Wales tort law might not have be available under New Caledonian delict law.[58]

The simplicity of the legal rule partially obfuscates the difficulty of its application in "double locality torts" where the acts comprising the tort arise in multiple states. The general rule in these cases is that the court will focus on the place of the act or omission rather than where the damage occurs.[59] Notably for the interesting case of internet defamation, the High Court recently held in *Gutnick* that this was the place where the damage to reputation occurred, which is where the person downloads the material.[60]

C. Exclusion of Foreign Law

Even where the traditional rules for choice of law suggest a foreign state's law should apply, sometimes an Australian or English court will not apply that law. Thus, one of the classic rules of common law conflicts is that courts will not apply either directly or indirectly any penal, revenue or other public law of a foreign state.[61] Of late, particularly since the UK's increasing exposure to European private international law through the Brussels Regulation and Rome Convention, there has been much speculation regarding whether the "public law" aspect of this rule might be interpreted broadly in a civilian sense to be an umbrella term covering many such public laws.[62]

Within this general debate two divergences between the English and Australian approaches have emerged. First, with regards to revenue laws the Australian decision of *Ayers v Evans* stands in contrast to the English and Irish refusal to assist a foreign insolvency that in part represents a foreign government tax claim.[63] Moreover, further weight is added to this constrictive reading of the revenue exclusion in Australia with regards to New Zealand tax claims, since those are expressly enforceable under statute.[64] Read narrowly these cases and statutes might merely be aspects of the unique relationship between Australia and New Zealand. Read more broadly, however, they suggest an important trend that provides a way through the complicated maze of cross-border insolvency frameworks and a means of holding transnational tax evaders liable.[65] New Zealand for its part seems to sit somewhere between Australia and England on this point as it would allow enforcement of Australian tax claims but not the broad approach of *Ayers*.[66]

A second interesting divergence between Australia, on the one hand, and New Zealand and England, on the other, regarding the broad "public law" rubric arose in the so-called *Spycatcher* litigation. In these parallel cases tried in Australia and New Zealand, the Attorney General for the United Kingdom sought injunctions in both countries to prevent a former British spy from publishing a book that allegedly revealed British state secrets. The exclusion of foreign laws problem arose in that the British Attorney General partially based his claim on a British statute prohibiting the disclosure of official secrets as well as the private rights of an employer regarding a former employee.[67] The Australian High Court found that despite the British Attorney General's attempt to cast the issue as a private law matter, the true nature of the action was regarding enforcement of a foreign public law and, therefore, the Australian court could not assist.[68] In contrast, the New Zealand court, relying in part on Lord Denning's speech in an earlier English House of Lords decision about New Zealand artefacts,[69] found that it could enforce the foreign secrecy law because "[i]t would seem anachronistic for the courts to deny themselves any power to do what they can to safeguard the security of a friendly foreign state".[70] Beyond the specific differences these cases show in their protection of foreign secrecy laws, the opinions also suggest that Australia is taking a narrower, stricter view of the

general restriction on application of foreign laws while New Zealand and England are taking a broader, more flexible view. Perhaps counter-intuitively, it is Australia's restrictive approach that is more favourable to international comity while the broader approach results in more parochial holdings.

IV. Enforcement of Foreign Judgments and Awards

The final step in Australia's private international law regime-enforcement of foreign judgments-is covered by both the common law and statute. Under both standards, little to no divergence arises between Australia and England's approaches. For designated countries including Japan,[71] the Australian *Foreign Judgments Act 1991* (Cth), chiefly modelled on the British *Foreign Judgments* (*Reciprocal Enforcement*) *Act 1933*, allows foreign judgments to be enforced by registration. The statute applies to final money judgments from the designated foreign courts handed down within six years.[72] After registration, a court may still set aside a judgment if, *inter alia*, it no longer satisfies the statute's eligibility requirements, the registered judgment seeks more than due, the judgment debtor did not receive adequate notice, the judgment was obtained by fraud, the judgment is contrary to Australian public policy, or the foreign court did not have jurisdiction.[73] Regarding the jurisdiction required to avoid being set aside, the test is not whether the foreign court had jurisdiction pursuant to its domestic law, but whether under the *Foreign Judgments Act*'s definition the judgment debtor consented to the foreign jurisdiction, had domicile in the foreign country, the relevant transaction went through the foreign state, or the property at issue was within in the foreign forum.[74] Assuming registration and no setting aside, the foreign judgment has the same force and effect for enforcement as a standard judgment from an Australian court.[75] As in the United Kingdom under its similar scheme, registration under statute has made enforcement quicker, cheaper and more predictable for judgments from eligible countries.

For judgments from those countries not designated under the *Foreign Judgments Act* such as the United States, judgment creditors must rely on the common law enforcement rules. These rules do not differ significantly from England's common law approach and are in fact consistent with the *Foreign*

Judgments Act's framework. Thus, Australian courts will enforce a foreign judgment at common law where the foreign court had jurisdiction recognised in Australia, the judgment is final for a set monetary amount, and the parties are the same.(76) After establishing a foreign judgment may be enforced, the judgment debtor may still raise a number of common law defences such as fraud in the original proceeding and contradiction of public policy or natural justice.(77) Further, following the United Kingdom's lead,(78) Australia has enacted the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) that precludes the enforcement of judgments based on "excessive jurisdiction", viz, multiple or punitive damage awards from US anti-trust cases.(79)

Foreign arbitral awards are also readily enforceable in Australia. For those countries designated under the *Foreign Judgments Act*, arbitration awards are treated in the same manner as judgments.(80) In addition, Australia has incorporated the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards into its *International Arbitration Act 1974* (Cth). Thus, for arbitration awards from states member to the New York Convention, those tried and tested rules apply.(81) For judgments from any remaining countries, the *International Arbitration Act* in Part III has also adopted the *UNCITRAL Model Law on International Commercial Arbitration 1985* which provides rules for recognising arbitral awards generally consistent with those under the New York Convention.(82)

V. Conclusion

For nearly two hundred years Australian conflicts rules were in essence a subset of English private international law. Thus, it is not surprising that the organisation, theoretical underpinnings and vocabulary of Australian conflict of laws retains a very English accent. This can be seen, among other places, in the use of English case law for many propositions of Australian common law powers such as personal jurisdiction and enforcement of judgments from non-designated countries. Further, even where Australia has used its own Parliamentary authority to create new conflicts laws, those laws have largely codified the English/Australian common law approach or have been modelled on English statutory developments. For example, Australia's court rules for service

out of jurisdiction and its *Foreign Judgments Act* might both be characterised as based on English statutes that had codified the common law.

Foreign observers, however, should not be tempted to take the easy route of assuming that if they learn England's conflict of laws rules they will know the Australian system. Over the past generation the two countries' laws have grown apart. Part of this is due to the simple fact that Australia and England are vastly different countries in different environments. Thus, English conflicts has been increasingly influenced by the civil law through the engagement of the United Kingdom with its European neighbours under the Brussels Regulation on jurisdiction and enforcement and the Rome Convention on choice of contract law. Similarly, there is nothing directly comparable in the English experience to Australia's unique form of constitutional federalism seen in the cross-vesting scheme or its special relationship with New Zealand evidenced in the narrow exceptions for exclusions of revenue laws.

The divergence is also a result of Australia's increasing willingness to assert more readily its own independent vision of the "common law of *Australia*".(83) Thus, in cases such as *Voth* and *Pfeiffer* the Australian High Court has openly rejected the classical English approaches as handed down by the House of Lords for its own rules on forum non conveniens and choice of tort law. Further, cases such as *Gutnick* and adoption of laws such as the *UNCITRAL Model Law on Electronic Commerce* show that the Australian courts and Parliament are willing to lead both England and the rest of the world in developing areas such as jurisdictional and choice of laws rules for the internet. The resulting message regarding current developments in Australian private international law is that while learning the subtlety of Antipodean conflicts law is more difficult than merely relying on English law, it is also, hopefully for a lawyer coming from a civilian background, more interesting and correspondingly useful from a comparative perspective.

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(1) *See, eg*, Cook v Cook (High Ct 1986) 162 *Commonwealth Law Reports* 376, 390 ("Subject, perhaps, to the special position of decisions of the House of Lords given in

the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems [including England] are not binding and are useful only to the degree of the persuasiveness of their reasoning").

(2) Brussels Council Regulation 44/2001, *formerly* 1968 Brussels and 1988 Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; Rome Convention on the Law Applicable to Contracts 1980.

(3) This is most evident in *Oceanic Sun Line Special Shipping Co v Fay,* (High Ct 1988) 165 *Commonwealth Law Reports* 197, where the majority of Australia's court of final appeal–the High Court–declined to adopt the English House of Lords' rule of *Spiliada Maritime Corp v Cansulex Ltd,* [House of Lords 1987] 1 *Appeal Cases* 460. New Zealand, incidentally, has followed *Spiliada. See* Club Mediterranee v Wendell [NZ Ct App 1989] 1 *New Zealand Law Reports* 216.

(4) *See* Saito, herein.

(5) *See* Imperial Laws Act 1988 s 5 (NZ).

(6) This rule covers real property in all the jurisdictions, and personal property or personal property mortgages in all the jurisdictions except, oddly, the Australian Capital Territory. Supreme Court Rules 1937 (ACT) Ord 12, R 2(a)-(b).

(7) *See, eg,* Evers v Firth (NSW Ct App 1986) 10 *New South Wales Law Reports* 22 (fleeting presence sufficient for personal jurisdiction with service).

(8) British South Africa Co v Companhia de Mocambique [House of Lords 1893] *Appeal Cases* 602.

(9) *See, eg,* Inglis v Commonwealth Trading Bank of Australia (Fed Ct 1972) 20 *Federal Law Reports* 30; Dagi v Broken Hill Proprietary Co Ltd (No. 2) [Vic Sup Ct 1997] 1 *Victoria Reports* 428.

(10) Civil Jurisdiction and Judgments Act 1982 s 30(1) (UK).

(11) Civil Law (Wrongs) Act 2002 (ACT) s 146(2).

(12) *Id* s 146(3); Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) s 4.

(13) High Court Rules 1952 Ord 10; Federal Court Rules 1979 Ord 8; Supreme Court Rules 1937 Ord 12 (ACT); Rules of Supreme Court 1996 Ord 7 (NT); Supreme Court Rules 1970 Pt 10 (NSW); Uniform Civil Procedure Rules 1999 Ch 4 Pt 7 R 124 (Qld); Supreme Court Rules 1987 R 18 (SA); Rules of the Supreme Court 1965 Ord 11 (Tas); Rules of the Supreme Court 1996 Ord 7 (Vic); Rules of the Supreme Court 1971 Ord 10 (WA) (hereinafter the court rules are abbreviated, eg, "SCR (ACT)").

(14) SCR (NSW) Pt 10 R 1(c).

(15) PE Nygh & M Davies, *Conflict of Laws in Australia* (7th ed, 2002) 57.

(16) Electronic Transactions Act 1999 (Cth) s 14(5); Electronic Transactions Act 2000

(NSW) s 13(5); Electronic Transactions Act 2000 (Vic) s 13(5). It is expected that eventually all states and territories will adopt this legislation.

(17) Further exceptions exist where the party's place of business is not clearly evident. *See id* s 14(6).

(18) *See, eg*, SCR (NSW) pt 10, Or 1A(d).

(19) Distillers Co (Bio-Chemicals) Ltd v Thompson [Privy Council 1971] *Appeal Cases* 458, 466 (on appeal from New South Wales).

(20) FedCR Ord 8 R 1(ad); SCR (NT) Ord 7.01(1)(k); SCR (NSW) Pt 10 Ord 1A(e); SCR (Qld) R 124(1)(l); SCR (SA) R 18.02 (fa); SCR (Vic) Ord 7.01(1)(j).

(21) Hall v Australian Capital Territory Electricity Authority [NSW Sup Ct 1980] 2 *New South Wales Law Reports* 26.

(22) *See, eg*, Lori A Wood, 'Cyber-Defamation and the Single Publication Rule' (2001) 81 *Boston University Law Review* 895 (collecting sources).

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

(24) Dow Jones & Co Inc v Gutnick (High Ct 2002) 194 *Australian Law Reports* 433 para 46 (per Geeson CJ, McHugh, Gummow, and Hayne JJ), paras 71, 100 (per Gaudron J).

(25) Gutnick v Dow Jones & Co Inc [Vic Ct App 2001] *Victoria Supreme Court of Appeals* 249, *affirming* [Vic Sup Ct 2001] *Victoria Supreme Court* 305.

(26) *Gutnick* 194 ALR at para 55. This case has received extensive treatment elsewhere. *See, eg*, Stephen Smith, 'Defamantion, the Internet and the High Court: Dow Jones v Gutnick' (2003) 77(2) *Australian Law Journal* 106. Nonetheless, it is important to remember that, though jurisdiction was established in the case and even assuming the defamation claim is made, any damages will be limited to the amount of dissemination in the forum (*see* David Syme & Co Ltd v Grey (Fed Ct en banc 1992) 115 *Australian Law Reports* 247, 253) and any enforcement will be limited by the assets of the defendant's in the forum or the ability to enforce the judgment abroad.

(27) *See* Diamond v Bank of London and Montreal Ltd [Ct App 1979] 1 *Queens Bench* 333.

(28) Voth v Manildra Flour Mills Pty Ltd (High Ct 1990) 171 *Commonwealth Law Reports* 538, 569.

(29) 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.

(30) *See id* s 5.

(31) Re Wakim; ex parte McNally (High Ct 1999) 163 *Australian Law Reports* 270.

(32) *See* Reid Mortensen, *Private International Law* (2000) 35-36.

(33) [House of Lords 1987] 1 *Appeal Cases* 460.

(34) *Id* at 476-78; Club Mediterranee v Wendell [NZ Ct App 1989] 1 *New Zealand Law Reports* 216.

(35) *See id.*

(36) *Voth* 171 CLR at 567.

(37) *Oceanic Sun* 165 CLR at 247-48.

(38) CSR Ltd v Cigna Insurance Australia Ltd (High Ct 1997) 189 *Commonwealth Law Reports* 345, 393-94.

(39) Airbus Industrie GIE v Patel [House of Lords 1999] *Appeal Cases* 19. *See also* Kent Anderson, 'What Can the United States Learn from English Anti-Suit Injunctions?' (2001) 25 *Yale Journal of International Law* 195 (critiqueing *Airbus* and comparing favourably the English approach to the American approach).

(40) In fact, this might occur as part of the jurisdiction deliberation, because choice of law may influence whether a court exercises its discretion. *See Voth* 171 CLR at 565.

(41) There are six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia), two territories (Australian Capital Territory and Northern Territory) and the Commonwealth central government.

(42) *Australian Constitution* ss 51, 52. Some areas of law are unified including much of family law and commercial law. *See, eg*, Marriage Act 1961 (Cth); Family Law Act 1975 (Cth); Bankruptcy Act 1966 (Cth); Bills of Exchange Act 1909 (Cth); Cheques Act 1986 (Cth); Corporations Act 2001 (Cth); Trade Practices Act 1974 (Cth). Furthermore, unlike the United States, the "common law" of Australia is a unified body. John Pfeiffer Pty Ltd v Rogerson (High Ct 2000) 172 *Australian Law Reports* 625, 630.

(43) Regarding the debate see, Nygh & Davies, above n (15), ch 2.

(44) Regie Nationale des Usines Renault SA v Zhang (High Ct 2002) 187 *Australian Law Reports* 1.

(45) *See* Australia Law Reform Commission, *Choice of Law Rules*, Report No 58 (1992) ch 8.

(46) Golden Acres Ltd v Queensland Estates Pty Ltd [Qld Sup Ct 1969] *Queensland Reports* 378, 385, reversed on other grounds (High Ct 1970) 123 *Commonwealth Law Reports* 418; Vita Food Products v Unus Shipping Co [Privy Council 1939] *Appeal Cases* 277.

(47) Trade Practices Act 1974 (Cth) ss 51AB, 67, 87(2).

(48) *Golden Acres* [1969] Qd R at 385.

(49) Akai Pty Ltd v People's Insurance Co Ltd (High Ct 1996) 188 *Commonwealth Law Reports* 418.

(50) *Id* at 441.

(51) *Id* at 438, 442.

(52) Bonython v Commonwealth of Australia [Privy Council 1951] *Appeal Cases* 201, 210 (on appeal from Australia).

(53) *See* Nygh & Davies, above n (15), at 368-69 (collecting sources).

(54) *See, eg*, JG Collier, *Conflict of Laws* (3d ed, 2001) 220-221. Regarding the proper law of tort see, JHC Morris, 'The Proper Law of a Tort' (1951) 64 *Harvard Law Review* 888.

(55) [House of Lords 1971] *Appeal Cases* 356.

(56) Private International Law (Miscellaneous Provisions) Act 1995 ss 11, 12 (UK).

(57) John Pfeiffer Pty Ltd v Rogerson (High Ct 2000) 172 *Australian Law Reports* 625; Regie Nationale des Usines Renault SA v Zhang (High Ct 2002) 187 *Australian Law Reports* 1.

(58) *Renault* 187 ALR at para 75.

(59) *Voth* 171 CLR at 567.

(60) *Gutnick* 194 ALR at para 44.

(61) Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) R 3.

(62) *See, eg*, FA Mann, *Studies in International Law* (1973) 514. *Cf* PB Carter, 'The Role of Public Policy in English Private International Law' (1993) 42 *International and Comparative Law Quarterly* 1.

(63) *Compare* Ayers v Evans (Fed Ct en banc 1981) 39 *Australian Law Reports* 129 (albeit this case relies, in part, on the express statutory authority provided in *Bankruptcy Act 1966* (Cth) s 29 and *Corporations Act 2001* (Cth) s 581) *with* Government of India v Taylor [House of Lords 1955] *Appeal Cases* 491; Peter Buchanan Ltd v McVey [Ireland Sup Ct 1954] *Irish Reports* 89, [1955] *Appeal Cases* 520. *Cf also* Re Southern Equities Corp Ltd (in liq), England v Smith [Ct App 2000] *British Company Law Cases* 123.

(64) Foreign Judgments Act 1991 (Cth) s 7(1)(a)(xi).

(65) Regarding the Australian and English approaches to cross-border insolvency in this regards see, Kent Anderson, 'Cross-Border Insolvency–A Proposal Considering the Experiences of Various Common Law Countries' (2001) 51 *Hokkaido Law Review* 1633, 1870 (in Japanese with English summary).

(66) *See* Reciprocal Enforcement of Judgments 1934 s 3 (3A)(NZ)(allowing enforcement of Australian tax claims); New Zealand Law Commission, *Cross-Border Insolvency*, Report No 52 para 37 (recommending New Zealand courts do not follow *Ayers* in favour of the English restrictive approach). *See also* Connor v Connor [NZ Sup Ct 1974] *New Zealand Law Reports* 632 (construing revenue claims narrowly so as not to include claims for legal aid assistance received).

(67) *See* FA Mann, '*Spycatcher* in the High Court of Australia' (1988) 104 *Law Quarterly Reports* 497 (1988).

(68) Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (High Ct 1988) 165 *Commonwealth Law Reports* 30, 46-47.

(69) Attorney-General (NZ) v Ortiz [House of Lords 1984] *Appeal Cases* 1, 19-24 (Lord Denning MR).

(70) Attorney-General (UK) v Wellington Newspapers Ltd [NZ Ct App 1988] 1 *New Zealand Law Reports* 129, 174.

(71) Alberta, Bahamas, British Columbia, British Virgin Islands, Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong SAR, Israel, Italy, Japan, Malawi, Manitoba, Montserrat, New Zealand, Papua New Guinea, Poland, St Helena, St Kitts and Nevis, St Vincent and the Grenadines, Seychelles, Singapore, Solomon Islands, Sri Lanka, Switzerland, Taiwan, Tonga, Tuvalu, United Kingdom, and Western Samoa. Foreign Judgments Regulations Reg 4-5, Sch 1.

(72) Foreign Judgments Act 1991 ss 5-6.

(73) *Id* s 7(2)(a).

(74) *Id* s(7)(3)-(4).

(75) *Id* s 6(7).

(76) *See* Nygh & Davies, above n (15), ch 9; Dicey & Morris, above n (61), ch 14.

(77) *See* Adams v Cape Industries plc[1990]*Chancellery Cases* 433; Yoon v Song(NSW Sup Ct 2000) 158 *Federal Law Review* 295. *Cf* Keele v Findley (NSW Sup Ct 1990) *New South Wales Law Reports* 444.

(78) *See* Protection of Trading Interests Act 1980 s 5 (UK).

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

(80) Foreign Judgments Act s 3(1) ("judgment") (c).

(81) International Arbitration Act 1974 (Cth) pt II, s 7(1), 8.

(82) *Id* pt III, arts 35-36.

(83) *Pfeiffer* 172 ALR at 630.