CONFLICT OF LAWS IN AUSTRALIA by Peter E Nygh and Martin Davies [2002, LexisNexis Butterworths, Australia, ISBN 0-409-314846, xcv + 719 pages; soft cover]

The world is made up of approximately 200 States, each one having its own domestic laws and at times adopting international laws. Their different jurisdictions and legal systems and the non-existence of a universal system of private (domestic) law have created the need to recognise the existence of conflict of laws, also known as private international law. With globalisation, the significance of this area of law has grown.

Dr Peter E Nygh's *Conflict of Laws in Australia* is the leading text on the subject in Australia. It is now in its seventh edition, the first with a co-author, Professor Martin Davies.

The text begins by explaining what conflict of laws encompasses and refers to *Perrett v Robinson*[1] that illustrates how and why a conflict of laws may arise in Australia.[2] Following a brief explanation of the terminology associated with the subject, the text explains the three key issues of conflict of laws. The first, on jurisdiction, raises the question on whether the local (or 'forum') court is able to hear the case that is always determined according to the *lex fori* or local law. This is followed by the choice of law issue, where the court considers the applicable law. The final issue is the recognition and enforcement of judgments involving one or more foreign elements.

The text has nine parts[3] and the discussion is more theoretical than practical in substance. Although it explores extensively the general theories on conflict of laws it is more reticent on extracts of statutes and cases. However, this aspect does not detract from its high quality since it is not intended to be a compilation of cases and materials. Its emphasis on conflict theories is evident in the layout and topic breakdown. Although the layout has not changed since the last edition,[4]

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[1] (1986) 169 Commonwealth Law Reports 172.
[2] At 3.
[3] They are: (1) General; (2) Procedural; (3) Enforcement of Judgments; (4) Choice of Law; (5) Obligations; (6) Family Law; (7) Property; (8) Bankruptcy and Corporations; and (9) Devolution on Death.
[4] Nygh PE, Conflict of Laws in Australia (1995, 6th edition, Butterworths, Sydney).

minor changes appear in most, if not all, of the chapters owing to developments in the law.

Since the last edition, there have been considerable developments in the field of conflict of laws. As it is impractical to address all of them here, three of the more important or relevant areas are selected for comment below.

The first deals with conflicts within Australia and the cross-vesting of jurisdiction. Conflict of laws can arise within Australia since it is a federation (six constituent states and two territories) or it can arise between Australian and foreign jurisdictions. Thus, within the Australian context, the expression 'conflict of laws' is more appropriate than 'private international law'. On 1 July 1988, the 1987 Jurisdiction of Courts (Cross-vesting) Act (Cth) and equivalent State legislation[5] entered into force concurrently. The legislation established a cross-vesting scheme mainly to avoid conflicts between state and federal jurisdictions. For example, under the scheme the Supreme Court of an Australian state or territory was invested with the power to exercise the jurisdiction of another state or territory, including the power to exercise the Federal Court's jurisdiction. In turn, the Federal Court was invested with the jurisdiction of state and territorial Supreme Courts.[6]

In 1999, the High Court of Australia almost destroyed this 'great Australian experiment'[7] of cross-vesting jurisdiction between state and federal courts in *Re Wakim; Ex parte McNally.*[8] Although this case held that federal courts could not exercise state jurisdiction, it did not eliminate the entire cross-vesting scheme. Subsequent to *Wakim*, states and territories could continue to exercise much of the federal courts' jurisdiction including each other's jurisdictions. This therefore begs the question, what effect would this have for conflicts within Australia? A possibility is that this will increase the activity between federal and state jurisdictions, but in reality only time can tell.

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[5] In 1987, all the Australian States (New South Wales, Queensland, South Australia, Western Australia, Victoria and Tasmania) and Northern Territory passed the Jurisdiction of Courts (Cross-vesting) Act. The Australian Capital Territory passed this act in 1993.

[6] Nygh PE, Conflict of Laws in Australia (1995, 6th edition, Butterworths, Sydney).

[7] At xviii.

[8] (1999) 198 Commonwealth Law Reports 511.

The second is family law, probably the area that has changed most since the last edition of the text. For example, the 1975 Family Law Act (Cth) introduced new terminology requiring substantial changes to Chapter 27 relating mainly to custody, guardianship and the welfare of children. For example, the discussion on children adds many new abduction cases, including international child abduction,[9] and they are concisely presented.[10] Another example is the 2000 Child Support (Overseas-Related Maintenance Obligations) Regulations (Cth) that extends the administrative child support scheme to overseas countries. Under this scheme, even if a child is not in Australia or an Australian citizen or resident, a parent who is liable for maintenance or is an eligible carer in a reciprocating country may apply for the administrative assessment of child support in Australia.[11]

On 1 December 1998, the 1993 Hague Convention on Intercountry Adoption became effective in Australia.[12] This established a cooperative procedure for intercountry adoptions between contracting states that must recognize foreign adoptions made under the Convention.[13] This means that a child adopted in a foreign country has the same rights as a child adopted under the laws of an Australian State or Territory.[14]

Marriage receives due attention also. It is seen that although the definition of marriage in Australia may not apply to 'marriages' formed outside Australia, Australian courts will recognise certain foreign relationships as a marriage. Other progressiveness is found in the recognition of homosexual and transsexual relationships, considered legal marriages in certain countries; a growing trend. For example,

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[9] For example, three recent High Court cases are presented: (1) DP v Commonwealth Central Authority (2001) 180 Australian Law Reports 402; (2) DJL v Central Authority (2000) 201 Commonwealth Law Reports 225; and (3) De L v Director General New South Wales Department of Community Services (1996) 187 Commonwealth Law Reports 640.

[10] At 526-547.

[11] At 508-509.

[12] The 1998 Family Law (Hague Convention on Intercountry Adoption) Regulations (Cth), made under the 1995 Family Law Act (Cth) section 111C, implemented the Convention.

[13] 1993 Hague Convention on Intercountry Adoption Article 23.

[14] 1998 Family Law (Hague Convention on Intercountry Adoption) Regulations (Cth) Regulation 18.

although persons in homosexual relationships enjoy the full status of a legal marriage in the Netherlands, Australian courts have yet to consider the recognition of such foreign 'marriages'. Whilst the authors admit that judicial authority on the topic is scarce, nonetheless they introduce discussion on these new issues.

The third involves international torts and the first question is invariably: if a tort is committed internationally, what choice of law rule applies? In the past, Australian courts applied *Phillips v Eyre*[15] where the 'double actionability' principle was born. The principle required a plaintiff to show that under the law of the forum (where the action is brought) and under the law of the place where the tort was committed, the alleged wrong raised a civil liability. In 2000, the High Court in *John Pfeiffer Pty Ltd v Rogerson*[16] replaced the principle and decided that the law of the place where the tort was committed should apply. However, this change affected intra-Australian torts only[17] and the principle continued to apply (awkwardly) to international torts. In 2002, the High Court changed this too in *Renault v Zhang*[18] and discarded the historic principle. Instead, the court reached a decision similar to that in *John Pfeiffer,* holding that the law of the place where the tort was committed should be the new choice of law principle for international torts.[19]

The High Court delivered the important decision in *Renault* after the text was published. However, the authors had predicted correctly that this would be the outcome and from this perspective the text provides the current position on international torts. If the completeness or currency of the text is an issue, a supplement dedicated to this topic is possible but, on the whole, perhaps it is not all that practical.

The fourth deals with the 'developing law of the internet',[20] especially the publication of defamatory material. In this regard, there have been very few Australian cases on the issue of the place of publication and

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[15] (1870) Law Reports 6 Queen's Bench 1.
[16] (2000) 203 Commonwealth Law Reports 503.
[17] They are wrongs committed in a State or Territory of Australia, which are sued upon in another.
[18] (2002) 187 Australian Law Reports 1.
[19] The only exception to this rule would be where the foreign law offended Australian public policy.
[20] At xix.

the appropriate forum where the defamation action may be brought. When the text was being prepared, the High Court granted the defendant, Dow Jones, leave to appeal to the High Court from the Supreme Court of Victoria decision in *Gutnick v Dow Jones Inc.*[21] In that case, the issue of choice of law regarding defamation on the internet involved material downloaded in Victoria from a website in the United States. The Supreme Court held that downloading was tantamount to publication and, as such, the defamation proceedings could be initiated in Victoria. The Court also held that since internet materials had global reach, Dow Jones could have protected itself by limiting the distribution of its materials.

Once again, the High Court judgment[22] was delivered after the text was published. The Court decided unanimously that the appeal should be dismissed and affirmed that an online document was published in the jurisdiction where it was downloaded and viewed, irrespective of where it was up-loaded onto the internet or where its web server resided. Acknowledging this pending appeal, the authors noted that if such a decision was handed down, any country could be a place of the wrong and anything published on the internet could be subject to litigation in every country where the internet could be accessed.[23] This decision is therefore significant for two reasons at least. First, it seems to be a world first on publishing on the internet. Secondly, it is likely to impact greatly on freedom of speech on the internet.

Conflict of laws is not an easy subject. It is challenging both in its composition and in some of its theoretical reasoning. One only has to consider the problem of *renvoi* (a conflict of the rules of conflict of laws) to see that this is the case. In fact, conflict of laws was once eminently described as 'a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon'.[24] Could this be one of the reasons why it is a subject with

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[21] [2001] Victoria State Reports 305.

[22] Dow Jones & Company Inc v Gutnick [2002] High Court of Australia 56 (10 December 2002).

[23] At 424.

[24] Prosser, "Interstate publication" (1953) 51 Michigan Law Review 959, 971, reproduced in Tilbury M and ors, Conflict of Laws in Australia (2002, Oxford University Press, Melbourne).

comparatively low student enrolments? Nevertheless, it is an intriguing and fundamental subject, particularly when we live in a federation and within an era of globalisation where conflict of laws issues surface daily. It is a subject that touches on every other subject in the law curriculum and the challenge ahead is its inclusion as a core subject in undergraduate law degrees.

Traditionally, authors' opinions in this field have assumed an important role, and this is still the case. It is sad though, that this is the last edition to have any contributions from Dr Peter Nygh who passed away earlier this year.

Through the contributions of Professor Davies however, this edition continues to provide a wide-ranging analysis of the laws and rules in this complex field. Further, it is sure to remain the authoritative and leading text on the subject.

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