Symposium Paper:
The Future of Private International Law in Australia

ANDREW BELL*

Abstract

This is an edited transcript of observations made by Andrew Bell SC in the course of a seminar on 16 May 2011 on 'The Future of Private International Law in Australia'.

I Introduction

When launching the 8th edition of *Nygh's Conflict of Laws in Australia*, Chief Justice Spigelman drew attention to the fact that this edition began with the sentence: 'The majority of cases that are litigated in our courts are domestic in character.' He pointed out that every previous edition began with the sentence: 'The *overwhelming* majority of cases that are litigated in our courts are domestic in character.'[1]

This was an amendment introduced by Professor Martin Davies who took responsibility for chapter one, and he was absolutely correct to do so. It is an important point, and in a sense the premise for anything I say academically or practically about this subject; namely that it follows, as night follows day, and as the world becomes more and more integrated — through technology; through electronic payment systems; through improved and vastly cheaper travel; through the liberalisation of trade barriers — that there will be more international movement and more international trade and, of course, as there is more international movement and more international trade, there will be more and more disputes of an international character. It is inevitable.

Since the 8th edition of *Nygh* was published, there have been well over 50 decided cases by Australian superior courts dealing with the subject of this text.[2] These have been either pure conflict of law cases or other international cases concerning, for example, the taking of evidence on commission and claims for sovereign or state immunity. That is quite a rate of emerging case law — 50 cases in just over 12 months.

In that same period, there have also been extensive amendments to the *International Arbitration Act*,[3] the introduction of the *Cross-Border Insolvency Act*,[4] important private international law provisions added to the personal property securities legislation,[5] the passage of the *Trans-Tasman Proceedings Act 2010* (Cth), and there is the possibility of

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* Dr Andrew Bell SC. This paper was first presented at the seminar held, under the same title, at the University of Sydney on 16 May 2011.

1 M Davies, A S Bell, P L G Brereton (eds), *Nygh's Conflict of Laws in Australia* (LexisNexis, 2010) (emphasis added) ('*Nygh*').

2 As at date of presentation of seminar.

3 *International Arbitration Act 1974* (Cth).

4 *Cross-Border Insolvency Act 2008* (Cth).

5 *Personal Property Securities Act 2009* (Cth)

accession to the *Hague Choice of Court Convention*.[6] All these developments will spawn more case law. This is understandably a growth area, with growth at an exponential rate.

II The Contribution of Chief Justice Spigelman

I echo Brereton J's observation about the contribution Spigelman CJ has made to this area of the law. He has given at least a dozen significant speeches on globalisation dealing with, among other things, private international law issues — the practice and the theory. He has also participated in at least seven very significant appellate decisions in the area. I list some of them here, noting their content, as it will lead me into my next point.

An early decision was *James Hardie Ltd v Grigor*.[7] This dealt with a *forum non conveniens* issue arising as a result of the export by Australian companies of asbestos products. Two countries, Australia and New Zealand, were involved in the case. New Zealand has its *Accident Compensation Act*[8] regime, fundamentally different to the Australian system of common law compensation for tortious acts and omissions, and generally perceived to be far less generous, thereby providing an inducement to litigators to come to Australia because of the existence of a different way of dealing with this major social problem.

Other cases in which Spigelman CJ gave leading judgments include *British American Tobacco Australian Services v Eubanks*,[9] which was the very important 'letter of request' case — the leading Australian authority on the *Hague Convention on Taking Evidence Abroad*,[10] adopting very important principles for its interpretation and implementation. That case, apart from anything else, reflects the mobility of executives. The United States Department of Justice wished to lead evidence from the former company secretary of British American Tobacco because he had effectively retired to Australia, and was not prepared to travel to the United States and subject himself personally to the risk of 'tag' jurisdiction . He was a critical witness but the Department of Justice needed to come here to examine him. The mobility of executives and mobility of people generally will often mean there are witnesses in transnational litigation who are not in the forum and who for a variety of reasons may not *want* to be in the forum.

Murakami v Wiryadi[11] is another very important *forum non conveniens*/stay case, which illustrates the role of choice of law in equity. Very often, jurisdictional or discretionary challenges give rise to very important issues on subsidiary points such as choice of law.

Garsec Pty Ltd v His Majesty Sultan of Brunei[12] dealt with issues of substance and procedure of a kind in some respects not dissimilar to the sort of substance and procedure issues Brereton J dealt with in the *Michael Wilson* case.[13] Other important decisions of Spigelman CJ included *Global Partners Fund Ltd v Babcock and Brown Ltd*,[14] which involved

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6 *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (not yet in force).
7 (1998) 45 NSWLR 20.
8 *Accident Compensation Act 2001* (NZ).
9 (2004) 64 NSWLR 83.
10 *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature 18 March 1970, 847 UNTS 241 (entered into force 7 October 1972).
11 (2010) 268 ALR 377 ('*Murakami*').
12 (2008) 250 ALR 682.
13 *Michael Wilson & Parters Ltd v Nicholls* (2008)74 NSWLR 218.
14 (2010) 79 ACSR 383.

the enforcement of a jurisdiction clause in a multi-party situation, and the extent to which a bit of artful pleading could be used as a jurisdictional anchor.

III Recent High Court Cases

Much, but by no means all, of the recent conflict of laws litigation in Australia has arisen in a jurisdictional context. As alluded to above, other important issues are often decided along the way, but typically these issues are thrown up in the context of a battle over venue or forum. Three of the four High Court decisions of the last 10 years[15] were *forum non conveniens* cases, but they all decided incidental but extremely important questions: *Zhang*, choice of law in tort; *Gutnick*, where an internet defamation takes place; and *Puttick*, the question of 'locating' a transnational tort. This last question can be a very important issue for grounding jurisdiction, including for choice of law purposes.

The High Court made very plain in *Puttick* that it is not interested in revisiting the question of the appropriate test for discretionary stays of proceedings.[16] It would take a radically differently constituted High Court to entertain a challenge to seek to implement the position which prevails in every other common law country — the *Spiliada* test[17] — that is, a more international 'natural forum' test. That will not happen in the next 10 years in the High Court of Australia. If ever there was a chance to do so it was *Puttick*, and this opportunity was roundly rejected.

The issue of *forum non conveniens* and what the appropriate test should be is actually a matter that could be dealt with by the rules committees of the courts. The rules could be amended to reflect a more internationalist view. It has not happened, and there is probably not any momentum for it to happen. If it were to happen, there might be a difficult decision to be made as to whether there should be a differentiation between commercial cases and personal injury cases. The case for the more parochial *forum non conveniens* test, the *Voth* test, is, I think, a little more compelling in personal injury cases because of often tragically injured plaintiffs who cannot physically manage litigation abroad. In most international cases, considerations of convenience are largely pretexts. What the parties really want to do is to be in the forum in which they are going to get the best result. *Puttick* was a case where it was a choice between the New Zealand accident compensation legislation or, possibly, Australian common law. *Union Shipping New Zealand Ltd v Morgan*,[18] a maritime tort case in the New South Wales Court of Appeal, involved precisely the same choice. Arguments about relative convenience, connection with the forum and so on, were put up, as was appropriate under the rubric of the *Voth* test, but what was really driving the litigants was the choice of law outcome.

Although there is not likely to be much development in *forum non conveniens* jurisprudence, I would make two observations. The first is that there will be first instance decisions or examples of people initiating litigation where the envelope is really being pushed. That is to say, there will be cases with extremely tenuous connections to the

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15 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ('*Zhang*'); Dow *Jones & Co Inc v Gutnick* (2002) 210 CLR 575 ('*Gutnick*'); *Neilson v Overseas Projects Corporation of Victoria* (2005) 223 CLR 331 ('*Neilson*'); *Puttick v Tenon Ltd* (2008) 238 CLR 265 ('*Puttick*').

16 *Puttick* (2008) 238 CLR 265.

17 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

18 (2002) 54 NSWLR 690.

forum, where the lawyers seek to take advantage of what on its face is a very onerous test — 'vexatious and oppressive' and sometimes, when the High Court wants to use the expression, 'abuse of process' — a very difficult test for a foreign defendant, wishing to have proceedings stayed, to satisfy. Now, there is in Brereton J's decision in *McGregor v Potts*,[19] a very deep and I think absolutely correct analysis of how the *Voth* test was meant to operate. But the formula which the High Court has employed makes it very tempting for plaintiffs to start cases here with only the slightest connection to the forum. A connection can be extremely slight especially when one considers that, at least in personal injury cases, you might be injured overseas, but so long as you have a single visit to your treating doctor in Australia, you will be taken to have suffered damage in New South Wales or Australia for the purposes of jurisdiction.

IV Other Cases

A couple of recent cases have shown judges doing a rare thing: granting a *forum non conveniens* stay. One was the decision of Siopsis J in the Federal Court in *PCH Offshore Pty Ltd v Dunn (No 2).*[20] That was a case which came out of the Caucuses. Justice Siopsis was powerfully influenced by the real difficulties he saw with the translation of documents and the giving of evidence by a large number of witnesses needing translators. Now, this was a very practical view of the world — it would have been a nightmare to hear that case: all the documents would have needed to be translated; there were issues about whether judgments given by the Azerbaijani courts gave rise to a *res judicata*; of course, that then meant you had to understand the judgments, understand the context of the judgments and understand the foreign law. And when all of those matters need to be litigated in an Australian court, it adds hugely to the impracticality or inconvenience, including added court time and additional expense.

So, one observation is that, notwithstanding the *Voth* test, there are likely still to be a number of stay applications partly reflecting the fact that there will be plaintiffs seeking to push the boundaries and bring cases with very tenuous connections to this country and its several jurisdictions.

The second observation and consequence of the *Voth* test is that, properly advised, defendants will be told that they do not have much chance of getting a stay, so if they are going to appear, there may well be issues of foreign law being determined in New South Wales or elsewhere in Australia, in contrast to the *Spiliada* 'natural forum' test, which tends to push litigation back to the same place whose law will govern the outcome of the dispute. That is a happy consequence of the *Spiliada* test. In contrast, we will have increasingly in Australia transnational litigation where the governing law is not Australian law, or not New South Wales law. That then pulls in some of the real issues concerning the proof of foreign law — the expense of that, the mechanics of it, the optimal ways of doing it. As an example of this, in *Ace Insurance Ltd v Moose Enterprise Pty Ltd,*[21] not only was expert evidence presented by video link, but there was a video link 'hot tub', where one tub was in San Diego and one tub was in Los Angeles and our tub was in Hospital Road. It worked,

19 (2005) NSWLR 109.
20 (2010) ALR 167.
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but I suspect there are better ways, and there is plenty of scope for rethinking the manner of proof and ascertainment of foreign law in the future.

I should say that, in terms of the case law, there is a well-established principle that evidence as to how foreign law would be applied to the circumstances of the case is not permitted. Although it is a doctrine well established, there is a strong case for revisiting it. It is ultimately for the local court to decide questions of law, but if, for example, the foreign law involves a discretion and there are principles relating to the exercise of discretion, it may be legitimate to take that principle one step further so that the court may receive evidence, not only as to the content of foreign law, but also as to how it would be applied.

On a related point, I think there is some scope for development in cases where there are parallel proceedings or extant foreign proceedings. The High Court dealt with this in *Henry v Henry*,[22] holding that the forum court should strive to avoid multiple proceedings to the extent that the *Voth* test permits this. This is not, with respect, a very helpful statement — there are a range of factors which the Court said are relevant, but it did not really give any guidance as to a hierarchy, or the significance of the individual factors. So, another consequence of our very welcoming (to plaintiffs) *forum non conveniens* test is that Australian courts will increasingly find themselves dealing with cases where there are multiple proceedings on foot.

Two further points follow. First, in the area of jurisdiction agreements, there is a large unresolved issue where there is a foreign jurisdiction agreement coupled with a foreign choice of law clause. What happens when a plaintiff invokes the *Trade Practices Act*[23] in Australia in a case contractually governed by English law and governed by an English exclusive jurisdiction clause? Prima facie the proceedings should be stayed to give effect to the jurisdiction agreement, but what if the English courts, as a result of the application of English law as the governing law, do not pick up the *Trade Practices Act*? Does contracting for English jurisdiction and English choice of law in these circumstances amount to contracting out of the *Trade Practices Act*? If this is anathema, and if the consequence of litigation in England is that the *Trade Practices Act* claim will not be given a run on its merits, is that a reason for not following the prima facie position and refusing to enforce the jurisdiction clause? Now that issue was almost decided in a case in the Federal Court, *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*,[24] but did not need ultimately to be decided.

The final point I wish to mention relates to enforcement of judgments in Australia. I think that, while there has been much focus on what I call the 'front end' of transnational litigation — the fights over jurisdiction, the establishment of jurisdiction, whether to stay proceedings or not — there will be a rise in the number of cross-border enforcement cases. In this context, the Canadians have taken a very different route to the other common law jurisdictions, essentially holding that if the foreign litigation has taken place in the natural forum, they will enforce that judgment irrespective of whether the defendant was present or submitted to the jurisdiction.[25] The conventional wisdom is that, if a foreign

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22 (1996) 185 CLR 571.

23 *Trade Practices Act 1974* (Cth).

24 [2008] FCA 191 (29 February 2008).

25 *Beals v Saldanha* [2003] 3 SCR 416, 2003 SCC 72.

defendant does not submit either contractually or by appearance and does not participate, while a default judgment against him may be enforceable against assets in that jurisdiction, it generally will not be enforceable in another common law country because there was no jurisdiction 'in the international sense'. The Canadians have rejected that approach. This was a very expensive surprise for the defendant in the first case which applied that approach because, on orthodox principles, the decision which was enforced and worth millions of dollars would not have been enforced. Now it has not been argued that the Canadian line of authority should be followed in Australia, but in terms of potential case law developments, that is an area where there would be some scope for fresh argument. When analysed, a very important and interesting philosophical question about what underpins conflict of laws is at the heart of that argument: is it comity, as the Canadians have said, or is it some more territorial orthodox basis of jurisdiction?