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# Butterworths Tutorial Series

# PRIVATE INTERNATIONAL LAW



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# CONTENTS

# PREFACE

If as sophisticated a judge as the Honourable John Doyle should admit that he approached multi-state legal problems 'with a sense of impending doom as [he] tackle[d] the complexities which arise in this area of law', then I really should have hesitated more at trying to present an understandable account of the private international law: see *Nalpantidis v Stark* (1995) 65 SASR 454 at 456. The area deserves its reputation for both complication and convolution, and neither can be avoided if the law is to be explained accurately. Still, I have aimed in this book to explain Australian private international law in a way that gives the method that should be used in applying its principles more prominence. The hope is that some acquaintance with the methods of private international law will help readers to negotiate its maze of principles, rules and policies with a little less frustration, and a little more success.

The impenetrability of the private international law is also accentuated by its exotic terminology. In one way, I am pleased to see Justice Kirby perpetuate this tradition with his comment in *Re Wakim* that '[t]he Constitution, and in particular Ch III, does not impose Laocoönian constraints on this court': (1999) 163 ALR 270 at 324. However, it is not always helpful and I have tried to simplify and anglicise the terminology where possible. So, while the traditional shorthand latinisms of *lex fori*, *lex situs*, *lex loci delicti commissi* and so on have been explained when first mentioned, I have generally used the English term instead. This is not always best: 'the inappropriate court' does not really convey the true sense of '*forum non conveniens*' and there is no adequate English substitute for the French *dépeçage*.

The book deals with the three key issues of jurisdiction, choice of law and the recognition and enforcement of foreign judgments — in that order. It is more common to put jurisdiction and foreign judgments together, and there is certainly a close relationship between the two issues. However, I have addressed all three issues as they would normally fall in the course of a dispute: *where* to litigate, under *what law* is litigation decided, and *how to enforce* adjudged litigation.

I also place special emphasis on the method of dealing with choice of law problems. Too often, the confusion created in multi-state cases arises not from a misunderstanding of the choice of law rules, but from uncertainty in how and when to use them. Accordingly, I recommend that special care be taken to grapple with the material in **Chapters 5** and **6**. For the most part, the

application of the choice of law rules explained later in the book should be easier once the reader becomes better acquainted with the issues relating to method. As in most texts, I have then dealt with topics of family law (marriage and dissolution and annulment), obligations (contract and tort) and property law (transfers between living persons and succession) in detail. Unfortunately, restrictions on the size of the book do not allow equally fascinating topics like parenting orders and trusts to be included. An extra family law chapter, 'Parenting and Custody of Children', is available on Butterworths' website: <*http://www.butterworths.com.au/universities/acpub/supplement /default.htm*>.

At the time of writing, the dust had not settled on the High Court's decision in *Re Wakim; Ex parte McNally* (1999) 163 ALR 270. Thankfully, it did not dismantle the whole cross-vesting scheme. To the extent that the state and territory supreme courts can still exercise each other's jurisdictions and can still exercise much of the jurisdiction of the federal courts, the scheme continues to have worth. However, *Wakim*'s revelation that the federal courts no longer have reciprocal powers to exercise the supreme courts' jurisdictions also means the scheme is much devalued. Either conflicts between federal and other jurisdictions will revive or, even more likely, legal business will emigrate from the better-resourced federal courts. A legislative overhaul could come, but it is still too early to predict how a new scheme would allocate civil jurisdiction amongst courts in the Australian federation. I can also only claim that, in my discussion in **[10.4.1]–[10.4.15]** about the impact that *Wakim* has on the nightmarish problems of choice of law under the cross-vesting scheme, the conclusions are tentative, and await more thorough consideration in the scholarly literature.

Tutorial problems and answers are provided at the end of each chapter, and hopefully enable the structured learning of private international law by the progressive introduction and reinforcement of its key concepts. The choice of law problems in particular are carefully sequenced, allowing some focus on questions of method before the uncertainties of choice of law rules are attempted. Frequently, I have adopted the common strategy of inventing fictional countries for the problems — although not the traditional co-opting of *The Prisoner of Zenda*'s 'Ruritania'. The use of fictional laws in these problems helps to accentuate the conflicts between laws that lie at the nub of private international law, and I think it better to attribute fictional laws to fictional countries. However, it may require a further mental leap for readers to deal with fictional Australian states. The national coverage of the book makes these an even greater necessity, as, regardless of where in Australia the problem is being considered, it has to be capable of being answered in the same way. The use of real states often does not allow this. An accident in Victoria creates a multi-state tort for us in the rest of the country, and requires some consideration of choice of law rules. For Victorians, it is purely an internal problem and would be approached differently. No such differences arise for accidents in 'Antipodia' and 'Capricornia'.

I wish to thank Dr R D Leslie of the University of Edinburgh for our discussions about private international law generally, but especially for settling my *angst* about the courts' interpretation of the choice of law rules for tort after *McKain v RW Miller (SA) Pty Ltd*. An anonymous reviewer offered helpful comments on jurisdictional questions. I am naturally indebted to the Universities of Queensland and Edinburgh for secretarial support, and the use of libraries and other facilities. Prue McLennan, Rowena Oldfield and Michele Croucher from Butterworths have been extremely helpful in the production and editing of the book, and I thank Prue especially for her patience through the delays and transformations of the book in the course of writing.

This book is dedicated to my wife Kim, and my daughter Julia.

The law is stated as at December 1999.

Reid Mortensen

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*December 1999*