

# RECOGNITION IN AUSTRALIAN PRIVATE INTERNATIONAL LAW: THE TENSION BETWEEN DE FACTO AND DE JURE

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*In Australia, and elsewhere, much turns on concepts of statehood in private international law. This article considers circumstances in which statehood or governance is contested — where a particular land area, region or state is the subject of a territorial dispute. Across the globe, there are various such partially recognised, unrecognised or otherwise disputed territories that pose a challenge for the resolution of conflict of laws issues. For example, choice of law rules often direct attention to the legal system of other jurisdictions; what, then, is to be done when that law area is disputed? In such matters, there is a tension between the de facto and the de jure and between the judicial and executive branches of government. Should courts show deference to Australia’s diplomatic position, as enunciated by its executive? What if doing so causes injustice to individual litigants, elevating legal fictions over practical realities? This article explores the evolution of the doctrine of recognition, a previously neglected issue in Australian private international law scholarship. We consider how Australian courts may react to changing executive policy, and suggest how the common law might strike a better balance between legal and diplomatic considerations in this fraught area.*

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## I INTRODUCTION

Private international law governs the resolution of disputes between private parties which contain a foreign element. These principles of private international law exist within legal systems. On a traditional view, these systems comprise a unitary system of law which,<sup>1</sup> at least in Western countries and since the development of public international law based on the exclusive authority of the state,<sup>2</sup> has been bounded and defined definitively by its territory or ‘law area’.<sup>3</sup> Given the world is so firmly divided into peoples and territories, much debate in this field has centred on whether private international law rules should prioritise ‘respect for state sovereignty and state legislative policy on the one hand, or on

<sup>1</sup> In *Breavington v Godleman* (1988) 169 CLR 41, Deane J described this concept as a system in which

the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise: at 121.

<sup>2</sup> *Island of Palmas (Netherlands v United States of America) (Award)* (1928) 2 RIAA 829, 838. See Liam Burgess and Leah Friedman, ‘A Mistake Built on Mistakes: The Exclusion of Individuals under International Law’ (2005) 5 *Macquarie Law Journal* 221.

<sup>3</sup> Law is not always, and historically was certainly not, associated with a particular territory: see Martin Davies et al, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2019) 8–12 [1.13]–[1.26] (‘Nygh’s’). In early European periods, law localised to a particular region or power centre was contrasted against the notion of personal law, associated with an individual by virtue of their identity or membership of a group: Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009) 32 (‘*The Confluence of Public and Private International Law*’). Today, personal law or the phenomenon of ‘legal pluralism’ may be facilitated by religious beliefs and practices of a particular group: for a discussion of these ideas in contemporary India, see Suchandra Ghosh and Anindita Chakrabarti, ‘Religion-Based “Personal” Law, Legal Pluralism and Secularity: A Field View of Adjudication under Muslim Personal Law in India’ (2021) 10(2) *Oxford Journal of Law and Religion* 254.

respect for individual will or autonomy, on the other'.<sup>4</sup> This article considers this debate, providing commentary on a specific aspect of private international law: that of contested territories.

At first glance, a political map of the globe projects cartographic stability. With the exception of Antarctica, that map has ostensibly been neatly divided up, each area of territory claimed by one of the 193 member states of the United Nations. Together, these states — centralised powers which exercise 'lawmaking and law-enforcing authority within a certain territory'<sup>5</sup> — have formed an 'exclusive club': a system of states, for states and by states.<sup>6</sup> For this reason, one scholar quips that '[t]here are states and there is little else'.<sup>7</sup>

Only, looks can be deceiving. Across the globe, parts of the map struggle to conform with this statist binary. At one end of the spectrum, there are territorial entities with widespread, but not universal, recognition by other states. As at September 2025, Palestine is recognised by over 150 UN members and has observer status at the UN, while Kosovo is recognised by more than 100. Western Sahara (the Sahrawi Arab Democratic Republic) is presently recognised by about a quarter of the world's states and is a member of the African Union, but much of its claimed territory is controlled by Morocco. Then there are several post-Soviet separatist territories: Abkhazia and South Ossetia, recognised only by a handful of nations, in otherwise Georgian territory; and Transnistria in Moldova. Northern Cyprus is recognised only by Turkey, while Somaliland, in northern Somalia, was recognised by no state for more than three decades until Israel announced it would establish diplomatic relations with the territory in December 2025.<sup>8</sup> In disputes, these territories invite difficult questions of private international law at the field's intersection with public international law.

Such entities are not static. Taiwan (claimed by the Peoples' Republic of China) is currently only recognised by 11 states, despite previously being widely recognised.<sup>9</sup> Somaliland, meanwhile, has been in diplomatic negotiations with

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<sup>4</sup> Roxana Banu, 'What Do We Owe to Each Other in Private International Law: Moral Contractualism and Transnational Justice' in Roxana Banu, Michael S Green and Ralf Michaels (eds), *Philosophical Foundations of Private International Law* (Oxford University Press, 2024) 323, 326. See generally Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018).

<sup>5</sup> Hans J Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Alfred A Knopf, 1948) 243; See also James R Crawford, *The Creation of States in International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) ix.

<sup>6</sup> Öyvind Österud, 'The Narrow Gate: Entry to the Club of Sovereign States' (1997) 23(2) *Review of International Studies* 167, 168; Andrew K Coleman, *Resolving Claims to Self-Determination: Is There a Role for the International Court of Justice?* (Routledge, 2013) 11–24.

<sup>7</sup> Dov Lynch, *Engaging Eurasia's Separatist States: Unresolved Conflicts and De Facto States* (United States Institute of Peace Press, 2004) xi.

<sup>8</sup> William Christou, 'Israel Becomes First Country to Recognise Somaliland as Sovereign State', *The Guardian* (online, 27 December 2025) <<https://www.theguardian.com/world/2025/dec/26/israel-first-country-to-recognise-somaliland-sovereign-state>>, archived at <<https://perma.cc/F8XS-D4RM>>.

<sup>9</sup> In January 2024, Nauru revoked recognition: 'Nauru Ceases to Recognise Taiwan as Separate Country as It Seeks Full Resumption of Diplomatic Relations with China', *ABC News* (online, 15 January 2024) <<https://www.abc.net.au/news/2024-01-15/nauru-severs-diplomatic-ties-with-taiwan/103322150>>, archived at <<https://perma.cc/97WY-GGPR>>.

Ethiopia over a naval port, with some conjecture that recognition may follow.<sup>10</sup> In September 2023, following Azerbaijan’s military activities in the region, the separatist government of Nagorno-Karabakh (the Republic of Artsakh) announced that it would be dissolved and cease to exist.<sup>11</sup> Elsewhere, Kurdistan has clear aspirations of statehood, notwithstanding its autonomy under the *Federal Constitution of Iraq*.<sup>12</sup> Lastly, since its invasion in February 2022, Russia has occupied Ukrainian territory in violation of public international law.<sup>13</sup> It has also recognised two supposedly independent territories — the Donetsk People’s Republic and the Luhansk People’s Republic.<sup>14</sup> Neither has received further recognition by the international community, and the extent of their de facto independence from Russia is questionable.

Collectively, these territories — often described as “de facto states”, “unrecognised states” or “partially-recognised states” — pose a dilemma for the international system. They are ‘square pegs in a world of round holes’.<sup>15</sup> These entities typically exercise partial or complete control of the territory they claim, but lack the corresponding international de jure recognition of that control. While these unusual entities once eluded academic inspection and scrutiny, partially because of their supposed ‘transitory’ nature,<sup>16</sup> their continued survival has necessitated the advent of new scholarly specialisations. In recent decades, de facto states have been subject to considerable scrutiny in international relations,<sup>17</sup> and public international law<sup>18</sup> — as part of a burgeoning wider literature on statehood.<sup>19</sup> Nevertheless, these territories, and the consequences of their status,

<sup>10</sup> Kalkidan Yibeltal and Damian Zane, ‘Ethiopia-Somaliland Deal: Can the Horn of Africa Rift Be Healed?’, *BBC News* (online, 3 July 2024) <<https://www.bbc.com/news/world-africa-67911057>>, archived at <<https://perma.cc/9AV8-742Z>>.

<sup>11</sup> Nagorno-Karabakh had been a self-governing territory backed by Armenia since the 1990s: ‘Nagorno-Karabakh Profile’, *BBC News* (online, 30 January 2024) <<https://www.bbc.com/news/world-europe-18270325>>, archived at <<https://perma.cc/T5MZ-SGUH>>.

<sup>12</sup> Rebecca Richards and Robert Smith, ‘Playing in the Sandbox: State Building in the Space of Non-Recognition’ (2015) 36(9) *Third World Quarterly* 1717, 1722–6.

<sup>13</sup> *Suspension of the Rights of Membership of the Russian Federation in the Human Rights Council*, GA Res ES-11/3, UN GAOR, 11<sup>th</sup> emergency special sess, 10<sup>th</sup> plen mtg, Agenda Item 5, UN Doc A/RES/ES-11/3 (8 April 2022).

<sup>14</sup> President of the Russian Federation, ‘Signing of Documents Recognising Donetsk and Lugansk People’s Republics’ (Media Release, 21 February 2022); *Указ Президента Российской Федерации ‘О признании Донецкой Народной Республики’* [Decree of the President of the Russian Federation ‘On the Recognition of the Donetsk People’s Republic’] (Russia) Decree No 71, 21 February 2022; *Указ Президента Российской Федерации ‘О признании Луганской Народной Республики’* [Decree of the President of the Russian Federation ‘On the Recognition of the Luhansk People’s Republic’] (Russia) Decree No 72, 21 February 2022.

<sup>15</sup> Deon Geldenhuys, *Contested States in World Politics* (Palgrave Macmillan, 2009) 1.

<sup>16</sup> Helge Blakkisrud and Pål Kolstø, ‘Dynamics of De Facto Statehood: The South Caucasian De Facto States between Secession and Sovereignty’ (2012) 12(2) *Southeast European and Black Sea Studies* 281, 282.

<sup>17</sup> See Geldenhuys (n 15).

<sup>18</sup> See below n 32.

<sup>19</sup> See, eg, Nina Caspersen and Gareth Stansfield (eds), *Unrecognized States in the International System* (Routledge, 2011); Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press, 2014).

have received significantly less attention from private international law scholars.<sup>20</sup> This is a curious omission, which this article seeks to address.

At the bedrock of public international law, presuming the exclusive authority of the state, lies the notion that a state occupies a certain, defined ‘territory’.<sup>21</sup> It follows then, that private international law — addressing disputes which transcend these invisible borders — will necessarily confront this question of territory. Take an example: say the authors were travelling by a car in Hargeisa, the capital of Somaliland. Imagine if, in an unfortunate turn of events, they were hit by another driver, driving dangerously. Say they returned to Australia for medical care, then commenced proceedings in tort against the driver in an Australian court. They then plead foreign law, on the basis of the Australian choice of law rule for a foreign tort being the *lex loci delicti*: the law of the place of the wrong.<sup>22</sup> Australia does not recognise Somaliland; it considers the territory to be part of Somalia. However, since the Somaliland War of Independence, which concluded in 1991, Somaliland has exercised de facto control of this territory.<sup>23</sup> What, then, would be the law applied by an Australian court? Applying Somali law would be a legal fiction — the Somalian government has exercised no practical control over Somaliland for more than three decades. Nevertheless, applying the law of Somaliland would embroil the court in diplomatic controversy and contradict the official policy of the executive, which has constitutional responsibility for foreign affairs. These tricky questions are not limited to choice of law questions: what, for example, would be the Australian status of a judgment issued by the Somaliland judiciary, if the authors instead chose to bring proceedings against the driver in Somaliland, and then wished to enforce a judgment in Australia?

In Australia and other common law jurisdictions, the current criterion in private international law for the legitimacy of a law area — a state (and by extension its government) — is *recognition*.<sup>24</sup> That is, the existence or non-existence of a

<sup>20</sup> For existing discussion on this subject, see JG Sauveplanne, ‘Recognition and Acts of State in the Conflict of Laws’ (1960) 7(1) *Netherlands International Law Review* 17; Stanley Lubman, ‘The Unrecognized Government in American Courts: *Upright v Mercury Business Machines*’ (1962) 62(2) *Columbia Law Review* 275; Ioan-Luca Vlad, ‘Private Law Effects of the Non-Recognition of States’ Existence and Territorial Changes’ (2015) 5(1) *Challenges of the Knowledge Society* 335; RD Leslie, ‘Unrecognised Governments in the Conflict of Laws: Lord Denning’s Contribution’ (1981) 14(2) *Comparative and International Law Journal of Southern Africa* 165. In Australia, the literature tends to consider the private international law implications of the subject as secondary to a public international law focus: see Andrew Godwin, ‘Legal Aspects of Australia’s Commercial Relationship with Taiwan’ (1992) 4(1) *Bond Law Review* 41; Hilary Charlesworth, ‘The New Australian Recognition Policy in Comparative Perspective’ (1991) 18(1) *Melbourne University Law Review* 1.

<sup>21</sup> Andrew Clapham (ed), *Brierly’s Law of Nations: An Introduction to the Role of International Law in International Relations* (Oxford University Press, 7<sup>th</sup> ed, 2012) 169. See generally Malcolm N Shaw, *International Law* (Cambridge University Press, 9<sup>th</sup> ed, 2021) 416–20.

<sup>22</sup> See, eg, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (‘*Pfeiffer*’); *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

<sup>23</sup> See Franco Henwood, ‘A Contribution to the Case for Somaliland’s Recognition’ in Abdulahi A Osman and Issaka K Souaré (eds), *Somalia at the Crossroads: Challenges and Perspectives in Reconstituting a Failed State* (Adonis & Abbey Publishers, 2007) 168, 168–79; Tomáš Hoch and Kateřina Rudincová, ‘Legitimization of Statehood in De Facto States: A Case Study of Somaliland’ (2015) 50(1) *Actas Universitatis Carolinae Geographica* 37.

<sup>24</sup> *Aksionernoye Obschetvo AM Luther v James Sagor & Co* [1921] 3 KB 532, 547–8 (Warrington LJ) (‘*Luther v Sagor (Appeal)*’); LexisNexis, *Halsbury’s Laws of Australia* (online at 23 February 2025) 215 Foreign Relations, ‘2 States and Governments: Foreign Relations’ [215-125]; Cf *Foreign Corporations (Application of Laws) Act 1989* (Cth) s 9.

foreign state (and its government) in private international law is determined by asking whether it is *recognised* as such in the domestic territory. The entity which grants that recognition in Australia is the executive, *not* the judiciary.<sup>25</sup> The foundation upon which this practice rests in Australia is the constitutional entrenchment of the executive's power to determine matters involving foreign affairs.<sup>26</sup> Thus the principle that the acts of an unrecognised state or government will not be given effect by the courts of the forum state ties — somewhat incompatibly — a political act with significant legal consequences in both the international and municipal planes.<sup>27</sup>

The issues created by this uncertain symbiosis between the legal and political are no mere intellectual dilemmas. Australia has significant trade relations with entities such as Taiwan; there are also considerable diaspora populations from a number of de facto states resident in Australia. The longer these territorial entities remain in limbo — neither dissolved nor integrated into the international system through recognition — the greater the prospect that these difficulties will confront an Australian court, as they have done in courts overseas. There is also a real possibility that the tension between the de jure position and the de facto reality could engender real injustice, particularly where the private rights of individuals are at issue.

The ongoing implications of the conflict in Gaza, which began while this article was being developed, only underscore the challenges we explore. When work on this article commenced, Australia did not recognise Palestinian statehood, saying only that it was 'committed to a two-state solution in which Israel and a future Palestinian state coexist'.<sup>28</sup> In such circumstances, how would Australian courts have responded to litigation which involved the Palestinian Authority? It was not farfetched at the time to imagine some emanation of Palestine's government being involved in litigation in Australian courts — would it have been granted the rights and privileges of statehood, reflecting its de facto effective control over parts of the West Bank, even in the absence of de jure recognition by the Australian government? What if Australian choice of law rules required application of the law of the territory of Palestine? As will be seen, in a corporate law dispute, statute would have permitted the application of Palestinian law — despite the lack of formal diplomatic recognition. In other areas, the required judicial approach was far from clear.

In September 2025, Australia formally recognised the State of Palestine.<sup>29</sup> In one sense, this diplomatic development resolved these issues prospectively — although complex retrospective issues might still arise, if subsequent litigation is related to activities in dispute before recognition. But not only do the underlying complexities remain for other contested territories, the Australian Opposition

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<sup>25</sup> See generally Charlesworth (n 20) 3–8.

<sup>26</sup> See below Part II(C)(2).

<sup>27</sup> 'International Persons' in Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9<sup>th</sup> ed, 1992) 126, 128.

<sup>28</sup> Foreign Minister Penny Wong, 'Reversal of Recognition of West Jerusalem' (Media Release, 18 October 2022) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/reversal-recognition-west-jerusalem>>, archived at <<https://perma.cc/VN7K-8G8Y>>.

<sup>29</sup> Foreign Minister Penny Wong, 'Australia Recognises the State of Palestine' (Media Release, 21 September 2025) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/australia-recognises-state-palestine>>, archived at <<https://perma.cc/C429-WDLU>>.

Leader has indicated that if her party is elected, it would ‘reverse’ the recognition of the State of Palestine.<sup>30</sup> Such a move would only compound the difficulties considered here.

Accordingly, this article investigates the relationship between recognition and private international law in Australian courts. After providing a brief contextual background and discussing applicable principles which emanate from British common law in Part II, it pursues two primary endeavours. First, in Part III, it identifies an ongoing uncertainty in Australian courts regarding the impact of the Australian Government’s 1988 recognition of governments policy on its private international law landscape, the effect of which is yet to be judicially considered domestically. In light of this gap in judicial authority, this article proposes a possible solution for Australian courts confronted with proceedings which raise that policy. Secondly, in Part IV, this article critiques existing authorities on this subject area, arguing that courts’ reluctance to circumvent executive power by remarking upon matters of foreign policy undermines private litigants’ reasonable expectations and is disproportionate to competing considerations demanded by modern transnational litigation. We argue that Australian courts should therefore seek to develop the law in a manner that underscores these concerns, and suggest several such opportunities.

This article focuses largely on Anglo-Australian private international law. English law and scholarship, having considered these issues more frequently than their Antipodean counterparts, has practical significance to Australian courts, given their shared legal heritage and enduring common law influence, particularly in conflict of laws. Given the distinctiveness of American private international law principles, we do not canvass the United States position — which has been subject to some judicial and scholarly discussion<sup>31</sup> — except where those ideas overlap with the central themes of this article. Furthermore, we do not dwell on the public international law significance of these contested territorial entities, which has also been explored elsewhere.<sup>32</sup> We focus on the difficulties de facto states present in Australian private international law — a not-insignificant challenge.

Any attempt to resolve that challenge also prompts wider reflections on the nature of private international law itself. In recent years, there has been increased

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<sup>30</sup> Paul Sakkal, “‘We Would Reverse It’: Ley Writes Back to Republicans over Recognition of Palestine”, *The Sydney Morning Herald* (online, 22 September 2025) <<https://www.smh.com.au/politics/federal/we-would-reverse-it-ley-writes-back-to-republicans-over-recognition-of-palestine-20250922-p5mx1h.html>>, archived at <<https://perma.cc/U6J4-DCQV>>.

<sup>31</sup> See, eg, *National City Bank of New York v Republic of China*, 348 US 356 (1955); *National Petrochemical Co of Iran v The M/T Stolt Sheaf*, 860 F 2d 551 (2<sup>nd</sup> Cir, 1988); *Transportes Aereos de Angola v Ronair*, 693 F Supp 102 (D Del, 1988). For scholarly discussion, see Lubman (n 20); Michael H Cardozo, ‘Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?’ (1963) 48(3) *Cornell Law Review* 461.

<sup>32</sup> See, eg, Duncan French, ‘Introduction’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, 2013) 1; Cedric Ryngaert and Sven Sobrie, ‘Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia and Abkhazia’ (2011) 24(2) *Leiden Journal of International Law* 467, 470; Carsten Thomas Ebenroth and Matthew James Kemner, ‘The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards’ (1996) 17(3) *University of Pennsylvania Journal of International Economic Law* 753, 807; Milena Sterio, *The Right to Self-Determination under International Law: “Selfistans,” Secession and the Rule of Great Powers* (Routledge, 2013) 183.

scholarly discussion about whether the supposed neutrality of private international law holds up to contemporary scrutiny. ‘Today, Private International Law is increasingly political,’ write Marc-Philippe Weller and Alix Schulz in one indicative recent contribution,<sup>33</sup> as ‘Savigny’s neutral, universal and multilateral approach to conflict of laws is being steadily given up’.<sup>34</sup> How Australian private international law rules deal with contested territories is a policy-driven, value-laden matter, whichever way the issues are ultimately resolved. Grasping the political nettle and confronting the consequence is more satisfactory than remaining beholden to an outdated understanding of the field and its practical realities.<sup>35</sup> As is evident from the discussion that follows, private international law operates in spaces shaped by geopolitical dynamics — and has done for at least the past century.

## II RECOGNITION: CONTEXT AND PRINCIPLES

The practice of recognition — the process of formally acknowledging the legal existence of a state or government — is embedded in contemporary mechanisms for addressing contested territories in Anglo-Australian private international law. To explore this concept, we begin by canvassing recognition in public international law, before addressing its determinative significance in identifying a foreign jurisdiction, or law area, in private disputes. We consider the tension that arises between the roles of the executive and the judiciary, exemplified by the practice of executive certification to demonstrate recognition. We also outline the limited statutory modification of this field undertaken in Australia, developed as a consequence of relations with Taiwan.

<sup>33</sup> Marc-Philippe Weller and Alix Schulz, ‘Political Private International Law: How European are Overriding Mandatory Provisions and Public Policy Exceptions?’ in Jan von Hein, Eva-Maria Kieninger and Giesela Rühl (eds), *How European Is European Private International Law: Sources, Court Practice, Academic Discourse* (Intersentia, 2019) 285, 286.

<sup>34</sup> *Ibid.* See generally Laura Carballo Piñeiro and Xandra Kramer, ‘The Role of Private International Law in Contemporary Society: Global Governance as a Challenge’ (2014) 7(3) *Erasmus Law Review* 109, 111; Dalia Palombo, ‘Who is Benefiting from the “Neutrality” of Private International Law?’, *European Association of Private International Law Blog* (Blog Post, 11 December 2024) <<https://eapil.org/2024/12/11/who-is-benefiting-from-the-neutrality-of-private-international-law/>>, archived at <<https://perma.cc/9HTU-E3Z9>>; Matthias Lehmann, ‘Is Private International Law Value-Neutral or Policy-Driven?’ *European Association of Private International Law Blog* (Blog Post, 14 April 2022) <<https://eapil.org/2022/04/14/is-private-international-law-value-neutral-or-policy-driven/>>, archived at <<https://perma.cc/2M6N-A5QR>>.

<sup>35</sup> As one scholar notes, evolving understandings of the operation of private international law were

of critical importance in drawing attention to the fact that private international law rules are not mechanical or neutral, but themselves engage with a variety of policy considerations. Private international law would be — and indeed was — much poorer without these insights.

Alex Mills, ‘The Identities of Private International Law: Lessons from the US and EU Revolutions’ (2013) 23 *Duke Journal of Comparative and International Law* 445, 466.

## A Territories in Public (and Private) International Law

## 1 The Public/Private Disjunct of International Law

The principles which we now call ‘private international law’ were initially developed alongside ‘public international law’ as a global system of natural law, conceived as ‘international in both character and function’.<sup>36</sup> However, as ideas of personal law (which attach to the person or individual and are still prevalent today) became subservient to the idea of ‘territorial’ law, so too did international law reflect and reinforce the increasing importance of regional autonomy and territorial sovereignty.<sup>37</sup> Under ideas of international positivism in the 18<sup>th</sup> and 19<sup>th</sup> centuries,<sup>38</sup> the defining territorial metric became the state.<sup>39</sup> As positivist theories argued, because public international law was derived from exercises of the sovereign will of states, it could only consist of law applicable *between* states: the law of nations. The boundary between private and public international law was thus struck. As Alex Mills explains, ‘private international law became reconceptualised as purely autonomous national law — an expression of the “sovereignty” of the state’.<sup>40</sup> Thus, private international law — once closer in character and universality to public international law — now exhibits greater heterogeneity, which flourishes with the entrenchment of these new territorial silos. Public international law, on the other hand, now concerns the rights and obligations of states with respect to other states and individuals.<sup>41</sup>

Yet the complete detangling of these two concepts is in practice otiose. On questions of statehood and territorial sovereignty, this enmeshment is made stark in the idea of “comity”. A concept permeating much of the practice of private international law, it is well-recognised that comity is a principle ‘formulated by reference to the principles of sovereignty and territoriality’,<sup>42</sup> requiring ‘mutual respect for the territorial integrity of each other’s jurisdiction’.<sup>43</sup> However, in addressing the treatment of contested territories and their governments in Australian private international law, this article sits in comity’s grey area: what role should, or even *can*, comity play in circumstances where the source of territorial sovereignty — the nation state — cannot so easily be identified?

Answers to this question begin first with the exercise, lying in public international law, of the identification of these contested territories.

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<sup>36</sup> Mills, *The Confluence of Public and Private International Law* (n 3) 298.

<sup>37</sup> *Ibid* 26–72.

<sup>38</sup> *Ibid* 40–2. See also David Roth-Isigkeit, ‘Mónica García-Salmones Rovira: *The Project of Positivism in International Law*’ (2014) 25(2) *European Journal of International Law* 602.

<sup>39</sup> See generally Shaw (n 21) 416–72.

<sup>40</sup> Mills, *The Confluence of Public and Private International Law* (n 3) 298.

<sup>41</sup> *Ibid* 1.

<sup>42</sup> Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) 137 [3.139].

<sup>43</sup> *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, 827 (Millett LJ). As one US judge noted in criticising certain English legislation which he viewed an attempt to reserve exclusively an area of jurisdiction shared between states: ‘the principles of comity and international accommodation ... must form the foundation of any international system comprised of coequal nation states’: *Laker Airways Ltd v Sabena Belgian World Airlines*, 731 F 2d 909 (DC Cir, 1984) 954.

## 2 Recognition in Public International Law

Public international law distinguishes between ‘states’, which bear unique rights, obligations, powers and immunities in the international community, and their ‘governments’, which possess the legal capacity to assert those rights and immunities, and incur liabilities.<sup>44</sup> While this article does not focus on the grounds for granting recognition as a matter of public international law and policy, it is helpful to briefly address the criteria by which recognition is granted and the broad lines upon which the swathes of academic literature on the subject diverge.<sup>45</sup> This diverse scholarship accompanies the complex history of recognition practice by states, which has both changed dramatically and often differs in its approach to recognition of a state itself or its government.

Regarding the recognition of states, academic opinion on the significance of a statement of recognition divides into two camps. Those supporting the declarative theory see acts of recognition as an acknowledgement of the fulfilment of the criteria for statehood outlined in the *Montevideo Convention on the Rights and Duties of States*.<sup>46</sup> According to declarative theory, statehood is attained from the moment those criteria are met; recognition simply acknowledges this status.<sup>47</sup> In contrast, the constitutive theory of recognition views recognition by other states an essential element of the claim to the rights and liabilities of statehood. To proponents of this theory, there is a concomitant legal duty upon other states to recognise entities meeting the traditional (and purportedly objective) requirements of statehood.<sup>48</sup>

The practice of recognition of governments is even more complex, inconsistent and unpredictable. Where a state has successive governments, legitimacy is assumed and thus recognition is relatively uncomplicated. However, in cases of revolutionary, rebel or separatist governments, the ‘effective control doctrine’ remains prominent as an ‘internationally authoritative criterion for an apparatus’ standing as ... government’.<sup>49</sup> The essence of the doctrine was captured in a draft

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<sup>44</sup> Brad R Roth, ‘Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine’ (2010) 11(2) *Melbourne Journal of International Law* 393, 394; Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947) 98.

<sup>45</sup> See Marcelo G Kohen (ed), *Territoriality and International Law* (Edward Elgar Publishing, 2016). Neither does it consider or challenge the legitimacy of territorial recognition in private international law: see Alex Mills, ‘Justifying and Challenging Territoriality in Private International Law’ in Roxana Banu, Michael S Green and Ralf Michaels (eds), *Philosophical Foundations of Private International Law* (Oxford University Press, 2024) 174 (‘Justifying and Challenging Territoriality’).

<sup>46</sup> *Montevideo Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) (‘*Montevideo Convention*’). Article 1 requires ‘(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States’ (or independence). See also Rowan Nicholson, ‘Statehood, Self-Determination and Territory’ in Emily Crawford, Allison Pert and Ben Saul (eds) *Public International Law* (Cambridge University Press, 2023) 107.

<sup>47</sup> Erdem Ertürk, *International Law and the Relationality of States: A Critique of Theories of Recognition* (Routledge, 2023) 2; See also James R Crawford, *The Creation of States in International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 93.

<sup>48</sup> Lauterpacht (n 44) 3. See generally Ertürk (n 47); Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 4<sup>th</sup> ed, 1990) 89–90; Roth (n 44) 396–8; Hans Kelsen, ‘Recognition in International Law: Theoretical Observations’ (1941) 35(4) *American Journal of International Law* 605.

<sup>49</sup> Roth (n 44) 422.

resolution submitted by the United Kingdom on the question of the UN's recognition of governments of a member state in 1950, paraphrased by the Ad Hoc Political Committee's Rapporteur as follows:

[W]here the question of the representation of a Member State arose in consequence of internal processes or changes which had taken place in that State, the right of a Government to represent the Member State concerned in the United Nations should be recognized if that government exercised effective control and authority over all or nearly all the national territory, and had the obedience of the bulk of the population of that territory, in such a way that this control, authority and obedience appeared to be of a permanent character.<sup>50</sup>

The effective control doctrine therefore contemplates recognition as a consequence of the government establishing its effective authority over most or all of the law area. Nevertheless, application of this doctrine has been varied: some jurisdictions grant recognition to any regime that meets the 'effective control' test,<sup>51</sup> while others accord recognition only when regimes meet further criteria — such as a commitment to democracy and international rule of law.<sup>52</sup> Developments in the recognition of governments policy in Australia and overseas have had significant ramifications for private international law questions considered in this article; they are addressed below in Part III.

### B *Contested Territories and Private International Law: The Significance of Recognition*

Contested territories provoke difficult questions in private international law, including issues of the standing of an applicant, choice of law and recognition of foreign judgments. Cases hinging on the significance of contested territories in private international law have arisen at various junctures over the past century, in tandem with the consolidation of the Western, statist, global order prevalent today. In the aftermath of the First World War, questions arose in English courts in the matter of *Aksionernoye Obschestvo AM Luther v James Sagor & Co* ('*Luther v Sagor*')<sup>53</sup> as to a plaintiff's title to goods which had been nationalised by the decree of the so-called Russian Soviet Republic and sold by that government to the defendant.<sup>54</sup> Later, following the Second World War, difficult questions emerged as to the validity of certain acts of an organisation whose affairs were to be managed by a 'Special Board' authorised by the East German government, which was at the time unrecognised by the United Kingdom.<sup>55</sup> Then, in the wave of (often violent) decolonisation movements over the 1960–70s, English courts were again forced to consider whether the rights of private parties would be given effect in

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<sup>50</sup> *Recognition by the United Nations of the Representation of a Member State: Report of the Ad Hoc Political Committee*, UN GAOR, 5<sup>th</sup> sess, Agenda Item 61, UN Doc A/1578 (1 December 1950) 3 [7], discussing the as yet undigitised the UK's Draft Resolution (UN Doc A/AC.38/L.21).

<sup>51</sup> See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 21 March 1951, vol 485, col 2410, discussing the UK's official policy.

<sup>52</sup> This was the former practice of the US: see Charlesworth (n 20) 13.

<sup>53</sup> [1921] 1 KB 456 ('*Luther v Sagor*').

<sup>54</sup> See *Luther v Sagor (Appeal)* (n 24). Later cases concerned similar facts: see, eg, *Princess Paley v Weisz* [1929] 1 KB 718.

<sup>55</sup> *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 ('*Carl Zeiss (House of Lords)*').

the domestic courts of newly decolonised states. In *Adams v Adams*,<sup>56</sup> questions arose this time in respect of the recognition of a foreign judgment: would a divorce granted by a judge appointed by the revolutionary (and unrecognised) Smith Government in Southern Rhodesia be recognised?<sup>57</sup>

These examples involve different questions of law, including the validity of certain legislation, the standing and authority of an organisation to act and the recognition of foreign judgments. Their commonalities comprise the court's search to identify the relevant law area and by corollary the existence or legitimacy of a state or government over that law area. In the UK, the common law principle grounded in *Luther v Sagor* has been applied in circumstances where the existence of a "state" or "government" — concepts which are distinguished in public international law — is at issue. The general rule (the '*Luther* principle') is that where a question before a court turns on the existence in a given law area of a state (and whether or not that question is considered a question of fact or of law), the appropriate approach is to defer to the view of the executive. This executive view has traditionally been expressed through an act of recognition. This is so even where the court is adjudicating disputes between private parties concerning matters of private law.<sup>58</sup> The *Luther* principle is widely considered applicable in Australia.<sup>59</sup>

Thus, in cases involving, for example, a choice of law rule which selects a law area in which the operating law is uncertain because of circumstances of contestation or government instability, the *Luther* principle has been described as such:

[W]hen our Courts are concerned to know the law which operates in a particular territory at a particular time and a question arises as to what is the Government whose laws govern at the time in that territory, the answer must be the law of that government whom His Majesty *recognises* as being in effective control at the material time.<sup>60</sup>

This principle is interrogated in Part III by reference to its consequences for private litigants.

### C The "One Voice Principle"

The justification for the use of recognition in private international law as the criterion for granting legal effect to the legislation and acts of a state and its

<sup>56</sup> [1971] P 188 ('*Adams*').

<sup>57</sup> The UK Court in that instance answered in the negative: *ibid* 216.

<sup>58</sup> *Luther v Sagor* (n 53) 466 (Roche J) and *Luther v Sagor (Appeal)* (n 24) 547–8 (Warrington LJ); *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1965] Ch 596 ('*Carl Zeiss*'); *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 ('*Madzimbamuto*').

<sup>59</sup> *Anglo Czechoslovak & Prague Credit Bank v Janssen* [1943] VLR 185, 191 (O'Bryan J) ('*Anglo Czechoslovak*'); *Halsbury's Laws of Australia* (n 24).

<sup>60</sup> *Anglo Czechoslovak* (n 59) 191 (O'Bryan J) (emphasis in the original). In Australia, the Minister for Foreign Affairs, performing their executive function as a member of Cabinet, is the appropriate source of this recognition function.

government is the “one voice principle”.<sup>61</sup> The obligation of courts to determine whether a particular person or institution is a sovereign by reference to the view of their own domestic sovereign is a principle grounded in *Luther v Sagor*<sup>62</sup> and *Government of the Republic of Spain v SS “Arantzazu Mendi”*.<sup>63</sup> In the UK, the one voice principle is predicated upon the separation of powers and ‘rooted in the constitutional allocation of the roles of the executive and the judiciary’.<sup>64</sup> ‘[a]s the conduct of foreign relations is entrusted to the executive branch of government’, on issues of recognition, ‘the judiciary must ... defer to the executive which alone is competent to determine foreign policy’.<sup>65</sup>

Despite these foundations, utilising a political act of the executive as the basis for accessing the unique rights enjoyed by states and their governments in courts has been criticised as a ‘superficial impression of logic and order’.<sup>66</sup> This incoherence forms the basis of a critique of this status quo in Part IV.

### 1 *Executive Certificates in British Common Law*

The practice of issuing “executive certificates” has emerged to assist the practical requirements of the one voice principle: ascertaining the opinion of the executive.<sup>67</sup> Recently in *Venezuela*,<sup>68</sup> the UK Supreme Court summarised the practice as follows:

[The] courts in this jurisdiction accept as conclusive statements made by the executive relating to certain questions of fact in the field of international affairs. These questions include the sovereign status of a state or government and whether an individual is to be regarded as a head of state.<sup>69</sup>

It has consistently been held by English appellate courts that no recourse may be had to extrinsic material to contradict, inform or supplement the information

<sup>61</sup> Affirmed in *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797, 815 (Viscount Finlay) (*‘Duff Development’*). See generally Cameron Sim, ‘Non-Justiciability in Australian Private International Law: A Lack of “Judicial Restraint”?’ (2009) 10(1) *Melbourne Journal of International Law* 102, 132–4; *Deutsche Bank AG London Branch v Receivers Appointed by the Court* [2023] AC 156, 213–18 [69]–[79] (Lloyd-Jones JSC) (*‘Venezuela’*).

<sup>62</sup> *Luther v Sagor (Appeal)* (n 24) 556 (Scrutton LJ).

<sup>63</sup> [1939] AC 256, 265 (Lord Atkin) (*‘The Arantzazu’*).

<sup>64</sup> *Mahmoud v Brish* [2020] EWCA Civ 637, [57] (*‘Mahmoud’*).

<sup>65</sup> *Venezuela* (n 61) 213 [69] (Lloyd-Jones JSC).

<sup>66</sup> Charlesworth (n 20) 3.

<sup>67</sup> See, eg, *Luther v Sagor (Appeal)* (n 24) 548 (Warrington LJ); *Mighell v Sultan of Johore* [1894] 1 QB 149, 158 (Lord Esher MR) (*‘Mighell’*); *Carr v Francis Times & Co* [1902] AC 176 (*‘Carr’*); *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 978 [342] (Henry, Brooke and Rix LJ) (*‘Kuwait Airways’*).

<sup>68</sup> *Venezuela* (n 61).

<sup>69</sup> *Ibid* 213 [69] (Lloyd-Jones JSC), citing *Mighell* (n 67) 161 (Kay J); *Carr* (n 67). See also Lord Reid’s seminal decision in this area in *Carl Zeiss (House of Lords)* (n 55):

It is a firmly established principle that the question whether a foreign state ruler or government is or is not sovereign is one on which our courts accept as conclusive information provided by Her Majesty’s Government: no evidence is admissible to contradict that information: at 901.

provided in an executive certificate when using it.<sup>70</sup> Additionally, recognition (or acknowledgement of that recognition by use of an executive certificate) occurs retrospectively: the acts and legislation of the state or government will be treated as if the entity had already been recognised.<sup>71</sup>

The application of the above principles is helpfully demonstrated in *Luther v Sagor*, which concerned title to movable property expropriated to England by the Soviet government. Without recognition by Her Majesty's government or a certificate affirming recognition of the Soviet government, the Court at first instance was 'unable to recognise [the Soviet government], or to hold it ha[d] sovereignty, or [was] able by decree to deprive the plaintiff company of its property'.<sup>72</sup> Upon later production of an executive certificate by the UK's Foreign Office recognising the Soviet government as the 'de facto'<sup>73</sup> government of Russia,<sup>74</sup> the Court of Appeal held its transactions enforceable and upheld the defendant's right to title.<sup>75</sup>

## 2 Australian Practice of Executive Certification

Separation of powers principles in Australia are codified in the *Australian Constitution* ('*Constitution*') which, broadly, divides power between the executive, legislature and judiciary. The executive government exercises prerogative powers of the Crown with respect to foreign policy, as provided by s 61 of the *Constitution*.<sup>76</sup> Reflecting UK precedent,<sup>77</sup> Australian courts respect the one voice principle.<sup>78</sup> This underpins its practice of observing executive certification, which may occur under common law,<sup>79</sup> or where common law has been modified by statute.<sup>80</sup> In *Petrotimor Companhia de Petroleos SARL v Commonwealth* ('*Petrotimor*'), Black CJ and Hill J accepted the general principle

<sup>70</sup> *Venezuela* (n 61) 223 [93], 224 [95]; *Carl Zeiss (House of Lords)* (n 55) 901 (Lord Reid), 925 (Lord Hodson), 941 (Lord Upjohn) and 957 (Lord Wilberforce); *The Arantzazu* (n 63) 264 (Lord Atkin); *Gur Corporation v Trust Bank of Africa Ltd* [1987] QB 599, 623 (Donaldson MR), 625 (Nourse LJ) ('*Gur Corp*').

<sup>71</sup> *Luther v Sagor (Appeal)* (n 24) 549 (Warrington LJ).

<sup>72</sup> *Luther v Sagor* (n 53) 477–8 (Roche J).

<sup>73</sup> The term *de facto* reflected the UK's former policy of distinguishing between *de facto* and *de jure* recognition. See below Part II(D).

<sup>74</sup> *Luther v Sagor (Appeal)* (n 24) 547–8 (Warrington LJ).

<sup>75</sup> *Ibid* 549 (Warrington LJ), 556 (Scrutton LJ).

<sup>76</sup> David Mason, Wendy Lacey and Elizabeth Toohey, 'Australian Treaty Practice' in Emily Crawford and Donald Rothwell (eds), *International Law in Australia* (Thomson Reuters, 3<sup>rd</sup> ed, 2017) 49, 50; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 635–6, 643–4 (Latham CJ), 681 (Evatt and McTiernan JJ); *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J). See generally Peta Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (2021) 44(3) *Melbourne University Law Review* 1001; FA Mann, *Foreign Affairs in English Courts* (Oxford University Press, 1986) 1.

<sup>77</sup> *Frost v Stevenson* (1937) 58 CLR 528, 549 (Latham CJ) ('*Frost*'); *Bradley v Commonwealth* (1973) 128 CLR 557, 562 (Barwick CJ and Gibbs J) ('*Bradley*'), citing *Duff Development* (n 61) 805–6 (Viscount Cave), 813 (Viscount Finlay), 824 (Lord Sumner), 830 (Lord Carson).

<sup>78</sup> See generally Sim (n 59) 132–4.

<sup>79</sup> See *Frost* (n 77) 549 (Latham CJ); *Bradley* (n 77) 562 (Barwick CJ and Gibbs J); *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354, 366 (Black CJ and Hill J) ('*Petrotimor*').

<sup>80</sup> See *Consular Privileges and Immunities Act 1972* (Cth) s 12; *Diplomatic Privileges and Immunities Act 1967* (Cth) s 14; *International Organisations (Privileges and Immunities) Act 1963* (Cth) s 11; *Crimes (Internationally Protected Persons) Act 1976* (Cth) ss 14(1)–(2).

that, excluding any ousting statute, ‘generally in matters involving foreign relations the Court may rely upon a certificate from the Executive and that certificate would be conclusive’.<sup>81</sup>

Certificates have been used in Australia to allow the executive to enunciate facts in relation to the delimitation of land borders and territorial waters,<sup>82</sup> states of war, government identity and statehood.<sup>83</sup> Judicial decision-making based on those certificates is thereby considered a demonstration of cohesion and unity; the imperative that courts reflect the executive is ‘basic public policy’.<sup>84</sup> This approach reflects the foundational divisions of responsibility between the judicial and executive branches enshrined in the *Constitution*. However, in other private international law contexts, the judiciary has identified some constitutional limits to the deference that might be shown to the executive in relation to matters of foreign affairs. In *Habib v Commonwealth*, for example, a case involving the act of state doctrine which provides some common law immunity for foreign states in Australian courts, Perram J observed: ‘No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it’.<sup>85</sup> While *Habib* raised distinct constitutional issues, involving judicial review of Commonwealth government action, the observation nonetheless underscores that respect for the executive is not unchecked under Ch III principles.

#### D *De Jure and De Facto Recognition*

Existing English and Australian judgments on this subject, involving questions of private international law resolved through identification of a ‘law area’, are made more complex by the historical convention in state diplomatic practice of distinguishing between a grant of ‘de jure’ or ‘de facto’ recognition.<sup>86</sup> Prior to a change in executive recognition policy in the 1980s, the UK and Australia extended formal recognition to each newly-formed state and government.<sup>87</sup> The practice of recognition granted in these two senses was described in the UK House of Commons by the Secretary of State for Foreign Affairs, Mr Herbert Morrison, on 21 March 1951:

[I]t is international law which defines the conditions under which a Government should be recognised de jure or de facto, and it is a matter of judgment in each particular case whether a régime fulfils the conditions. The conditions under

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<sup>81</sup> *Petrotimor* (n 79) 366 [32].

<sup>82</sup> See, eg, *Petrotimor* (n 79) 399 (Beaumont J); *Frost* (n 77) 549 (Latham CJ).

<sup>83</sup> Sim (n 61) 124. In *Chow Hung Ching v The King* (1948) 77 CLR 449, Latham CJ identified the following list of subject matters, about which an Australian court would accept an executive certificate as conclusive:

- (1) a person is a foreign sovereign;
- (2) a foreign state exists;
- (3) territory belongs to a foreign state;
- (4) a person has been recognised as a foreign ambassador or member of diplomatic staff; or
- (5) a ship is a warship or public vessel of the state: at 467.

<sup>84</sup> *Kuwait Airways* (n 67) 978 [343] (Henry, Brooke and Rix LJJ).

<sup>85</sup> *Habib v Commonwealth* (2010) 183 FCR 62, 77 [37] (*‘Habib’*).

<sup>86</sup> See *Venezuela* (n 61) 219–21 [83]–[86] (Lloyd-Jones JSC).

<sup>87</sup> ‘Recognition of Governments: Change in Australian Policy’ (1989) 12 *Australian Year Book of International Law* 319, 357 (*‘Australian Recognition Policy’*), quoting Minister of Foreign Affairs and Trade Bill Hayden’s news release of 19 January 1988.

international law for the recognition of a new régime as the de facto Government of a State are that the new régime has in fact *effective control* over most of the State's territory and that this control seems likely to continue. The conditions for the recognition of a new régime as the de jure Government of a State are that the new régime should not merely have effective control over most of the State's territory, but that it should, in fact, be firmly established.<sup>88</sup>

In Australia by example, de facto recognition of East Timor's integration into Indonesia occurred in January 1978.<sup>89</sup> Later, de jure recognition occurred in February 1979.<sup>90</sup> On both occasions, Australia emphasised that recognition was not to imply approval of the method of the takeover of the territory.<sup>91</sup>

De jure and de facto status are deployed, in many cases, as a matter of convenience. The former is, in essence, the 'fullest' kind of recognition.<sup>92</sup> It is a device employed to qualify the act of recognition.<sup>93</sup> The latter is a 'lesser degree' of recognition, often used in the case of usurper, or rebel governments, when

in the view of the recognising state, the new authority, although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not as yet offer prospects of complying with other requirements of recognition.<sup>94</sup>

#### E *Statutory Modifications of Australian Common Law*

The principle that acts of unrecognised governments will not be acknowledged in Australia has been modified with respect to choice of law and standing of foreign corporations by the *Foreign Corporations (Application of Laws) Act 1989* (Cth) ('*FC Act*'). The *FC Act* provides that an Australian court, when called upon to apply a foreign law relating to a foreign corporation, should apply 'the law applied by the people in the place in which the foreign corporation was incorporated'.<sup>95</sup> Section 9 explicitly provides that the *FC Act*'s application is not to be affected by Australia's recognition or non-recognition of a foreign state, place, government or entity. Clearly, such legislation bears on resolving tricky questions of standing, or in the application of certain laws in the choice of law exercise.<sup>96</sup> The *FC Act* was introduced to address uncertainties as to the status of companies incorporated in Taiwan and is similarly reflected in the UK legislation.<sup>97</sup>

<sup>88</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 21 March 1951, vol 485, cols 2410–2411 (emphasis added).

<sup>89</sup> Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *East Timor: Final Report* (Report, December 2000) 155 [7.16].

<sup>90</sup> *Ibid* 157 [7.20].

<sup>91</sup> Peter Bowers, 'Timor Policy Stands, Says PM: Jakarta Claim Denied', *The Sydney Morning Herald* (Sydney, 12 October 1976).

<sup>92</sup> *Carl Zeiss (House of Lords)* (n 55) 957 (Wilberforce LJ).

<sup>93</sup> 'International Persons' (n 27) 154–5. See, eg, *Bank of Ethiopia v National Bank of Egypt* [1937] Ch 513; *Banco de Bilbao v Sancha* [1938] 2 KB 176.

<sup>94</sup> 'International Persons' (n 26) 155.

<sup>95</sup> *Foreign Corporations (Application of Laws) Act 1989* (Cth) s 7(3) ('*FC Act*').

<sup>96</sup> But only where such issues are considered substantive, rather than procedural: see *Ebbage v Manthy* [2001] QSC 4, [8] (Helman J) ('*Ebbage*'), where the question of standing as it applied in the proceeding was considered procedural.

<sup>97</sup> *Foreign Corporations Act 1991* (UK).

In his second reading speech, Minister for Trade Negotiations Michael Duffy noted that

an Australian court may be called upon to make a decision on a dispute involving such companies by referring to foreign laws, and may well find itself in a situation where it has to choose between conflicting laws of two or more foreign jurisdictions. ... [W]hen the ordinary rules of private international law require that a rights [sic] of a foreign company be determined by reference to a foreign law, the Bill will ensure that the law to be applied will be determined by the place of incorporation of the company, without regard to the political circumstances, questions of official recognition or otherwise of the government authorities there, or the legal status of the place of incorporation.<sup>98</sup>

While the approach adopted by the *FC Act* provides certainty and mitigates the risk of unjust outcomes in corporate disputes, it provides no such assistance in other private law matters. It is, however, instructive in its explicit recognition of that risk and elevation of the *de facto* over the *de jure* — perhaps hinting at a way ahead for the common law.

### III AUSTRALIA'S POST-1988 RECOGNITION OF GOVERNMENTS POLICY: ADVOCATING FOR A 'FUNCTIONS OF GOVERNMENT' APPROACH

In 1977, the US issued a statement officially updating its policy regarding the recognition of governments.<sup>99</sup> In 1980 and 1988 respectively, the UK and Australia followed.<sup>100</sup> The updated policy ended the practice of formal recognition of governments and heads of state.<sup>101</sup> However, the practice of recognition of states did not change.<sup>102</sup>

The motivation for this change was largely political. It had been consistently asserted that applying the effective control doctrine to 'the recognition of a Government *de jure* or *de facto* should not depend on whether, the character of the régime is such as to command His Majesty's Government's approval'.<sup>103</sup> As the Australian Cabinet explained:

[R]ecognition of a new Government inevitably led to public assumptions of approval or disapproval of the Government concerned, and could thereby create domestic or other problems for the recognising Government. On the other hand, 'non-recognition' limited the non-recognising Government's capacity to deal with the new regime.<sup>104</sup>

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<sup>98</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 21 Dec 1989, 3479–80 (Michael Duffy).

<sup>99</sup> Department of State (US), 'Diplomatic Recognition: A Foreign Relations Outline' (1977) 77 *US Department of State Bulletin* 462, 462–3.

<sup>100</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 28 April 1980, vol 408, cols 1121–2 (Lord Carrington); *Australian Recognition Policy* (n 87).

<sup>101</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 28 April 1980, vol 408, cols 1121–2. The Australian announcement stated: 'In future, Australia will no longer announce that it recognises, or does not recognise, a new regime in an existing State': *Australian Recognition Policy* (n 87) 359.

<sup>102</sup> *Australian Recognition Policy* (n 87) 359.

<sup>103</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 21 March 1951, vol 485, cols 2410–11.

<sup>104</sup> *Australian Recognition Policy* (n 87) 359. See also Charlesworth (n 20) 11.

While government practice has largely concurred with the new policy, in the three decades since they entered into effect, there have been few judgments addressing its effect in common law jurisdictions and none under Australian domestic law. Yet this policy clearly has ramifications in cases involving the determination of private rights in private international law.

By reference to existing case law in the UK and New Zealand, this section discusses the implications for Australian private international law of two key questions which emerge in light of this policy.

The first can be considered as relatively settled: does recognition, where an executive certificate is issued, remain the determinative criterion in proceedings in which the existence of a government is at issue? The second is far less certain: how should the existence or recognition of a government be determined if the executive *refuses* to provide an executive certificate of recognition (or non-recognition)?

These are by no means discrete questions, but they nevertheless assist in structuring and understanding the issues which foreign courts have grappled with in considering the effect of this policy change to the traditional understanding of the *Luther* principle.

#### A *Does Recognition Remain the Primary Criterion for Access to Legal Rights?*

The answer to this question is relatively straightforward: yes. In the UK, despite the announcement of the new recognition policy, courts made clear they would continue to defer to the executive's clear statement on recognition of governments,<sup>105</sup> such a stance being paradigmatic of the 'basic public policy constraint' that courts act '[consistently] with the foreign policy or diplomatic stance of this country'.<sup>106</sup>

Recently in 2021 in *Venezuela*, the UK Supreme Court addressed the further question of whether an executive certificate (if given) remained determinative of recognition. The Court's view was as follows:

[D]espite the 1980 statement, there is nothing to prevent HMG, if it thinks it appropriate, from tendering to the courts an unequivocal certificate of recognition or non-recognition of the existence of a foreign government.<sup>107</sup>

A similar approach is used in New Zealand, whereby the Ministry of Foreign Affairs and Trade may depart — albeit in 'unusual cases'<sup>108</sup> — from its normal practice of declining to make formal statements of recognition or non-recognition.

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<sup>105</sup> See, eg, *Kuwait Airways* (n 67) 980 [349]–[350]; *British Arab Commercial Bank plc v National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm), [25] (Blair J); *Veysi Dag v Secretary of State for the Home Department* (2001) 122 ILR 529, [17]–[18].

<sup>106</sup> *Gur Corp* (n 70) 620 (Sir Donaldson MR).

<sup>107</sup> *Venezuela* (n 61) 212 [68] (Lloyd-Jones JSC), citing *Kuwait Airways* (n 67) 980 [349]–[350].

<sup>108</sup> *Attorney-General for Fiji v Robt Jones House Ltd* [1989] 2 NZLR 69, 71 (Jeffries J) ('*Fiji v Robt Jones*'), citing a letter dated 28 March 1988 from the NZ Minister of Foreign Affairs, Cedric Marshall. See Stefan Talmon, 'New Zealand's Policy of Implied Recognition of States: One Step Ahead or Falling Behind?' (2010) 7 *New Zealand Yearbook of International Law* 3, 19–20.

Such a statement is conclusive of recognition and therefore determines the status afforded to the foreign entity in New Zealand's domestic courts.<sup>109</sup>

### 1 *De Jure & De Facto Recognition*

Nevertheless, while a statement of non-recognition may well remain determinative of legal rights in jurisdictions with similar common law traditions to Australia, a key development appears to be the temporary — if not permanent — disappearance of the practice of de jure and de facto recognition. In the UK, this was affirmed in *Venezuela*. In the Court of Appeal, Lord Males (with whom Lords Lewison and Phillips agreed) concluded that the executive certificate issued by the Foreign Office recognised one government de jure, and left open the possibility of recognising the other 'impliedly' de facto.<sup>110</sup> On appeal, the Supreme Court found this interpretation was 'misplaced' as it depended upon a de jure and de facto recognition policy which was no longer in use.<sup>111</sup> Instead, the Court said, where the UK Foreign Office chose to make a statement of recognition, the Court were to consider that statement one of the fullest (or de jure) recognition, with no room to recognise an alternative government de facto.<sup>112</sup>

#### B *Circumstances in Which the Executive Declines to Provide an Executive Certificate*

In lieu of existing Australian jurisprudence addressing this question, English and New Zealand consideration of this issue establishes that recognition (when given) clearly remains the determinative criterion of the existence or territory of a government when it is at issue in a private dispute. It also shows that executive certificates which assert conclusively whether that recognition is granted may *still* be issued by the executive if it so chooses. The question which remains concerns the approach to be taken in the case of silence by the executive on the question of recognition.

To this, Australia's Cabinet stated: 'Australia's attitude to a new regime will be ascertained by the nature of our policies towards and relations with the new regime.'<sup>113</sup> The 'indicators' of that attitude, the statement said, included public statements, the establishment of and/or the conduct of diplomatic relations, ministerial contact and other relationships including aid, economic or defence arrangements, and technical or cultural exchanges.<sup>114</sup> The suggested 'approach' of

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<sup>109</sup> Talmon (n 107) 19.

<sup>110</sup> *Deutsche Bank AG London Branch v Receivers Appointed by the Court* [2021] QB 455, 515; *Venezuela* (n 61) 162.

<sup>111</sup> *Venezuela* (n 61) 225 [99] (Lloyd-Jones JSC).

<sup>112</sup> *Ibid* 223 [93] (Lloyd-Jones JSC). Similarly, in *Kuwait Airways* (n 67) their Lordships spoke decisively that where Her Majesty's government had given its 'unequivocal certificate of recognition or non-recognition of the existence of a foreign government', all question 'for determining the de facto government of a state falls away': at 980 [349]–[350] (Henry, Brooke and Rix LJ).

<sup>113</sup> *Australian Recognition Policy* (n 87) 359–60.

<sup>114</sup> *Ibid* 360.

the UK — to the extent that it might be viewed as a suggestion to the judiciary — was similar.<sup>115</sup>

Absent Australian judicial consideration of the question of recognition following this change in policy, it is helpful to consider the two primary forms of judicial reasoning which have emerged in the UK and New Zealand in response to a situation in which the executive refuses to give a conclusive statement of recognition or non-recognition.

### 1 *New Zealand's Implied Recognition Approach*

The policy statements above suggest that, absent an express statement, the “attitude” of the executive is to be inferred by looking to its relationship with and treatment of that regime. Academic commentary has suggested that this may require a court to embark on an assessment of the practice understood as ‘implied recognition’:<sup>116</sup> the process of ‘ascertain[ing] whether Her Majesty’s Government had recognised a foreign entity as a government as a matter of inference from the dealings HMG had with it’.<sup>117</sup>

In the only reported New Zealand case addressing this policy,<sup>118</sup> the New Zealand High Court<sup>119</sup> reconciled these questions in *Attorney-General for Fiji v Robt Jones House Ltd* (*Fiji v Robt Jones*).<sup>120</sup> There, the Fijian government sought an injunction to prevent the defendant from re-entering into possession of premises leased to the Fijian government for its diplomatic mission. The attempted repossession having occurred after the 1989 Fijian coup, the defence argued that no formal government existed. A letter, or executive certificate, of New Zealand’s Minister of Foreign Affairs, Mr Cedric Marshall, described New Zealand’s new policy (which mirrored Australia and the UK’s): ‘New Zealand’s general practice therefore, has been to leave any questions of recognition in respect of new Governments to be inferred from the nature and level of its dealings with such Governments’.<sup>121</sup> Jeffries J concluded that the policy brought New Zealand ‘close, if not actually to the point of, the familiar doctrine of “implied recognition”’.<sup>122</sup> Jeffries J then turned to the remainder of the executive certificate, which set out details of New Zealand’s post-coup relationship with Fiji. He concluded that the

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<sup>115</sup> Its attitude would be ‘left to be *inferred* from the nature of the dealings, if any, which we may have with [the entity], and in particular on whether we are dealing with it on a normal Government to Government basis’: United Kingdom, *Parliamentary Debates*, House of Commons, 23 May 1980, vol 985, col 385W (emphasis added).

<sup>116</sup> *Venezuela* (n 61) 160 [80] (Lloyd-Jones JSC). See James Crawford, ‘Decisions of British Courts during 1985–6 Involving Questions of Public or Private International Law’ (1986) 57(1) *British Yearbook of International Law* 405; Ian Brownlie, ‘Recognition in Theory and Practice’ (1982) 53(1) *British Yearbook of International Law* 197, 209. Cf *Foreign Affairs in English Courts* (n 76) 42; Colin Warbrick, ‘The New British Policy on Recognition of Governments’ (1981) 30(3) *International and Comparative Law Quarterly* 568 (‘British Policy on Recognition’).

<sup>117</sup> *Venezuela* (n 61) 161 [82] (Lloyd-Jones JSC).

<sup>118</sup> See Talmon (n 108) 18.

<sup>119</sup> Then the highest court in New Zealand, subject only to the right of appeal to the Judicial Committee of the Privy Council.

<sup>120</sup> *Fiji v Robt Jones* (n 108).

<sup>121</sup> *Ibid* 72.

<sup>122</sup> *Ibid* 75.

nature of the dealings between the New Zealand and Fijian governments was 'ordinary and normal' and was thus prepared to grant standing to the plaintiff.<sup>123</sup>

His Honour's insistence upon only taking into account the information provided by the executive certificate (and thus disregarding any extrinsic material)<sup>124</sup> exhibits strong judicial deference in furtherance of the one voice principle.<sup>125</sup> This approach requires significant judicial discretion in interpreting the intention and attitude of the Ministry using only the limited (and selected) facts provided in the executive certificate.<sup>126</sup> The approach differs from that of the UK.

## 2 The UK's 'Functions of Government' Approach

Where no clear executive statement on the existence of recognition is forthcoming, UK courts have devised a valuable alternative to the imprecise exercise of inferring recognition. In *Venezuela*, the Supreme Court summarised it as follows:

If the [Foreign Office] has departed from its usual practice by issuing an express statement of recognition, any ambiguity in the statement should be resolved by a further request to the [Foreign Office] for clarification. In the absence of such an express statement of recognition by [Her Majesty's Government], the issue of recognition does not arise and the courts are left to conduct an inquiry as to whether the entity in fact carries out the functions of a government in accordance with *Somalia v Woodhouse*.<sup>127</sup>

*Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* ('*Somalia v Woodhouse*')<sup>128</sup> dealt with the effect of the new recognition policy. There, the standing of a representative of the Republic of Somalia was at issue following a coup after the ouster of the Siad Barre government in 1991 by the United Somali Congress. The Foreign Office's certifications to the trial judge only commented that '[t]he general situation in Somalia continues to be insecure and confused',<sup>129</sup> and that Her Majesty's government did not consider there to be an effective government in Somalia, the interim government merely being one among a number of factions.<sup>130</sup>

In light of the letters' ambiguity, Hobhouse J was faced with determining the 'criterion of the locus standi of a foreign "government" in the English courts'.<sup>131</sup> One suggested option was the implied recognition approach, requiring him to infer recognition status from the dealings of Her Majesty's government with the purported government. Hobhouse J pointed out the shortcomings of using dealings to infer or imply recognition:

The non-existence of such dealings cannot however be conclusive because their absence may be explained by some extraneous consideration, for example, lack of

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<sup>123</sup> Ibid 75–6.

<sup>124</sup> Ibid 75.

<sup>125</sup> See Charlesworth (n 20) 24.

<sup>126</sup> *Fiji v Robt Jones* (n 108) 75.

<sup>127</sup> *Venezuela* (n 61) 225 [96] (Lloyd-Jones JSC) (citation omitted).

<sup>128</sup> [1993] QB 54 ('*Somalia v Woodhouse*').

<sup>129</sup> Ibid 64 (Hobhouse J).

<sup>130</sup> Ibid.

<sup>131</sup> Ibid 63.

occasion, the attitude of the regime to human rights, its relationship to another state.<sup>132</sup>

‘The impracticality of the “inferred recognition” theory as a legal concept’ was, therefore, ‘obvious’; the phrase ‘left to be inferred’, Hobhouse J suggested, was ‘designed to fulfil a need for information in an *international* or *political*, not a *judicial*, context’.<sup>133</sup>

Thus, Hobhouse J reasoned that in light of the evolved recognition policy, where the Crown did not accord any government with a statement of recognition, recognition ceased to be the determinative criterion.<sup>134</sup> The Court would instead make its own findings of fact through the use of legal reasoning and relevant evidence before it.<sup>135</sup> Hobhouse J devised a test which, instead of asking whether the executive *recognises* another entity’s capacity as government of a territory,<sup>136</sup> asks what entity, as a *question of fact*, carries out the functions of a government.<sup>137</sup> Hobhouse J looked at three primary factors in deciding whether a government exists as the government of a state:<sup>138</sup>

- a) whether it is the constitutional government of the state;
- b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; [and]
- c) whether Her Majesty’s Government has any dealings with it and if so ... the nature of those dealings ...<sup>139</sup>

A fourth factor — international recognition as government of the state — may be relevant in ‘marginal cases’.<sup>140</sup> Applying this analysis to the facts, Hobhouse J

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid (emphasis added).

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid 68.

<sup>137</sup> *Venezuela* (n 61) 225 [96] (Lloyd-Jones JSC).

<sup>138</sup> *Somalia v Woodhouse* (n 128) 68.

<sup>139</sup> Ibid. Hobhouse J acknowledged the particular significance of this factor in light of the one voice principle:

Where Her Majesty’s Government is dealing with the foreign government on a normal government to government basis as the government of the relevant foreign state, it is unlikely in the extreme that the inference that the foreign government is the government of that state will be capable of being rebutted and questions of public policy and considerations of the interrelationship of the judicial and executive arms of government may be paramount: at 65–6, citing *The Arantzazu* (n 63) 264 and *Gur Corp* (n 70) 625.

<sup>140</sup> *Somalia* (n 128) 68. Hobhouse J justified this factor using the following reasoning:

[Article 1 of the *Montevideo Convention* requires] ‘(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states’. Whilst illustrating that it is difficult to separate the recognition of a state from the recognition of a government of that state, this definition also shows that part of the function of a government of a state is to have relations with other states. This is also implicit in the reference in the 1980 Parliamentary answers to dealings on a government to government basis: at 67.

found that, on the evidence, the interim government did not qualify on any of the first three factors.<sup>141</sup>

Some commentary views this as suggesting that ‘effective control’ is the new legal criterion of government<sup>142</sup> — effectiveness being viewed in the sense of discharging governmental functions, not merely making the authority’s will effective.<sup>143</sup> However, given effective control is a reference to the standards of international law applied by the executive in issuing recognition<sup>144</sup> — a different exercise to the judicial inquiry undertaken in *Somalia v Woodhouse* — the *Somalia v Woodhouse* approach is properly viewed as a new judicial approach to dealing with complicated questions involving recognition of governments.

In this vein, *Somalia v Woodhouse* left considerable uncertainty in that it appeared to be at odds with those cases discussed in Part III(A) above that, despite the new recognition policy, appeared to affirm a precedent of recognition as the criterion of legitimacy.<sup>145</sup> This appears to have been resolved in 2021 by the Supreme Court of the UK in *Venezuela*. There, the central issue concerned which of two contending claimants — each ‘appointed’ by a purported President of Venezuela — was entitled to represent the Central Bank of Venezuela under English law.<sup>146</sup> The decision of the Court of Appeal described above — which determined that the executive certificate issued by the Foreign Office recognised one government de jure, and left open the possibility of recognising the other ‘de facto’ — was reached by application of an implied recognition approach.<sup>147</sup> The Supreme Court unequivocally dismissed the implied recognition approach.<sup>148</sup> In obiter, they agreed that in circumstances in which there is an absence of an executive certificate the approach of *Hobhouse J* was apposite, clarifying that it was to be applied only where a request for an unambiguous and unequivocal

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<sup>141</sup> Ibid 67. On requirement a) and b), *Hobhouse J* stated:

The *Djibouti Agreement* was not constitutional. It did not create a de jure status for the interim government in Somalia. The interim government was not and did not become the constitutional successor of the Government of President Siad Barre. Accordingly, if the interim government is to be treated as the Government of Somalia, it must be able to show that it is exercising administrative control over the territory of the Republic. That it is not able to do. Accordingly, that argument must fail: at 67.

On requirement c), the Foreign Office letter stated clearly “‘there have been no dealings on a government to government basis’”: at 65.

<sup>142</sup> Warbrick, ‘British Policy on Recognition’ (n 116) 570.

<sup>143</sup> Lord Atkin described the concept as

all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government: *The Arantzazu* (n 63) 264–5.

<sup>144</sup> See *Montevideo Convention* (n 46).

<sup>145</sup> *Hobhouse J*’s approach in *Somalia v Woodhouse* was applied in a small number of subsequent cases: see *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821 in which *Creswell J* of the Commercial Court of the Queen’s Bench Division applied *Hobhouse J*’s suggested approach in *Somalia v Woodhouse* to determine the status of the government of Sierra Leone.

<sup>146</sup> *Venezuela* (n 61) 201 [2].

<sup>147</sup> *Deutsche Bank AG London Branch v Receivers Appointed by the Court* [2021] QB 455, 515; *Venezuela* (n 61) 162.

<sup>148</sup> *Venezuela* (n 61) 162.

statement of recognition or non-recognition from the executive, expressed in the form of an executive certificate, had not been granted.<sup>149</sup>

But on the facts before the Court, the executive certificate provided by the Foreign Office referred the Court to the Foreign Secretary, Mr Hunt's statement that "The United Kingdom now recognises Juan Guaidó as the constitutional interim President of Venezuela until credible presidential elections can be held".<sup>150</sup> Such a statement was considered by the UK Supreme Court an 'unambiguous and unqualified statement' of recognition of Mr Guaidó as interim President of Venezuela.<sup>151</sup> This finding led to the conclusion that the Guaidó board was entitled to unqualified representation of the Central Bank of Venezuela.<sup>152</sup>

The decision in *Venezuela* is notable in that the Maduro regime remained, and indeed remains at the time of writing, the governing authority in Venezuela. The Supreme Court's judgment therefore elevates the de jure recognition of the UK government above the de facto reality.

### C Implications for Australia

This discussion has shown that both UK and New Zealand courts endorse, as largely unmodified, the traditional principle that an unambiguous statement of the executive on the question of recognition will be conclusive of a foreign government's treatment in domestic courts. Typically, this will take the form of an executive certificate. However, where an executive certificate is ambiguous, or refused, the approach between jurisdictions is inconsistent (in the admittedly few cases it has arisen).

An Australian court may soon be confronted with a case in which the executive refuses to make a statement of recognition, or non-recognition, of a foreign government. If it follows the interpretations of similar policies in its common law relations, an Australian court may have two primary options. First, it may choose to adopt the implied recognition interpretation, following more closely the suggestion of the 1988 policy and seeking to ascertain the executive's "attitude" through analysing Australia's dealings with the new government (whether or not evidence of those dealings is provided in an executive certificate, or otherwise).<sup>153</sup> Alternatively, the judiciary may adopt the approach developed in *Somalia v Woodhouse* and approved by the UK Supreme Court in *Venezuela*, applying Hobhouse J's factors to determine what would become (in lieu of any executive certification) a factual question of the existence of the government in question.

On balance, an Australian court should follow the second, functions of government approach. The court would first seek a clear statement of recognition or non-recognition. If one was not forthcoming from the executive, then the Court would change its inquiry to the determination of whether a government exists as the government of a state. Hobhouse J's factors should be applied in pursuit of that objective.

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<sup>149</sup> *Venezuela* (n 61) 225 [96] (Lloyd-Jones JSC).

<sup>150</sup> *Ibid* 227 [106].

<sup>151</sup> *Ibid* 226 [101].

<sup>152</sup> *Ibid* 229–51 [111]–[170]. The Supreme Court applied the act of state doctrine, giving effect to the act of Mr Guaidó in appointing the Guaidó Board.

<sup>153</sup> *Fiji v Robt Jones* (n 108) involved the former: Jeffries J refused to consider extrinsic evidence of government dealings.

The benefits of this approach are numerous. First, it addresses the fundamental inconsistency of using an implied recognition theory in the context of executive policy *not* to make statements of recognition. It also avoids the imprecision of the implied recognition exercise,<sup>154</sup> problems with which were made clear in *Fiji v Robt Jones*: in that case, the policy prohibiting the consultation of extrinsic evidence meant that the determination of “recognition” of the Fijian government turned on a narrow selection of facts made by the executive.<sup>155</sup>

Furthermore, an overly deferential approach in this manner undermines, rather than reinforces, the separation of powers and those matters which fall within the executive’s exclusive competence. The inquiry contemplated in *Somalia v Woodhouse* and *Venezuela* transforms the question at issue from a politically determined act of recognition into one that may be more flexibly ascertained by evidence, facts and judicial reasoning. As the Supreme Court in *Venezuela* commented in the English context, an implied recognition approach would ‘trespass into an area which is constitutionally within the exclusive competence of the executive’.<sup>156</sup> This is analogous to Mason J’s views in *Koowarta v Bjelke-Petersen*,<sup>157</sup> and later, *Commonwealth v Tasmania*, on the question of whether a matter is of international character or concern for the purposes of the external affairs power under s 51(xxix) of the *Constitution*:

In any event, as I observed in *Koowarta*, the Court would undertake an invidious task if it were to decide whether the subject matter of a convention is of international character or concern. On a question of this kind the Court cannot substitute its judgment for that of the executive government and Parliament.<sup>158</sup>

Adopting Hobhouse J’s approach allows resumption of judicial agency by utilising an enquiry which diverts focus away from an executive function and favours a judicially-developed and implemented approach. While the risk remains that the fact-finding approach may be viewed as communicating recognition on behalf of Australia’s executive, the practical benefits obtainable should outweigh the possibility that foreign observers could fail to understand constitutional structure and the nuance of this approach.

Colin Warbrick, approving Hobhouse J’s approach, agrees with this view that the foreign policy change which directed outsiders to infer recognition was intended at an ‘international or political, not a judicial context’.<sup>159</sup> He warns that attempting to infer recognition (or lack thereof) from political disapproval may create a ‘dissonance’, blurring the lines between the complexities of intergovernmental political relations and what should be a factual enquiry undertaken by the judiciary.<sup>160</sup> The High Court of Australia itself outlined the undesirability of such circumstances. In *Attorney-General (UK) v Heinemann*

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<sup>154</sup> Sim (n 61) 103.

<sup>155</sup> Successive cases have forbidden the consultation of extrinsic evidence relating either to whether the executive had in fact granted recognition, or whether their assessment of effective control in granting that recognition is correct: see above discussion.

<sup>156</sup> *Venezuela* (n 61) 225 [98] (Lloyd-Jones JSC).

<sup>157</sup> (1982) 153 CLR 168, 229.

<sup>158</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 125 (Mason J) (citation omitted).

<sup>159</sup> Colin Warbrick, ‘Recognition of Governments’ (1993) 56(1) *Modern Law Review* 92, 94 (‘Recognition of Governments’).

<sup>160</sup> *Ibid.*

*Publishers Australia* ('*Spycatcher*'), in relation to the act of state doctrine, the Court stated that

the notion that effective access to the courts should depend on a decision of the Executive is as unacceptable as the related notion that the enforceability of a claim should depend on an Executive decision that the claim should be able to succeed.<sup>161</sup>

Finally, it is worth noting that Australian courts have used this approach before, prior to the recognition of governments policy change. In *Frost*,<sup>162</sup> decided by the High Court decades before *Somalia v Woodhouse* in 1937, no executive certification had been issued regarding the question of whether New Guinea was part of the Commonwealth's dominions. Latham CJ held, in deciding whether New Guinea was within the Commonwealth's dominions, that '[t]he court must ... do the best it can to reach a conclusion ... upon such material as is available'.<sup>163</sup> Latham CJ analysed, first, which entities could be said to have 'complete and exclusive governmental authority in New Guinea' in determining whether it was a place within or outside of His Majesty's dominions.<sup>164</sup> This approach echoes the effective control doctrine and the second of Hobhouse J's factors, as well as the international legal materials and treaties which provided a mandate for Australia's administration of New Guinea.<sup>165</sup> The precedential value of this case is limited, given the vastly different government policy circumstances, and the fact that the magistrate at trial failed, erroneously, to ensure the parties sought executive certification.<sup>166</sup> Nevertheless, it demonstrates the Australian High Court's willingness to undertake a fact-finding analysis in lieu of executive certification. These varying approaches, and the difficulties arising in the cases canvassed, suggest the desirability of greater clarity in Australian law. It is to this the article now turns.

#### IV CHALLENGING THE ROLE OF RECOGNITION IN THE AUSTRALIAN PRACTICE OF PRIVATE INTERNATIONAL LAW

This article has thus far addressed Australian and comparative cases involving the recognition of governments, whose just and convenient resolution is potentially jeopardised by a lack of executive recognition. That analysis has presented options for reform which fit within existing principles and structures for the allocation of authority between the judiciary and the executive in the realm of international law and policy. The position of contested territories in Australian private international law remains uncertain — this may give rise to opportunities for jurisprudential development, particularly as and when courts confront the implications of the change of recognition policy. Accordingly, this Part makes a broader critique of the existing framework upon which this article has thus far been based. This critique proposes, first, that the status quo — the *Luther* principle (in its traditional formulation; leaving to one side the question of an implied

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<sup>161</sup> (1988) 165 CLR 30, 48 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ) ('*Spycatcher*').

<sup>162</sup> *Frost* (n 77).

<sup>163</sup> *Ibid* 549.

<sup>164</sup> *Ibid* 552.

<sup>165</sup> *Ibid* 552–3 (Latham CJ).

<sup>166</sup> This shortcoming was criticised by Latham CJ: *ibid* 549.

recognition, or *Somalia v Woodhouse* approach) — places an inflexible emphasis upon recognition as the singular, and increasingly inappropriate, criterion of legitimacy. Second, it argues that executive certification is a rigid and outdated method through which this recognition is expressed. Consequently, this Part provides a number of suggestions for jurisprudential evolution.

## A Critique

### 1 Recognition as the Criterion of Legitimacy

The discussion in Part III proceeded upon the basis that recognition remains the determinative criterion for access to legal rights and immunities in foreign domestic courts. Part III showed that, in light of the new recognition of governments policy of 1988, should Australian courts choose to follow the UK's approach developed in *Somalia v Woodhouse* and *Venezuela*, this statement could be qualified: where recognition is not certified clearly and unambiguously, recognition ceases to be the determinative criterion and the court should undertake a fact-finding exercise to determine which government is the government of the state. Nevertheless, *Venezuela* still affirmed the enduring dominance of executive certification and the one voice principle and the significance of an unambiguous statement of recognition: such a statement is determinative, and where such a statement is given, no recourse to Hobhouse J's fact-finding exercise is permitted.<sup>167</sup> Its facts are an instructive example of the difficult consequences this approach may yield: while the decision recognised the 'unambiguous and unqualified statement'<sup>168</sup> of recognition of the Guaidó government, the Maduro government instead retains effective control of Venezuela today.

There is a potential incoherence in the relationship between recognition (a political act) and its civil or commercial effect in domestic courts (the legal consequences). The attitudes and roles of the executive and judiciary in relation to the grant of recognised status differ greatly. The executive's concern is, primarily, the *political* consequences of recognition; formal recognition may be withheld as an expression of political disapproval or as an effort to maintain neutrality in internal struggles. For example, Australia declined to recognise the government of the People's Republic of China until 1972, despite its effective control being apparent well before that date.<sup>169</sup> More recently, the invasion and occupation of Ukrainian territory by Russia has been met with international opprobrium — most states refuse to recognise Donetsk or Luhansk (either as independent nations in their own right or parts of Russia). In contrast, the judiciary is concerned with the just resolution of disputes between parties, subject only in the private international law context to limited considerations of public policy.<sup>170</sup>

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<sup>167</sup> *Venezuela* (n 61) 224–5 [96].

<sup>168</sup> *Ibid* 226 [101].

<sup>169</sup> AM Greig, 'The Effects in Municipal Law of Australia's New Recognition Policy' (1987) 11 *Australian Year Book of International Law* 33, 38–9.

<sup>170</sup> Lord Nicholls in *Kuwait Airways* (n 67) viewed the exception as one relating to the principle of non-justiciability: at 1080–1 [26]; *Belhaj v Straw* [2017] 3 All ER 337; *Akai Pty Ltd v Peoples' Insurance Co Ltd* (1996) 188 CLR 418; *Pfeiffer* (n 22).

Australian judicial officers are not ignorant of this state of affairs. As O'Bryan J in *Anglo Czechoslovak & Prague Credit Bank v Janssen* ('*Anglo Czechoslovak*') surmised:

the legal or judicial question whether our Courts will recognise and give effect to the laws adopted or imposed by the invader or usurper of power depends upon the political question, has His Majesty's Government accorded recognition to the power exercising such control as the sovereign in respect of such territory?<sup>171</sup>

The role of the public-private international law disjunct — first identified in Part II — in facilitating this state of affairs must also be acknowledged. As the discussion and case law in the previous part showed, the treatment given to recognition is entwined with traditional notions of the sanctity of state relations; not only a reverence for the function of the executive, but the executive's role as a unit which reinforces these legal structures as the policy representative of nation-states, in a world by states and for states.<sup>172</sup> In this vision, recognition, territory and the state are fused together: 'the territorial nature of sovereignty is taken as a fact of the international legal order'.<sup>173</sup>

However, this position is no longer supportable. As Mills argues, the dividing lines which once existed between the international and national domains are

coming under increasing pressure from both normative and institutional developments within international law, and from the growth of private international interactions, as an aspect of the range of phenomena loosely called globalisation.<sup>174</sup>

The 20<sup>th</sup> century's inviolable sovereign nation-state is challenged; new ideas of international law and world order demand a 'reconceptualisation of private international law'.<sup>175</sup>

It is precisely because recognition is (traditionally) used as the determinative criterion — and the accompanying proposition that recognition is not a legal question which courts may determine for themselves — that the judiciary is overly-reliant upon the executive. As Steyn J noted in the English decision of *Gur Corporation v Trust Bank of Africa Ltd* ('*Gur Corp*'), 'the recognition of a foreign state or government is a matter of foreign policy on which the executive is in a markedly superior position to form a judgment'.<sup>176</sup>

The difficulties that this over-reliance encourages were made clear in Part III. The fixation upon "recognition" necessitated resort to the implied recognition approach as a poor substitute for the views of the executive. Thus, the above discussion of Hobhouse J's approach welcomes criteria which transcend recognition and encourage judicial investigation beyond the inclinations of the executive. In a more generalist context, so too should courts be prepared to look beyond, or even disregard recognition. While a statement of non-recognition remains entirely determinative of legal rights in domestic courts, this is arguably too great a reliance upon the executive and unbalances the separation of powers.

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<sup>171</sup> *Anglo Czechoslovak* (n 59) 189.

<sup>172</sup> See above nn 36–43 and accompanying text.

<sup>173</sup> Mills, 'Justifying and Challenging Territoriality' (n 45) 183.

<sup>174</sup> Mills, *The Confluence of Public and Private International Law* (n 3) 72–3.

<sup>175</sup> *Ibid* 73.

<sup>176</sup> *Gur Corp* (n 70) 604.

There are possibilities of real injustice if the judiciary elevates legal fiction over reality, in deference to the executive — possibilities explored below.

## 2 *Legal Fictions Achieved by the Principle*

Historical treatment of the *Luther* principle in private international law case law is evident in the legal gymnastics resorted to by certain courts, in an effort to evade the unpalatable results that application of the recognition criterion may otherwise deliver. Those efforts may broadly be grouped into two categories: first, the use of artificial or acrobatic reasoning processes; second, the development of more formalised doctrines to address situations of crises, usurpation or unilateral declarations of independence. Each will be discussed in turn.

At issue in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* (*'Carl Zeiss'*), decided in 1931, was the validity of certain acts of the Council of Gera, a local government organ of East Germany and a government then-unrecognised by the UK.<sup>177</sup> The House of Lords, acknowledging the difficult consequences of giving no legal effect to those acts,<sup>178</sup> instead resorted to the somewhat artificial initiative of finding that the unrecognised government of East Germany derived its authority from the Union of Soviet Socialist Republics (*'USSR'*), a recognised government. The acts of East Germany could therefore be given effect 'because they [were] acts done by a subordinate body which the USSR set up to act on its behalf'.<sup>179</sup> These facts are not entirely dissimilar to the contemporary situations of Donetsk and Luhansk (formerly Ukraine); it would be interesting to observe how an Australian court today would treat acts, legislation or judgments of Donetsk or Luhansk in civil litigation. In *Gur Corp*, concerning the existence of a state in what is now South Africa, the situation was the same. At trial, Steyn J interpreted the effect of the executive certificates given as conclusive of the non-recognition of the state of the Republic of Ciskei, denying it standing to sue or be sued.<sup>180</sup> The Court of Appeal, likely viewing cautiously the consequences of giving no legal effect to acts of the entity, instead resorted to applying the approach of *Carl Zeiss*. They found that the certificates, read in conjunction with Ciskei's constitution, implied that South Africa was entitled (even if unwilling) to exercise sovereign authority over the territory of the Ciskei.<sup>181</sup> Hilary Charlesworth points out that while this conclusion accorded with the Ciskei's status at international law, it was a 'quite inaccurate description of the intention of South Africa in establishing the Ciskei'.<sup>182</sup>

The later development of similar, but more formalised lines of argument was seen in the wake of various forms of independence movements in the 20<sup>th</sup> century. The use of recognition as a determinative criterion is most clearly inapposite in cases of secession, rebellion or independence movements in which those usurper

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<sup>177</sup> *Carl Zeiss (House of Lords)* (n 55).

<sup>178</sup> *Ibid* 907 (Reid LJ), 925 (Hodson LJ), 940 (Guest and Upjohn LJ concurring).

<sup>179</sup> *Ibid* 907 (Reid LJ).

<sup>180</sup> *Gur Corp* (n 70) 607.

<sup>181</sup> *Ibid* 624 (Sir Donaldson MR).

<sup>182</sup> Charlesworth (n 20) 21. This approach has been criticised as a solution constructed with commercial interests front-of-mind: see Andrew Beck, 'A South African Homeland Appears in the English Courts: Legitimation of the Illegitimate?' (1987) 36(2) *International and Comparative Law Quarterly* 350, 360.

entities may maintain power for only brief periods of time. The doctrine of necessity, having its roots in the internal rebellions of seceding US states during the American Civil War,<sup>183</sup> was acknowledged by British courts called upon to address independence movements of former colonial outposts. The phrase was discussed in its private international law sense by the UK House of Lords first in *Madzimbamuto v Lardner-Burke* ('*Madzimbamuto*').<sup>184</sup> There, at issue was the legality of the detention of the appellant's husband in the British colony of Southern Rhodesia by the British colonial government in November 1965 — the same month in which a unilateral declaration of independence was issued by the lawfully constituted Smith government which purported to establish the new sovereign state of Rhodesia. Considering the potential application of the doctrine of necessity, Lord Reid described its justification as such:

[W]hen a usurper is in control of a territory, loyal subjects of the lawful Sovereign who reside in that territory should recognise, obey and give effect to commands of the usurper in so far as that is necessary in order to preserve law and order and the fabric of civilised society.<sup>185</sup>

The doctrine, the Court acknowledged, consisted of the grant of an 'implied mandate' to the usurper by the lawful sovereign in recognition of the need to preserve law and order in that territory.<sup>186</sup> As RD Leslie explains, it is properly conceived as an 'internal doctrine', and not strictly one of private international law: whether the laws of an unrecognised government can be given effect in an English court is determined by reference to the recognised government.<sup>187</sup> In the case of *Madzimbamuto*, that recognised government was the UK. While the application of the doctrine in that case was precluded on the facts by the express repudiation of this 'implied mandate' by the UK government,<sup>188</sup> a New Zealand Court was later willing to find that the doctrine could be applied to validate an act of an official of the High Court of Rhodesia appointed after the unilateral declaration of independence.<sup>189</sup>

Australia has made its own efforts to evade undesirable consequences of tricky questions of recognition by enacting the more general and wide-reaching amendments in the *FC Act*. Discussed above, and despite its territory-agnostic drafting, it was intended to address commercial concerns regarding the uncertain

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<sup>183</sup> See *Texas v White*, 74 US 700, 733 (1868); *Horn v Lockhart*, 84 US 570, 580 (1873).

<sup>184</sup> *Madzimbamuto* (n 58).

<sup>185</sup> *Ibid* 726.

<sup>186</sup> *Ibid* 729.

<sup>187</sup> Leslie (n 20) 167.

<sup>188</sup> *Madzimbamuto* (n 58) 726–9 (Reid LJ). Legislation declared that Southern Rhodesia continued to be part of Her Majesty's dominions, and an Order in Council that: 'any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect': *Southern Rhodesia (Constitution) Order*, 18 November 1965 (Order in Council) s 2(1). Lord Reid stated: '[i]t is for Parliament and Parliament alone to determine whether the maintenance of law and order would justify giving effect to laws made by the usurping Government, to such extent as may be necessary for that purpose': *Madzimbamuto* (n 58) 731. The legislation and Order in Council demonstrated that Parliament had decided against such an action. This was followed in *Adams* (n 53) in which the Court declined to recognise the validity of a divorce granted by a judge appointed by the revolutionary Smith government in Southern Rhodesia.

<sup>189</sup> See *Bilang v Rigg* [1972] NZLR 954.

implications of Taiwan's unsettled status in Australian foreign policy:<sup>190</sup> in the late 1980s, a Taiwan-government-owned steel company proposed to build a multi-billion dollar steel mill in Australia, but subsequently withdrew these plans due to the legal uncertainty.<sup>191</sup> Addressing those uncertainties was important given the commercial relationship and flow of private investment between Australia and Taiwan. As one scholar observed, '[i]n order to take full advantage of the potential which such investment offers, it [was] necessary to treat Taiwanese investment in the same way as investment from other foreign countries'.<sup>192</sup>

In the contexts discussed here, courts have grappled with anomalous circumstances in which application of the *Luther* principle essentially resulted in legal black holes. Consideration of these cases necessarily asks the observer to question whether a more principled, less piecemeal approach might be sought.

### 3 *The Reasonable Expectations of Parties and Executive Certificates*

In an age of modern, transnational litigation, private, corporate and state agents are conducting their business and affairs across borders with ever-increasing frequency. Legal certainty — often cited in normative justifications of private international law and comprising concepts including public promulgation, equal application and impartial adjudication — is critical in abating the litigation which inevitably arises out of these transactions.<sup>193</sup> In *John Pfeiffer Pty Ltd v Rogerson*,<sup>194</sup> the Australian High Court recognised, when applying *lex loci delicti* to choice of law questions involving tort, the integral significance of the reasonable expectations of parties: a 'certain and predictable norm, neutrally applied as between the parties'.<sup>195</sup>

When courts strictly observe statements of fact made in executive certificates and consequently refuse to apply the law which applies "de facto", they risk unjustly holding private litigants to different, unanticipated legal standards.<sup>196</sup> In cases such as *Carl Zeiss*, deferral to the determination of the executive regarding recognition neglected certainty and the reasonable expectations of parties. It elevated legal fiction over practical reality. As Warbrick argues '[i]n domestic judicial proceedings, the primary objective ought to be to maintain an identity

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<sup>190</sup> Godwin (n 20) 61. Godwin identifies two interrelated objectives of the legislation with respect to Taiwan:

The first objective, which may be defined as the 'economic' objective, is to facilitate and encourage investment from Taiwan. In order to take full advantage of the potential which such investment offers, it is necessary to treat Taiwanese investment in the same way as investment from other foreign countries. The second objective, which may be defined as the 'legal' objective, is to remove any legal impediments to the recognition of Taiwanese law as it applies to Taiwanese corporations and, consequently, to provide for the security of their investments in Australia: at 61.

<sup>191</sup> *Ibid* 61–2.

<sup>192</sup> *Ibid* 61.

<sup>193</sup> *Ibid*.

<sup>194</sup> *Pfeiffer* (n 22).

<sup>195</sup> *Ibid* 553 (Kirby J).

<sup>196</sup> See Peter Kincaid, 'Justice in Tort Choice of Law' (1996) 18(2) *Adelaide Law Review* 191, 198–9; JA Clarence Smith, 'Torts and the Conflict of Laws' (1957) 20(5) *Modern Law Review* 447, 459; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 445–6 (Slade LJ).

between the rules of law applied by the court and those actually effective in the relations between the parties'.<sup>197</sup>

In *Venezuela*, where the Foreign Office had departed from usual practice to make a statement of recognition of the Guaidó government, no latitude was permitted for the consultation of extrinsic materials or for conducting a factual analysis.<sup>198</sup> The concern, therefore, is that the realities of the political circumstances in Venezuela at the time were given little to no consideration.

As much might be begrudgingly accepted in such a politicised case, given it involved duelling claims to a government institution and its assets. However, these outcomes are even more concerning in cases which centre more closely upon the rights of private parties. One can readily imagine the difficulties if *Venezuela* involved not competing claims to government assets but a dispute involving private rights, against the backdrop of that political uncertainty. Indeed, the Southern Rhodesian cases discussed above are demonstrative. In *Adams v Adams*, a divorce granted by a judge appointed by the revolutionary Smith Government in Southern Rhodesia was refused recognition.<sup>199</sup> Unhappy with that position, legislative solutions were resorted to which, first, gave English courts jurisdiction to hear divorce and nullity proceedings, and second, validated Rhodesian marriages, divorces, nullities of marriage and other relevant decrees which might otherwise have been void.<sup>200</sup>

These concerns suggest that the judiciary's reliance upon the executive, and the 'contrived'<sup>201</sup> solutions sought by judges when confronted by the uncertain consequences of the *Luther* principle, require evolution. At minimum, a measure of flexibility in this rule is greatly desirable. In the more extreme, rethinking the use of recognition entirely may be a valuable exercise. A court should not, in every instance, be constrained by the executive's inclinations in granting recognition, whether or not that recognition occurs in accordance with international law. This is particularly so in cases involving private litigants, where strict adherence to the one voice doctrine delivers injustice.

## B Possible Solutions

Finally, we propose opportunities for reform to present judicial practice in Australia. We suggest a new test, with some grounding in Australian precedent, which better grapples with practical reality to avoid doing injustice to individual litigants.

### 1 *A New Judicial Approach for Determining the Existence of a State or Government*

When the recognition of governments policy changed in the 1980s, this might pragmatically have been the impetus for the development of a new or reformed rule to assist in the identification of a state and its government. To some extent, by proposing a newly-formulated test for determining the existence of a government,

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<sup>197</sup> Warbrick, 'Recognition of Governments' (n 159) 94.

<sup>198</sup> *Venezuela* (n 61) 223 [93] (Lloyd-Jones JSC).

<sup>199</sup> *Adams* (n 56).

<sup>200</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 10 November 1970, vol 312, cols 716–27 (Lord Hailsham, Lord Chancellor). See also Leslie (n 20) 168–9.

<sup>201</sup> Charlesworth (n 20) 16.

*Somalia v Woodhouse* and *Venezuela* did just that. Yet, while the assertion expressed in *Venezuela* — that an executive certificate must first be sought from the executive, and that Hobhouse J’s factors may only be consulted if there is residual ambiguity — still stands, much remains to be desired. Given the difficulties discussed at length in this article with respect to applying the executive’s act of recognition as the determinative criterion, options for reform must prioritise flexibility and greater judicial independence. The search thus begins: in identifying the forum selected by a contract’s jurisdiction clause, or in ascertaining the *lex causae* of a claim, or in ascertaining the legitimacy of a purported judgment of a foreign decision-making body, how might the existence of a government or state be confirmed?

Canvassing options for the formulation of a test which does not heavily rely on the complicated question of recognition is both a desirable and intriguing exercise. The remaining part of this article does not advance a new test to definitely replace the position of recognition in the identification of states or governments in private international law — a daunting task. Instead, it undertakes the more manageable task of expounding a justifiable conceptual grounding for injecting flexibility into current practice and identifying judicial tools in a court’s existing arsenal which may assist with this. It should be emphasised that nothing proposed here is intended to interfere with the position in public international law — we are concerned solely with the private law implications for parties in domestic litigation. Nevertheless, as recognised in this article’s introduction and has been readily apparent in the course of discussion, such an endeavour necessarily confronts the practical reality of private international law’s battle with, or rather away from, politicisation.

## 2 Flexibility in the Australian Approach

As a starting point, it should be noted that there is some existing judicial flexibility under Australia’s common law conflict of laws principles which may avoid undue injustice in this context. First, Australian law takes as its starting point the application of forum procedural and substantive law. Difficulties may be avoided in the ordinary course of proceedings where certain questions which in some cases may be considered substantive, such as issues relating to standing of a party in proceedings,<sup>202</sup> are in the particular case matters of procedure, not substance. In the case of substantive law, only where the application of foreign law is pleaded will this starting point be displaced.<sup>203</sup> Second, even where foreign law is applicable, it is presumed that foreign law is the same as Australian law. Only where this presumption, or ‘default rule’, is overcome through the use of appropriate evidence will foreign law be applied.<sup>204</sup> A consequence of this “plead and prove” approach is that, provided an Australian court’s jurisdiction can be properly engaged, that the subject matter of a dispute arises in an unrecognised or contested territory will not in and of itself prevent the dispute’s determination in accordance with Australian law.

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<sup>202</sup> See *Ebbage* (n 96). Noting that on the facts Vanuatu was not a contested territory, the standing of the plaintiff was considered to be a procedural one, and as such the question was governed by Australian law: at [6].

<sup>203</sup> *Nygh’s* (n 3) 422–3.

<sup>204</sup> *Ibid* 434–5.

In other contexts, judicial officers might embark on more deliberate lines of reasoning which allow them to side-step what they see as tricky questions where a statement of recognition is not forthcoming. Taking judicial notice of the existence of a state or government was the approach of an Australian court in the case of *Anglo Czechoslovak*, discussed in depth below. However, while the principle of judicial notice banishes the need for debate on the question, it nevertheless requires the court to identify and accept the existence of the relevant state or government (an exercise which may, itself, raise questions about the appropriateness of such). Alternatively, and more drastically, it requires the refusal of adjudication and exercise of judicial restraint; the notoriously nebulous principle of non-justiciability was resorted to in *Petrotimor* in deciding that determining for itself Australia's territorial boundaries under international law would impermissibly prejudice and embarrass Australia's position in ongoing negotiations over these boundaries.<sup>205</sup>

These solutions may mitigate injustice in certain circumstances, but they do not resolve the core issues identified above. An approach immediately coming to mind in considering options for further flexibility in the otherwise rigid application of the *Luther* principle is the test expounded by Hobhouse J in *Somalia v Woodhouse*. Hobhouse J's factors are readily available for use to determine the existence of the government in question without resort to a request for an executive certificate. In their current form, the factors are tailored to identify the existence of a government. Yet, by looking at ideas such as stability, connection with a territory and relations with other states, there is arguably scope for modification. An advantage in the use of the test is the application of an approach different to that utilised by the executive for recognition; it therefore promotes greater differentiation between the two organs and enhances, rather than contravenes, their constitutional roles. The last of Hobhouse J's factors was that of recognition, which may be applied in marginal cases: by still allowing recognition to play a role, the test skilfully and appropriately balances judicial independence with deference to the role of the executive in matters of foreign policy.

Alternatively, courts might adopt and apply the tests available in public international law — the *Montevideo Convention* art 1 test and the effective control test — for the existence of a state or government respectively. In this respect, a court would be substituting itself into the role formerly played by the executive, wading into previously undisturbed and potentially, or perhaps plainly, policy-laden and value-driven decision-making arenas. Such an approach calls for caution: there may be valid concerns about the transgression of the one voice principle should the executive and judiciary be seen to reach differing conclusions on their application of these tests.

In *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd*,<sup>206</sup> Lord Denning MR in dissent demonstrated some support for the effective control test vis-à-vis the existence of governments. His Lordship argued that there existed two views regarding the correct approach in law to the laws and acts of unrecognised governments. The first was the traditional *Luther* principle, which accords 'no

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<sup>205</sup> *Petrotimor* (n 79) 369–70, 372 (Black CJ and Hill J).

<sup>206</sup> [1978] 1 QB 205 ('*Hesperides Hotel*').

juridical existence' to an unrecognised government.<sup>207</sup> The second, his Lordship argued,<sup>208</sup> was that

the courts of this country can recognise the laws or acts of a body which is in *effective control of a territory* even though it has not been recognised by Her Majesty's Government de jure or de facto: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth: and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.<sup>209</sup>

Despite a Foreign Office Certificate which stated that the British government did not recognise the administration known as the Turkish Federated State of Cyprus as the government of an independent de facto sovereign state, Lord Denning found that '[t]here [was] an effective administration in North Cyprus which [had] made laws governing the day to day lives of the people'.<sup>210</sup> Lord Denning argued, not unpersuasively, that such laws should be given effect in British courts.<sup>211</sup> There was no support for this approach in the opinions of the other two judges.<sup>212</sup> However, in light of the concerns articulated in this article, we see merit in Lord Denning's approach.

### 3 Support for Uses in Private Rights Scenarios

Utilising a different test for determining the existence of a government (and/or a state) should be of critical concern in matters where private rights are at issue. It is hard to rationalise an approach whereby an Australian court would bind private litigants to laws not actually applicable at the relevant time (as a matter of fact) and of which they were thus unaware. While there are strong public policy foundations for aligning with the executive on sensitive foreign policy issues, where the link to international relations is only circumspect and private disputes require judicial resolution, courts should be willing to exercise their decision-making capabilities independently of the executive's pronouncement (of what is, in effect, a legal fiction).

This approach has had some support in obiter of a select number of cases where private rights have been at issue. In them, commentators have noted a 'judicial preparedness to look beyond the fact of recognition'.<sup>213</sup> In *Carl Zeiss*, the House of Lords sought a means to avoid an unpleasant outcome in which all acts of the East German government would be treated as a nullity. In his Lordship's reasons, Lord Wilberforce opined:

In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where *private rights*, or *acts of everyday occurrence*, or *perfunctory acts of administration* are concerned (the scope of these exceptions has never been precisely defined) the

<sup>207</sup> Lauterpacht (n 44) 145, quoted in *ibid* 217.

<sup>208</sup> *Hesperides Hotel* (n 206) 218. Lord Denning cites some authorities in support of this view. However, they were very minimal.

<sup>209</sup> *Ibid* 218 (emphasis added).

<sup>210</sup> *Ibid* 221.

<sup>211</sup> *Ibid* 221–2.

<sup>212</sup> *Ibid* 223 (Roskill LJ), 229 (Scarman LJ).

<sup>213</sup> Charlesworth (n 20) 15.

courts may, in the interests of justice and common sense, where *no consideration of public policy* to the contrary has to prevail, give *recognition to the actual facts or realities found to exist in the territory in question*.<sup>214</sup>

In *Gur Corp*, Lord Donaldson approved Lord Wilberforce's theorised exception, commenting 'it is one thing to treat a state or government as being "without the law," but quite another to treat the inhabitants of its territory as "outlaws"'.<sup>215</sup> Indeed, the potential nullity of legal rights between individuals simply by virtue of their occurrence in a non-recognised territory requires precisely the 'justice and common sense' proposed by Lord Wilberforce in *Carl Zeiss*.<sup>216</sup> This may suggest distinct approaches need to be taken *within* the private international law context — for example, between granting an unrecognised state standing to sue or the immunities of statehood, on the one hand, and applying the law of a *de facto* state in resolving a private dispute between individual litigants, on the other.

#### 4 Support in Australian Authority

This flexible exception approach has some precedent in an Australian authority. In an action for the recovery of the amount of certain bills of exchange against the defendant, *Anglo Czechoslovak* confronted issues (now codified in respect of corporations by the *FC Act*)<sup>217</sup> concerning personal jurisdiction over litigants from an unrecognised state.<sup>218</sup> The defendant challenged the standing of the plaintiff company, which had been incorporated under the law of Czechoslovakia, a country illegally occupied by Germany since March 1939. The defendant sought to establish that:

- 1) since that time, the government of Germany occupied and remained in occupation of the whole of Czechoslovakia;
- 2) the government of Germany had taken and retained effective control of the government and administration of that country; and
- 3) in or about October 1940 in the exercise of such governmental control, the German authority by its decree or order dissolved the plaintiff corporation.

At trial, the issue was decided pursuant to the orthodox *Luther* principle.<sup>219</sup> O'Bryan J considered an executive certificate provided by the Acting Minister for External Affairs 'conclusive' that the Commonwealth of Australia 'ha[d] not... recognised the German Government as having been, since March 1939, in effective administrative control of any part of the territory of Czechoslovakia which concern[ed] this case'.<sup>220</sup> For O'Bryan J, the continued recognition of Czechoslovakia as the *de jure* sovereign was a clear and 'positive refusal to

<sup>214</sup> *Carl Zeiss (House of Lords)* (n 55) 954 (emphasis added).

<sup>215</sup> *Gur Corp* (n 70) 622, discussing *Carl Zeiss (House of Lords)* (n 55) 954 (Lord Wilberforce).

<sup>216</sup> *Carl Zeiss (House of Lords)* (n 55) 954.

<sup>217</sup> See above Part II(E).

<sup>218</sup> *Anglo Czechoslovak* (n 59) 197–9 (Mann CJ). Hilary Charlesworth, writing in 1991, likened this to an approach taken by Lord Denning in *Hesperides Hotels* (n 206): Charlesworth (n 20) 16. However, *Hesperides Hotels* involved a clear statement of non-recognition from the Foreign Office. The approach taken in *Anglo Czechoslovak* was recommended only where 'difficulties' arose in obtaining an executive certification: *Anglo Czechoslovak* (n 59) 197 (Mann CJ).

<sup>219</sup> *Anglo Czechoslovak* (n 59) 189–92 (O'Bryan J).

<sup>220</sup> *Ibid* 192.

recognise any *de facto* change in the control of the administration of that country'.<sup>221</sup> Notably, this case was decided at a time when *de jure* and *de facto* recognition was usual practice.

On appeal, the Full Court of the Victorian Supreme Court reversed the decision. Mann CJ stated:

Where doubts exist as to what Government has or had the administration of a particular territory at a given time the question may be best resolved by obtaining a statement on the point from one of His Majesty's Ministers of State. The question is one of fact and ... the proper form of question ... would be — Was Germany in *de facto* control of Czechoslovakia (on or at the relevant date)? ... But where no difficulties of this kind occur, *de facto* occupation in the required sense may be proved by other evidence or the fact may be notorious as matter of common public knowledge not calling for sworn testimony at all ... The occupation and control of Czechoslovakia by the German government ... falls within the latter category.<sup>222</sup>

Interestingly, the Court took 'judicial notice' of the occupation and control of Czechoslovakia (that is, its 'effective control'), finding that German occupation of Czechoslovakia since March 1939 was 'notorious' and that, therefore, it was open to the Court to find that the German government exercised *de facto* control over the territory of Czechoslovakia.<sup>223</sup> Recognition was not the determinative criterion applied.

The judicial notice approach taken was certainly a significant departure from precedent and the one voice principle. Nevertheless, the pragmatic methodology of the Victorian Supreme Court was a forward thinking use of evidentiary doctrines in addressing some of the practical issues raised by this article, using an effective control approach to acknowledge that Germany was the *de facto* authority in the territory:

The legal effects of a *de facto* control [do not] cease to exist when the controlling power becomes the enemy of this country, the territory in question not being that of either a British or Allied Government. The question of *de facto* control in this case is only of importance for the just determination of private rights and has nothing to do with the interests, merits or demerits of the occupying power.<sup>224</sup>

## V CONCLUSION

States occupy a central position in the conflict of laws discipline. In Australia, and many other jurisdictions, states and their governments enjoy certain rights and privileges as a corollary of statehood. In most cases, the dominance of statehood in conflict of laws is unproblematic; it is not controversial that Indonesia should be afforded the rights and immunities associated with statehood in Australian courts. Nor does it pose any major difficulties if a choice of law rule requires Australian courts to apply American or Indian or Chilean law to resolve a dispute. There are, however, circumstances where the state-centric analysis in conflict of laws is less straight-forward — circumstances which give rise to thorny issues and potential injustices.

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<sup>221</sup> Ibid (emphasis in original).

<sup>222</sup> Ibid 197–8 (Mann CJ) (emphasis in original).

<sup>223</sup> Ibid.

<sup>224</sup> Ibid 199 (emphasis omitted).

This article has considered the position of unrecognised or partially-recognised states and contested territories in Australian conflict of laws. It is a timely analysis, with the endurance of some such territories (such as Somaliland or Abkhazia), the disappearance of others (Nagorno-Karabakh) and the ongoing evolution of the legal status of the likes of Taiwan (which has seen its international recognition wane) and Palestine (which in the months before this article's publication, was recognised by not less than 10 states, including Australia and the UK). Beyond the practical significance of these issues, the topic also highlights tensions between judicial independence and judicial deference in matters relating to executive foreign policy. As this article has demonstrated, these issues have separation of powers implications and remain largely unresolved in Australian law.

This article has focused on these issues through a judicial lens. Legislative reform would be available to resolve some uncertainties, as demonstrated by the existing legislation enacted to prevent legal issues hampering trade with Taiwan: the *FC Act*. However, even an expansion of that statutory modification would only address a small subset of the challenges raised in this article; more broadly, the federal Parliament has largely neglected conflict of laws as a matter of statutory concern — further legislation in this respect is unlikely to be a priority. The fundamental separation of powers issues raised underscores why these matters warrant judicial introspection.

Given the significance and complexity of the subject matter, at the heart of the intersection between public and private international law, this article is necessarily only an initial foray into difficult territory. There is considerable scope for further scholarly engagement with the issues raised here. What these unresolved tensions say about the supposedly apolitical, neutral status of private international law and how to reconcile the opposed interests of comity and judicial deference to the executive in matters of foreign policy in this fraught context are two significant topics raised in our discussion warranting deeper reflection. There are also numerous practical private international law issues requiring further scrutiny.<sup>225</sup> How might an Australian court assume personal jurisdiction over litigants from a contested territory, in light of the requirements of extraterritorial service of process? What if a choice of law or choice of court clause in a contract points to the legal system of an unrecognised territory? Could a judgment delivered by a breakaway state's courts be enforced under Australian common law recognition of foreign judgment principles?

Ultimately, the issues canvassed by this article raise complex matters of foreign policy and the intersection between different branches of government. The temptation for the judiciary to follow the direction of the executive, and avoid potential international controversy, is no doubt significant. Nevertheless, blanket solutions can cause injustice. Upholding legal fictions in the interests of deference, at the expense of recognising the de facto reality and properly resolving a dispute between private litigants, is a fraught approach. These issues have troubled courts for over a century, and they are not going away. Courts would be wise to peer through the faux-image of stability offered by a world map, and confront the complexities therein.

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<sup>225</sup> We acknowledge the useful contribution of a peer reviewer in identifying some of these issues.