

PRIVATE INTERNATIONAL LAW

SIR ZELMAN COWEN AND THE  
EMERGENCE OF AN INTERSTATE PRIVATE  
INTERNATIONAL LAW IN AUSTRALIA

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*For many years Australian courts observed the fiction that private international law questions arising within the Australian federal system should be resolved by the same English common law principles that were applied to international cases. Such an approach was taken despite the existence of provisions in the Constitution that suggested a different approach. Sir Zelman Cowen was one of the first Australian scholars to identify this anomaly and to argue persuasively for the creation of a new doctrine of private international law for interstate matters. His pleas were ultimately accepted.*

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I INTRODUCTION

As the papers presented in this Conference reveal, Sir Zelman Cowen achieved great distinction as a scholar and practitioner in many legal areas. One field in which he excelled was private international law. Not only was he a Specialist Editor of the prestigious text *Dicey's Conflict of Laws*<sup>1</sup> but he also

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<sup>1</sup> See J H C Morris (ed), *Dicey's Conflict of Laws* (Stevens, 6<sup>th</sup> ed, 1949).

wrote many articles in prominent academic journals<sup>2</sup> and two monographs<sup>3</sup> on the subject.

One issue which particularly intrigued Cowen was the interface between Australian constitutional law and private international law. The interaction of these two bodies of law arises in the following way. While the Australian federal *Constitution* was closely derived from the United States precedent and focused on providing rules for the operation of a federal system of government, principles of private international law were wholly derived from the English common law inherited by all Australian states in the 19<sup>th</sup> century. While in most areas of law the *Constitution* and the common law have occupied separate spheres of operation, private international law in Australia has always offered the potential for conflict.

## II FULL FAITH AND CREDIT: SIR ZELMAN'S CONTRIBUTIONS

Australia, as a federal system, produces two distinct species of private international law problems. (The focus of this article will be on that part of private international law dealing with choice of law or conflict of laws disputes, not questions involving personal jurisdiction or recognition of foreign judgments.) The first type of conflict of laws which may occur is between the law of an Australian jurisdiction such as Victoria and that of a foreign country such as France. This situation may be described as an 'international' conflict of laws. So if, for example, a plaintiff sues a French defendant

<sup>2</sup> See, eg, Zelman Cowen, 'The Recognition of Foreign Judgments under a Full Faith and Credit Clause' (Pt I) (1948) 2 *International Law Quarterly* 21; Zelman Cowen, 'The Recognition of Foreign Judgments under a Full Faith and Credit Clause: A Further Commentary' (Pt 2) (1948) 2 *International Law Quarterly* 621; Zelman Cowen, 'Foreign Judgments and the Defence of Fraud' (1949) 65 *Law Quarterly Review* 82; Zelman Cowen, 'Recent English Decisions on Private International Law' (1950) 3 *International Law Quarterly* 74; Zelman Cowen, 'Divorce and the Domicile' (1952) 68 *Law Quarterly Review* 88; Zelman Cowen, 'Full Faith and Credit: The Australian Experience' (1953) 6 *Res Judicatae* 27; Zelman Cowen, 'The Conflict of Laws: The Experience of the Australian Federation' (1953) 6 *Vanderbilt Law Review* 638; Zelman Cowen, 'Choice of Law Provisions in Matrimonial Causes' (1957) 73 *Law Quarterly Review* 350; Zelman Cowen and D Mendes da Costa, 'The Unity of Domicile' (1962) 78 *Law Quarterly Review* 62; Zelman Cowen, 'English Law and Foreign Adoptions' (1963) 12 *International and Comparative Law Quarterly* 168; Zelman Cowen and Derek Mendes Da Costa, 'The Contractual Forum: Situation in England and the British Commonwealth' (1964) 13 *American Journal of Comparative Law* 179.

<sup>3</sup> Zelman Cowen, *American-Australian Private International Law* (Oceana Publications, 1957); Zelman Cowen and Derek Mendes da Costa, *Matrimonial Causes Jurisdiction: Being the Law of Jurisdiction, Choice of Law and Recognition of Foreign Decrees under the Matrimonial Causes Act 1959* (Law Book Co of Australasia, 1961).

in Victoria in respect of a tort committed in France and the laws of Victoria and France differ the court will have to determine which law applies. Where a conflict exists between the law of an Australian state and a foreign country no issue of Australian constitutional law arises. The matter is resolved exclusively by common law choice of law rules drawn largely from English law as well as any local statutory deviations enacted by individual Australian states or territories. This broad position has remained unchanged since Federation.

The second type of conflict of laws in Australia emerges from the fact that Australia is a federal system with each state and territory having the capacity to enact different laws from one another, despite there being a uniform Australian common law. Where, for example, one Australian state has retained the common law rules of negligence for personal injury but another state has introduced a no-fault scheme of compensation, there is scope for conflict when a case arises with connections to both states. Suppose A were injured in a road accident due to B's negligence in the Northern Territory (where a no-fault scheme operated) but A sued B in Victoria (whose law still allowed negligence actions). The Victorian court would be confronted with an interstate or 'intranational' conflict of laws.<sup>4</sup> While the existence of the uniform Australian common law has reduced the scope of such conflicts when compared with the United States, for example, the range and scope of statutory departures and innovations by individual Australian states, particularly in the area of personal injury, has led to a surprising number of interstate conflict of laws cases. Indeed, until the last decade, the clear majority of cases decided by Australian courts since Federation were interstate or intranational rather than international in nature.

Interestingly, however, and this was a major theme in Sir Zelman Cowen's writing, Australian courts made little attempt to distinguish international from interstate conflict cases as regards the principles of choice of law which should be applied.<sup>5</sup> In fact, with few exceptions, Australian courts almost routinely applied English common law choice of law rules to the interstate context. Such an approach was often justified by the claim that the Australian states and territories, for the purposes of private international law, were foreign countries to one another.<sup>6</sup>

<sup>4</sup> Such a situation arose in *Breavington v Godleman* (1988) 169 CLR 41.

<sup>5</sup> See Cowen, 'Full Faith and Credit: The Australian Experience', above n 2; Cowen, *American-Australian Private International Law*, above n 3, 8–10, 19–29; Zelman Cowen, 'The Conflict of Laws by Graveson' (1957) 1 *Melbourne University Law Review* 126, 127.

<sup>6</sup> In *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375, 396 ('*Chaff and Hay*'), Williams J said: '[In the context of private international law] South

As Cowen noted, such an assertion seems misplaced in the context of a highly homogenous and integrated federal system in Australia with shared political, cultural and linguistic traditions.<sup>7</sup> Legally also, Australia is remarkably unified compared to other federations such as the United States in that it inherited a single body of common law from England and has, since Federation, been subject to overriding appellate control in state and federal matters by the High Court. The development of a set of conflict of laws rules which reflects the commonality and unity of the Australian federation may therefore have been expected in interstate conflict of laws. Instead, Australian courts applied rules developed by the English courts for transnational disputes involving conflicts with the laws of European civil law countries. This approach was likely part of a more 'general disinclination on the part of Australian courts to take into account special local conditions in deciding whether the general principles of [English] unenacted law should apply'.<sup>8</sup>

Cowen's argument, therefore, was that Australian courts' adherence to English precedent developed in the disparate context of international conflicts often obscured the fundamentally local nature of intra-Australian cases. Moreover, as Cowen again noted, there exists a provision in the Australian federal *Constitution* which appears highly relevant to the resolution of interstate conflict of laws disputes, yet had also been largely ignored by Australian courts. Section 118 of the *Constitution* provides that '[f]ull faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State'. This 'full faith and credit' clause was barely mentioned in the Convention debates with the general view appearing to be that its effect was solely to dispense with the need for parties to litigation to 'prove' interstate laws by expert evidence as is required with most foreign laws.<sup>9</sup> Hence, a Victorian court should take judicial notice of a New South Wales statute and apply it directly to the facts

Australia is a foreign country in the courts of New South Wales'. This sentiment was still alive and well 17 years later when Windeyer J declared that '[t]he States are separate countries in private international law, and are to be so regarded in relation to one another': *Pedersen v Young* (1964) 110 CLR 162, 170. Rather amazingly, this last quotation was very recently endorsed by Gray J of the Supreme Court of South Australia in *Re Tamburin* (2014) 119 SASR 143, 146 [9].

<sup>7</sup> Cowen, *American-Australian Private International Law*, above n 3, 84. The same view was expressed, more than 30 years later, by Mason CJ of the High Court in *Breavington v Godleman* (1988) 169 CLR 41, 77–8.

<sup>8</sup> Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1, 9.

<sup>9</sup> Cowen, 'Full Faith and Credit: The Australian Experience', above n 2, 34–5; Cowen, *American-Australian Private International Law*, above n 3, 20.

of a case but only after such law was selected pursuant to the common law choice of law rules. Such an approach to full faith and credit was described as giving the clause 'evidential' as opposed to 'substantive' effect.<sup>10</sup>

Cowen, however, felt that this approach was too narrow and limited given both the highly integrated and homogenous nature of the Australian federation and the fact that a very similar provision existed in the *United States Constitution*<sup>11</sup> which the United States Supreme Court had (at the time at which Cowen wrote) given a substantive operation in United States interstate conflict of laws disputes. According to the then applicable United States approach, a state court must apply the law of another state in any case where the common law choice of law rules pointed to that state's law.<sup>12</sup> Cowen therefore felt that the full faith and credit clause should be given greater effect and recognition in Australian law. In this regard, Cowen welcomed<sup>13</sup> the 1933 decision of the High Court in *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* ('*Merwin Pastoral*').<sup>14</sup>

*Merwin Pastoral* involved an action by a vendor in Victoria for unpaid instalments and interest on a contract for the sale of land and chattels in New South Wales. The contract was found to be governed by New South Wales law and the defendant relied on a New South Wales statute, the *Moratorium Act 1930* (NSW), which annulled any personal obligation to complete an instalment contract and limited the vendor to its rights against the land. The Victorian Supreme Court declined to apply this legislation on the ground that its effect was to contravene the public policy of Victoria by causing serious injustice to the plaintiff. The public policy exclusion is well-established in common law principles of choice of law, allowing an Australian court, exceptionally, to exclude a foreign law which would otherwise be applied as

<sup>10</sup> See Cowen, *American-Australian Private International Law*, above n 3, 20.

<sup>11</sup> *United States Constitution* art IV § 1.

<sup>12</sup> Cowen cites *Hughes v Fetter*, 341 US 609 (1951) and *First National Bank of Chicago v United Air Lines Inc*, 342 US 396 (1952) as authority for this view, but the principle originated in *New York Life Insurance Co v Dodge*, 246 US 357 (1918): see Cowen, *American-Australian Private International Law*, above n 3, 26. Note, however, that since the 1980s, the United States Supreme Court has dramatically wound back its interpretation of the full faith and credit clause, now requiring only that the forum state have a significant contact or contacts with the subject matter of the litigation before it can validly apply its law: *Allstate Insurance Co v Hague*, 449 US 302 (1981).

<sup>13</sup> Cowen, *American-Australian Private International Law*, above n 3, 21.

<sup>14</sup> (1933) 48 CLR 565.

part of the law of the cause of action where its operation would offend fundamental values and policies of the forum or cause substantial injustice.<sup>15</sup>

The High Court in *Merwin Pastoral*, however, reversed the decision of the Victorian Supreme Court, holding that the *Moratorium Act 1930* (NSW) must be applied in the Victorian proceeding as part of the law of the contract. Importantly, the Court suggested that the full faith and credit clause precluded an Australian state court from invoking the common law public policy rule to deny effect and operation to laws of other states.<sup>16</sup> The effect of the judgments of Rich and Dixon JJ and Evatt J was that it was not appropriate for a state court to exclude another state's laws on the ground that they offended the forum's fundamental values. Full faith and credit therefore required a modification to the operation of the common law choice of law rules for interstate conflict of laws in Australia to the extent that the public policy exclusion no longer could be applied. The *Merwin Pastoral* decision is therefore an example of an Australian court giving 'substantive' effect to the full faith and credit provision for the first time.

In *Merwin Pastoral*, Evatt J also pointed out that 'Victoria too [had] enacted a law which differed in degree only from that of New South Wales'.<sup>17</sup> Hence, presumably even if the public policy basis for exclusion of foreign laws were available in the interstate sphere, *Merwin Pastoral* was not an appropriate case for its employment as there was a 'false conflict'. Victoria could hardly be offended by a law the substance of which it had also enacted. Consequently, there was no bar to the Victorian Court applying the New South Wales statute directly.

Cowen also shows how the full faith and credit clause was ignored in other Australian decisions in circumstances where it was arguably relevant.<sup>18</sup> In *Potter v The Broken Hill Proprietary Co Ltd* ('Potter'), an action was brought in Victoria by a Victorian plaintiff against a Victorian defendant for infringement in New South Wales of a New South Wales registered patent.<sup>19</sup> The Court refused to adjudicate the action on the basis of two doctrines — the *Moçambique*<sup>20</sup> and act of state<sup>21</sup> principles which were developed in the

<sup>15</sup> For a recent statement, see *Jenton Overseas Investment Pte Ltd v Townsing* (2008) 21 VR 241, 246–7 [22].

<sup>16</sup> (1933) 48 CLR 565, 577 (Rich and Dixon JJ), 588 (Evatt J).

<sup>17</sup> *Ibid* 587.

<sup>18</sup> See Cowen, 'Full Faith and Credit: The Australian Experience', above n 2, 54–6; Cowen, *American-Australian Private International Law*, above n 3, 26–8.

<sup>19</sup> (1906) 3 CLR 479.

<sup>20</sup> See *British South Africa Company v Companhia de Moçambique* [1893] AC 602.

context of transnational disputes between English law and foreign legal systems. The *Moçambique* rule provides that a court cannot adjudicate an action involving title or trespass to foreign land and was created in the midst of a highly politically sensitive dispute between two colonial empires involving lands in Africa. The act of state doctrine provides that a court of one nation may not review the validity of the acts of a foreign state on its territory. This principle was created in the context of a tort action arising from an armed revolution in South America.

In *Potter*, Griffith CJ held that the plaintiff's action for infringement was not justiciable in Victoria because a question relating to the validity of a patent is analogous to a determination as to the title to or possession of foreign land.<sup>22</sup> All members of the Court (Griffith CJ, Barton J and O'Connor J) relied on the act of state doctrine to hold that the grant of a patent monopoly by administrative authorities of the State of New South Wales amounted to an unreviewable act of a foreign state for the purposes of proceedings in the courts of Victoria.<sup>23</sup> As Griffith CJ put it, '[t]his case must therefore ... be considered on precisely the same basis as if the patent in question had been granted by the Government of the French Republic or of the United States of America'.<sup>24</sup> Surely, however, the decision of an administrative officer in a neighbouring Australian state to grant a patent is not of the same political sensitivity as the determination of colonial boundaries in Africa or the legality of acts during a revolution in South America.

To equate the international and interstate contexts here seems absurd, especially as the patent laws of both States were identical and so no question of offence to Victorian values could arise by applying New South Wales law.<sup>25</sup> As Cowen suggests, therefore, *Potter* was a case where the Court should have allowed the action to proceed in Victoria and applied New South Wales law under the full faith and credit clause.<sup>26</sup> Interestingly, Cowen's views on the *Potter* case have been implicitly endorsed recently by the High Court in *Moti v*

<sup>21</sup> See *Underhill v Hernandez*, 168 US 250 (1897).

<sup>22</sup> (1906) 3 CLR 479, 494.

<sup>23</sup> *Ibid* 498–9 (Griffith CJ), 504–7 (Barton J), 510–13 (O'Connor J).

<sup>24</sup> *Ibid* 495.

<sup>25</sup> The question, however, of whether an Australian court can adjudicate upon the validity of a patent granted by a *foreign country* is much more contentious and here the common law principles of abstention such as the *Moçambique* and act of state doctrines have a stronger claim to application.

<sup>26</sup> See Cowen, 'Full Faith and Credit: The Australian Experience', above n 2, 55–6.

*The Queen*.<sup>27</sup> Six members of the Court there noted that *Potter* was argued on a basis which can now be seen to be false, namely 'that, for the purposes of the question ... under consideration, the several States of Australia stand towards each other in the position of foreign States'<sup>28</sup> and further, that '[n]o consideration appears to have been given in argument or in the judgments to relevant constitutional questions including, but not limited to, the application of the full faith and credit provisions of s 118 of the *Constitution*'.<sup>29</sup>

Another example where Australian courts previously failed to appreciate the difference between the international and interstate contexts and the relevance of the full faith and credit clause occurred in the area of interstate torts. In *Koop v Bebb* an action for wrongful death was brought in Victoria arising from an accident which occurred in New South Wales.<sup>30</sup> Despite the wrongful death legislation of both States being effectively identical (and so no conflict of laws existing) the plaintiff, in order to recover, was required to satisfy the cumbersome and confusing tort choice of law rule in *Phillips v Eyre*.<sup>31</sup> Under this rule the plaintiff had to show that the claim was actionable under both the law of the forum (Victoria) and the law of the place of the wrong (New South Wales). As Cowen again suggests, surely a simpler solution would have been for the Victorian Court to apply New South Wales law directly under the full faith and credit clause as there was again no difference in content with Victorian law and the jurisdictions were neighbouring units of a federation.<sup>32</sup>

Application of the rule in *Phillips v Eyre* led to absurd and unjust results in later cases that were decided after Cowen had written. In a number of Australian interstate personal injury cases plaintiffs were allowed to proceed under forum law despite the action being barred or limited under the law of the place of the wrong.<sup>33</sup> Plaintiffs were, in effect, immunised from the laws of the states to which they had travelled and allowed to carry their own residen-

<sup>27</sup> (2011) 245 CLR 456.

<sup>28</sup> *Ibid* 475 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *Potter* (1906) 3 CLR 479, 510 (O'Connor J).

<sup>29</sup> *Moti v The Queen* (2011) 245 CLR 456, 475 [49].

<sup>30</sup> (1951) 84 CLR 629.

<sup>31</sup> (1870) LR 6 QB 1.

<sup>32</sup> See Cowen, 'Full Faith and Credit: The Australian Experience', above n 2, 54-5; Cowen, *American-Australian Private International Law*, above n 3, 28.

<sup>33</sup> See, eg, *Breavington v Godleman* [1985] VR 851, revd (1988) 169 CLR 41; *Hartley v Venn* (1967) 10 FLR 151; *Kolsky v Mayne Nickless Ltd* [1970] 3 NSW 511; *Kemp v Piper* [1971] SASR 25.

tial law with them and invoke it in any subsequent tort dispute. Such an outcome is known as ‘forum shopping’, a recognised cardinal sin in private international law according to most scholars and judges.<sup>34</sup> Such a practice has some defensibility in the context of transnational disputes involving highly different legal systems, where protection for an Australian party from unconscionable or outrageous foreign laws is sought. Yet this approach is clearly inappropriate to the interstate situation where courts of one Australian state should be willing, if not obliged, to recognise and give effect to the laws of another state or territory, at least where such latter jurisdiction has a closer connection to the subject matter of the dispute.

Relying on the *Merwin Pastoral* case, Cowen then proceeded to go further and propose a more far-reaching interpretation of the full faith and credit clause. Returning to the common law choice of law rule for torts, from the *Phillips v Eyre* decision, Cowen noted that it had two parts. The first part provided that the plaintiff must show that its claim was actionable under the law of the place of the wrong. The second part of the rule required the plaintiff to show that its claim was actionable under the law of the forum. Cowen noted that in *The Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v Benham; The Halley*,<sup>35</sup> a case decided before *Phillips v Eyre*, a plaintiff’s action in relation to a foreign tort had failed because he had been unable to show that the defendant would be liable under English law as the law of the forum. In other words, the second part of *Phillips v Eyre* could not be satisfied. Cowen argued that the second part of the rule in *Phillips v Eyre* was in effect a public policy-type exclusion since the court would refuse to recognise a foreign species of tort liability unless forum law would also have provided relief on the same facts. The foreign law of the place of the wrong was therefore entirely subordinated to the local law of the forum.

Consequently, in Cowen’s view, if the High Court were correct in *Merwin Pastoral* that the full faith and credit clause prevented an Australian state court from using forum law to prevent the admission of the laws of another state on the ground of public policy, the same outcome should also be reached in the case of the second part of *Phillips v Eyre* inasmuch as it also gave undue preference to forum law. In Cowen’s words, ‘[t]here is a strong case for arguing ... in ... interstate tort cases, the application of the [second part of

<sup>34</sup> See Sir Anthony Mason, ‘Foreword’ in Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) ix, ix.

<sup>35</sup> (1868) LR 2 PC 193.

the] *Phillips v Eyre* rule[] would be unconstitutional'.<sup>36</sup> The argument is that methods of forum control in common law private international law such as the public policy exclusion and choice of law rules which wholly or partly refer to forum law such as *Phillips v Eyre* are all incompatible with the obligation on an Australian state to give full faith and credit to the statutory laws of other states.

Cowen would likely have added to this list of forum-favouring rules an overbroad use of the 'procedural' classification to shut out laws of other states such as in the case of the statute of frauds and statutes of limitation. Some explanation is required here. Common law choice of law rules have long distinguished between questions of substance which are governed by the law applicable to the cause of action and issues of procedure which are determined by the law of the forum.<sup>37</sup> Courts in common law countries such as Australia have until recently given a very broad definition to 'procedural' to embrace any matter concerning the *remedy* as opposed to the right in a dispute.<sup>38</sup> According to this approach, issues such as the application of writing requirements in contracts or whether an action was barred by expiry of time were regarded as procedural since they did not bar the right of action but only the method of enforcing such right (the remedy). Hence, in common law countries where foreign law governed the cause of action and imposed a writing requirement or a limitation period, such rules could be ignored by a plaintiff suing in an Australian jurisdiction such as Victoria as an Australian court would only apply its own procedural rules. Forum shopping was therefore encouraged by this approach. Civil law countries, by contrast, have long defined procedure more narrowly as referring only to the mechanics of the litigation and so give more scope to the applicable law of the cause of action.

Cowen, therefore, is to be applauded for stating as early as the 1950s that in interstate conflict of laws disputes an expansive interpretation of forum law was undesirable. Australian state courts should seek to apply interstate laws as far as possible when it is found to be the law governing the cause of action not only on the basis of trust and respect between coordinate federal units of a

<sup>36</sup> Cowen, *American-Australian Private International Law*, above n 3, 28. In fact, Cowen took the view that both limbs of *Phillips v Eyre* were unconstitutional.

<sup>37</sup> For a fuller discussion of the substance-procedure distinction, see Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012).

<sup>38</sup> But see below nn 70–2 and accompanying text.

single country but also because the *Constitution* (in the full faith and credit clause) demands it.<sup>39</sup>

### III SUBSEQUENT DEVELOPMENTS

If Cowen were a voice in the wilderness in the 1950s he would no doubt have been impressed by subsequent developments in Australian law — although the change in approach took some time to emerge. The application of the common law choice of law rules to interstate matters with little or no reference to the federal *Constitution* (in particular, s 118) continued to be the dominant paradigm in Australia until 1988. In the 30-year period from 1957 (when Cowen last wrote on the subject) until 1987 only two major decisions were handed down on the impact of the full faith and credit clause on interstate choice of law: one progressive and one conservative.

In *Permanent Trustee Co (Canberra) Ltd v Finlayson* ('*Finlayson*'), Dunphy J of the Supreme Court of the Australian Capital Territory held that it was not appropriate for a state or territory court to refuse to apply legislation of another state or territory on the basis that it was a penal or revenue law or involved foreign governmental interests.<sup>40</sup> Once again, such grounds are well-recognised bases for declining to enforce foreign laws in common law principles of private international law. Dunphy J, however, correctly found that such concerns are hardly warranted in the context of the highly integrated Australian federation and that the full faith and credit clause, consistent with its interpretation in the *Merwin Pastoral* case, should preclude recourse to such common law exclusionary rules.

Interestingly, Cowen had anticipated this very issue when he said that

the rule that a forum will not enforce a foreign tax claim, whatever its justification in the international field, has very doubtful validity as between the juris-

<sup>39</sup> Cowen, *American-Australian Private International Law*, above n 3, 28 n 89, briefly adverts to another High Court decision in which full faith and credit could have been relied upon: *Chaff and Hay* (1947) 74 CLR 375. In *Chaff and Hay* the High Court applied common law choice of law principles to allow an entity created by South Australian law (the Chaff and Hay Acquisition Committee) to sue and be sued in New South Wales where the entity, though not a corporation, had separate personality from its members. Arguably, a more direct path for recognition of the Committee could have been via application of the full faith and credit clause.

<sup>40</sup> (1967) 9 FLR 424, 439. Dunphy J's decision was reversed by the High Court on other grounds in *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338.

dictions within a federation. The maintenance of the rule materially aids tax evasion.<sup>41</sup>

The *Finlayson* case therefore reveals Cowen to have been again ahead of his time.

Three years earlier a more ambitious claim for full faith and credit was made in the High Court in *Anderson v Eric Anderson Radio & TV Pty Ltd* ('*Anderson*').<sup>42</sup> *Anderson* involved a negligence action in New South Wales arising out of a road accident in the Australian Capital Territory. The plaintiff argued that Australian Capital Territory legislation which abolished the defence of contributory negligence<sup>43</sup> should apply to the New South Wales proceeding under the full faith and credit clause (in preference to New South Wales law under which contributory negligence was a complete defence). The High Court, however, rejected the argument, saying that full faith and credit did not displace the common law choice of law rule for tort (*Phillips v Eyre*) but at most only required an Australian state court to take judicial notice of another state or territory's law after such law had been selected pursuant to the common law choice of law rule.

#### IV *BREAVINGTON v GODLEMAN* AND BEYOND

Such settled orthodoxy was, however, to be dramatically challenged 23 years later in the High Court decision in *Breavington v Godleman* ('*Breavington*').<sup>44</sup> In *Breavington*, a majority of the Court acknowledged for the first time that the federal *Constitution* may have a substantial impact on choice of law questions in interstate disputes within Australia.

Mason CJ noted that a clause existed in the *Constitution* which confers on the federal Parliament power to legislate with respect to the 'recognition throughout the Commonwealth of the laws [and] public Acts ... of the States',<sup>45</sup> which may be a source of federally enacted choice of law rules.<sup>46</sup> The Australian Law Reform Commission, in its 1992 report on choice of law, supported this view.<sup>47</sup> The advantage of federally enacted choice of law rules

<sup>41</sup> Cowen, *American-Australian Private International Law*, above n 3, 10.

<sup>42</sup> (1965) 114 CLR 20.

<sup>43</sup> *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT) s 15.

<sup>44</sup> (1988) 169 CLR 41.

<sup>45</sup> *Constitution* s 51(xxv).

<sup>46</sup> *Breavington* (1988) 169 CLR 41, 83.

<sup>47</sup> Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) 25 [3.24].

would be the attainment of uniformity of result in interstate choice of law cases throughout Australia since all courts, state, territory and federal, would have to apply the same rules. This conclusion of course assumes that the rules themselves are balanced and do not unduly favour the law of the forum.

Yet such federal rules have never been enacted. One explanation may be out of a concern that to do so would curtail state legislative power since any state legislation on choice of law inconsistent with the federal rules would be invalid under s 109 of the *Constitution*. In other words, the policy of preserving state legislative sovereignty and interests within the federation is regarded as having priority over the accomplishment of uniformity of result. Of course, another explanation for Commonwealth inaction may be simply inertia or uncertainty as to the extent of its constitutional powers. Mason CJ's suggestion, therefore, while intriguing, has not been acted upon.

Three other judges in *Breavington* suggested that the full faith and credit clause in s 118 of the *Constitution* (and wider inferences from the *Constitution* as a whole) had the effect of displacing the common law choice of law rules. According to Wilson and Gaudron JJ, the purpose of the full faith and credit clause is to ensure that 'one set of facts occurring in a State would be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication'.<sup>48</sup> In other words, uniformity of outcome is mandated by the *Constitution*: to achieve this in a tort case an Australian court must apply the law of the place of the wrong as a 'constitutional' rule.

Deane J in *Breavington* similarly found the common law choice of law rules to be ousted by the *Constitution* which, in his view, created a 'unitary national legal system' in Australia.<sup>49</sup> The consequence of such a system was that an Australian court is required to apply the law with the 'predominant territorial nexus' to the facts of the case — which in a tort case will almost always be the law of the place of the wrong.

The views of Wilson and Gaudron JJ and Deane J to the effect that the *Constitution* abrogated common law choice of law rules were, however, not accepted by the majority (Mason CJ, Brennan J, Dawson J and Toohey J) in *Breavington*. Three years later a differently constituted majority of the High Court even more emphatically rejected any concept of constitutionally embedded choice of law rules, at least in part for the reason that such an approach would nullify state legislative power — specifically the capacity to

<sup>48</sup> *Breavington* (1988) 169 CLR 41, 98.

<sup>49</sup> *Ibid* 124; see generally at 120–2, 124–5.

legislate inconsistently with the ‘constitutionalised’ choice of law rules. In *McKain v R W Miller & Co (South Australia) Pty Ltd* (*McKain*), Brennan, Dawson, Toohey and McHugh JJ said:

a constitutional imperative that the courts of a State should apply only the substantive law of another part of the Commonwealth in determining a claim for damages for a tort occurring outside the State but within Australia would deny the forum State an important legislative power. ... The laws of the States, though recognized throughout Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts unless a valid law of the Commonwealth overrides the relevant State laws and prescribes a uniform legal consequence. That may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union.<sup>50</sup>

The above passage suggests that the only legitimate method of constitutional control of interstate conflicts is federally enacted legislation; otherwise, the protection of state legislative sovereignty within the Australian federation is paramount. Obviously much depends upon individual judges’ conceptions of the structure of the federal system, but nowhere in this passage is there recognition of the problem of plaintiff forum shopping and how such a practice undermines the legislative integrity of states by strategic choice of forum.<sup>51</sup>

If this view on the constitutional issue were not enough of a throwback to the past, the above judges in *McKain* then proceeded to hold that the rule in *Phillips v Eyre* should be preserved as the choice of law rule for torts<sup>52</sup> and that the scope of procedure should continue to embrace matters affecting the remedy and the enforcement of any rights, including the applicability of statutes of limitation.<sup>53</sup>

The *McKain* decision was therefore a major setback for those such as Cowen who argued that a difference in approach be taken between interstate and transnational conflict of laws cases.<sup>54</sup> The subsequent decision of the High Court in *Stevens v Head* maintained this position, holding that a New South

<sup>50</sup> (1991) 174 CLR 1, 36.

<sup>51</sup> For an extracurial critique of this passage by a judge who was later appointed to the High Court, see Justice W M C Gummow, ‘Full Faith and Credit in Three Federations’ (1995) 46 *South Carolina Law Review* 979, 1001–5.

<sup>52</sup> *McKain* (1991) 174 CLR 1, 37–40.

<sup>53</sup> *Ibid* 44–5.

<sup>54</sup> Justice Gummow also supported such a distinction, see Justice Gummow, above n 51, 1000.

Wales statutory limitation on quantum of damages was a matter of procedure, not substance, and so was inapplicable to proceedings in the Queensland forum in respect of a tort committed in New South Wales.<sup>55</sup>

Yet this was not to be the final word on the impact of the *Constitution* on interstate and intranational choice of law disputes. In what has become the leading and authoritative case on interstate choice of law in Australia, *John Pfeiffer Pty Ltd v Rogerson* ('*Pfeiffer*'), a 6:1 majority of the High Court in 2000 recognised a direct role for the *Constitution* in the formulation of common law choice of law rules.<sup>56</sup> Specifically, the choice of law rule for interstate torts was pronounced to be the law of the place of the wrong (without exception) and adoption of this rule was said to be strongly supported by constitutional principles such as full faith and credit and the nature of the federal compact including the 'predominantly territorial concern[s]' of the states and territories.<sup>57</sup> By contrast, forum-centred principles such as the rule in *Phillips v Eyre* were inconsistent with such values and so rejected. The majority also reaffirmed the principle from *Merwin Pastoral* that the law of another Australian state could not be denied application on the ground that it offended the public policy of the forum state, again due to the influence of the *Constitution*.<sup>58</sup> Yet while Wilson and Gaudron JJ and Deane J in *Breavington* had considered that the *Constitution* ousted the common law choice of law rules, the majority judges in *Pfeiffer* appeared to state that the *Constitution* merely determined *the scope and content* of such rules.

Nevertheless, in another passage the Court appeared to suggest that the *Constitution* may have an even greater effect and that the common law choice of law rules were embedded in the *Constitution*:

The matters we have mentioned as arising from the constitutional text and structure may amount collectively to a particular constitutional imperative which dictates the common law choice of law rule which we favour. It may be that those matters operate constitutionally to entrench that rule, or aspects of it concerning such matters as a 'public policy exception'. If so, the result would be

<sup>55</sup> (1993) 176 CLR 433.

<sup>56</sup> (2000) 203 CLR 503.

<sup>57</sup> *Ibid* 551 [124] (Kirby J). Note that this analysis appears to have been foreshadowed by Justice Gummow in his extrajudicial writing: Justice Gummow, above n 51, 988. He was one of the six majority judges in *Pfeiffer*.

<sup>58</sup> *Pfeiffer* (2000) 203 CLR 503, 533–4 [64], 535 [70] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

to restrict [state] legislative power to abrogate or vary that common law rule. However, we leave those questions open ...<sup>59</sup>

Such an 'entrenching' view would produce a result closer to that proposed by Wilson and Gaudron JJ and Deane J in *Breavington* in that states' legislative capacity would be confined to enacting laws which were consistent with the constitutionally mandated common law choice of law rules. The main difference between any entrenchment created by the majority in *Pfeiffer* and the view of those three judges in *Breavington* would be that the common law choice of law rules would be retained, although their content would be shaped by the integrated federal structure provided by the *Constitution*. Consequently, a choice of law rule which was expressed partly or wholly in favour of the law of the forum (such as the rule in *Phillips v Eyre*) was impermissible since it was parochial and failed to recognise adequately the interests of other states and territories in regulating activities within their borders. By contrast, a choice of law rule based on a strict application of the law of the place of the wrong (which was adopted by the Court in *Pfeiffer*) was neutral and so sat much more comfortably with constitutional values.

Interestingly, however, despite some references to the issue in later cases, the Court has refused to confirm whether such 'constitutionalisation' of the common law choice of law rules has occurred and the question remains strictly unresolved. For example, in *Sweedman v Transport Accident Commission* ('*Sweedman*'), the Court had to consider an action in Victoria for an indemnity by a Victorian insurer under Victorian legislation against a New South Wales resident in respect of an accident that occurred in New South Wales.<sup>60</sup> It was argued by the defendant that the Victorian statute could not apply because it was inconsistent with a New South Wales statute. A majority of the Court (Gleeson CJ, Gummow, Kirby and Hayne JJ) found there to be no inconsistency between the statutes on the facts.<sup>61</sup> The majority also held that the Victorian statute applied to allow the claim for indemnity since such a claim was characterised for choice of law purposes as restitutionary and governed by the law of the state with the closest connection to the obligation to indemnify, which was Victoria.<sup>62</sup> While such a conclusion is consistent with the view that the common law choice of law rules have been constitutionally

<sup>59</sup> Ibid 535 [70].

<sup>60</sup> (2006) 226 CLR 362.

<sup>61</sup> Ibid 405–6 [43]–[45].

<sup>62</sup> Ibid 402 [32].

entrenched, the Court did not reach its decision on that ground and expressed no opinion on the issue.

By contrast, when *Sweedman* was before the Victorian Court of Appeal, Nettle JA (with whom Winneke P agreed) commented in obiter that a state legislature may have only limited power to change the common law choice of law rules, which suggests the existence of some sort of constitutional entrenchment.<sup>63</sup>

A middle position between full constitutional entrenchment of the common law rules and only constitutional ‘influence’ on such rules is the suggestion that the *Constitution* operates as a prohibition on choice of law rules of a forum-centred nature.<sup>64</sup> This approach is similar to that advocated by Cowen.<sup>65</sup> In this category would be the rule in *Phillips v Eyre*, the application of the exclusionary doctrines to interstate laws such as the public policy and the penal and revenue exceptions and, arguably, also an excessively wide conception of procedure. All such matters could not be the subject of valid state legislation. Certainly this view can be seen to have historical continuity since, as noted above, the High Court in the *Merwin Pastoral* case suggested that full faith and credit operated to displace the common law public policy exception. In practice, however, this view goes close to entrenchment since it potentially knocks out any state legislated choice of law rule which favours the forum, which is not so different to saying that the law of the place of the wrong is a constitutionally mandated choice of law rule.

Some commentators (predominantly from constitutional law backgrounds) have, however, rejected the view that the common law choice of law rules are constitutionally embedded for the reason that this approach would unduly restrict state legislative power.<sup>66</sup> These scholars see a different role for the full faith and credit clause in resolving interstate conflicts in Australia. The provision should be used to give ‘full effect’ to state statutes including where they have extraterritorial effect with the result that a statute of State A would prevail over the common law in State B in the event of a conflict. Where a conflict existed between state statutes (as was argued but not found in

<sup>63</sup> *Transport Accident Commission v Sweedman* (2004) 10 VR 31, 47 [50].

<sup>64</sup> See, eg, Graeme Hill and Adrienne Stone, ‘The Constitutionalisation of the Common Law’ (2004) 25 *Adelaide Law Review* 67, 80–1, 95.

<sup>65</sup> See above nn 35–6 and accompanying text.

<sup>66</sup> Greg Taylor, ‘The Effect of the *Constitution* on the Common Law as Revealed by *John Pfeiffer v Rogerson*’ (2002) 30 *Federal Law Review* 69; Perry Herzfeld, ‘Constitutional Limitations on State Choice of Law Statutes’ (2005) 16 *Public Law Review* 188; James Stellios, ‘Choice of Law and the Australian *Constitution*: Locating the Debate’ (2005) 33 *Federal Law Review* 7.

*Sweedman*), principles of statutory interpretation, including favouring the state with the closest territorial connection,<sup>67</sup> or the most compelling interest,<sup>68</sup> would be used to break the deadlock.<sup>69</sup>

Yet there is no sign that any of these approaches, which attempt to shift the focus back to state legislative sovereignty and interests in resolving interstate choice of law disputes, will be adopted by the Court in the near future. After *Pfeiffer* the High Court now seems more concerned with furthering traditional private international law interests in interstate choice of law disputes, namely, providing for certainty, predictability and uniformity of outcome and deterring forum shopping, rather than preserving state powers. For the first time, also, the High Court has recognised a separate body of private international law rules for interstate and intranational disputes, one uniquely influenced by the text and structure of the *Constitution*. Such a regime reflects the cultural, political and legal homogeneity of the Australian federation and is a clear endorsement of the views of Cowen expressed more than 40 years before.

The High Court in *Pfeiffer* further loosened the control of forum interests on choice of law by redefining the boundaries of substance and procedure. Gone was the distinction between the existence of the right (substantive) and the enforcement of the right, or remedy (procedural) which had been a gift to plaintiff forum shoppers, especially in time limitation and quantum of damages cases. After *Pfeiffer* any matter pertaining to the 'mode or conduct of court proceedings' will be classified as procedural and governed by forum law<sup>70</sup> and any matter directed at the 'existence, extent or enforceability of the rights and duties of the parties to an action' will be regarded as substantive and governed by the law of the cause of action.<sup>71</sup> In addition, and to clarify, 'all questions about the kinds of damage, or amount of damages that may be recovered' would be regarded as substantive.<sup>72</sup>

<sup>67</sup> *Stellios*, above n 66, 54; Justice Bradley Selway, 'The Australian "Single Law Area"' (2003) 29 *Monash University Law Review* 30. See also Geoffrey Lindell and Sir Anthony Mason, 'The Resolution of Inconsistent State and Territory Legislation' (2010) 38 *Federal Law Review* 390.

<sup>68</sup> Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247.

<sup>69</sup> See Stephen Gageler, 'Private Intra-national Law: Choice or Conflict, Common Law or Constitution?' (2003) 23 *Australian Bar Review* 184, 187.

<sup>70</sup> (2000) 203 CLR 503, 543–4 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>71</sup> *Ibid* 543 [99].

<sup>72</sup> *Ibid* 544 [100] (emphasis in original).

In a stroke, much of the previous practice of forum shopping in interstate cases has been extinguished — now the applicable limitation period and all questions relating to the availability and quantum of damages will be governed by the law of the cause of action — regardless of where the matter is heard. Interestingly, unlike the tort choice of law rule, this change was not said by the Court to be expressly motivated by constitutional concerns. Yet, as noted above, an excessively wide and forum-centred conception of procedure may be precisely the type of common law choice of law rule which the full faith and credit clause should aim to ‘prohibit’.

## V CONCLUSION

The result today, therefore, is that a position very similar to that advocated by Cowen in the 1950s has been reached for interstate conflicts. While the *Constitution* (including the full faith and credit clause) does not oust the common law choice of law rules entirely (as Wilson and Gaudron JJ and Deane J in *Breavington* had suggested), it nevertheless has a strong influence on their content and gives wide operation to interstate statutes in Australian courts. In particular, the rule in *Phillips v Eyre*, which had been part of Australian law for 130 years, was finally banished on the basis that any choice of law rule which excessively favours the forum is incompatible with the *Constitution*. Cowen would hopefully feel heartened and vindicated by this outcome. An issue which, however, remains unresolved is whether the *Constitution* has a role in resolving conflicts between state and state, and state and territory, legislation. It would have been interesting to know Cowen’s views on this question.

So in conclusion, it is no exaggeration to say that Sir Zelman Cowen was a pioneer in the emergence of a truly interstate private international law system in Australia. For well over 80 years Australian courts, with a few exceptions, largely treated interstate and international choice of law cases alike despite the entirely different contexts involved. Cowen ‘forcefully advocated a new thinking in Australia on problems of interstate private international law’<sup>73</sup> and his pleas were ultimately, if belatedly, accepted.

<sup>73</sup> Haddon Storey, ‘*Bilateral Studies: American-Australian Private International Law*’ (1959) 2 *Melbourne University Law Review* 274, 274.