

THE AUSTRALASIAN ASSOCIATION OF PRIVATE INTERNATIONAL LAW

Launch of the Association

5 December 2024

The Hon. A S Bell

Chief Justice of New South Wales*

- 1 It is with great pleasure that I am able to participate, albeit indirectly on this occasion, in the launch of the Australasian Association of Private International Law. I am equally delighted to have been asked to be the Association's inaugural patron.
- 2 As many of you will know, private international law has held my intellectual fascination for many years – or for many decades, if I were to be totally honest, since my introduction to the subject by Ross Anderson in the mid-1980s at Sydney University Law School. At law school, we grappled with *Oceanic Sun Line Special Shipping Co Inc v Fay*¹ (**Oceanic Sun**) and *Breavington v Godleman* (**Breavington**).² The former, as you may recall, involved five judges taking three different approaches to an important question of practice and procedure, namely *forum non conveniens* stays of proceedings; the latter also involved a number of different approaches being taken by the High Court in different sets of reasons of great length and complexity to questions of choice of law in tort, with an Australian constitutional law overlay.
- 3 After law school and during my year or so as Sir Anthony Mason's Associate in 1990-1991, two very important private international law cases were decided in

* The Chief Justice acknowledges the assistance of his tipstaff, Mr John Lidbetter, in the preparation of this paper.

¹ (1988) 165 CLR 197; [1988] HCA 32.

² (1988) 169 CLR 41; [1988] HCA 40.

the High Court. The first was *McKain v Miller*³ (dealing with questions of substance and procedure and which Peter Nygh described as “the Miraculous raising of Lazarus” because it reinstated *Phillips v Eyre*⁴ by a sidewind after many thought it had been put to bed in *Breavington*).⁵ The second was *Voth v Manildra*,⁶ which famously went against the trend and did not adopt *Spiliada*,⁷ but resolved the 3-2 split in *Oceanic Sun*, securing the clearly inappropriate forum test⁸ and, in the words of Sir Anthony Mason many years later, placing Australia in “lonely isolation” amongst common law jurisdiction.⁹

- 4 As with a number of people watching this address, I then had the great good fortune to be taught conflicts in Oxford by Adrian Briggs and Francis Reynolds with occasional visits by Lawrence Collins, then a partner of Herbert Smith before his inevitable but spectacular rise up the British judicial hierarchy. The latter two were my doctoral examiners and Adrian, my supervisor. Ed Peel, editor of *Treitel’s The Law of Contract*, was in my BCL class, and won the conflicts prize. He went on to teach the BCL conflicts course for many years with Adrian Briggs. And Andrew Dickinson was one year after me, and now runs the BCL seminar, assisted by Associate Professor Dr Brooke Marshall, now a Fellow of Teddy Hall but a graduate of the University of Queensland, Oxford and the University of Hamburg, and a former senior lecturer at UNSW where she taught conflicts. Andrew Dickinson of course also spent time as a Professor at the University of Sydney before his return to Oxford.

- 5 Australia and New Zealand have a very rich history when it comes to conflict of laws or private international law scholarship, contributed to in Australia’s case by our federal polity and the inevitable conflict of laws issues presented by it,

³ *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1; [1991] HCA 56.

⁴ (1870) LR 6 QB 1.

⁵ P E Nygh, “The Miraculous Raising of Lazarus: *McKain v R W Miller & Co (South Australia) Pty Ltd*” (1992) 22(2) *University of Western Australia Law Review* 386.

⁶ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; [1990] HCA 55.

⁷ *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

⁸ See AS Bell, “The Natural Forum Revisited” in Andrew Dickinson and Edwin Peel (eds), *A Conflict of Laws Companion: Essays in Honour of Adrian Briggs* (OUP, 2021); AS Bell, “Sir Anthony Mason and the Conflict of Laws- a Critical Appraisal” in Barbara McDonald, Ben Chen, Jeffrey Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022).

⁹ Sir Anthony Mason, “Foreword” in AS Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP, 2003).

overlain by the *Commonwealth Constitution* and the *Judiciary Act 1903* (Cth). The *Trans-Tasman Proceedings Act 2010* (Cth) and its New Zealand analogue¹⁰ have generated a new line of case law between our jurisdictions.¹¹

- 6 One aim of the Trans-Tasman legislation was to promote comity between Australian and New Zealand jurisdictions, as evidenced by the recent New Zealand decision of *A-Ward Ltd v Raw Metal Corp Pty Ltd*,¹² where the Court held that anti-suit injunctions were unavailable under the Trans-Tasman regime. Justice Gorman observed that the Trans-Tasman legislation reflects both countries' "confidence in each other's judicial institutions",¹³ and that anti-suit relief has "no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction".¹⁴
- 7 The New Zealand courts may also have an opportunity to consider interesting choice of law and jurisdictional issues in a Trans-Tasman defamation context after Australia's former foreign minister, Bob Carr, accused New Zealand's foreign minister and deputy prime minister, Winston Peters, of defamation.¹⁵
- 8 When I was going through law school, there were two leading Australian texts, Peter Nygh's *Conflict of Laws in Australia* and *Australian Private International Law* by Sykes and Pryles which sadly never went beyond its third edition in 1991. It has found a worthy replacement, however, in *Private International Law*

¹⁰ *Trans-Tasman Proceedings Act 2010* (NZ).

¹¹ In Australia, see eg *Zurich Insurance PLC v Koper* (2023) 277 CLR 164; [2023] HCA 25; (2022) 110 NSWLR 380; [2022] NSWCA 128 (service of process and personal jurisdiction); *Herd v Haines* [2023] FCA 325 (recognition and enforcement of New Zealand judgment); *Huang v Drumm* [2019] NSWCA 77; [2019] NSWCA 140 (stay of proceedings); *LFDB v SM* [2015] FCA 725 (freezing orders). In New Zealand, see eg *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] 2 NZLR 475; [2024] NZHC 736 (anti-suit injunction); *Whyte (suing as a representative plaintiff under High Court Rule 4.24) v A2 Milk Co Ltd* [2023] 2 NZLR 486; [2023] NZHC 22 (stay of proceedings).

¹² [2024] NZHC 736. For an insightful analysis of this case, see Maria Hook, *No role for anti-suit injunctions under the TTPA to enforce exclusive jurisdiction agreements* (ConflictOfLaws.net, 22 April 2024), available at <<https://conflictoflaws.net/2024/no-role-for-anti-suit-injunctions-under-the-ttpa-to-enforce-exclusive-jurisdiction-agreements/>>.

¹³ *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 at [4].

¹⁴ *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 at [17].

¹⁵ *Bob Carr accuses Winston Peters of defamation after NZ deputy PM calls him a 'Chinese puppet'* (The Guardian, 2 May 2024), available at <<https://www.theguardian.com/australia-news/2024/may/02/bob-carr-suing-winston-peters-defamation-nz-deputy-pm-chinese-puppet-remark>>. For commentary, see Jack Wass, *Carr v Peters: a potential case of trans-Tasman defamation* (University of Otago, 7 May 2024), available at <<https://blogs.otago.ac.nz/conflicts/carr-v-peters-a-potential-case-of-trans-tasman-defamation/>>.

in Australia, now in its fifth edition, by Reid Mortensen, Richard Garnett and Mary Keyes.¹⁶ All are leading scholars in the field.

- 9 I can also report that there will be a new edition of *Nygh* late next year under the authorship of Martin Davies, Michael Douglas and myself with Perry Herzfeld SC joining the team, taking over the chapters formerly authored by Paul Brereton.
- 10 In New Zealand, we now have Maria Hook and Jack Wass' publication *The Conflict of Laws in New Zealand* (LexisNexis, 2020).
- 11 There are also a number of Australian authored monographs on private international law topics, including:
- Brooke Marshall, *Asymmetric Jurisdiction Clauses* (OUP, 2023);
 - Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005);
 - Richard Garnett, *Substance and Procedure in Private International Law* (OUP, 2012); and
 - Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP, 2001).

as well as my own *Forum Shopping and Venue in Transnational Litigation* (OUP, 2003).

- 12 Across the ditch, there are Campbell McLachlan's books on *Lis Pendens in International Litigation* (Nijhoff, 2009) and *Foreign Relations Law* (CUP, 2016). My friend, Justice David Goddard, who will be speaking to you shortly, has also been a major contributor to the field, including but not only through his work as Chair of the Diplomatic Section of the Hague Conference on Private International Law that adopted the *Hague Convention on Recognition and*

¹⁶ Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 5th ed, 2023).

Enforcement of Foreign Judgments in Civil and Commercial Matters, work to which Professor Richard Garnett has also contributed.

13 In addition, there are collections of essays by predominantly Australian and New Zealand scholars and practitioners including:

- Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Bloomsbury, 2019);
- Andrew Dickinson, Mary Keyes and Thomas John (eds), *Australian Private International Law for the 21st Century* (Bloomsbury, 2014);
- Mary Keyes (eds), *Optional Choice of Court Agreements in Private International Law* (Springer, 2020);
- Kevin Lindgren and Nye Perram (eds), *International Commercial Law, Litigation and Arbitration* (Ross Parsons, 2011); and
- Kevin Lindgren (ed), *International Commercial Litigation and Dispute Resolution* (Ross Parsons, 2009).

14 There has also been a regular stream of judicial activity in the area of private international law in Australia the last 30 years. The cases decided in the High Court of Australia alone could form the backbone of the modern syllabus. Flowing on from *Miller v McKain* and *Voth*, we have:

- *Stevens v Head* (1993) 176 CLR 433; [1993] HCA 19 (also concerning substance and procedure and the choice of law rule in tort);
- *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418; [1996] HCA 39 (a classic case illustrating the operation of a mandatory law of the forum);
- *Henry v Henry* (1996) 185 CLR 571; [1997] HCA 51 (lis alibi pendens);

- *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; [1997] HCA 33 (anti-suit injunctions and stays of proceedings);
- *Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41 (service out of the jurisdiction);
- *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36 (choice of law in tort);
- *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575; [2002] HCA 56 (defamation);
- *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10 (choice of law in tort and the clearly inappropriate forum);
- *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; [2005] HCA 54 (renvoi);
- *Sweedman v Transport Accident Commission* (2006) 226 CLR 362; [2006] HCA 8 (choice of law involving an interstate motor accident);
- *Puttick v Tenon Ltd* (2008) 238 CLR 265; [2008] HCA 54 (stays of proceedings);
- *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 (international arbitration);
- *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1; [2015] HCA 36 (freezing orders in aid of prospective enforcement of a foreign judgment);
- *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31; [2015] HCA 43 (enforcement of foreign judgment);
- *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514; [2019] HCA 13 (interpretation of arbitration agreement);

- *Clayton v Bant* (2020) 272 CLR 1; [2020] HCA 44 (transnational res judicata created by foreign judgment);
- *Wells Fargo Trust Company National Association v VB Leaseco Pty Ltd (Administrators Appointed)* (2022) 275 CLR 1; [2022] HCA 8 (Applying the Cape Town Convention to an aircraft leasing dispute);
- *Karpik v Carnival plc* [2023] HCA 39; (2023) 98 ALJR 45 (extraterritorial application of statute);
- *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* (2023) 275 CLR 292; [2023] HCA 11 (recognition and enforcement of arbitral award as against foreign state);
- *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4; (2024) 417 ALR 173 (international arbitration agreement);
- *Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd* [2024] HCA 21; (2024) 98 ALJR 828 (foreign state immunity); and
- *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24; (2024) 98 ALJR 880 (applicability of proportionate liability legislation in arbitration).

15 The New South Wales Court of Appeal has also written extensively on jurisdiction agreements in recent years, especially in the context of multi-party disputes:

- *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419; [2019] NSWCA 61;
- *Inghams Enterprises Pty Limited v Hannigan* [2020] NSWCA 82; (2020) 379 ALR 196;

- *Lepcanfin Pty Ltd v Lepfin Pty Ltd* (2020) 102 NSWLR 627; [2020] NSWCA 155;
- *Joshan v Pizza Pan Group Pty Ltd* (2021) 106 NSWLR 104; [2021] NSWCA 219;
- *Qantas Airways Ltd v Rohrlach* [2021] NSWCA 48; (2021) 304 IR 218; and, most recently,
- *HNOE Limited v Angus & Julia Stone Pty Ltd* [2024] NSWCA 271.

- 16 Many of you will also be familiar with the Court's judgment in *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692; [2020] NSWCA 242 dealing with the extraterritorial reach of statutes and *Nyunt v First Property Holdings Pte Ltd* [2022] NSWCA 249; (2022) 408 ALR 277 dealing with matters of res judicata and issue estoppel arising from foreign judgments.
- 17 My focus on High Court and New South Wales cases is not intended to hide the fact that many other private international law cases exhibiting great scholarship and learning have been decided elsewhere in the last decade,

including in the Federal Court,¹⁷ in other Australian intermediate appellate courts,¹⁸ and in New Zealand.¹⁹

- 18 Private International law is alive and well in Australia and New Zealand in 2024, and so it should be with our ever more globalised economy and the concomitant scope for an increase in international disputes. Of course, many of these are resolved in international arbitrations but we have also seen, in recent times, the rise of international commercial courts,²⁰ whose membership is typically constituted by judges or retired judges from different jurisdictions. It will be interesting to observe what flows from this in terms of the development of legal principle, especially given that the subject matter of disputes in such tribunals will inevitably raise private international law issues.

¹⁷ Recently, see *Epic Games Inc v Google LLC* [2022] FCA 66; [2021] FCAFC 122 (stay of proceedings); *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2021) 284 FCR 319; [2021] FCAFC 3 (recognition and enforcement of arbitral award as against a foreign state); *BHP Group Limited v Impiombato* (2021) 286 FCR 625; [2021] FCAFC 93 (extraterritorial application of statutes); *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548; [2019] FCAFC 8 (service out of the jurisdiction); *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; [2017] FCAFC 224 (extraterritorial application of Australian Consumer Law); *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1; [2017] FCAFC 6 (service out of the jurisdiction); *Jones v Treasury Wine Estates Ltd* (2016) 241 FCR 111; [2016] FCAFC 59 (anti-suit injunction). For earlier authorities, see *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 1]* (1996) 64 FCR 1 (anti-suit injunction); *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496; [2004] FCA 698 (stay application); *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192 (stay application); *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (2008) 168 FCR 169; [2008] FCA 551 (stay application).

¹⁸ In Victoria, see eg *Re Tang (aka Zheng)* (2017) 52 VR 786; [2017] VSCA 171 (choice of law in succession); *Australian Gourmet Pastes Pty Ltd v IAG New Zealand Ltd* (2017) 321 FLR 345; [2017] VSCA 155 (stay of proceedings). In Queensland, see eg *Geoscience Resource Recovery LLC v Central Petroleum Ltd* [2019] 2 Qd R 276; [2018] QCA 216 (service out of the jurisdiction); *Mackellar Mining Equipment Pty Ltd v Thornton (Appeal Flag per AP request)* [2019] QCA 077; (2019) 367 ALR 171 (anti-suit injunction). In Western Australia, see eg *Kok v Resorts World at Sentosa Pte Ltd* [2017] WASCA 150; (2017) 323 FLR 95 (recognition of foreign judgment); *Man Mahan Singh v Sardul Singh* [2009] WASCA 53; (2009) 253 ALR 575 (in personam relief in respect of foreign immoveable property). In South Australia, see *Andressen v Bendigo and Adelaide Bank Ltd* [2018] SASCFC 30 (service out of the jurisdiction).

¹⁹ See, eg, *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 (anti-suit injunctions under the Trans-Tasman legislation); *Commerce Commission v Viagogo AG* [2024] NZHC 713 (asymmetric jurisdiction clause deemed an unfair contract term); Maritime Mutual Insurance Association (NZ) Limited v Silica Sandport Inc [2023] NZHC 793 (anti-suit injunction); *Whyte v A2 Milk Company Ltd* [2023] NZHC 22 (stay of proceedings); *Lu v Industrial and Commercial Bank of China (NZ) Ltd* [2020] NZHC 402 (anti-suit injunction).

²⁰ The Hon Justice A S Bell, "An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea?" (2020) 94 *Australian Law Journal* 24; The Hon Justice J Allsop, *International Commercial Courts: Next Frontier or Latest Trend?* (Singapore International Commercial Court Symposium, Speech, 10 March 2021).

- 19 I am delighted that this Association has been founded by those members of the academy and profession who recognise the importance of private international law and also its intrinsic fascination. It will provide an invaluable forum for debate on a whole host of topics. As my survey of just some of the recent decisions suggests, there is much to debate.
- 20 There is also, I venture to suggest, an important role the Association can play in advancing the profession's knowledge of private international law. In very, very few law schools is it a compulsory subject and, even where it is, it is offered in a fairly truncated manner.²¹ Not all Law Schools have the means to offer it as an elective and yet, as we know, private international law issues regularly present themselves in practice, both federally and on an international basis. One role of the Association will be to assist in raising the profile of this subject, including by offering courses for those who have gone into practice without the opportunity to study the private international law syllabus systematically. Already the website offers valuable links to publications as well as a link to Conflict of Laws.net. It may be that the website can aim to capture private international law decisions of Australian and New Zealand courts to build a database of decisions in the area. That would be an invaluable resource.
- 21 The Association need not confine its jurisdiction reach to Australian and New Zealand as the reference to "Australasian" in its name makes plain. There is, for example, great interest in private international law scholarship in Singapore, and a regular flow of important private international law decisions from the Singapore courts.²² And there is sure to be interest in the South Pacific and further afield in South-East Asia.

²¹ See Michael Douglas, "Integrating Private International Law into the Australian Law Curriculum" (2020) 44(1) *Melbourne University Law Review* 98.

²² See, eg, *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] SGHC 21 (applying Singapore's new rules on service out of jurisdiction); *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102; [2021] SGCA 14 and *Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10 (transnational res judicata). For a recent commentary and exposition of private international law in Singapore, see Adeline Chong and Yip Man, *Singapore Private International Law: Commercial Issues and Practice* (OUP, 2023).

- 22 Can I wish the Association the very best of luck in all of its future endeavours and take great pleasure in launching it!