Symposium Paper:
The Future of Private International Law in Australia

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Abstract

In a seminar held at the University of Sydney on 16 May 2011, four speakers were invited to consider 'The Future of Private International Law in Australia' from different perspectives — judge, lawyer in government, practitioner and academic. Unsurprisingly, given the breadth of the topic, the subject matter of the presentations varied widely. Justice Paul Le Gay Brereton of the New South Wales Supreme Court addressed the difficulties inherent in the proof of foreign law, and recent developments in New South Wales practice in this area. Thomas John of the Commonwealth Attorney-General's Department considered Australia's approach to the regulation of private international law issues at an international level. Dr Andrew Bell SC of the New South Wales Bar looked at recurring themes and likely future trends in Australian case law in the area. In the final presentation, based on this paper, the author considered two related topics. First, the development and recognition of a unified body of Australian private international law. Second, the case for reform of the currently diverse regimes regulating the personal jurisdiction of courts in Australia. The author argues that the subject has now developed and matured to a point where the label 'Australian private international law' is justified in two of the three key areas: applicable law and the recognition and enforcement of judgments. He urges reform of federal and state rules governing personal jurisdiction, by a process of harmonisation, in order to complete the last side of the Australian private international law triangle.

Introduction

A lawyer working at a university or other academic institution may contribute in a number of ways to the development of the law. The most important of these roles is that of legal education, encouraging students (among whom will be potential legal practitioners, legislators and judges) to acquire the knowledge and skills they will need in their future careers. In this role, and in undertaking research and writing, academic lawyers enjoy greater flexibility and freedom than their counterparts in legal practice. Whereas the latter, at least in terms of legal principle, must focus on the present, the law teacher may and, indeed, should trace the historical development of the law and suggest its future direction. He or she may also choose, without fear of reproach from the bench, which topics to highlight and which to leave for another day.

Taking full advantage of that liberty, this short paper will consider three topics. First, the teaching of private international law in Australia. Second, the development of a uniform body of 'Australian private international law'. Third, the case for harmonisation

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of the rules of jurisdiction applied by Australian courts in cases with a foreign connection (that is, a connection to a legal system outside Australia).

The Teaching of Private International Law in Australia

A glance at any reading list for a course on private international law at an Australian university demonstrates that students are required to grapple with a combination of older common law and equitable doctrine, recent judicial innovation, and legislative intervention at federal and state level. In this eclectic mix lies much of the subject's appeal (at least to the author).

There is no doubt that private international in Australia is becoming more and more important over time. As demand for Australia's resources and the skills of the population grow, and as technological innovation facilitates communication and travel between nations, the number of cases brought before Australian courts with an overseas connection[1] has increased significantly in recent years,[2] reflecting an evident global trend. In light of this development, no longer can the study of the ways in which legal systems deal with private law aspects of cross-border transactions and disputes be offered only as a specialist elective in a post-graduate setting. All law students should be exposed to the extra dimensions to which an international element in any dispute gives rise — the recognition that a dispute may be resolved in more than one forum, that a court will not necessarily apply rules of local origin and that a judgment may (or may not) have legal effects outside the system in which it originated.

Happily (at least for those who enjoy the challenges of the subject), the University of Sydney and other Australian universities have recognised this need. Undergraduate students at Sydney Law School have long been exposed to the subject as an element in the general international law course. From 2013, every third-year student in the University's Juris Doctor program will study private international law as a separate, compulsory unit and, from 2015, the subject will be taught to all LLB students as well. Those teaching the course will be able to cover in greater depth, in particular, at the ways in which Australian courts approach questions of jurisdiction and the law applicable to transnational disputes. The Australian approach is unusual, and not replicated, for example, in England, where private international law remains in most universities a subject studied only on masters level programs.

Australian Private International Law

When referring to 'The Future of Private International Law in Australia' (the title of this paper, and of the seminar), one cannot but notice the elephant in the room, that is the way in which the words 'in Australia' appear to be used in a geographical sense only, a tacit admission of a lack of uniformity in the treatment of the subject among the legal systems

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1 That is, a connection to a country or legal system outside Australia.

2 At the seminar, Dr Andrew Bell SC reported that he had noted 50 Australian cases in the field in the period of a little over a year since the publication of Martin Davies, Andrew S Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 8th ed, 2010): Andrew Bell, 'The Future of Private International Law in Australia' (Paper presented at the Seminar on the Future of Private International Law in Australia, Sydney Law School, University of Sydney, 16 May 2011) 1 <http://www.sydney.edu.au/law/events/2011/May/Andrew_Bell.pdf>. The flow has not abated since.

which make up the Commonwealth of Australia.[3] The same reticence can be seen in the titles of the two most recently published Australian textbooks, the eighth edition of *Nygh's Conflict of Laws in Australia* (co-authored by Dr Bell and Justice Brereton, as well as Professor Martin Davies)[4] and Professor Mortensen's *Private International Law in Australia*,[5] co-authored by Professor Mary Keyes and Professor Richard Garnett.[6]

This begs the question whether there is a sufficiently coherent body of law to earn the title 'Australian private international law' (that is, the law 'of' rather than 'in' Australia) and, if so, the further questions as to how that body of law developed and the ways in which it may develop in the future.

Looking to the past, two principal obstacles to the emergence of a unified 'Australian private international law' are evident. First, the historical and constitutional ties which linked Australia to the United Kingdom and, in particular, to the English common law. Second, the demands of a federal structure and the need for Australian courts to determine disputes connected to two or more Australian states or territories much more frequently than those involving a foreign country. These two circumstances, pulling private international law in different directions, were noted by Professor Nygh in the preface to the first edition of his work *Conflict of Laws in Australia* ('*Nygh*') in 1968.[7] In light of the continuing influence of English case law, and the prevalent need to find solutions to intra-state conflicts issues, Professor Nygh acknowledged that it was, as yet, 'incorrect to speak of an Australian law of conflicts'.[8] He suggested that:

> the main justification for a special Australian text on conflict of laws is that such a text will encourage Australian lawyers to try and find their own solutions to conflictual problems at a time when the traditional dependence on all things British is rapidly disappearing. It is not, it must be stressed, intended to strike a blow for Australian nationalism. Rather, it is intended to encourage a greater freedom in local experimentation in which solutions are adopted for their own intrinsic merit and not because some august overseas tribunal thought of it first.[9]

By that time, the separation of the Australian and English legal systems was, of course, well underway. In 1963, the Australian High Court had held that it would not consider itself bound by decisions of the House of Lords if they were manifestly wrong[10] and, in 1967, the Privy Council upheld the High Court's rejection of the English common law's approach to exemplary damages,[11] thereby acknowledging the separate existence of the common law in (if not 'of') Australia. Shortly after Professor Nygh wrote his preface in

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3 In addition to six states (New South Wales, Queensland, Tasmania, Victoria, South Australia and Western Australia) and two territories (Australian Capital Territory and Northern Territory), the separate jurisdiction and legal structure of the federal courts (including the High Court and Federal Court of Australia) must be acknowledged.

4 Davies, Bell and Brereton, above n 2.

5 Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 2nd ed, 2011).

6 Professor Sykes was rather bolder in naming his work *Australian Private International Law*: Edward I Sykes, *A Textbook on the Australian Conflict of Laws* (Law Book, 1972); Edward I Sykes and Michael C Pryles, *Australian Private International Law* (Law Book, 3rd ed, 1991).

7 P E Nygh, *Conflict of Laws in Australia* (Butterworths, 1968) 5.

8 Ibid 6.

9 Ibid.

10 *Parker v The Queen* (1963) 111 CLR 610, 632 (Dixon CJ). Cf *Rookes v Barnard* [1964] AC 1129.

11 *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221.

March 1968, the first of three Australian statutes removing final rights of appeal to the Privy Council, and establishing the supremacy of the High Court in the Australian legal system, received Royal Assent.[12]

The publication of *Nygh* should be seen as the first landmark on the road to the creation of a unified body of Australian private international law. Other events have, directly or otherwise, contributed to that process. First, the UK's accession to the European Economic Community in 1973 and its adoption in 1987 of the *Brussels Convention* on jurisdiction and the recognition and enforcement of judgments between the member states of that organisation.[13] These developments, as the current custodians of *Nygh* rightly point out,[14] committed the UK to follow a course away from the rest of the common law world and towards the adoption of private international law rules with a heavy civilian and European influence. Among the principal common law jurisdictions, the United States and Canada have also moved in very different directions, partly dictated by their own federal and constitutional structures.[15] Although other Commonwealth jurisdictions (including New Zealand and Singapore) have remained more faithful to a 'traditional' common law approach, uniformity in the common law world no longer provides a strong reason for Australia to hold back from developing its law according to its own policies and interests.

Second, the *Service and Execution of Process Act 1992* (Cth) introduced a uniform, exclusive regime for the service of process and the recognition and enforcement of judgments within Australia.[16] This development may be seen as important for two reasons: first, in setting a precedent for harmonisation of rules regulating jurisdiction in cross-border cases;[17] and second, in segregating the rules governing claims against defendants present in Australia from those governing claims against foreign defendants. Twenty years later, the latter category of cases continues to be separately regulated in each Australian system by rules of court, to be considered in the final part of this paper.

In the 1990s, the High Court of Australia asserted the unity of Australian common law rules — a single common law to be applied, subject to statutory modification, by courts and tribunals in all states and territories and by the federal courts.[18] The significance of this development for private international law could not be underestimated, for it remains a subject, increasingly rare these days, in which the common law plays a major part,

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12 *Privy Council (Limitation of Appeals) Act 1968* (Cth). See also *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Australia Act 1986* (Cth).

13 *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, opened for signature 27 September 1968, 1262 UNTS 222 (entered into force 1 February 1973). The UK had acceded to the *Convention* in 1978, but the *Civil Jurisdiction and Judgments Act 1982* (UK), giving force of law to its provisions, did not enter into force until 1987.

14 Davies, Bell and Brereton, above n 2, xxiii. See also the comments of Chief Justice Spigelman of the New South Wales Supreme Court (Speech delivered at the launch of *Nygh's Conflict of Laws in Australia*, 8th ed, Sydney, 16 April 2011) Lawlink <http://lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman160410.pdf/$file/spigelman160410.pdf>.

15 In Canada, see, eg, the approach taken by the Supreme Court to the recognition and enforcement of foreign judgments in *Beals v Saldanha* [2003] 3 SCR 416. See also, in relation to jurisdiction, the Supreme Court's recent decision in *Club Resorts Ltd v Van Breda*, 2012 SCC 17.

16 *Service and Execution of Process Act 1992* (Cth) s 8. Cf *Flaherty v Girgis* (1987) 162 CLR 574, in which the High Court had held that the service provisions of the *Service and Execution of Process Act 1901* (Cth) did not exclude state rules regulating service out of the jurisdiction.

17 See also *Trans-Tasman Proceedings Act 2010* (Cth) discussed below n 32.

18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *Lipohar v The Queen* (1999) 200 CLR 485 ('*Lipohar*').

particularly in identifying the law applicable to the determination of disputes with a cross-border element. The High Court's decisions in *Lange*[19] and *Lipohar*[20] provided, therefore, a constitutional basis for unifying a significant part of the subject across all Australian legal systems.

This importance of the last of these developments was soon borne out by the High Court's decision in *John Pfeiffer Pty Ltd v Rogerson*.[21] *Pfeiffer* is, I would respectfully submit, the most important landmark in the development of Australian private international law. That observation may seem a little strange, in that the facts of the case had no connection to a legal system outside Australia and the High Court expressly limited itself to redefining the rules governing the law applicable to torts in intra-state situations. Two aspects of the case, however, are significant. First, the Court downplayed the constitutional arguments that had bedevilled the development of the law in this area in the past[22] and dealt with the problem as one concerning development of the Australian common law, albeit in an intra-state context and with the objectives of the constitution in mind. Second, the High Court distanced itself from the English common law by rejecting the 'double actionability' rule, and the dominant role which it attributed to the law of the forum (*lex fori*). It saw that rule as being unfit for purpose in fixing the law to be applied by Australian courts in intra-state tort cases.

These elements of the decision paved the way for the development of the common law in international cases. In *Regie Nationale des Usines Renault SA v Zhang*[23] and *Neilson v Overseas Products Corporation of Victoria Ltd*,[24] the High Court seized upon this opportunity and adopted a distinctive, Australian rule of applicable law for torts, combining application of the law of the place of the tort (*lex loci delicti*) with a form of the doctrine of *renvoi*, referring to the whole of the law of that place, including rules of private international law. If one asks the question whether Australian private international law exists, *Neilson* surely provides an affirmative answer,[25] whatever one may think of the merits of the approach taken by the High Court.[26]

In other areas, however, and in particular the law applicable to contractual obligations, the English common law continues to exert a strong influence on Australian law and practice. If the Australian rules governing the law applicable to tort (*Renault* and *Nielson*) may be compared to a modernist building, new but not to everyone's taste, the common law rules governing the law applicable to contractual obligations seem more in the character of a pre-fabricated bungalow, full of character but ripe for renovation or rebuilding. No doubt, if the legislator does not intervene first,[27] it will not be too many

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19 (1997) 189 CLR 520.

20 (1999) 200 CLR 485.

21 (2000) 203 CLR 503 ('*Pfeiffer*').

22 See especially *Breavington v Godleman* (1988) 169 CLR 41; *McKain v R W Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1.

23 (2002) 210 CLR 491 ('*Renault*').

24 (2005) 223 CLR 331 ('*Neilson*').

25 Ibid.

26 That debate must be left for another day.

27 The reform project launched by the Commonwealth Attorney-General's Department, in furtherance of an initiative of the Standing Committee on Law and Justice (see <http://consult.govspace.gov.au/pil/>) provides a valuable

years before the High Court and other appellate courts have the chance to bring the Australian common law in this and other areas into the 21st century.

Coupled with statutory and common law rules regulating the reception of foreign judgments in Australia,[28] the common law rules of applicable law form a significant body of Australian private international law along two sides of the traditional, triangular framework used to analyse the subject. However, the third side, that of jurisdiction, may be seen to be largely incomplete. It is this area which, in my submission, represents the most important field in the future development of private international law in Australia, and to which we now turn.

Harmonisation of Australian Rules of Jurisdiction

The case for reform of the rules currently applied by Australian courts is twofold. First, the need for uniformity. The jurisdiction of Australian courts continues to be based on the amenability of the defendant to service of initiating process. Although the rules governing service of process in Australia have been substantially harmonised by the *Service and Execution of Process Act 1992* (Cth),[29] the service of process outside Australia[30] continues to be separately regulated by the rules of court of the nine legal systems.[31] Although Professor Nygh was able to claim in 1968 that these rules bore a 'family likeness',[32] the family has long since grown apart[33] and there exist sharp differences between the current rules, with respect to the following issues:

- the need to obtain the court's leave to serve originating process outside Australia;[34]
- the information that must be provided to defendants;[35]

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opportunity for reflection on the current state of private international law in Australia, and for discussion of possible reforms.

28 See especially *Foreign Judgments Act 1991* (Cth).

29 *Service and Execution of Process Act 1992* (Cth) ('1992 Act'). See text to n 17 above.

30 Service of originating process in New Zealand will, upon the coming into force of the *Trans-Tasman Proceedings Act 2010* (Cth), be regulated by the provisions of Pt 2 of that Act. Any future reform proposal would need to take into account the terms of the Act, and any implementing rules, but this aspect is not considered further here.

31 *Federal Court Rules 2011* (Cth) pt 10 div 10.4; *Court Procedure Rules 2005* (ACT) div 6.8.9; *Uniform Civil Procedure Rules 2005* (NSW) pt 11 and sch 6; *Supreme Court Rules* (NT) O 7; *Uniform Civil Procedure Rules 1999* (Qld.) ch 4 pt 7; *Supreme Court Civil Rules 2006* (SA) r 40; *Supreme Court Rules 2000* (Tas) pt 7 div 10; *Supreme Court (General Civil Procedure) Rules 2005* (Vic.) O 7; *Rules of the Supreme Court 1971* (WA) O 10.

32 Nygh, above n 7, 117.

33 The authors of the current edition of *Nygh* express the view that:

> the lack of uniformity both as between the State Supreme Courts and the Federal Court in relation to extended jurisdiction and service upon individuals and corporations resident or present abroad continues to be an undesirable feature of practice in this area, and is ripe for co-ordinated reform by the rules committees of the several superior courts of the country. (Davies, Bell and Brereton, above n 2, xxii).

34 Leave to serve a defendant outside Australia is required in all cases in Western Australia (*Rules of the Supreme Court 1971* (WA) O 10 r 1A(2)). Leave to serve is also required under *Federal Court Rules 2011* (Cth) rr 10.43–10.44 and in the Supreme Court of the Northern Territory (*Supreme Court Rules* (NT) r 7.02), but in these Courts service may be confirmed after the fact in other cases if the failure to obtain leave is sufficiently explained. For cases falling within the grounds for service outside Australia set out in the rules, leave is not generally required in the other states or in the Australian Capital Territory (see eg *Uniform Civil Procedure Rules 1999* (Qld) r 124, but note *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.06, retaining the requirement in some cases). In Queensland (*Uniform Civil Procedure Rules 1999* (Qld) r 127) and the Australian Capital Territory (*Court Procedures Rules 2006* (ACT) r 6505), leave to serve originating process may be given in cases not otherwise falling within the specified grounds for service out.

- the need to obtain the court's leave to proceed if the defendant does not enter an appearance;[36]
- whether it is required that each and every part of the claim falls within one or other of the grounds for serving originating process outside Australia, or whether it sufficies that one or more parts do so;[37]
- the allocation of the legal and evidential burdens of showing that the claim falls within those grounds, that the claim has sufficient prospects of success and that the forum is a convenient (or 'not clearly inappropriate') place to bring the action;[38] and
- the number and content of the grounds for service out,[39] in particular with respect to claims in tort[40] and the joinder of foreign parties as 'necessary or proper' parties to the action.[41]

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35 Eg, in Victoria, the originating process must contain an indorsement stating the facts and the particular ground(s) for service out relied on (see *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.02(1)), whereas in New South Wales a more general indorsement of the statement of claim suffices (*Uniform Civil Procedure Rules 2005* (NSW) r 11.3).

36 Eg, leave to proceed is required in New South Wales (*Uniform Civil Procedure Rules 2005* (NSW) r 11.4), Tasmania (*Supreme Court Rules 2000* (Tas) r 147B), Victoria (*Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.04) and the Australian Capital Territory (*Court Procedure Rules 2006* (ACT) r 6508), but not in Queensland. The position in South Australia is less clear. The authors of *Nygh* suggest that leave to proceed is required (Davies, Bell and Brereton, above n 2, 34 n 58), but the rule to which they referred (*Supreme Court Civil Rules 2006* (SA) r 46) is not in point and r 40 does not, in terms, require leave to proceed: See Mortensen, Garnett and Keyes, above n 5, 54 n 130.

37 Compare, eg, *Uniform Civil Procedure Rules 2005* (NSW) sch 6 para (w) (requiring that all of the claim be fitted within one or other of the grounds for service out — 'partly within one or more of the foregoing paragraphs and, *as to the residue*, within one or more of the others') with *Uniform Civil Procedure Rules 1999* (Qld) r 124(1)(x), *Supreme Court Rules 2000* (Tas) r 147A(1), *Court Procedure Rules 2006* (ACT) r 6501(1)(y) and *Federal Court Rules 2011* (Cth) r 10.42 (requiring only that part of the claim be fitted within one of those grounds — 'a proceeding that consists of, *or includes*, any one or more of the kinds of proceeding mentioned in the following table'). See also Davies, Bell and Brereton, above n 2, 61–2, pointing out that this issue is not addressed by a specific provision in the rules for South Australia, Victoria, Western Australia and the Northern Territory.

38 Eg, (1) under *Rules of the Supreme Court 1971* (WA) O 10 r 4, a party seeking leave to serve out must support his application with evidence (a) that he believes he has a good cause of action, and (b) as to the defendant's whereabouts, and the court may not grant leave unless the case is a 'proper one' for service out; (2) under *Federal Court Rules 2011* (Cth) r 10.43(4), the party seeking leave must satisfy the court that it has jurisdiction, that there exist grounds for service out and that the person seeking leave has a prima facie case for all or any of the relief claimed; (3) under *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, a party seeking leave to proceed need only demonstrate that his claim falls within one or more of the grounds for service out (*Agar v Hyde* (2000) 201 CLR 552 ('*Agar*')), and (4) in Queensland, leave to proceed is not required. Otherwise, the defendant must make an application to set aside service on grounds including the strength of the plaintiff's case and the inappropriateness of the forum, and will bear the legal burden (*Agar*). See also Davies, Bell and Brereton, above n 2, 36–9.

39 The number of separately listed grounds is as follows: Western Australia — 13 (including the additional ground in *Rules of the Supreme Court 1971* (WA) O 10 r 2); South Australia — 13; Victoria — 14; Northern Territory — 15; Tasmania — 21; Federal Court of Australia — 24; New South Wales — 23; Queensland — 24; ACT — 25. For a detailed comparison, see Davies, Bell and Brereton, above n 2, 40–62. In addition to the two areas specifically mentioned in the following notes, the authors draw attention to significant differences between the rules in the areas of (a) statutory claims, (b) claims relating to property within the jurisdiction, (c) trusts, (d) claims relating to corporations, (e) arbitration, and (f) foreign judgments.

40 The Western Australian rules (*Rules of the Supreme Court 1971* (WA) O 10 r 1), unlike those of the other states and territories and of the Federal Court, do not allow service out in tort cases on the basis of damage sustained within the jurisdiction. The contrast with the position in New South Wales (see below n 46 and accompanying text) is striking.

41 Differences exist as to (1) whether the 'anchor defendant' must be served in Australia (eg, New South Wales: *Uniform Civil Procedure Rules 2005* (NSW) sch 6 para (i)) or may be served outside Australia (eg, South Australia: *Supreme Court Civil Rules 2006* (SA) r 40(1)(c); Victoria: *Supreme Court (General Civil Procedure) Rules 2005* (Vic),

The existing regimes may be seen to operate on a scale of permissiveness, with Western Australia at the conservative end, Queensland at the liberal end and the other Australian legal systems (including New South Wales and the federal courts) somewhere in between.

This diversity in approach is deeply unattractive. It creates uncertainty for Australian businesses and those dealing with them, adding to legal risk and costs when a transaction or dispute is connected to two or more Australian legal systems, as well as to a foreign system. Moreover, it has the potential to affect the ability of businesses in different Australian states and territories to compete with each other on equal terms in view of the differing levels of access to local courts and procedural requirements in cross-border situations, and the additional costs and inconvenience involved in litigating disputes abroad when such access is not granted.

Second, the existing rules governing service (at both federal and state level) do not always perform the most basic function of rules of jurisdiction, of ensuring the matters that come before courts have a substantial connection to the forum in which they are to be determined. Temporary presence within Australia will suffice to validate service under the 1992 Act, and the modern trend with respect to the grounds for service out is to interpret them more broadly,[42] and in some instances to a point which requires only the most tenuous connection with Australian soil. The case law in New South Wales with respect to the requirement of damage within the jurisdiction in tort cases provides the clearest example of this, invariably giving New South Wales based plaintiffs the right to start proceedings locally.[43]

Of course, and recognising that the grounds of jurisdiction are widely formulated, Australian courts have developed other techniques for controlling 'forum shopping'. The recognition in *Voth v Manildra Flour Mills Pty Ltd*[44] of the power to stay proceedings on 'clearly inappropriate forum' grounds[45] and the 'whole law' approach in *Neilson*[46] stand out in this respect. These developments, however, remind one of the familiar cautionary tale of the old lady who swallowed a fly. Here, of course, we know why the fly was swallowed and we may realise that this is a 'bad thing', but it does not follow that the best method of tackling the problem is to swallow a spider (that is, *Voth*) and then, when the spider causes further indigestion, to consume a bird (that is, *Neilson*) as well. The principal cause of the mischief — the rules conferring jurisdiction on the Australian courts — should be re-examined and changed where appropriate.

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r 7.01(1)(l)), and (2) whether service out is possible where the defendant seeks to join a third party as a proper party to the action (see Davies, Bell and Brereton, above n 2, 55–6).

42 See, in particular, *Agar* (2000) 201 CLR 552, 570–1 [42]–[43] (Gaudron, McHugh, Gummow and Hayne JJ). Cf Davies, Bell and Brereton, above n 2, 37–9.

43 *Uniform Civil Procedure Rules 2005* (NSW) sch 6 para (e). See *Flaherty v Girgis* (1985) 4 NSWLR 248 (injury sustained abroad but continuing within the jurisdiction); *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc; The Katowice II* (1990) 25 NSWLR 568 (financial liability incurred abroad but funded from and/or accounted for within the jurisdiction). For recent examples, which emphasise that the ground has been stretched to the point where it is no longer a substantial obstacle to bringing a tort action in New South Wales, see *Sigma Coachair Group Pty Limited v Bock Australia Pty Limited* [2009] NSWSC 684; *Barach v University of New South Wales* [2011] NSWSC 431. See also, in the Federal Court, *Heilbrunn v Lightwood plc* [2007] FCA 433.

44 (1990) 171 CLR 538 ('*Voth*').

45 See *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 241–57 (Deane J), 257–67 (Gaudron J); *Voth* (1990) 171 CLR 538. Recent case law, in particular the High Court's decision in *Puttick v Tenon Ltd* (2008) 238 CLR 265, suggests that the power to stay may be a blunter weapon for controlling the parties' freedom to choose a forum than the majority in *Voth* seemed to think.

46 *Neilson* (2005) 223 CLR 331.

Similar considerations to these have recently informed the European Commission's proposal to harmonise the EU member states' rules governing the assertion of jurisdiction over defendants domiciled in third countries.[47] If that proposal were to be adopted,[48] it would sweep away the common law and statutory rules in England regulating jurisdiction based on service (as well as the doctrine of *forum conveniens*) and replace them with a restrictive regime based on the premise that jurisdiction is best located in the courts of the place where the defendant is based ('domiciled'), subject to limited and exhaustively stated exceptions and room for the exercise of judicial discretion only in very few cases.

I would not seek to argue that Australian private international law should follow this approach. However, I would submit that harmonisation of the existing rules (rather than a radical restatement) should represent the primary objective of any reform process and, in particular, that now being undertaken by the Attorney-General's Department.[49] That said, the opportunity should be taken to make some more fundamental changes. Three aspects, in particular, should be addressed, as follows:

1. It would be better for the rules to be formulated in terms of the circumstances in which Australian courts have, or do not have, jurisdiction over a party to civil proceedings, rather than in terms of the power to serve originating process within or outside Australia. The right to serve outside Australia should exist without the need to apply to the court for permission if, and only if, the plaintiff is able to certify (in the originating process or otherwise) that the court has jurisdiction.[50]
2. There should, at least, be a debate and consultation with stakeholders as to whether to replace the basic common law requirement of 'presence' with a test requiring a more substantial connection to Australia, for example, residence (in the case of individuals) or principal place of business (in the case of corporations) or the undertaking in Australia of activities linked to the dispute (in the case of businesses generally).[51]
3. Finally, some of the worst excesses of the current rules, and in particular those concerning service out in tort cases[52] should be identified, with a view to some modest pruning.[53]

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47 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* (Document No COM(2010) 748 final, European Commission, 14 December 2010) 8 <http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf>. See also European Commission, *Commission Staff Working Paper — Impact Assessment: Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* (Document No SEC(2010) 1547 final, European Commission, 14 December 2010) 19–27 <http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf>.

48 At the time of finalising this paper for publication, it now appears highly unlikely that this will happen. For the time being, therefore, the member states will be allowed to maintain their existing rules of jurisdiction in most cases involving non-EU defendants.

49 See above n 27.

50 See, eg, *Civil Procedure Rules 1998* (UK) r 6.34.

51 See *Foreign Judgments Act 1991* (Cth) s 7(3)(iv)–(v), which may provide a drafting model.

52 See text to n 45 above.

53 Eg, it could be provided that the fact that injuries are treated or payments funded from or accounted for in Australia does not constitute 'damage' within the jurisdiction for the purposes of rules corresponding to the current *Uniform Civil Procedure Rules 2005* (NSW) sch 6 para (e).

Any process of this kind in Australia raises, of course, issues arising from the constitutional division of legislative power.[54] I would submit, however, that it is in the interests not only of the Commonwealth but also of the States and Territories for these matters to be regulated in a uniform manner and for the limits of international jurisdiction of the Australian courts to be clearly set out. If federal legislation is not possible, or is impractical, the problem could be addressed (as the authors of *Nygh* suggest)[55] by co-ordinated action among the rule-making bodies.

The purpose of the last part of this paper has been to open a debate as to whether harmonised Australian rules of jurisdiction are necessary or desirable. Further discussion of that topic, and of the detail of reform proposals, must await another day. In the meantime, I would offer the following conclusion: Australian private international law does exist, and is growing in significance, both in legal practice and in higher education. Its future is bright.

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54 In terms of federal legislative power, the most obvious basis for Commonwealth legislation extending to the states and territories would seem to be the 'external affairs' power in s 51(xxix) of the *Constitution*. Its use, in the absence of an international treaty, may however be controversial. Of the other grounds, neither s 51(xxiv) (service and execution within the Commonwealth) nor s 51(xxv) (recognition of laws, records and judicial proceedings) would appear sufficiently broad.

55 See above n 33.