

SWEEDMAN V TRANSPORT ACCIDENT COMMISSION: A SIMPLE CRASH AND BANG?

This article discusses the decision of the High Court in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362. The decision in that case that the Victorian Transport Accident Commission could recover the compensation paid by it from the negligent driver of a car in New South Wales pursuant to the Victorian statute under which it operated was appropriate and adapted to the requirement of contemporary Australian society. However it is argued that the conclusion reached by the majority is not supported by the common law choice of law rules on which they relied. Rather, the conclusion can be more satisfactorily supported by relying directly on the valid extraterritorial operation of the Victorian statute.

INTRODUCTION

Australia's historical status as a federation of States constituting 'separate countries in private international law'¹ allows a potential for conflict between the laws of the States that is yet to be satisfactorily resolved. In *Sweedman v Transport Accident Commission*² the application of common law choice of law rules within the Australian federation again came before the High Court. The case concerned the collision, in New South Wales, between a car, driven by a New South Wales resident, Mrs Sweedman, and a car driven by a Victorian resident, Mr Sutton. It was assumed that Mrs Sweedman was at fault. It is almost certainly an equally safe assumption that Mrs Sweedman had no idea that on that day she was also responsible for what her counsel was later to describe as 'a clash at an intersection'³ of State statutes.

In the first part of this article I summarise the legislative context and the reasoning of the Court. The majority concluded that Mrs Sweedman was liable to the Commission for the compensation the Commission had paid to Mr and Mrs Sutton by applying choice of law principles. Justice Callinan in dissent concluded, for constitutional reasons, that she was not. I proceed to discuss some difficulties that appear to beset both approaches. I suggest that it is difficult to justify the majority decision by reference to accepted principles of private international law even though the substantive result of their reasoning is probably the most satisfactory. I attempt to justify the result by applying constitutional principles even though Callinan J reached a contrary conclusion on that approach. Finally I will explore the

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¹ *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 36.
² (2006) 226 CLR 362.

³ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 407.

difficulties in formulating a satisfactory rule for resolving inconsistencies between State statutes where one or more of them has some extraterritorial operation.

I THE PROCEEDINGS

The case arose out of a collision that occurred in July 1996 in New South Wales. Mrs Sweedman, a resident of New South Wales whose car was registered in that State, collided with a car driven by a Victorian resident, Mr Sutton, whose car was registered in Victoria. Mr Sutton and his wife, who was a passenger, were injured, and sought compensation for their injuries from the Transport Accident Commission of Victoria ('the Commission') under that State's no fault compensation scheme. The case proceeded on the assumption that the accident was Mrs Sweedman's fault.

The Suttons did not sue Mrs Sweedman under the *Motor Accident Act 1988* (NSW) (the 'NSW Act'), but rather claimed compensation under the *Transport Accident Act 1986* (Vic) (the 'Victorian Act'). The NSW Act had effectively re-instated the common law in New South Wales, albeit with various restrictions and limitations, after a period in which it had been abolished. The NSW Act required motor vehicles driven in that State to be both registered and insured for third party personal injury risk. In contrast the Victorian Act substantially abrogated the common law, but conferred a 'no fault' entitlement to compensation on a person injured as a result of a transport accident. The Victorian Act applied where the accident occurred in Victoria, or, relevantly to the facts in *Sweedman*, elsewhere where the car involved was registered under the *Road Safety Act 1986* (Vic) and was driven by a resident of Victoria. The registered owners of motor vehicles in Victoria were required to pay a charge to the Commission that was credited to a fund established under the Victorian Act. The Commission had compensated the Suttons by payment out of that fund.

The High Court accepted that the Commission was an emanation of the State of Victoria for the purposes of s 75(iv) of the *Constitution*. Under s 104(1) of the Victorian Act, an entitlement was conferred upon the Commission to an indemnity where it had made compensation payments.⁴ The Commission's action against Mrs Sweedman for recovery of the compensation it had paid was therefore brought in

⁴ Section 104 (1) of the *Road Safety Act 1986* (Vic) provided that: 'If an injury arising out of a transport accident in respect of which the Commission has made payments under this Act arose under circumstances which, regardless of s 93, would have created a legal liability in that person (other than a person who is entitled to be indemnified under s 94) to pay damages in respect of the pecuniary loss suffered by reason of the injury, the Commission is entitled to be indemnified by the first mentioned person for such proportion of the amount of the liability of the Commission to make payments under this Act in respect of the injury as is appropriate to the degree to which the injury was attributable to the act, default or negligence of the first mentioned person.'

federal jurisdiction, in the Victorian Courts. The liability of Mrs Sweedman was limited by s 104 of the Victorian Act so as not to exceed the amount of damages which, but for the Victorian Act, she would be liable to pay Mr and Mrs Sutton in respect of their injuries and to a proportion of the compensation paid by the Commission that was commensurate to Mrs Sweedman's fault. Thus while the choice of the Victorian forum for the action was not greatly significant for the issue of damages, the effect of the differing limitation periods between the States meant that the question of which State's law was the governing law became an issue of some importance. The High Court was required to consider the nature of the cause of action under the Victorian Act, and which State's laws should govern the action.

PART I: THE APPLICATION OF PRIVATE INTERNATIONAL LAW AS BETWEEN THE AUSTRALIAN STATES

The nature of Australia as a federation of States whose intra-national laws conflict in a manner analogous to the conflicts encountered in the more traditional international sphere has naturally seen the application of private international law principles to matters involving these intra-national laws conflicts. However, the much over-quoted description of private international law as 'a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon,'⁵ reflects an essential truth of the subject matter. It is a challenging area of law at the best of times, doubly so given the additional constitutional consideration in Australia.

Gleeson CJ, Gummow, Kirby and Hayne JJ ('the plurality') explained the proper place of choice of law rules in the Australian constitutional context in the following way:

There is nothing necessarily antithetical to the system of federation established and maintained under the Constitution in the legislation of one State having legal consequences for persons or conduct in another State. There are three relevant corollaries to that general proposition. First, it is sufficient for the validity of a law such as s 104(1) that it has any real connection between its subject-matter and the State of Victoria. Plainly, s 104(1) meets that criterion. The appellant does not assert lack of State power to legislate with extra-territorial operation.

Second, as to adjudication of the legal consequences referred to above, the choice of law rules have the important function, in the absence of an effective statutory overriding requirement, of selecting the law to be applied to determine the consequences of acts or omissions which occurred in a State (or Territory) other than that where action is brought. This means that questions of alleged 'inconsistency' between laws of several States must be considered

⁵ W L Prosser, 'Interstate Publications' (1953) 51 *Michigan Law Review* 959, 971.

not at large, but first with allowance for the operation of applicable choice of law rules. This may remove the necessity in a given case to answer those questions of inconsistency. However, as will appear, the appellant enlists what are said to be constitutional imperatives which dictate an outcome in the litigation at odds with the operation of choice of law rules, rather than consistent with those rules.

Third, reference is appropriate to the point clearly made in the joint reasons in *John Pfeiffer Pty Ltd v Rogerson* that, subject to what followed in that passage:

because there is a single common law of Australia, there will be no difference in the parties' rights or obligations on that account, no matter where in Australia those rights or obligations are litigated.

Their Honours went on to refer to statutory modifications to the common law and to other considerations, including those applying in federal jurisdiction, which may dictate different outcomes according to the seat of the litigation. Further, it is well settled that (putting to one side consideration of specific provisions such as ss 51(ii), 51(iii), 92, 99 and 117) there is no general requirement in the Constitution that a federal law such as s 80 of the *Judiciary Act* have a uniform operation throughout the Commonwealth. In addition, s 118 of the Constitution does not require certainty and uniformity of legal outcomes in federal jurisdiction or otherwise.⁶

There are several observations that I would make about those passages. First, the proposition that there is nothing antithetical to the Australian federal structure in the legislation of one State having legal consequences for persons or conduct in another State has long been accepted. However, it is important to draw a distinction between State legislation that has extraterritorial effect by force of that State's legislative power, on the one hand, and the indirect application of the legislation of one State by force of statutory, or common law, choice of law rules that are binding in another State. In the latter case it is the law of the forum State that is applied, even though that State's courts may formulate the rule for decision by reference to laws that are in force in another State and even though the law of the forum State that selects the law to apply will most often be the Australian common law that applies uniformly throughout the federation. The indirect application of the laws of one State by operation of the choice of law rules of another State is not the result of the extraterritorial legislative power of the first State. Rather, it is the application of the laws of the forum State to extraterritorial events and circumstances. Equally, where the forum State legislates to alter the common law choice of law rules to apply its laws to facts and circumstances that have arisen beyond its territory, it is legislating extraterritorially even though the legislation may take the form of a choice of law rule directed to its courts.

⁶ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 398-9 [18]-[20].

The First Corollary: Extraterritorial Effect of State Law

The first of the three corollaries referred to in the passages I have set out accepts the validity of a State law that operates extraterritorially where there is a real connection between its subject matter and the State of its enactment.⁷ However, it is important to appreciate that the acceptance of the extraterritorial operation within Australia of State laws is inconsistent with the three essential axioms upon which private international law is based. Those axioms were formulated in this way by Yntema:

First, that the laws of a state (*imperii*) apply within its territory, binding all those subject thereto, *and not without*; second, that all persons, permanently or temporarily commorant within the territory of a state, are to be deemed subject to its laws; third, that *the right of each nation exercised within its territory*, are by comity recognized as having their effect everywhere, insofar as the power or law of another state and its citizens is not prejudiced.⁸

It is only those laws operating within the territory and on the subjects of one sovereign that are recognised by the courts of another sovereign, for reasons of comity, to have effect insofar as the power or laws of their own sovereign are not prejudiced. The acceptance of the extraterritorial legislative power of the legislatures of the Australian States and Territories is inconsistent with the strict territoriality from which the principles of private international law are derived.

The Second Corollary: Choice of Law Rules Capable of Application

Although the second corollary, namely that choice of law rules are *capable* of resolving *most* matters that arise from factual circumstances extending over more

⁷ *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 271.

⁸ H E Yntema, "The Historical Bases of Private International Law" (1953) 2 *American Journal of Comparative Law* 297, 298. (Emphasis added.) The propositions are further elaborated in *Story's Commentaries on the Conflict of Laws*, (5th ed, 1857) in this way:

'Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory. It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules which none were bound to obey. The absurd results of such a state of things need not be dwelt up-on.'

than one State can largely be accepted, it is not at all clear why it is *necessary* to resort to private international law within the Australian federation. For the reasons that are developed below, it is suggested that most matters can be satisfactorily resolved, and usually with the same result, by the direct application of valid State laws in accordance with constitutional principles. Moreover, the ‘choice of law approach’ must ultimately face the reality that State statutes may modify common law choice of law rules in contradictory ways. Within Australia, a choice of law issue can only arise in a statutory context because there is a single Australian common law. Logically, the reach of conflicting State choice of law statutes must first be construed before turning to the common law choice of law rules.⁹ That is so because a State statute may expressly or impliedly amend the common law choice of law rules by claiming or eschewing an application to facts and circumstances that the common law rules would otherwise deny or grant it. True it is that the construction of the statute must proceed in accordance with common law principle, and in the absence of any contrary statutory indication, it might be presumed that the statute concerned is enacted on the basis that it will have such application as the common law choice of law rules might give it. Of course the State statute may expressly provide otherwise. The point I seek to make is that the very process of statutory construction that courts throughout Australia are bound to engage in, whichever State or Territory legislature enacted the law, accepts that the State statute may apply by force of the enacting legislature’s extraterritorial legislative power.

The proposition that the law of a foreign sovereign applies of its own force can never be accepted in the truly international application of private international law. In the context of the Australian federation, in contrast, it is a more satisfactory solution to construe competing State statutes in a way that avoids conflict than to speak of the choice of law rules ‘remov[ing] the necessity in a given case to answer those questions of inconsistency’. Similarly, in a federation where the courts and people of all the States and Territories are bound to observe the laws of all of the federal legislatures one would expect the mechanism for resolving any conflict that remains after a proper construction of competing State statutes to be found in the Australian *Constitution* and not in private international law. This analysis does suggest, however, that the presumption of statutory interpretation which is usually expressed as the ‘presumption against extraterritorial operation’ may entail too simplistic an approach. Rather, the proper expression of the presumption may incorporate the whole common law of choice of law or, alternatively, this may

⁹ However, it should be noted that a question may arise in a particular case as to whether a deliberate legislative silence by one State, with the intention of leaving the common law of Australia in place, should be treated as inconsistent with a law of another State which purports to abrogate the common law.

simply be seen as a particular application of the presumption that legislation is not intended to abrogate the common law.¹⁰

*The Third Corollary: Statutory Modification may Alter the
Outcome in a Different Forum*

The third corollary is the repetition of the observation made by the Court in *John Pfeiffer Pty Ltd v Rogerson*¹¹ that statutory modification of the common law may result in different outcomes depending on the seat of the litigation. It can be accepted that there may be different outcomes in different courts because of their particular jurisdictional restraints. However it is discordant with the concept of a single common law to accept that statutes construed in accordance with its canons of construction can modify the common law applicable to the same set of circumstances in contradictory ways. The short point is that it is altogether too absurd to accept that the *Constitution* and the single common law of Australia subject the people of Australia to the contradictory commands of the legislatures they recognise.

II SELECTING THE APPLICABLE LAW IN *SWEEDMAN*

Before returning to the fundamental question of whether it is necessary, or indeed whether it continues to be helpful, to employ choice of law reasoning within the Australian federation, it is convenient to examine the way in which choice of law principles were applied in *Sweedman*, and to refer to the way in which those rules are engaged in federal jurisdiction.

It is now accepted that s 79¹² of the *Judiciary Act* is subject to s 80¹³ and that the latter section is the first provision that must be applied in federal jurisdiction.¹⁴ It is

¹⁰ This latter approach is probably more intellectually satisfying as it allows the same presumption of statutory interpretation to be applied to State and Commonwealth laws.

¹¹ (2000) 203 CLR 503.

¹² Section 79 of the *Judiciary Act 1903* (Cth) provides: ‘The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.’

¹³ Section 80 of the *Judiciary Act 1903* (Cth) provides: ‘So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.’

¹⁴ *Blunden v The Commonwealth* (2000) 218 CLR 347.

s 80, then, that allows the common law choice of law rule to be ‘picked up’ and applied in federal jurisdiction before turning to the statute law of the State in which the Court is sitting as required by s 79.¹⁵ It may well be that even without s 80, s 79 itself would have required the application of common law choice of law rules.¹⁶ Section 79 speaks of applying the laws of the State in which the Court is sitting where those laws are *applicable*. The substantive laws of that State arguably are only applicable where the common law choice of law rules would choose the laws of that State. It may also be that the choice of law rules (common law or statutory) are ‘applicable laws of the State’.¹⁷

Application of Choice of Law Principals

Acting on the second of the corollaries in the passages cited earlier, the plurality proceeded to identify the particular choice of law rule that should be applied in the case before it. They accepted as correct the concession made by the parties and the interveners that the obligation of the appellant to indemnify was distinct from any underlying claim in tort. The choice of law rule applicable to torts therefore had no direct role to play.¹⁸ That conclusion was consistent with authority.¹⁹

The plurality observed that, in *Victorian WorkCover Authority v Esso Australia Ltd*,²⁰ the Court had referred to older authorities that suggested that where a statutory entitlement was liquidated, the action of debt provided the appropriate analogy for choice of law purposes even though the statute concerned gave no particular method of enforcing the obligation.²¹ However, the plurality held that where it is necessary to fix an appropriate degree of attribution to the negligence of the tortfeasor before quantification of the amount recoverable on the indemnity, as

¹⁵ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 401-2, [27], [30].

¹⁶ Section 79 is modelled on s 34 of the Judiciary Act 1789 (US). Section 80 is modelled on s 3 of the *Civil Rights Act* 1866 (US). Those statutory provisions were introduced in the United States at different times and probably for different purposes. The former section would appear to be more naturally applicable in diversity jurisdiction and the latter applicable to matters arising under federal laws like *Civil Rights Act* in which the provision was first enacted.

¹⁷ The Supreme Court of the United States has proceeded on the basis that s 34 of the *Judiciary Act* 1789, later enacted as s 721 of the *Revised Statutes of the United States* (RS 722 (1878-74)) required the federal courts to apply the common law of the States where it was applicable. *Swift v Tyson* 41 US (1842) and *Erie Railroad Co v Tompkins* 304 US 6 (1938). Even in Australia where there is a single common law there is no reason why the common law could not be regarded as the common law of Australia and therefore also a law of each State.

¹⁸ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 401, [27].

¹⁹ However in *Wilson Electric Transformer Co Pty Ltd v Electricity Commission of New South Wales* [1968] VR 330 it had been suggested, obiter, that the law of the tort should be applied in similar circumstances.

²⁰ (2001) 207 CLR 520.

²¹ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 401 [27].

it was pursuant to s 104 of the Victorian Act, a characterisation more akin to *indebitatus assumpsit*²² than to the old action of debt should be preferred. Accordingly, they accepted the characterisation of Nettle JA of the right of indemnity as a right that was ‘enforceable’ as a quasi-contractual cause of action in the nature of a *quantum meruit*.²³ They held that the law applicable to the action so characterised, the *lex causae*, was the law of the State with which the obligation of the Appellant to indemnify the Commission had the closest connection.²⁴ They held that that State was Victoria. The plurality claimed that their conclusion was consistent with the view taken by Bray CJ of analogous South Australian legislation in *Nominal Defendant v Bagots Executor and Trustee Co Ltd*²⁵ and *Hodge v Club Motor Insurance Agency Pty Ltd and Australian Motor Insurers Ltd*.²⁶

The plurality referred to Victoria’s contention that the restitutionary nature of the claim required the application of the law that was the source of the legal compulsion to make the compensation payment. Victoria had referred in its submissions to a rule suggested by Panagopoulos to the effect that:

The legal system under which the plaintiff was compelled to make the payment should be the applicable law to govern restitutionary liability. After all, given that the particular demand was lawful, restitution should only follow where it is allowed by the same legal system.²⁷

However, Victoria accepted, I think correctly, that the use of ‘proper law of the obligation’ test may be question begging because the first step is to determine whether the laws of the place that created the obligation to indemnify are applicable. If it is not applicable then the fact that the obligation was created under the Victorian law takes the matter no further.

The laws of the State by which the plaintiff was compelled to make a payment to a third party can only lay claim to governing the relationship between the plaintiff and the defendant from which recovery is sought if the factual circumstances of that relationship have a sufficient connection to that State. A choice of law question arises where the facts and circumstances of the dispute before a Court extend over more than one law area and where the application of the laws of the different sovereigns that appear to have a legitimate claim to regulate those facts and circumstances could lead to different results. There is no good reason always to

²² An action for *indebitatus assumpsit* arose where the plaintiff first alleged a debt, and then a promise in consideration of the debt. The action was taken to recover the debt.

²³ *Transport Accident Commission v Sweedman* (2004) 10 VR 31, 41 [28].

²⁴ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 401 [29].
²⁵ [1971] SASR 346, 365-6.

²⁶ (1974) 7 SASR 86, 91.

²⁷ George Panagopoulos, *Restitution in Private International Law* (2000) 175-9.

apply the laws of the State under which the obligation was imposed.²⁸ Such a rule would tend to favour plaintiffs over defendants.

Properly understood Panagopoulos was not suggesting a rule that disregarded the degree to which the relationship between the parties justified the application of one law system over another. Rather, he proposed the rule because it was ‘difficult to envisage cases where the elements for a compulsory discharge of another’s liability will have much connection with the legal system other than that which compelled the plaintiff to make the payment.’²⁹

He gave as examples a Canadian defendant exporting goods to England that are then stored in an English warehouse owned by the plaintiff, who comes under an obligation to pay import duties that are the responsibility of the defendant. The plaintiff’s right to recovery will plainly be determined in accordance with English law even though the defendant’s enrichment occurs in Canada. In that case, however, the very conduct of the defendant in requesting the plaintiff to store its goods in England is conduct that properly attracts the obligations imposed by the laws of England. Panagopoulos also uses the example of two Englishmen jointly owning property in France where one only of them pays local rates and taxes for which they are jointly liable. Panagopoulos argues that French law should govern the claim for contribution from the owner who has not paid his share. Again, French law is fairly obviously attracted by the conduct of both owners in jointly purchasing the property in France.

Panagopoulos supported his conclusions with respect to his hypothetical examples by reference to the decisions of Bray CJ in *Nominal Defendant v Bagot Executor Trustee Co* and *Hodge v Club Motor Insurance Agency Pty Ltd and Australian Motor Insurers Ltd* to which I refer below. For present purposes it is sufficient to notice that Panagopoulos did not rely on a choice of law rule that simply applied the law of the place that imposed the obligation to make the payment that the plaintiff seeks to recover.

The plurality also referred to another rule suggested by Gutteridge and Lipstein favouring ‘the law of the place in which the payment of money or the vesting of property occurs which constitutes the enrichment’.³⁰ However, the examples given by the authors of that article involve *consensual* conduct between contracting parties that fairly obviously attract the law of the place in which the conduct occurs. One example involved the payment of an advance on a contract which is subsequently frustrated. It is difficult to apply the same rule where there is no

²⁸ Cf G A Hill, ‘Resolving a True Conflict Between State Laws: A Minimalist Approach’ (2005) 29 *Melbourne University Law Review* 39, 75.

²⁹ George Panagopoulos, *Restitution in Private International Law* (2000) 175.

³⁰ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 402 [31], fn 26, referring to Gutteridge and Lipstein, ‘Conflicts of Law in Matters of Unjustifiable Enrichment’ (1939) 7 *Cambridge Law Journal* 80, 92-3.

conduct on the part of person against whom recovery is sought that justifies the adoption of the law of the law imposing the obligation.

In the South Australian cases to which the plurality referred, Bray CJ explained at some length that it was the conduct of the parties that must be examined to determine the law that has the closest connection with the claim.

In *Hodge v Club Motor Insurance Agency Pty Ltd and Australian Motor Insurers Ltd*³¹ a passenger in a car driven in South Australia suffered injuries in an accident in which the driver of the car was killed. The passenger sued the insurer of the driver under an insurance policy that had been issued in Queensland pursuant to the *Motor Vehicles Act 1936* (Q). The direct liability of the insurer depended on Queensland law. The insurer was not liable under any South Australian law. The question was whether the rules of private international law required the South Australian court to apply the Queensland legislation. The Full Court of the Supreme Court held that the passenger was entitled to sue upon the cause of action based on the Queensland legislation in South Australia and that the proceedings had properly been served on the insurer pursuant to the *Service and Execution of Process Act 1901* (Cth). Bray CJ said:

Hence I think that it is immaterial that the law of South Australia in the limited municipal sense does not create any obligation on the defendant in this case. The Queensland law does and that is sufficient according to the rules of private international law in force in this State, provided that the law of Queensland is the proper law applicable to the obligation and that there is no reason of public policy to the contrary. *It might, although it was not, have been argued that that is not the case here, because the plaintiff had no connection with Queensland and the accident happened out of Queensland and hence there is nothing under our rules of private international law to attract the law of Queensland to the situation. I think there is.* Under regulation 38 of the *South Australian Motor Vehicle Regulations* Riley was permitted to drive his car in South Australia if it was insured and registered in compliance with the law of Queensland. The terms of the policy contemplate that the car might be driven by him in South Australia and the defendant undertook to be responsible for damages for bodily injuries caused in South Australia by his negligence. The permission to drive in South Australia can be regarded as conditional on the acceptance of the obligation imposed under the Queensland insurance policy by the Queensland law with regard to South Australian accidents and *the defendant, by the contract of insurance, impliedly undertook so to accept them.*³²

Justice Zelling was concerned that if it was right that South Australian courts were bound to apply the Queensland statute to hold the insurer liable then it would also follow that South Australian courts were bound to recognise the rights of the insurer

³¹ (1974) 7 SASR 86.

³² *Hodge* (1974) 7 SASR 86, 91. (Emphasis added.)

given by the Queensland legislation to recover against third parties in South Australia. Those rights might differ procedurally and substantively from the third party rights available under South Australian law. Justice Zelling was concerned that that result was difficult to justify because the third party would not have subjected himself or herself in any way to the application of the Queensland legislation. He thought that the solution may well be that the choice of law rules would apply only to that part of the Queensland legislation that imposed liability on the insurer and not those provisions that conferred on it third party rights that differed from South Australian law.³³ Justice Zelling went on to consider the effect of s 118 of the Constitution on the question before him. He stated his view on the subject of s 118 “with much trepidation”. It was:

[T]hat provided there is no conflict between the law in South Australia and the law in Queensland, and here there is not, the combined effect of ss 118 and 51(xxv) of the Constitution and s 18 of the *State and Territorial Laws and Records Recognition Act* is to provide a substantive right in the cases to which it applies and that this is one such case. If there was such a conflict, one would have to go on and consider the effect of s 118 on conflicting ‘sister-State’ statutes, a matter which has caused much judicial debate in the United States. ... To give s 18 merely an evidential effect is in my view to say that that section goes no further than s 3 of the same Act and is in fact otiose at least as far as statutes are concerned.³⁴

In *Nominal Defendant v Bagot’s Executor and Trustee Company Limited*³⁵ the Supreme Court of South Australia dealt with a claim arising out of a car accident that occurred in New South Wales that was the converse of the factual situation in *Hodge*. The negligent South Australian driver and owner of the car was killed and his passenger injured. The deceased had a South Australian third party insurance policy. The passenger had sued the nominal defendant under the *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) in the Supreme Court of New South Wales and had recovered damages. The nominal defendant then sued the estate of the driver in the Supreme Court of South Australia pursuant to s 32 of the *Motor Vehicles (Third Party Insurance) Act*, seeking recovery of the compensation it had paid. In the Full Court, Hogarth and Mitchell JJ held that on its terms s 32 did not purport to create an obligation upon the defendant to reimburse the nominal defendant. Having so held, they did not need to consider whether common law choice of law rules would have applied the section in proceedings brought against the driver. Chief Justice Bray, dissenting, held that the section did confer a right of recovery and that the right was enforceable in South Australia.

Chief Justice Bray dismissed an argument that the New South Wales Parliament did not have authority to legislate extraterritorially by imposing an obligation on the

³³ Ibid 86, 101.

³⁴ Ibid 86, 102.

³⁵ [1971] SASR 346.

estate of the owner/driver. He held that the occurrence of the accident in New South Wales afforded a sufficient nexus with that State to validate the legislation. The right of recovery was limited to death or bodily injury occurring *in* New South Wales.³⁶

Chief Justice Bray accepted that the statutory obligation to indemnify should be regarded as quasi-contractual and not delictual. He said of quasi-contracts:

The obligation is like one arising out of contracts; it is as if – quasi – it were created by contracts. The difference is that it does not arise from the consensus of the parties; it is imposed by the law as if there had been such a consensus. So here there was no agreement by the deceased Taylor or his executors to indemnify the Nominal Defendant, but the statute, in creating the debt, imposes the same sort of obligation on the estate as if there had been a contract by the deceased that on his death his executors would be bound in terms of s 32.³⁷

However, that conclusion was not sufficient to dispose of the question of private international law. The New South Wales Nominal Defendant was suing in South Australia on an obligation that depended on the ‘foreign’ law of New South Wales. Bray CJ next turned to consider why the law he had characterised as quasi-contractual law should be applied in South Australia. He said:

What then, according to the rule of private international law adopted in common law systems, is the proper law of a quasi-contract? The authority is scanty but it seems to me that in a case like this, where the obligation is not one supervening upon any real contract (as for example in cases of frustration), the true rule is that the proper law of a quasi-contract is the law of the place *with which the circumstances giving rise to the obligation have the most real connection*: Westlake, *Private International Law*, (6th ed, 1922) 308-309; Dicey and Morris, *Conflict of Laws*, (8th ed, 1967) 904-905. That place is clearly New South Wales. *The accident occurred there and the deceased died there*, though I do not say that the position would be any different if he had died elsewhere. On the assumption of his negligence the injured passenger acquired a right of action against him and would have been able to sue him if he had lived (and indeed one which under the legislation, both of South Australia and New South Wales, survived against his estate, though that is immaterial) and on his death acquired also a right of action under s 15(2)(a) against the nominal defendant. Once the right arose against the nominal defendant at least a potential obligation to indemnify was

³⁶ That construction of the section was obviously right. Plainly the New South Wales Parliament would not have intended to create a right of action against its Nominal Defendant in the case of an accident occurring *outside* New South Wales and therefore could not have intended to confer on it a right of recovery against third persons with respect to interstate accidents.

³⁷ *Nominal Defendant v Bagot's Executor and Trustee Company Limited* [1971] SASR 346, 365.

imposed on the executors whose title after the grant related back to the death. *That right became crystallised as a result of the judgment in New South Wales and payment pursuant to it.*

...
So here it might be said that every person driving in New South Wales but insured under the law in South Australia impliedly undertakes that, in the event of his death, his estate will indemnify the nominal defendant against any sum of money which the nominal defendant has to pay to those injured in New South Wales as the result of his negligence. Alternatively, it could be said that the law of New South Wales imposes a quasi-contractual obligation actionable under s 32 as if the deceased had entered into a contract that his estate would indemnify the nominal defendant in the event of his death for any money which the latter had to pay to persons so injured.³⁸

The reasoning of Bray CJ in both cases depended, critically, on identifying some aspect of the defendant's conduct that was *an implied acceptance of obligations imposed by the interstate law*. Moreover, there must be an identity, or at least a close association between, the conduct that results in the imposition of the obligation and the conduct by which it is impliedly accepted.

Taking the approach of Bray CJ from those cases and applying it to the facts in *Sweedman*, it is plain that Mrs Sweedman did not by her conduct in any way impliedly accept an obligation imposed by the Victorian Act. Indeed, the imposition of an obligation arising out of Victorian law on Mrs Sweedman contravened the cardinal principle of private international law, namely, that the recognition given to the legislative power of another sovereign is limited to regulating the conduct of persons present in or otherwise having some connection with its territory. That is to say, it is limited to conduct which can properly be said to expressly or impliedly accept its authority. The fact that persons injured by Mrs Sweedman's negligence happen to have been visiting Victorians and that they later claimed on a Victorian accident fund are factors that are quite unconnected to Mrs Sweedman. The only relevant act attributable to her is driving in New South Wales, an act that implies an acceptance of New South Wales law only and not Victorian law.³⁹

³⁸ *Nominal Defendant v Bagot's Executor and Trustee Company Limited* [1971] SASR 346, 365-6 (emphasis added).

³⁹ It may be *possible* to conclude that, in driving in a nation of federated States, the possibility of colliding with a driver from another state is not fanciful, and that laws from that State may impact upon the liability for the collision. It may follow that that by so driving in one state you are impliedly consenting to being subject to the laws of another state should such a collision occur. However, as quickly becomes apparent, such reasoning is abstract in the extreme and should not be allowed to displace the above proposition. Moreover, it is inconsistent with the acceptance of the laws of the State in which the accident occurred which is more readily implied from the conduct of the interstate visitor.

Justice Callinan was sceptical of the plurality's choice of law reasoning. He referred⁴⁰ to the sequential approach to the selection of the *lex causae*⁴¹ described by Nygh and Davies.⁴² First the matter before the court must be categorised as one for which a choice of law rule exists such as tort or contract. Once the choice of law rule is identified it will prescribe a connecting factor. The application of that connecting factor to the facts of the matter will lead the court to the *lex causae*. He continued:

The relevance for present purposes of the matters to which I have referred is that the facts, or the factual situation, determine what the correct cause of action is, and ultimately therefore the law to be chosen.⁴³

It was his view that it was strongly arguable that the facts constituting the cause of action included the collision and the resulting injuries and that therefore action was more properly characterised as an action in tort. He continued:

It also strikes me as both unfair, and somewhat eccentric that the appellant and her insurer, who may perhaps be presumed to know the law of New South Wales, but hardly the choice of law rules of Victoria and the statutory law creating the claim against them, are now to be confronted with a claim in a Victorian court in respect of events occurring in New South Wales, made long after any action in respect of them in New South Wales could successfully be pursued. That this is so provides further reason for the discouragement and rejection of the excessively long-arm reach of s 104 of the TA Act which Victoria wishes to extend here.⁴⁴

It can here be observed that the Victorian recovery provision could well have been drafted in a form that would have very obviously lead to its classification as a cause of action in tort, for example, 'the Commission can by action recover financial loss suffered by it in compensating persons injured by negligent third parties'. If the provision had been so enacted the result in *Sweedman* arguably would have been reversed even on the reasoning of the majority. That in itself would suggest that the majority had greater regard to the form of the provision than the conduct of the parties and the 'factual situation'.

Justice Callinan observed that, even if the case was properly characterised as an action for an indemnity, it was arguably more closely connected with New South Wales than Victoria. Not only was the accident in New South Wales but the liability of the insurer to indemnify Mrs Sweedman would fall to be determined in accordance with New South Wales law. His reasoning follows more closely the

⁴⁰ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 425 [111].

⁴¹ The *lex causae* translates as the 'law of the cause of action' and refers to the legal regime governing the legal relationship between parties.

⁴² P Nygh and M Davies, *Conflict of Laws in Australia*, (7th ed, 2002) 273.

⁴³ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 426 [113].

⁴⁴ *Ibid* 427 [117].

approach of Bray CJ in *Hodge* than the reasoning of the majority. Justice Callinan commented:

The connection with Victoria depends almost entirely upon the fact of the TA Act. If the test of closer connection, the test for an indemnity claim is to be applied, New South Wales and its law may better satisfy it.⁴⁵

Finally, Callinan J questioned whether the common law choice of law rules had any application at all and suggested that the Victorian Act had by necessary implication abrogated the common law and replaced it with a statutory rule. He said:

Subject to a reservation which I will explain later, if the law to be applied to the action is Victorian law, that would not be because a common law rule requires it. It would be so, because, in creating the right or cause of action, the [Victorian Act], necessarily also enacts by necessary implication, a choice of law rule to govern the action. How could it be otherwise? One State cannot legislate for another. In enacting a novel statutory cause of action, a parliament of a State could hardly be intending that the law of some other State apply to the litigation of it. In enacting s 104 of the [Victorian Act], the legislation of Victoria also necessarily sought to enact the choice of law rule to apply to it, of Victoria. There can be no doubt about the statutory intendment of a legislature which creates and enacts a statutory cause of action. On this analysis it is unnecessary to look for and compare similar non-statutory causes of action, and to seek to apply the choice of law rules governing them to the statutory cause of action under s 104 of the [Victorian Act].⁴⁶

The radical nature of the result in *Sweedman* in the context of private international law can best be illustrated by contemplating a hypothetical accident between Mrs Sweedman and two French tourists. If the tourists had claimed compensation against the fund of a no-fault scheme in France that had a similar right of recovery under French law to that of the Transport Accident Commission, one would not expect the courts of New South Wales to recognise and apply the right to recovery of the managers of the French fund under French law simply because the French nationals received compensation under the French legislative scheme.⁴⁷

⁴⁵ Ibid 428 [120].

⁴⁶ Ibid [109]. (Emphasis added.)

⁴⁷ The recent decision of the House of Lords in *Harding v Wealands* [2007] 2 AC 1 is a timely reminder of the more conservative approach that is taken to the application of ‘foreign’ law in a truly international context. In that case an action was brought in England by an English visitor to Australia against his Australian girlfriend for injuries suffered in a car accident caused by her negligence. The House of Lords held that the statutory modifications to the common law effected by New South Wales legislation were applicable in the action brought in England.

PART II: CONSTITUTIONAL IMPERATIVES AND STATE HEGEMONY –
AN ALTERNATIVE APPROACH

The proposition that in Australia the Constitution, and not private international law, should determine the law applicable to the matter in dispute should not be at all surprising. The descriptor ‘choice of law rules’ should not be allowed to obscure the fact that the practical effect of choice of law rules is to give some extraterritorial operation either to the law of the forum or the law of another law area. Indeed, Dicey’s view was that a more accurate description of the topic was ‘the extraterritorial effect of law’.⁴⁸ The extraterritorial effect of law is of course a matter of legislative power that in Australia is to be determined by the *Constitution*.

A UNITARY SYSTEM OF LAW

The appellant and some of the interveners in *Sweedman* relied heavily on the reasons of Deane J in *Brevington v Godleman*.⁴⁹ Justice Deane there held that ‘the Commonwealth and State Constitutions and laws comprise a unitary system of law’. He explained that he meant by that ‘a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent and reconcilable.’⁵⁰ This did not mean that ‘identical rules regulate conduct property or status and defined its consequences or attributes regardless of where in the jurisdictional territory it may occur or exist’.⁵¹ Rather, what was essential was ‘that the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct property or status at a particular time and a particular part of the national territory will be the same, regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise’.⁵²

Justice Deane considered that result was manifest from the very purpose of the Constitution which was ‘to federate the former colonies into a single nation’. He identified five other indications that the Constitution so provided.⁵³

1. The original jurisdiction of the High Court and the vesting of federal jurisdiction in Federal Courts and the courts of the States. In particular, federal diversity jurisdiction assumed ‘the existence of a national law, with Commonwealth and State ingredients, which can be ascertained and applied by a Court whose territorial jurisdiction extends indefinitely to all parts of the Commonwealth’. Justice Deane observed that s 76(iv)

⁴⁸ A V Dicey and A Keith (ed), *Conflict of laws*, (3rd ed, 1922) 15.
⁴⁹ (1988) 169 CLR 41.

⁵⁰ *Brevington v Godleman* (1988) 169 CLR 41, 121.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid* 122-4.

allows the Commonwealth to confer on the High Court a jurisdiction over matters ‘relating to the same subject matter claimed under the laws of different States’.⁵⁴

2. The constitutional separation of judicial power implied that laws had an independent existence.
3. The cardinal role of the common law was a powerful reason for regarding the Australian legal system as a unitary one. He relied on the extra curial observations of Sir Owen Dixon⁵⁵ concerning the role of the common law either as a source of constitutional authority or as an element of the legal system which the Constitution established and its pervading influence. The central role of the common law provided a powerful justification for the perception of that system as a unitary one.
4. The inherent value of the Australian constitutional legal system that an individual should not be exposed to the injustice of being subjected to the requirements of contemporaneously valid but inconsistent laws.⁵⁶
5. The jurisdiction of the High Court as the final and conclusive appellate tribunal to hear and determine appeals from both State and federal Courts.

To the considerations adumbrated by Deane J could well be added the Constitutional preamble. A valid state law that has extraterritorial operation does not just bind the courts of the State or Territory in which it was enacted. Section 5 of the *Commonwealth of Australia Constitution Act 1900* (UK) provides that:

This Act shall be binding on the Courts, judges and people of every State and of every part of the Commonwealth.

It is the *Constitution* that continues to sustain the legislative power of the States, including the power to legislate with extraterritorial effect. The extraterritorial operation of State statutes, including any amendment of the common law choice of law rules made by them, therefore binds the people and the courts of every State and every part of the Commonwealth. This observation leads naturally to a consideration of s 118 of the Constitution.⁵⁷ Justice Deane explained the limited support his view derived from s 118 in this way:

⁵⁴ The purpose of this provision is obscure.

⁵⁵ O Dixon, ‘Sources of Legal Authority’ in *Jesting Pilot* (1965) 198-202.

⁵⁶ *Breavington v Godleman* (1988) 169 CLR 41, 129-30. Deane J referred there to *University of Wollongong v Metwally* (1984) 158 CLR 447, 467, 476-7.

⁵⁷ Section 118 of the *Constitution* provides that: ‘Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.’

The directive of s 118 must, of course, be read within its constitutional context. That means that it must be read as applying only to laws and Acts to the extent that they are not invalid either on the ground that they purport to operate beyond the State legislative competence or on the ground that they are inconsistent with a valid Commonwealth law.⁵⁸

Justice Deane's solution to the possibility of conflict was to hold that 'the operation of State laws and the direct reach of State legislative powers, while continued and incorporated within the new national system, was seen as remaining fundamentally territorial.'⁵⁹ The recognition of the extraterritorial legislative power of the States could not, in the opinion of Deane J, 'reverse the historical fact that the Constitution was framed in the context of the traditional view that colonial (and State) legislative powers were confined by strict territorial limitations which precluded the extraterritorial operation of laws'.⁶⁰ Viewed in that traditional context, 'the Constitutional solution of competition and inconsistency between purported laws of different States as part of the national law must, where the necessary nexus for prima facie validity exists, be found either in the territorial confinement of their application or, in the case of multi-State circumstances, in the determination of predominant territorial nexus.'⁶¹

In the subsequent decision of *McKain v RW Miller & Co (SA) Pty Ltd*, Deane J explained that:

the determination of predominant territorial nexus for the purpose of resolving competition or conflict between the laws of different States or Territories within the Australian legal system would, at least in a borderline case, involve a weighing process in which considerations of the requirements of justice may well be relevant in the comparative assessment of the competing factors.⁶²

He also accepted that on his approach the rules of private international law were not rendered irrelevant in all circumstances. He said:

In a case where there is a substantive nexus with the territory of more than one State the determination of predominant territorial nexus may well involve a discretionary weighing of competing factors, including considerations of what is fair and just, in which the rules of private international law may be important by way of analogy.⁶³

Indeed it could be strongly argued that State statutes should be construed not only in accordance with the presumption of territoriality but also so that they apply

⁵⁸ *Breavington v Godleman* (1988) 169 CLR 41, 130.

⁵⁹ *Ibid* 128.

⁶⁰ *Ibid* 129.

⁶¹ *Ibid*.

⁶² (1991) 174 CLR 1, 46.

⁶³ *Ibid* 53.

consistently with common law choice of law rules. If State statutes were so construed there would be little practical difference in moving from the choice of law approach to the constitutional approach suggested by Deane J.

However reliance on private international law principles alone offers no solution to the problem of contradictory legal outcomes depending on the jurisdiction invoked. It may also in some cases, like it may have in *Sweedman* itself but for what I have suggested was the erroneous application of those principles, lead to results that are maladapted to the economic legal and constitutional structure of the Australian federation.

In his article, *Conflicts and Choice of Law within the Australian Constitutional Context*, Jeremy Kirk has described Deane J's approach as a search for the 'proper law of the dispute'.⁶⁴ Kirk argues for an approach to s 118 that gives effect to the natural meaning of its words and which recognises its place in the Constitution and its general unifying aim. According to Kirk that approach requires that all valid statutes be given full effect.⁶⁵ Kirk concludes that the criterion for resolving inconsistencies between statutes, the 'closer connection' test, emerges not from s 118, but from the broader notions of federal relations within the Australian constitutional context. Kirk makes the point that:⁶⁶

Within [the federal system established by the *Constitution* and the *Australia Acts*] States have power to make laws for the government of the territory within their boundaries. They also have power to make laws governing matters outside those boundaries if those matters have a real connection to their territory. The common element to these two types of power is having a connection to the government of the territory. If an assessment of paramountcy is required, it is natural and appropriate to assess the relative strengths of that connection, that is, the strength of the governmental interest in regulating a matter connected to the governance of the politics territory. This test can be seen as an implied limitation on State powers derived from the incorporated constitutional doctrine of federalism (informed by the rule of law), a doctrine which is manifest in the multiple provisions of the *Constitution*.

Kirk contends that a court should consider the particular facts in issue in the litigation before it in order to determine which State has the closest connection.⁶⁷ I doubt that the enquiry should be confined to the facts in issue in the particular litigation before the court. The constitutional issue is necessarily wider. The relevant question, it is suggested, is which State has the greatest interest in the subject matter that is regulated in inconsistent ways by competing State legislation

⁶⁴ J K Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247, 265.

⁶⁵ Ibid 268.

⁶⁶ Ibid 285.

⁶⁷ Ibid 288.

and not which State has the closest connection to the particular facts of the case out of which the wider constitutional question arises.

In his article *The Australian 'Single Law Area'*,⁶⁸ Selway J observed that, at least where federal jurisdiction is based upon a matter arising under any law made by the Parliament, the Commonwealth could, as it had in ss 79 and 80 of the *Judiciary Act 1903*, legislate for the substantive law that is to be applied in the hearing of the dispute. However, he doubted that the legislative power of the Commonwealth extended to prescribing the applicable substantive law in other contexts such as diversity jurisdiction.⁶⁹

Justice Selway observed that s 79 of the *Judiciary Act 1903* (Cth) does not have the result that the same substantive law is applied in federal jurisdiction no matter where the proceedings are taken. Indeed, in cases where State laws amend the common law choice of law rules in inconsistent ways, s 79 favours the law of the State in which the court happens to be sitting.

In my view Selway J was correct to maintain that Chapter III of the Commonwealth Constitution 'necessarily assumes that the rights and liabilities of the citizen in federal jurisdiction are capable of determination independently of knowing in what State the proceedings are to be heard'.⁷⁰ It follows from this that in 'determining what rights and liabilities parties may have in respect of an Act or event which is governed by Australian law' one looks to:

1. The Constitution and, subject to that,
2. valid and applicable Commonwealth statutes and, subject to that,
3. valid and applicable State statutes and, subject to that,
4. the single common law.⁷¹

The written submissions for the appellant in *Sweedman* relied more explicitly on the rule of law itself to support the same proposition. The central principle of the rule of law, argued the appellant, is 'that it involved the law being obeyed', and that presupposes that the law is 'capable of guiding the behaviour of its subjects.' If the law that applies to any given facts or circumstances is determined by where a person sues (and, perhaps more significantly, is determined at the time when a person sues) then, said the appellant, 'the law becomes radically indeterminate'.⁷²

⁶⁸ B M Selway, 'The Australian "Single Law Area"' (2003) 29 *Monash University Law Review* 30.

⁶⁹ *Ibid* 36.

⁷⁰ *Ibid* 38.

⁷¹ *Ibid* 40.

⁷² Written Submission of the Appellant, 26 July 2005 [42].

On the application of s 118, Selway J said:⁷³

That section has generally been understood (consistent with its US counterpart) as being directed to the recognition of the laws of another State for the purpose of the common law conflict of laws rules. Not only does this approach involve giving supremacy to common law rules over statutes, it also is inconsistent with the clear terms of s 118 itself. If a valid interstate statute purports to apply to a particular act or event a local court in ignoring that statute is clearly not giving full faith and credit to it. This does not mean that s 118 is itself the answer to problems of inconsistent State laws. But, as Justice Gummow pointed out, ‘Constitution section 118 assumes the existence of constitutional conflict rules without specifying their content’.

Plainly a direct inconsistency between State laws cannot be resolved by s 118 of the *Constitution*. Indeed, the very terms of s 118 suggest that one (or both⁷⁴) of the two laws that are inconsistent must to the extent of the inconsistency be invalid. The invalidity must logically both be limited to the extent of the inconsistency and persist only during such time as both statutes remain on foot. I suggest that s 118 not only assumes the existence of a constitutional conflict rule but also necessarily implies the invalidity of at least one of the competing State statutes because s 118 would be incapable of application by Australian courts if one were to accept that competing State statutes could be both valid *and* inconsistent. The logical impossibility of applying s 118 to conflicting State statutes necessarily implies the existence of a constitutional rule for resolving that inconsistency.

Justice Selway concluded that a constitutional conflict rule could properly be implied from the structure of the Constitution. He thought that it was a natural consequence of Chapter III and the broad extraterritorial powers of the States. He put it in this way:

In this case the implication is the consequence of Chapter III of the *Constitution* combined with the broad extra-territorial power of the States confirmed by s 106 of the *Commonwealth Constitution* and s 2 of the *Australia Act* 1986 (Cth). What is implied is such a rule as is necessary to ensure that the integrated judicial system created by the *Constitution* can operate notwithstanding the broad powers of the States. The implication is necessarily a narrow one, proven by the fact that there is no example of the need for such a rule in over a century.⁷⁵

The plurality in *Sweedman* also alluded to the existence of a constitutionally conferred federal jurisdiction to resolve inconsistency between State statutes arising from the requirement in *Constitution* s 74 for leave to appeal to the Privy Council

⁷³ Selway, above n 68, 41, citing W M C Gummow, ‘Full Faith and Credit in Three Federations’ (1995) 46 *South Carolina Law Review* 929, 1019.

⁷⁴ Cf Hill, above n 28, discussed in text accompanying below nn 101-103.

⁷⁵ Selway, above n 68, 45.

on any question ‘as to the limits inter se of the Constitutional powers of any two or more States’.⁷⁶

The *Constitution* also, in s 76(iv), contemplates the exercise of federal jurisdiction in matters ‘relating to the same subject matter claimed under the laws of different States’. Other provisions of the *Constitution* (in particular, ss 52 and 90) require a distinction between exclusive and concurrent legislative power. The body of authority concerning s 109 of the *Constitution* is concerned with inconsistent laws made in exercise of concurrent federal and State powers. There was some consideration of inconsistency between State laws in *Port MacDonnell Professional Fishermen’s Association Inc v South Australia* but no ‘real’ inconsistency arose on the facts of that case.

Justice Selway suggested the following sequential approach to the problem of conflicting State statutes,⁷⁷ where any conflict could be resolved by:

1. Construction of the statute in accordance with a presumption against extraterritoriality and consistently with choice of law rules;
2. A determination of a sufficient State nexus to support any extraterritorial operation;
3. A determination that the State statutes are not repugnant to any express or implied constitutional term nor inconsistent with Commonwealth laws;
4. Applying a test of ‘direct repugnancy’ rather than inconsistency between the competing State statutes; and
5. Applying a test of greater territorial nexus where there is such a repugnancy.

The test of predominant territorial nexus suggested by Deane J in *Breavington* and by Selway J is supported by the following considerations:

1. The fundamentally territorial nature of State power. The historical division of State powers upon a territorial design is provided for in specific provisions of the *Constitution* and in the federal structure of the *Constitution*.⁷⁸

⁷⁶ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 405 [44].

⁷⁷ Selway, above n 68, 45.

⁷⁸ See ss 51(xiii), (xiv), (xxiv), (xxxv), 80, 89(i), 92, 117, 123, 124, 125 of the *Constitution*. See also Sir Owen Dixon, ‘Sources of Legal Authority’ in *Jesting Pilate* (1965), 199 (‘A State is an authority established by and under the law, an authority possessing legislative and other power restricted territorially and qualified in point of subject matter’); 201 (‘The colonies were and the States are distinct jurisdictions and the enactments of their legislatures are confined in their territorial operation because a State is a fragment of the whole’); *Breavington v Godleman* (1988) 169 CLR 41, 128 (Deane J); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 533-4 [64] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ);

2. The equality of the States as bodies politic. The constitutional equality of the States is reflected in many different provisions of the *Constitution* and by the federal structure of the *Constitution*.⁷⁹ The relevant sense in which the States are equal for the purposes of determining which State enactment ought to prevail in the case of inconsistency is the equality of each States' interest in providing for the 'peace, order and good government' of that State as a polity by the exercise of its legislative power.⁸⁰
3. The constitutional status of the States as self-governing colonies, before federation, with the result that they had legislative power to regulate matters beyond their territorial boundaries.

I suggest that the relevant nexus to each jurisdiction must be weighed according to the territorial interest of the jurisdiction in legislating with respect to the subject matter of the legislation. The legislature of the place in which the conduct that the competing enactments seek to regulate takes place⁸¹ will *almost* always have a closer territorial nexus than the legislature of the place in which the consequences of that conduct become manifest.

CONSIDERATION OF THE CONSTITUTIONAL ISSUE IN *SWEEDMAN*

In *Sweedman*, the plurality and Heydon J did not have to finally resolve the constitutional question because they rejected the appellant's contention that the Victorian and New South Wales statutory regimes were inconsistent. Heydon J explained that the differences in the awards available under the New South Wales Act and those available under the Victorian Act ultimately had no effect because 'whatever a victim recovers under the [Victorian Act] the amount recoverable under

State Authorities Superannuation Board v Commissioner of State Taxation (WA) (1996) 189 CLR 253, 271 (Brennan CJ, Dawson, Toohey and Gaudron JJ); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 25 [15] (Gleeson CJ).

⁷⁹ See ss 7, 99, 106, 107, 108 and 118 of the *Constitution*. See also *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 217 (Mason J), 248-50 (Deane J); *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

⁸⁰ Equality in this sense has been recognised in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 55 [116] (Kirby J). Such equality was also recognised by the refusal of the Court to allow for a public policy exception to operate between the States for the purposes of private international law: *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, 577 (Rich and Dixon JJ), 587-8 (Evatt J).

⁸¹ It may be conceded, however, that identifying a single location in which conduct took place will not always be a simple task. As Deane J noted in *Breavington v Godleman* (1987) 169 CLR 41, 137, the rules of private international law may be of some analogical assistance in such cases. Cases where the conduct, for example in the case of a conspiracy, occurs across several States and cases of omission will pose special difficulties.

s 104(1) by the Commission cannot exceed the amount recoverable by the victim under the [NSW Act].⁸²

Justice Heydon dealt with the provisions of the Victorian Act that allowed awards to be reopened and the resulting possibility of further recovery in this way:

Since the third-party policy insures against ‘liability in respect of’ vehicles used or operated in any part of the Commonwealth, the legislative language contemplates the policy meeting liabilities other than those which sound in damages and which are subject to the specific limitation and other restrictions of Pts 5 and 6 of the [NSW Act]. The fact that the [NSW Act] contemplates those other liabilities arising indicates that legislation in other States generating them is not inconsistent with the [NSW Act]. In particular, provision will have to be made for those other liabilities, or they will have to be closed off, as insurers see fit in the light of claims under the legislation of other States which are subject to limitation periods which may be longer than that provided by the [NSW Act].⁸³

Justice Heydon summarised his conclusion that there was no inconsistency between the statutes thus:

In short, the relevant sections of the [NSW Act], in terms of what they provide and what they do not provide, do not seek to *deal with and regulate* claims of the kind which arise under s 104(1). But they *do permit* persons against whom indemnity is obtained under s 104(1) to recover from their insurers. There is thus no collision between the [NSW Act] and s 104(1) in that respect. Similarly, s 104(1) does not purport to reduce the ambit of the [NSW Act]. Section 104(2) provides that the liability of the defendant under s 104(1) shall not exceed the amount of damages payable to the injured person: that is, under s 104(1) neither the tortfeasor nor the insurer incurs greater liability than that tortfeasor or insurer would have incurred had the victim proceeded against the tortfeasor under the common law as modified by the [NSW Act].⁸⁴

His conclusion on inconsistency allowed Heydon J to dismiss the appeal without dealing with the underlying constitutional issue that might otherwise have arisen. Nor did Heydon J deal with the choice of law issues. He held only that:

The appellant's arguments that material inconsistencies exist must fail. The [Victorian Act] and the [NSW Act] have differences, but they are not what the appellant accepted had to be found – inconsistencies *in substance*. They satisfy no possible test for inconsistency, and the correctness of various tests for inconsistency debated at the bar table need not be considered.⁸⁵

⁸² *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 437 [149].

⁸³ *Ibid* 438 [150].

⁸⁴ *Ibid* 436 [147].

⁸⁵ *Ibid* 439 [153].

Having concluded that there was no inconsistency, there was no reason not to allow the Victorian Act to operate and therefore no occasion to consider the Constitutional question more widely.

On the other hand, Callinan J found that the statutes did conflict. Callinan J referred extensively to the different legal position that Mrs Sweedman and her insurer would have faced if an action had been brought pursuant to the NSW Act rather than under the regime that was imposed by the Victorian Act. Judgments imposed under the Victorian Act could be reopened if there was a recurrence or worsening of the effect of an injury. It provided correspondingly that Mrs Sweedman could be subjected to further actions for recovery of the compensation paid in the event that the judgement was reopened. Understandably that possibility made it difficult for Mrs Sweedman's insurer to make accurate and sufficient provision for, or to finalise, claims.⁸⁶ The NSW Act prescribed a strict limitation period.⁸⁷ In passing Callinan J referred to the 'recent disturbing trend on the parts of courts and tribunals, and legislatures, towards jurisdictional over-reach, the former by insisting on hearing cases that could more efficiently, proximately and appropriately be heard by courts of other jurisdictions, and the latter, by seeking to confer excessive long-arm jurisdiction on their courts'.⁸⁸

Having so found, Callinan J had to address the constitutional basis for resolving conflicts between State statutes. Justice Callinan strongly denied that the Commonwealth Parliament had any constitutional power to legislate for the resolution of conflicts between the States: only the High Court could resolve such conflicts.⁸⁹ In particular Callinan J denied that the provisions of the *Judiciary Act* could validly resolve 'constitutional conflicts between the States'. The constitutional principle that should govern conflicts between State laws was, said Callinan J, that 'the polity of a State will have the primary responsibility for, and hegemony over the people, institutions, lands and activities within its boundaries'.⁹⁰ That principle results in the rule that the legislation of one State that is in conflict with the extraterritorial operation within its territory of the legislation of another State prevails over that extraterritorial operation.⁹¹

Justice Callinan referred to the test of closer or stronger connection postulated in *Port MacDonnell Professional Fishermen's Association Inc v South Australia*.⁹² He went on to say:

⁸⁶ Ibid 418 [96].

⁸⁷ Ibid 419 [98].

⁸⁸ Ibid 421 [102].

⁸⁹ Ibid 422 [104].

⁹⁰ Ibid 421 [101].

⁹¹ Ibid 422 [105].

⁹² (1989) 168 CLR 340.

If the test propounded in *Port MacDonnell* were a, or the exclusive, test of prevalence, then for the reasons which I have already given, I would hold that New South Wales, and New South Wales law only, should govern the action. The adoption of the State law having the closer or stronger connexion with the facts in issue has several attractions, including that it is suggested in prior authority of this Court. One such benefit is that the application of the closer or stronger connexion test ensures consistency of result, regardless of the forum. Another is that it recognises the primary responsibility or, to use the phrase of the majority in *John Pfeiffer Pty Ltd v Rogerson*, the ‘predominant concern’ that each State has over its own geographical area. Even though, as I pointed out in *Mobil Oil*, more than one State can have a legitimate connexion with the same facts, it is clear that the Constitution intended each State to have primary legislative responsibility, subject to the Commonwealth's enumerated powers, for occurrences within its borders.⁹³

Justice Callinan reviewed a number of decisions of the Supreme Court of the United States that dealt with cause of actions that had multiple State elements. He discovered in those cases recognition of the predominant interest of States over affairs within their territory and a preference for substance over form.⁹⁴ He made the point that the decision of the Court in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*⁹⁵ showed that an emanation of one State operating within the territory of another is bound by the laws of the latter. He argued:⁹⁶

By parity of reasoning, if the respondent here, and those whom it ‘insured’ (the casualties) choose to come into New South Wales or seek to recover money in respect of events occurring there, then they should be bound by the law of New South Wales. It is not as if the casualties could not have sued in that State, and recovered there, had they done so in a timely way, what the respondent now seeks to recover from the appellant.

He concluded:

I would accordingly allow the appeal on the basis that s 104 of the [Victorian Act] in its application to this case is unconstitutional: it represents an unconstitutional interference with, projection into, or intrusion upon the State of New South Wales, and the natural and predominant hegemony that that State has over claims for personal injuries arising out of negligently caused motor vehicle accidents occurring within it, involving one of its residents, and her insurer licensed to insure her under the law of New South Wales; and upon the further basis that the scheme for which the [Victorian Act] provides

⁹³ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 429 [123] (Footnotes omitted).

⁹⁴ *Ibid*, [129].

⁹⁵ (1996) 189 CLR 253.

⁹⁶ *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 432 [130].

is in conflict as the table and other provisions discussed show, with the scheme mandated by the [NSW Act].⁹⁷

The reasoning of Heydon J on the question of inconsistency is persuasive. His conclusion that it was not the purpose of the New South Wales Act to ‘deal with and regulate’ claims under the Victorian Act is consistent with the existence and nature of the State based statutory regimes that regulate third party personal injury liability.

On that construction, the constitutional objection to the application of the Victorian Act in New South Wales loses its foundation. The application of the Victorian Act then follows simply as a consequence of the extraterritorial operation of the Victorian Act, that it was plainly within the legislative competence of the Victorian Parliament to enact. The Australian common law in its application anywhere in Australia can be modified by the valid laws of any State. It follows then that a more parochial application of common law choice of law rules may have caused some difficulty for the operation of State based personal injury schemes even where they could apply harmoniously. On the other hand the constitutional approach would allow those schemes to operate together except where there was a real inconsistency between the local and interstate schemes.

INCONSISTENCY AND COMPETING STATE STATUTES

The possibility of inconsistent State statutes has created some interest in the nature of the test of inconsistency that should be applied in that context. The judgment of the plurality in *Sweedman* contains the following observations about the meaning of ‘inconsistency’ in the context of competing State statutes:

Constitutional discourse has been informed by principles of varying width and precision which identify and resolve the disharmony between laws of more than one legislature. One principle adopts from Imperial law the term ‘repugnancy’; another the term ‘incompatibility’ considered recently in *Fardon v Attorney-General (Qld)*. The broadest principle is the ‘covering the field’ test which was developed in cases applying s 109 of the *Constitution*, as remarked above. Authorities such as *Collins v Charles Marshall Pty Ltd* and *Ansett Transport Industries (Operations) Pty Ltd v Wardley* which upheld State laws against ‘covering the field’ claims by federal law suggest that the NSW Act would not prevail over s 104(1) if this were the determinative constitutional norm.

But principles derived from Imperial law and later from s 109 assume a hierarchy of legislative competence, whether its peak be at Westminster or at the seat of government established under s 125 of the *Constitution*. The ‘covering the field’ test was devised to uphold conceptions of federalism expressed in the paramountcy provision of s 109. Whatever principle may be

⁹⁷

Ibid [131].

settled upon to meet cases of inconsistency between laws of several States in exercise of concurrent powers held as polities of equal authority, it will not be one that relies upon a 'covering the field' test.

Perhaps with an awareness of these difficulties, the appellant in her submissions eschewed reliance upon the s 109 case law. (And, in light of *Pfeiffer*, reliance upon s 118 of the *Constitution* as itself a circuit breaker also was discounted in oral submissions.)⁹⁸

I suggest that the distinction drawn in the above passage between 'repugnancy' and 'inconsistency' in the s 109 sense is illusory. Laws are only inconsistent if, and to the extent that, they impose conflicting duties, rights, powers or obligations. Inconsistency of the 'covering the field' type ultimately depends on an express or implied provision in one or both of the statutes under consideration to the effect that conduct or circumstances falling within the scope of the statute will not result in any legal consequence other than that provided for by the terms of that statute.

The point can be illustrated by the following abstracted laws:

- (a) If X, A must pay B \$Y
- (b) If X, A must pay B \$Y and no more than \$Y
- (c) If X, A must pay B \$Y+1
- (d) If X+Z, A must pay B \$Y
- (e) If and only if X+Z, A must pay B \$Y
- (f) If and only if X+Z, A must pay B \$Y and has no other liability to B.

Superficially laws (a) and (c) appear not to be inconsistent. However, a law that on its face says (a), on a proper construction may be found to command (b). Law (b) is plainly inconsistent with law (c). This illustrates the inconsistency described by Isaacs J in *Clyde Engineering Co Ltd v Cowburn*.⁹⁹ A similar analysis can be applied to laws (a), (d) and (e). On its face law (a) is not inconsistent with law (d). However, a law that on its face commands (d) may on a proper construction command (e), and law (a) is plainly inconsistent with law (e). Finally, law (f) is a law that effectively covers the field both as to the conditions for, and extent of, A's liability to B.

The analysis demonstrates, I hope, that any inconsistency between laws and the scope of that inconsistency is located in the statutes themselves. Inconsistency is a question of statutory construction. The consequences of that inconsistency and, in particular, the determination of which statute will prevail, must be found elsewhere. In the case of Commonwealth/State inconsistency it is found in s 109. In the case of State/State inconsistency it must be implied.

⁹⁸ Ibid [47]-[49].

⁹⁹ (1926) 37 CLR 466, 492-3.

AN ALTERNATIVE APPROACH — GAGELER

Stephen Gageler SC has argued for a different approach to the resolution of conflicts between State laws.¹⁰⁰ Gageler's suggests, for reasons similar to those explored earlier, that choice of law is unnecessary within the Australian federation. Section 118, Gageler says, 'does not bespeak any room for choice ... [l]iterally construed, the section requires no less than that a State statute be given elsewhere in Australia exactly the same force and effect as it is given in the State of its enactment'.¹⁰¹ Gageler argues that the question of whether a State law is applicable to a given case can be resolved simply by construing the relevant State law, with emphasis upon the presumption of interpretation that a statute applies only to things 'in and of' the enacting State.¹⁰² This is in essence the same approach which I suggested earlier, except that I would place lesser emphasis on the presumption against extraterritorial operation and allow a greater role for the common law choice of law rules to guide the resolution of the question of whether a State statute purports to apply to events occurring outside the enacting State. Thus Gageler accepts that the laws of the States apply directly to events in other States by reason of the fact that, on their proper construction, they have an extraterritorial operation, rather than applying indirectly by virtue of the 'choice' of that law by the law of the forum State.

It follows that 'the potential exists for there to be conflicting State and Territory laws simply because State and Territory statutes may have a valid extraterritorial operation'. Thus, '[w]hile choice of law is eliminated, conflict of laws remains a possibility'.¹⁰³

The point of departure between Gageler's suggested approach and those of other commentators lies in the way that conflict is to be resolved. Having regard to the equality of the States, Gageler suggests that conflict should be resolved in a manner which treats the question 'as one of repugnancy between statutes of equal status'.¹⁰⁴ Again resorting to the ordinary rules of statutory construction, Gageler states that, in the event of repugnancy, 'the general might be expected to give way to the particular and, in the extreme case of equal particularity, the earlier to the latter'.¹⁰⁵ Thus, effectively, Gageler's approach would permit the 'repeal' of the law of one State by the legislature of another. Although it is not explicitly spelt out in Gageler's article, the logical consequence of this approach would appear to be that the Parliaments of two States may become locked in a battle for supremacy where each enacts and re-enacts its law so as to be the last in time. The ultimate solution

¹⁰⁰ Stephen Gageler, 'Private Intra-national law: Choice or Conflict, Common Law or Constitution?' (2003) 23 *Australian Bar Review* 184.

¹⁰¹ Ibid 186.

¹⁰² Ibid 186.

¹⁰³ Ibid 187.

¹⁰⁴ Ibid 188.

¹⁰⁵ Ibid 188.

may well be a political one, as it is unlikely that the citizens of either State will tolerate for long the inconvenience of constantly changing laws.

It seems to me that there are two fundamental criticisms that may be levelled at this approach. First, apart from the ultimate limitation on State legislative *power* that laws be ‘for the government of the State’, the approach gives no effect whatsoever to the fact – which emerges from the text of the Constitution itself – that the Australian States are fundamentally geographical in nature. Secondly, the approach treats the laws of different States not only as laws of equal *status*, but also as laws of *the same legislature*, which, self-evidently, they are not. As Graeme Hill has pointed out, unlike legislation enacted by the same legislature, ‘there is no reason to suppose that the statutes of different states were intended to coexist’.¹⁰⁶

AN ALTERNATIVE APPROACH — HILL

Hill himself has suggested a different approach again.¹⁰⁷ He argues that a conflict between State laws can be resolved by applying *neither* law. This might be described as the ‘anti-matter’ approach. As soon as matter and anti-matter come into contact they immediately annihilate each other. So it is with State laws. However, Hill locates this approach within a framework that only recognises inconsistency in a very narrow class of cases, being those cases where it is logically *impossible to obey* the laws of both States. For example, take the following set of laws:

- (a) X must do A.
- (b) X must not do A.
- (c) X may do A but is not required to do so.

Hill would regard laws (a) and (b) as inconsistent: it is impossible both to ‘do A’ and to ‘not do A’. Hill apparently would not treat laws (a) and (c) as inconsistent, though, because it is possible to obey both laws. Likewise, Hill would not treat laws (b) and (c) as inconsistent. Superficially, it might be said that the effect of this approach is to allow both laws to operate. But if law (c) was allowed to operate, this would mean that X was *neither prohibited nor required* to do A. Although the *obligation* imposed by law (c) is not inconsistent with the *obligation* imposed by either law (a) or law (b), the *rights* imposed by law (c) are plainly inconsistent with the obligations imposed by both law (a) and law (b). Thus the laws themselves are inconsistent, as was shown in *Clyde Engineering Co Ltd v Cowburn*.¹⁰⁸

¹⁰⁶ Hill, above n 28.

¹⁰⁷ *Ibid.*

¹⁰⁸ (1926) 37 CLR 466.

Although Hill at one point describes his inconsistency as arising when it is ‘impossible to give effect to both statutes’,¹⁰⁹ he would not regard laws (a) and (c) as inconsistent, although it is plainly impossible to give effect to each. It follows that Hill’s ‘minimalist’ approach of ‘recognising’ inconsistency between State laws only where there is a conflict between obligation and obligation, or between right and right, and not when there is a conflict between right and obligation, actually involves not the *recognition* of inconsistency but the *resolution* of inconsistency: the inconsistency between laws is resolved by applying the law that imposes the greater restriction on the subject’s liberty.

If, as I suggest inconsistency must ultimately be determined as a matter of statutory construction the rights and liabilities of the subject will not be determined by the most active State legislature nor by a particular bias for or against liberty in the implied Constitutional test but by a determination of which State has the greatest claim to regulate the relevant conduct.

CONCLUSIONS

Most observers would accept that it was appropriate that the Transport Accident Commission recover the compensation it had paid from Mrs Sweedman. To have denied its right to recover would have resulted in a windfall to the New South Wales insurer. The establishment of State based compensation schemes would become more difficult.

However, a parochial application of private international law principles may not always provide an outcome that is appropriate and adapted to contemporary Australian social economic and legal relations. Indeed, *Sweedman* could well have been decided differently if those principles had been more strictly applied.

Even more importantly private international law principles are simply incapable of dealing with the possibility that State statutes may expressly alter common law choice of law rules in inconsistent ways. The development of a constitutional solution is inevitable.

¹⁰⁹ Hill, above n 28, 84, 85.