THE RESOLUTION OF INCONSISTENT STATE AND TERRITORY LEGISLATION

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I INTRODUCTION

It is a great pleasure to contribute to a festschrift devoted to celebrating the 80th anniversary of our friend and colleague, Emeritus Professor Leslie Zines. His contribution to the study of Australian constitutional law is too well known to require any reinforcement from us. It spans a period of five decades. His principal book *The High Court and the Constitution*[1] has been and continues to be at the forefront of constitutional scholarship since it was first published. That book and his other writings represent the distilled essence of much of his valuable and incisive understanding of the way the High Court interprets and should interpret, the *Constitution* — something which has held a life-long fascination for him. In his publications as in his many years of teaching, he displays not only a mastery of the technical and analytical aspects of public law, but a social and functional awareness that goes well beyond deriving the meaning and application of many provisions of the *Constitution* by the mere contemplation of the language used or by the canons of construction. Overall he was and continues to be a teacher in the widest sense of that term. He has had the good fortune to see the High Court accept many of his ideas as well as the more open kind of reasoning which he advocated in successive editions of his book — even if, in the last edition, he has felt less satisfied with the mode of reasoning adopted by the modern Court involving the use of legalistic techniques with less reliance on values and policy considerations.

As problems of federalism have always been at the centre of Zines' scholarly interests, we have chosen to discuss an important aspect of the subject which has become even more important since the High Court recognised that State legislation is capable of operating beyond the territorial limits of the enacting State. That aspect is how conflicts are resolved between overlapping State and Territory civil and criminal legislation which is capable of operating beyond the territorial limits of the enacting

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State or Territory. Our aim is to identify the principles which govern, or should govern, the resolution of such conflicts.

As will appear, the governing principles which we favour are as follows:

(1) a State (or Territory, if authorised by the Australian Parliament) can, subject to some limitations, legislate with extraterritorial effect in another State (or Territory); primacy will be accorded, in a case of direct or indirect inconsistency, to the law of the State (or Territory) legislature which has competence to legislate in the geographical area in which the law of the former State (or Territory) purports to operate (our 'main solution');

(2) the closer connection test suggested in *Port MacDonnell Professional Fishermen's Association Inc v South Australia*[2] ('closer connection test') applies only where the same inconsistency arises with respect to legislation which seeks to operate outside the geographical area of both the jurisdictions mentioned in the first principle, for example Australian offshore areas; and

(3) principles (1) and (2) only operate in the absence of uniform choice of law rules prescribed by federal legislation which displaces them.

By way of explanation of our approach, we make several preliminary comments. First, the question under consideration is to be distinguished from familiar choice of law problems where the courts are called upon to make a choice between the competing laws of different jurisdictions as the law to be applied to the facts of the case. In choice of law cases, the choice is made by identifying the law of the appropriate jurisdiction as, for example, the *lex loci delicti*.

Here the question is different. It is a matter of resolving an issue of inconsistency between two statutes, each of which is validly enacted. In order to resolve this issue it is necessary to formulate a test by reference to which one statute can be said to prevail over the other with the consequence that its application to the facts of the case will govern the outcome of the dispute. Although the process of resolving such an inconsistency may bear a superficial resemblance to resolving a choice of law problem, in one case (the present case) we are concerned with an actual inconsistency, in the other (choice of law), we are concerned with apparent inconsistency only.[3]

The second comment to be made is that it is now accepted that 'ideally' the rules governing the resolution of disputes should provide certainty and uniformity of outcome no matter where in Australia a matter is litigated, and whether it is litigated in federal or non-federal jurisdiction.[4] In other words, the rules should substantially inhibit, even if they cannot eliminate altogether, 'forum shopping'.

Our main solution, namely, that primacy be accorded to the law of the legislature which has competence to legislate in the relevant geographical area of operation, will, if adopted, substantially reduce without eliminating altogether forum-shopping, as will the closer connection test which we propose. In proposing the main solution, we concluded that it has stronger claims to apply in the case of the conflicts to which it is

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2 (1989) 168 CLR 340, 374 ('*Port MacDonnell*') even though the Court uses the term 'nexus'.

3 See *State Authorities Superannuation Board v Commissioner of State Taxation* (WA) (1996) 189 CLR 253, 285–6 and n 126 (McHugh and Gummow JJ) ('*State Authorities*') where the distinction was drawn between conflict in the constitutional sense and in the sense known in conflict of laws.

4 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 528 [44] ('*Pfeiffer*').

directed than the closer connection test which could be applied to those conflicts as well as conflicts in the offshore areas. Although the closer connection test, if so adopted, would also substantially reduce forum shopping, it is a less precise test and more difficult to apply.

Our next comment is that we do not see s 118 of the *Constitution* as providing a constitutional answer to the problem which we are addressing. Section 118 provides:

> 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.

Later, in Part IX of this essay, we discuss the interpretation of this section.

Our final preliminary comment relates to inconsistency. We use the term with reference to the sense in which it is understood in s 109 of the *Australian Constitution*. In this context, inconsistency in its full sense consists of direct and indirect inconsistency. Direct inconsistency arises where it is not possible to obey both laws or where one law confers a right, power, privilege or immunity and it is taken away by the other law. Indirect inconsistency (often referred to as 'covering the field' inconsistency) arises where a competent legislature evinces expressly or impliedly its intention to cover the whole field to which its enactment is directed to the exclusion of any other law.[5] As will appear, we consider that inconsistency in its full sense should be applied in the resolution of inconsistency between inconsistent State and Territory legislation.

II THE CONSTITUTIONAL FRAMEWORK AND RELATIONSHIP WITH CHOICE OF LAW PRINCIPLES

As McHugh and Gummow JJ pointed out in *State Authorities*,[6] the *Australian Constitution* does not contain an express paramountcy provision similar to s 109 that is capable of applying to the resolution of these conflicts. The *Constitution* does, however, contain the full faith and credit clause in s 118 which is directed to the recognition of State, but not Territory, laws.

In the same case[7] McHugh and Gummow JJ also quoted with approval the following remarks of Sir Owen Dixon speaking extra-judicially in 1943:

> 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. In other States the recognition of its statutes depends upon the general common law principles governing the extra-territorial recognition and enforcement of rights, *as affected by the full faith and credit clause*.[8] (emphasis added)

They went on to say that the subsequent recognition of the full scope of the power of States to enact extraterritorial legislation served only to increase the potential scope of the problem presented by these conflicts.[9] This recognition achieved constitutional backing when the *Australia Acts* in 1986 confirmed the ability of State Parliaments to

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5 See generally Geoffrey Lindell, 'Grappling with inconsistency between Commonwealth and State legislation and the link with statutory interpretation' (2005) 8 *Constitutional Law and Policy Review* 25, 27–30.

6 (1996) 189 CLR 253, 286.

7 Ibid.

8 'Sources of Legal Authority' in *Jesting Pilate* (1965) 198, 201.

9 (1996) 189 CLR 253, 286.

make laws that have extraterritorial operation if they are concerned with the peace, order and good government of their States.[10] Judicial authority has confirmed that ability.[11]

The High Court has explicitly acknowledged the existence of territorial limitations of State legislative powers *inter se* which are expressed or implied in the *Constitution*.[12] It has also suggested — though that may be too strong a word — a test for resolving conflicts between overlapping State laws in the offshore areas. The suggested test is that in relation to competing State laws which affect the same persons, transactions or relationships in those areas the State law which has the stronger nexus with those persons, transactions or relationships should prevail.[13] But the Court has yet to provide a solution to conflicts between overlapping State laws that operate on the Australian mainland. The Court has made it clear, however, that whatever the correct test may be for such conflicts it will only be applied in cases of direct inconsistency because of the absence of a paramountcy provision like s 109.[14] Possible overlaps encountered in the past have fallen short of giving rise to such an inconsistency.

Conflicts between overlapping State and Territory statutory laws can be expected to be less frequent than those between State and federal laws. Each State and Territory is primarily responsible for legislating with respect to whatever happens within its own boundaries. The extraterritorial extension of their laws is therefore an exception to the general rule. This position contrasts with overlapping State and federal laws where both laws frequently operate in the same geographical area. There are also rules of statutory construction which create presumptions that in the absence of a contrary intention (a) the operation of State and Territory legislation is confined to things, persons or matters within the geographical boundaries of the relevant State of Territory [15] and (b) such legislation does not override the common law rules of private international law.[16] But none of these considerations prevents the occurrence of a conflict if there is a sufficient indication that the legislature of a State or Territory does intend its legislation to operate in the geographical area of a sister State or Territory.

In particular, such conflicts will occur where the statutory laws of a sister State or Territory, having extraterritorial effect, apply in the forum by reason of their own force and independently of s 118 of the *Australian Constitution*.[17] For reasons already explained this can give rise to inconsistency which calls for an implied constitutional solution rather than one found in the conflict of laws principles. The latter principles minimise, but do not avoid altogether any inconsistency.

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10 *Australia Act 1986* (Cth) s 2. See also *Australia Act 1986* (UK) c 2, s 2.

11 *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 ('*Union Steamship*'); *Port MacDonnell* (1989) 168 CLR 340, 372; *State Authorities* (1996) 189 CLR 253, 286; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 22–3 [9]–[10], 33–4 [45]–[48] ('*Mobil Oil*'); *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 405 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ) ('*Sweedman*').

12 *Union Steamship* (1988) 166 CLR 1, 14.

13 *Port MacDonnell* (1989) 168 CLR 340, 374.

14 *Sweedman* (2006) 226 CLR 362, 406 [48] and 407 [52] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

15 For example, *Interpretation Act 1987* (NSW) s 12.

16 For example, *Wanganui-Rangitikei Electric Power Board v AMP Society* (1934) 50 CLR 581, 600–1 (Dixon J).

17 See the following sub-paras, particularly with reference to sub-para (4)(b) below.

Legislation of a sister State or Territory can apply in the forum by virtue of:

(1) the *common law* choice of law principles which are now seen as uniform throughout Australia, subject only to their statutory modification in the various Australian jurisdictions;[18]

(2) the application of the *Judiciary Act 1903* (Cth) ss 79 and 80 for courts exercising federal jurisdiction;[19]

(3) the *statutory* authority of the *forum*;[20] and

(4) the *statutory* authority of the *enacting legislature* of the sister State or Territory either:

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18 For the purposes of this essay we have assumed that as the law stands at present those principles apply subject to some modifications to intra-national conflicts cases. Although we do not develop the point further in this essay common law choice of law principles were developed in order to identify the applicable law in situations in which it was necessary to decide between the competing laws of different national jurisdictions. It is doubtful whether the application of legislation of a sister State in a federation should be determined by its characterisation as falling within an existing category of law as occurred for example in *Sweedman* (2006) 226 CLR 362 (restitution). The choice of law principles are in many cases inappropriate and ill-suited to resolve choice of law questions within a national legal system which has been described as a single law area — a description which must be at least accurate in regard to the application of the Australian common law: *Lipohar v The Queen* (1999) 200 CLR 485, 513 [67], 517 [80], 522 [92], 531 [111]–[112], 532 [115] ('*Lipohar*').

19 This source of law, like the preceding source, is subject to forum legislation that must also be applied by reason of the provisions referred to in the accompanying text: eg, *Blunden v Commonwealth* (2004) 218 CLR 330, 339 [18]. This leaves open the existence of possible inconsistent legislation which courts exercising federal jurisdiction would have to resolve. The main provisions of the sections referred to in the text read as follows:

> Section 79(1): 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…
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> Section 80: 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.

20 A possible illustration is provided in the national cross-vesting legislation in its application to the cross-vesting of jurisdiction between the Supreme Courts of the States and Territories, and the law to be applied in the exercise of such jurisdiction in relation to claims arising under sister State or Territory legislation: eg, *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) and (Cth) ss 4 and 11(1)(b) which, however, are not free from difficulty: *David Syme & Co Ltd v Grey* (1992) 38 FCR 303, 327–31 (Gummow J). Those difficulties aside, the same source is used in this and other federal cooperative schemes which helps to minimise but not avoid altogether the problems caused by inconsistent State and Territory legislation. Under such schemes legislation in one jurisdiction can operate in other jurisdictions with the consent and by virtue of the authority of those jurisdictions. But even with those schemes the consenting jurisdiction may subsequently withdraw its consent either expressly or by implication.

(a) as required by s 118 of the *Australian Constitution*; or

(b) by reason of its own force and independently of s 118 of the *Australian Constitution*.

The first three sources of law described above go far towards avoiding any inconsistency between the legislation of the sister State or Territory and that of the forum. They have the effect of recognising the application of sister State and Territory legislation in the forum either as a result of the common law choice of law rules[21] or the legislation of the forum. That recognition can, however, be withdrawn by the enactment of inconsistent forum legislation. While some have seen in s 118 — the source identified in sub-para (4)(a) above — a means of avoiding or resolving the problem posed by inconsistent legislation, we explain later in Part IX of this essay our disagreement with that view.

The problem we seek to address is concerned with the source of law identified in sub-para (4)(b) above and the solutions needed to resolve any inconsistency between the legislation of a sister State or Territory and that of the forum legislation, once the forum legislation departs from either (a) the common law choice of rules or (b) any forum legislation which allows for the application in that forum of legislation of a sister State or Territory.[22]

The same problem is neither resolved nor illuminated by authority and must therefore be determined by reference to 'first or basic principles'. The reality is that it is a matter of establishing what these principles *ought* to be. We have not attempted an encyclopaedic analysis of recent academic writing on the problem. For reasons that will be made clear later there are serious difficulties with the solutions advanced by others either because they tend to constitutionalise rules of private law or because they fail to provide a satisfactory solution to the problem of inconsistency between overlapping State and Territory laws. Moreover the main solution we propose has not been previously canvassed in detail by anyone else.

III THE EXTRATERRITORIAL OPERATION IN THE FORUM OF SISTER STATE AND TERRITORY LEGISLATION BY VIRTUE OF ITS OWN FORCE (AND INDEPENDENTLY OF *CONSTITUTION* SECTION 118)

In the remarks of Sir Owen Dixon quoted earlier he assumed that the Australian States were 'distinct jurisdictions' whose enactments were 'confined in their territorial operation'.[23] But he fell short of asserting that the enactments were 'confined in their territorial operation' *to the enacting States themselves.* Notwithstanding the statutory

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21 See, eg, *Kemp v Piper* [1971] SASR 25, 29 (Bray CJ).

22 This was referred to as constitutional inconsistency in the authority cited above n 3. For a possible example of legislation in (b) see above n 20.

23 Above text accompanying n 8. See also *Mobil Oil* (2002) 211 CLR 1, 25 [15] where Gleeson CJ referred to 'State legislative, executive and judicial power' as being 'territorially based'. An American writer has suggested that the 'fundamental allocation of authority among states is territorial' and that 'a state's claim to regulate behaviour or govern a dispute must be based on some thing or event within its territory': Douglas Laycock, 'Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law' (1992) 92 *Columbia Law Review* 249, 251.

presumption which normally confines the operation of legislation to the territory of the enacting legislature,[24] as already indicated it is now well recognised that the States may legislate extraterritorially in the light of the *Australia Acts* including, in some cases, in relation to persons, matters or things which exist or take place in another State or Territory.[25] Most recently the Court upheld the power of the States to deal with the social and legal consequences of motor vehicle accidents which occur outside their borders.[26] The Court has also recognised the ability of States to legislate extraterritorially by enacting laws that impose criminal sanctions giving rise to possible questions of double jeopardy.[27]

These developments illustrate why it is possible to speak in Australia of only the '*predominant* territorial concern of the statutes of the State and Territory legislatures' (emphasis added).[28] It now seems too late to reverse these developments, even if it were desirable to adopt an approach which would have preserved to a State or Territory an exclusive responsibility for, or concern over its own geographical area in matters not falling within national legislative authority.

It is true that the power of a State to enact extraterritorial legislation is qualified by a limitation based on the need to satisfy a connection between the matters covered by the legislation and the State which enacted the legislation. But the requirement is liberally applied and a remote and general connection suffices.[29] A similar limitation is recognised regarding statutory jurisdiction vested in State courts.[30]

Reference has already been made to the other express or implied constitutional limitations which relate to the exercise of State legislative powers *inter se;*[31] and also to the closer connection test for giving effect to that limitation, namely, to determine which State has the stronger 'nexus' with the subject matter of the legislation.[32] The limitation is derived from the federal nature of the *Australian Constitution*.[33] That said a

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24 Above n 15 and accompanying text.

25 *Mobil Oil* (2002) 211 CLR 1, 22–3 [9]–[10], 33–4 [45]–[48]; *Sweedman* (2006) 226 CLR 362, 405 [43].

26 *Mobil Oil* (2002) 211 CLR 1, 26 [16] (Gleeson CJ), 36 [57] (Gaudron, Gummow and Hayne JJ); *Sweedman* (2006) 226 CLR 362, 395 [2], 398 [18] (Gleeson CJ, Gummow, Kirby and Hayne JJ) but cf Callinan J in dissent who favoured greater limitations on the power to legislate extraterritorially.

27 *Sweedman* (2006) 226 CLR 362, 405 [43]; *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78 ('*Brownlie*'); and for a discussion of those questions see Mark Leeming, 'Resolving Conflicts between State Criminal Laws' (1994) 12 *Australian Bar Review* 107, 112–5.

28 *Pfieffer* (2000) 203 CLR 503, 535 [67].

29 *Union Steamship* (1988) 166 CLR 1, 14; *Mobil Oil* (2002) 211 CLR 1, 22–3 [9], 34 [48].

30 *Lipohar* (1999) 200 CLR 485, 534–5 [121]–[123] (Gaudron, Gummow and Hayne JJ) and 552–3 [170] (Kirby J).

31 Above n 12 and described as 'somewhat vague and ill defined' in *Mobil Oil* (2002) 211 CLR 1, 24 [13] (Gleeson CJ). The probable inability of a State to extend the operation of its legislation to a territory surrendered by a State to the Commonwealth under s 111 is mentioned below (see para 2 under 'V TERRITORY LAWS'.)

32 Above n 2.

33 *State Authorities* (1996) 189 CLR 253, 271 (Brennan CJ, Dawson, Toohey and Gaudron JJ) and see also Gleeson CJ in *Mobil Oil* (2002) 211 CLR 1, 25 [14] who quoted with approval the famous remarks by Dixon J regarding the constitutional existence of the States in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82.

majority of the High Court did not accept the attempt made to widen the *inter se* limitation by Callinan J (in dissent) in *Sweedman.* His Honour also considered that the same limitation was based on the federal nature of the *Constitution* and the need for the States to co-exist with each other. From this he developed the view that each State had the primary responsibility for, or predominant concern over, its own geographical area notwithstanding the acknowledgment that more than one State could have a legitimate connection with the same facts. He saw this as preventing each State from projecting into, or intruding upon, the exercise of their natural and primary responsibility other States have over claims for personal injury.[34]

The fact that the High Court has accepted the extraterritorial legislative competence of States also marks an implicit rejection of the need to satisfy the kind of territorial nexus developed under the so called 'unitary national law' theories. They were developed partly at least by reference to s 118 and were advanced by Wilson, Gaudron and Deane JJ in *Breavington v Godleman*.[35] Those views will be explained later.[36] But for the moment it suffices to emphasise that whatever the merits of those views and that of Callinan J discussed above, they appear to have been rejected by the Court.

Another likely federal limitation on the ability of a State to legislate extraterritorially is the inability of a State legislature to confer jurisdiction on the courts of another State, without the consent of the other State.[37] This extends to dealing with matters arising from any legislation passed by the former State which operates in the other State. It is true that the national cross-vesting Acts represent an imaginative attempt by State legislatures to vest courts in other States with the same jurisdiction possessed by the courts of the enacting legislatures but this has only been achieved with the necessary consent of those other States.[38] The need for that consent has important consequences for determining which courts have the authority to apply extraterritorial legislation — a matter which is dealt with later in this essay.[39]

The limitations on the ability of States to legislate extraterritorially described above do not avoid the potential for inconsistency between overlapping State legislation. A similar potential for inconsistency may arise in relation to overlaps involving Territory legislation assuming the federal Parliament has given Territory law-making bodies the power to enact extraterritorial legislation. However as will be seen later, in that context special considerations apply because of ss 109 and 111.

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34 *Sweedman* (2006) 226 CLR 362, 429 [123], 432 [131] and generally 428–32 [121]–[131]. For an earlier expression by him of the same kind of limitation on State legislative authority see *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 471 [189], 472 [192] ('*Schultz*').

35 (1988) 169 CLR 41 *('Breavington'*).

36 Text below (see 'IX.D THE UNITARY NATIONAL LAW THEORIES').

37 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 573 [107]–[108] (Gummow and Hayne JJ) *('Wakim'*).

38 See, eg, *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) and (Cth) s 9.

39 Text below (see 'VIII JURISDICTION OF COURTS'.)

IV THE RESOLUTION OF INCONSISTENCY BETWEEN OVERLAPPING STATE LAWS

A Necessity to resolve inconsistency

It has been rightly pointed out that an individual should not be exposed to the injustice of being subjected to the requirements of contemporaneously valid but inconsistent laws.[40] It may also be an implicit assumption in the very notion of a law that its contents will, in some manner or other, be accessible to the citizen so that the citizen will have an opportunity to know what it says and will be able to obey it.[41] The assumption is particularly important for overlapping laws operating in the same area and passed by legislatures of two different jurisdictions if there is lacking an explicit solution for resolving inconsistencies between those laws. Its absence gives rise to a compelling need to imply one from the *Australian Constitution* however infrequently inconsistencies between otherwise valid State and Territory laws may arise.[42] Leaving the solution to the political processes is unlikely to provide an adequate answer to concrete cases of inconsistency.[43]

B Proposed solutions in relation to inconsistent State laws

Although it has received very little attention in the literature, the main solution which we favour is to allow a State[44] to legislate with extraterritorial effect in another State but accord primacy in case of inconsistency (understood in the fullest sense as including indirect inconsistency) to the legislation of the State which has competence to legislate in the geographical area where the law of the former State purports to operate. Our implication to this effect would be drawn from covering clause 5 of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12[45] and ss 106-8 and 122 of the *Australian Constitution*. This solution would have the effect of restoring primacy to the 'predominant territorial concern of the statutes of State legislatures'[46] without seeking to reverse the developments which have acknowledged the ability of the States to legislate in each other's territory provided a weak connection is satisfied.

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40 *Breavington* (1988) 169 CLR 41, 123 (Deane J).

41 L Fuller, *The Anatomy of the Law* (1971) 88. Elsewhere Fuller emphasised the elimination of contradiction in his eight model principles of legality: *The Morality of Law* (Rev ed, 1969) 39, 65–70. He also quoted at 33 the following remarks of Vaughan CJ in *Thomas v Sorrell* (1677) 124 ER 1098 who observed: '[A] law which a man cannot obey, nor act according to it, is void, and no law; and it is impossible to obey contradictions, or act according to them': 1102.

42 As was recognised for State legislation in *Schultz* (2004) 221 CLR 400, 458 [142] (Kirby J).

43 Compare Peter Nygh, 'Full Faith and Credit: A Constitutional Rule for Conflict Resolution' (1991) 13 *Sydney Law Review* 415, 432.

44 The application of our solutions in relation to overlaps involving Territory laws are considered separately and below (see under 'V TERRITORY LAWS').

45 So far as it is relevant for present purposes this clause reads:

> This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.

46 *Pfieffer* (2000) 203 CLR 503, 535 [67] and see also *Schultz* (2004) 221 CLR 400, 459 [144] (Kirby J).

It would also confine the application of the closer connection test to resolve inconsistency in offshore areas and other areas outside Australia since it is difficult to conceive a viable alternative for that purpose. Previous experience in conflict of laws demonstrates that this test is very difficult to apply and often delivers contestable outcomes. Witness the difficulty courts repeatedly have in determining which law should govern a contract with international and intra-national contacts when the parties have failed to stipulate that law for themselves.[47] Difficulties of this kind underlie the High Court's refusal to adopt the notion of a proper law and allow exceptions to the *lex loci* rule in intra-national and international torts.[48]

It is strongly arguable that if the closer connection test is to be applied even for the limited purpose suggested above it should be applied in a transparent way that explicitly allows for the weighing of conflicting governmental interests.[49] But the weighing of such interests is difficult and has been rejected in various cases.[50] Further, and this is an important point, American opinion which once favoured that approach, has moved away from it, as Justice Gummow pointed out in an article.[51]

C Responses to objections

There are a number of possible objections to the main solution advocated. The first is the suggestion that it would be better to deny the States the power to extend the territorial operation of their legislation to another State.[52] The suggestion is based on the assumption that there is little likelihood of one State intending the territorially extended legislation of another State to operate in its own territory.

The first response to this suggestion is that it is linked to the denial of the extraterritorial extension of laws into other States as being the only viable alternative to the main solution we have advocated. But that denial cannot be squared with the current state of the authorities. The experience in Australia and the United States shows that such extraterritorial extension is inevitable in a federal country. This is readily understandable given the inherent interest which a State has in the affairs and activities of its own residents even when they are interstate, thus making it irrational to deny such a capacity as a matter of policy.

Secondly in this respect, it would be a mistake to assume that there would be little likelihood of one State intending the territorially extended legislation of another State to operate in its territory. There may be less room in this context — as in federal

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47 See, eg, *The Al Wahab* [1984] AC 50, 71 (Lord Wilberforce); *Coast Lines v Hudig & Veder Chartering NV* [1972] 2 QB 34, 44 (Lord Denning MR); *Atlantic Underwriting Agencies Ltd v Compania di Assicurazione di Milano SpA* [1979] 2 Lloyd's Rep 240, 245; *Stanley Kerr Holdings Pty Ltd v Gibor Textile Enterprises Ltd* [1978] 2 NSWLR 372, 379, 380. The difficulty may be no easier with the similar process involved in applying the same kind of test when a settler has failed to choose a system of law governing a trust: eg, *Lindsay v Miller* [1949] VLR 13; *Perpetual Executors and Trustees Association of Australia v Roberts* [1970] VR 732.

48 *Pfieffer* (2000) 203 CLR 503, 535–8 [72]–[80] and *Regie National Des Usines Renault SA v Zhang* (2002) 210 CLR 491, 508 [36], 516–7 [63]–[66], 520 [75].

49 Jeremy Kirk, 'Conflicts and Choice of Law Within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247, 286.

50 Above n 48 and *Sweedman* (2006) 226 CLR 362, 407 [50]–[51].

51 William Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979, 1023.

52 Michael Detmold, *The Australian Commonwealth* (1985) 140.

cooperative schemes — for thinking that coverage of the same legislative field necessarily implies that the legislature which enacted the legislation operating in its own territory, intends its legislation to be the *only* law to govern the subject matter of the legislation - the usual inference of statutory intention attributed to the coverage of the same legislative field. Even in relation to the application of the covering the field test under s 109 the potential for invalidation should not be exaggerated.[53] Hence the cases that have upheld the notion of operational inconsistency regarding the co-existence of dual State and federal powers to clear harbours of ship wrecks[54] and the creation of dual marketing schemes in respect of the same products.[55]

The second possible objection is the difficulty of determining the place where something actually occurs, when what is regulated is a recognised legal activity or transaction.[56] Of course it is necessary to make such a determination in order to know which State legislation will prevail under our main solution. Such determinations are made in the application of the criminal law, and conflict of laws principles both as to the authority to serve defendants outside the jurisdiction and the application of choice of law principles. They are also made in the application of statutory presumptions against the extraterritorial application of forum legislation. The sophisticated rules that have been devised for such purposes assume that a civil or criminal activity or transaction can only occur in one jurisdiction even when the regulated activity or transaction consists of multiple elements which may occur in more than one jurisdiction.[57] This may result in artificiality which may make it tempting to argue that the place where the activity or transaction occurred should be determined by reference to which place has the closest connection with all the requisite facts giving rise to the activity or transaction.[58] Admittedly this could be used to determine the jurisdiction in which the activity or transaction was deemed to have occurred. But as attractive as such a solution may be for other purposes, the interests of certainty make it desirable to resist that temptation here and to adhere to the sophisticated rules already mentioned. Overall, the difficulties encountered in determining where something occurs are tolerated in the law where there is a compelling reason for doing so.[59]

A third possible objection is that the main solution may allow for inter-border conflict. This may be illustrated by reference to *Brownlie*[60] where a defendant was successfully prosecuted in New South Wales for committing a criminal offence under

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53 *Australian Constitutional Commission*: *Distribution of Powers Advisory Committee Report* (1987) 23 n 25 and accompanying text.

54 *Victoria v Commonwealth* (1937) 58 CLR 618.

55 *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557.

56 *Mobil Oil* (2002) 211 CLR 1, 26 [16] (Gleeson CJ).

57 See, eg, *Lipohar* (1999) 200 CLR 485, 498 [18] (Gleeson CJ) (statutory offences); Edward Sykes and Michael Pryles, *Australian Private International Law* (3rd ed, 1991) 35–7, 37–9 (making and breaching contracts), 39–42 (commission of torts).

58 Compare the Canadian developments which depart from having to determine a single situs for a crime mentioned in *Lipohar* (1999) 200 CLR 485, 498–9 [19] and for tort, Sykes and Pryles, above n 57, 41.

59 We note in passing that our solution has not had to be applied in s 109 cases where the 'field' covered by federal legislation is not considered by reference to the geographical operation of that legislation unless the legislative provisions make the geographical operation a relevant factor.

60 (1992) 27 NSWLR 78.

New South Wales legislation. The offence consisted of polluting the waters of a river in Queensland which flowed into New South Wales, thus harming the users of the river in the latter State. The potential for conflict could have arisen if the relevant Queensland law authorised the polluting activity which took place in that State, and a New South Wales law penalised the entry into New South Wales of any person connected with the pollution of the river in Queensland. This example would not give rise to any relevant inconsistency since both laws would be confined to what happens within their own geographical borders. It recalls the position which existed when Australian colonies were subject to much greater restrictions on their ability to legislate extraterritorially.[61] The New South Wales law here does not directly apply to anything occurring in Queensland but only penalises the *entry of persons into New South Wales* who were responsible for any polluting activity which occurred in Queensland. Doubtless the potential for some interstate retaliation is, to some extent, an inevitable consequence of the federal system of government; but more importantly, its extent may be minimised by the constitutional guarantees contained in ss 92 (freedom of interstate trade and intercourse) and 117 (discrimination against interstate residents).

D Rejection of alternative options

Alternative solutions advanced by others for the resolution of inconsistency are not persuasive. In particular, it does not seem appropriate to apply the ordinary principles of statutory construction relating to *implied repeal* and the relationship between general and special provisions. Those principles govern the situation when apparently inconsistent legislation is passed by the same legislature. The most recent legislation prevails in the case of implied repeal while special provisions prevail over general provisions in the case of such provisions.[62] Those principles are directed to the ascertainment of the intention of a single legislature; and the principle of implied repeal would, in this different context, ascribe primacy merely by reference to the fortuitous timing of enactments passed by different legislatures.[63]

Nor is it appropriate to adopt what would amount to a 'statute free zone' by refusing to give effect to inconsistent legislation passed by two different State legislatures. This is so, however narrowly defined inconsistency is for that purpose, and even though the failure to give effect to such legislation would be strictly confined to the extent of any relevant inconsistency between them.[64] This novel solution is both surprising and artificial. It also would detract from the recognised capacity of States to legislate extraterritorially. To the extent that it rests on the equality of State authority under ss 106–8 and the absence of any explicit hierarchy between the States, it overlooks the ability of covering clause 5 to accord binding force to any implied constitutional solution to the problem of inconsistency.

The remaining objection that could be raised against our main solution relates to the way we have defined inconsistency — a matter to which we now turn.

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61 *P & O Steam Navigation Co v Kingston* [1903] AC 471. Laws of this kind were seen as indirect methods of evading the restrictions mentioned in the accompanying text.

62 Stephen Gageler, 'Private intra-national law: Choice or conflict, common law or constitution' (2003) 23 *Australian Bar Review* 184, 188.

63 See also Kirk, above n 49, 286–7.

64 Graeme Hill, 'Resolving a True Conflict between State Laws: A Minimalist Approach' (2005) 29 *Melbourne University Law Review* 39, esp at 41–2, 72–85.

E Nature of inconsistency

While the High Court has yet to pronounce a definitive solution to the problem of inconsistency it has decided that whatever that solution will be, the 'covering of the field' test of inconsistency has no place for such inconsistency essentially because of the absence of paramountcy.[65] Although we are unaware of any commentary that has questioned this view, we disagree with it.

From a purely analytical perspective, it is strongly arguable that covering clause 5 supplies the requisite 'paramountcy' once it is accepted that the solutions to inconsistency are to be implied from the *Constitution*. Moreover in the United States the supremacy clause of the federal *Constitution* is treated as the reason for ascribing supremacy to federal law in the event of a conflict with State law without the need for an additional provision like s 109 and preemption of State law is recognised under a doctrine which corresponds with the covering the field doctrine.[66] Although reliance has also been placed by some Australian commentators on the equality of the States as a reason for excluding indirect inconsistency in this area[67] we think that reliance is misplaced if ultimately all States are treated equally in regard to the operation of their legislation in the event of inconsistency.

Equally crucial is the policy justification which underlies our main solution. That justification rests on the importance of restoring primacy to the predominant territorial concern of the State legislatures without seeking to reverse the developments which have acknowledged the ability of the States to legislate in each other's territory. Looked at in this light it seems irrational to create an exception to that primacy in favour of the legislation of another state when a State is legislating with respect to places, things and persons *within its own geographical boundaries*. That said it will not always follow that States will always wish to exclusively legislate with respect to those places, things and persons.

To the extent that our main solution conflicts with the narrow view of inconsistency adopted by the High Court, we think that view should be reconsidered. This view may appear to reduce the need to find solutions to the problem of inconsistency and it is possible to confine our main solution to the narrow view of inconsistency. But once there are solutions to resolve that problem — whether they be express or implied — it seems artificial to confine inconsistency in this way in the absence of a compelling reason for doing so. We also think the adoption of such a view would conflict with the importance of restoring primacy to the predominant territorial concern of the legislation of State legislatures.

F Application of our solutions to hypothetical examples

It remains to illustrate how our solution would work by applying it to a number of hypothetical examples.

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65 *Sweedman* (2006) 226 CLR 362, 406 [48] — a view implicitly rejected by Callinan J in dissent. Its actual application in that case may have not have been essential to the decision since the relevant Victorian and New South Wales provisions did not displace the choice of law rules: 400 [24]. The test referred to in the text accompanying this note is of course directed to the resolution of what we have described as indirect inconsistency.

66 See the cases and other materials cited in *Distribution of Powers Report*, above n 53, 23 and also *Pacific Gas & Electric Co v SERRC Commission*, 461 US 190 (1983).

67 For example, Hill, above n 64, 47–9.

1 Torts

The first example is drawn from the law of torts and involves the application of South Australian legislation to a motor vehicle accident which occurs within that State. The legislation is inconsistent with Victorian legislation which applies extraterritorially to the same accident. The accident is actionable according to the South Australian legislation but it is only actionable according to the Victorian legislation if the plaintiff was wearing a seat belt. The Victorian legislation applies extraterritorially in relation to vehicles registered in that State or where the driver of one of the vehicles involved in the accident resides in that State. It is assumed that the Victorian legislation purports to override the normal common law choice of law rules.[68]

Our solution accords primacy to the South Australian legislation in case of inconsistency with the Victorian legislation in its extraterritorial operation in South Australia. If the closer connection test is applied it necessitates a choice between whether South Australia or Victoria has the closest connection with the accident in question. As indicated before, this is not an easy question to answer.

2 Contracts

The next hypothetical example involves State legislation which has a potential extraterritorial application regarding the law governing a contract irrespective of the law chosen by the parties. The legislation is inconsistent with legislation of another State or States which applies or apply to the same kind of contract. The legislation of those States could prohibit or authorise either the making or performance of the contract *in the enacting State*. The same legislation overrides the common law choice of law rules.

Our solution focuses on where the act (or omission) that is prohibited or authorised by the inconsistent legislation takes place. Primacy is accorded to the law passed by the State in which what is prohibited or authorised takes place in order to resolve any inconsistency. To adopt that approach would serve as a signal warning to States wishing to overreach their legislative authority by legislating for what occurs in other States. Their legislation will only be effective if the State in which what is prohibited or authorised does not enact inconsistent legislation. Again, if the closer connection test is applied it would entail the application of a very similar test to that which courts apply when parties to a contract fail to stipulate which law they wish should govern the contract — with all the uncertainty which that test entails.

3 Restitution

The next example is taken from the law relating to restitution. It involves modifying the legislation in *Sweedman*.[69] In that case a Victorian resident drove a car registered in that State. His wife was a passenger in the car which was involved in a collision in New South Wales with a New South Wales registered car which was driven by a resident of that State. The Victorian driver and his wife were compensated by the Victorian Transport Accident Commission which in turn sought to exercise its statutory right of indemnity under Victorian legislation to recover from the New South

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68 An example taken from Bradley Selway, 'The Australian "Single Law Area"' (2003) 29 *Monash University Law Review* 30, 38, 46.

69 (2006) 226 CLR 362.

Wales driver.[70] Both States had their own statutory regimes for dealing with such accidents. The Commission sought to pursue its statutory right of indemnity by commencing proceedings against the New South Wales driver in the Victorian County Court. The majority of the Court upheld the exercise of that right by applying the common law choice of law rules. Once they characterised the Victorian statutory right of indemnity as restitutionary it became unnecessary to determine whether the applicable law was that of the jurisdiction which had the closest connection with the claim or that which created the right of indemnity. This was because, according to the majority,[71] the law to be applied was Victorian law under either of those two possible views.

In the hypothetical example advanced here the New South Wales legislation would be modified so that its provisions bar the exercise of the Victorian statutory right of indemnity in respect of accidents which occurred in New South Wales. If the closer connection test is applied to resolve the conflict between the Victorian and New South Wales legislative provisions it would resemble one of the tests actually applied by the majority in *Sweedman*. If our solution is adopted and the New South Wales legislative provisions evidence the necessary intention to override the common law choice of law rules, New South Wales law will operate to the exclusion of the Victorian statutory provisions which created the right of indemnity in so far as it purports to exempt a person from paying money otherwise owing to the Transport Accident Commission in respect of something which occurred in New South Wales.

The fact that the majority and Callinan J took different views of the law to be applied is an illustration of the difficulties in the application of the closer connection test, a point to be developed later. The majority considered that Victorian law had the closest connection with the claim, while Callinan J thought that New South Wales had the closer connection with the claim.[72]

4 Trusts

Our hypothetical trust example involves a trust which makes no provision as to the governing law and also involves trustees who are resident in New South Wales and administer trust assets which are situated both in that State and Victoria. It assumes that the laws of both States are intended to override the common law choice of law rules. Proceedings are brought by beneficiaries of the trust in the Supreme Court of New South Wales against the trustees for breach of trust in relation to the Victorian assets of the trust, which include Victorian real estate. Assume that by New South Wales law trustees are liable to pay equitable compensation for any breach of trust whatsoever but that by Victorian law trustees of assets situated in Victoria are not so liable if the breach of trust is committed honestly and without negligence on the part of the trustees. The trustees acted honestly and without negligence. Proceedings lie against trustees in the jurisdiction in which they are present, that is, even if the assets in respect of which the proceedings are brought are situated in another jurisdiction, though it has been held that relief will not be granted if it is unavailable in the latter jurisdiction.

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70 *Transport Accident Act 1986 (Vic)* s 104(1).
71 *Sweedman* (2006) 226 CLR 362, 400–2 [25]–[32].
72 Ibid 400 [32] (Gleeson CJ, Gummow, Kirby and Hayne JJ), 429 [123] (Callinan J).

If the liability of the trustees is determined by applying the closer connection test, it is likely that New South Wales law would be the applicable law as the trust was created and administered there and the trustees are present there. Our solution, on the other hand, focuses attention on where it can be said the acts or omissions giving rise to the liability of the trustees took place. In the example given this may turn on the location of the relevant trust assets thus enabling Victorian law to prevail in regard to the trust assets located in that State — especially if they consisted of real property and the transfer of the property was executed and registered there. New South Wales law would prevail in regard to assets located in that State. It is true that the result of applying this solution is to fragment the law which applies to determine the liability of the trustees. The ability of Victorian law to produce a different result may serve to underline the point of our main solution by deterring New South Wales from overreaching its authority. That said it should not be assumed that both tests will always produce different results.

We acknowledge that a court may be tempted in the above example to apply the closer connection test and possibly conclude that the New South Wales law should apply as the law which should naturally govern the liability of the trustees, being the law of the place where the trustees are and where the trust is administered. This may to some seem to be the appropriate test to apply in the example given but it would suffer from the same disadvantages which attend the application of the closer connection test already outlined. The point is that our solution is on balance the most satisfactory overall.

5 Criminal law

The final hypothetical example is taken from *Brownlie*.[73] It involves polluting a river in Queensland so as to prejudicially affect downstream users of water in the same river in New South Wales on the assumption that Queensland legislation authorised the conduct penalised by New South Wales regulatory and penal legislation. Under our solution the Queensland legislation would prevail.[74] As with the other examples, the closer connection test involves the more difficult task of weighing which of the two States have the closer connection with what New South Wales was seeking to penalise.

V TERRITORY LAWS

So far the proposed solutions to inconsistency have been directed at overlapping State legislation and it now remains to consider the position in relation to overlapping State and Territory legislation as well as overlapping Territory legislation.

At first sight it would seem odd if Territory legislation could apply in a State without the reverse being true. But in fact the States may be unable to extend the operation of their legislation to the internal Australian Territories because they were surrendered to the Commonwealth under s 111 and thus became 'subject to the exclusive jurisdiction of the Commonwealth'. Because the provisions of s 111 are

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73 (1992) 27 NSWLR 78. Another example consists of the conflicting Western Australian and Tasmanian internet gambling legislation involved in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 473 [83], 482 [123].

74 Contrast the effect of the hypothetical legislation considered above (see text at paragraph accompanying nn 60–1).

'always speaking' they continue to attract the provisions of s 52(iii) which vests the Australian Parliament with an exclusive power to legislate with respect to them. Accordingly there can be no inconsistency with State legislation operating in those Territories.

Even without the application of s 111, it may also seem odd that Territory legislation made under or pursuant to laws passed by the Australian Parliament under s 122 may perhaps enjoy greater extraterritorial operation than that of the States. But this is the consequence of the well-established principle in *Lamshed v Lake*[75] where the High Court took the view (with which we agree) that laws passed by the Australian Parliament under s 122 may operate extraterritorially and are 'law(s) of the Commonwealth' within the meaning of s 109. Accordingly laws made by a Territory legislature under a power to legislate with respect to the affairs of a Territory under s 122 have, depending upon the scope of the powers granted to them, the capacity to override the laws of a State.

There appear to be at least two ways of denying Territory legislation the benefit of the principle in *Lamshed v Lake.* The *first* is the possibility of the High Court reconsidering the correctness of that case — something that is unlikely to happen. The *second* is in a sense fortuitous and involves applying the analogous reasoning upheld by a majority in *Capital Duplicators Pty Ltd v Australian Capital Territory.*[76] The fact that the reasoning is unsatisfactory is unlikely in our view to lead to a reversal of the decision in that case. Accepting the reasoning, legislation enacted by the *Australian Parliament* should be distinguished from that enacted by the *separate and independent Territory legislatures.* In *Capital Duplicators* the same distinction was drawn for the purposes of s 90 of the *Constitution*. The analogy would not be affected by the way *Capital Duplicators* was distinguished in the case of *Svikart v Stewart*[77] where it was held that 'places acquired by the Commonwealth' in a Commonwealth Territory did not qualify as 'places' within the meaning of s 52(i) of the *Constitution*. This ensured that 'exclusive' in that provision only meant exclusive of the States. Here our proposition is that s 122 does not empower the Parliament to constitute separate and independent Territory legislatures with the power to make laws which have a greater force or status than those passed by the States for the purpose of resolving inconsistency.[78] This proposition, if accepted, would ensure that our solutions will apply to inconsistency involving otherwise valid Territory and State legislation, just as they would apply to inconsistency involving only State legislation. For this argument to succeed it would need to be accepted that laws passed by separate and independent Territory legislatures are *not* 'law(s) of the Commonwealth' within the meaning of s 109.

For this purpose we distinguish between laws made by Territory legislatures and those made by the Governor-General in Council or federal Ministers in the exercise of delegated legislative powers. Laws of this kind should continue to enjoy the full benefits of the view upheld in *Lamshed v Lake* given that such Territories would not have reached the separate and independent status accorded to those that have been granted self-government. Considerations of the national interest may require that the

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75 (1958) 99 CLR 132.
76 (1992) 177 CLR 248 ('*Capital Duplicators*').
77 (1994) 181 CLR 548.
78 See also Brian R Opeskin, 'Constitutional Dimensions of Choice of Law in Australia' (1992) 3 *Public Law Review* 152, 185.

delegated powers of legislation exercised with respect to Territories which have not been granted self-government should continue to be treated as laws of the Commonwealth within the meaning of s 109. Ultimately the national interest is itself reflected by the responsibility which the Parliament exercises when it legislates itself or through its delegated agents who are not independent and separate from itself.

There remains inconsistent legislation enacted by two or more Territories irrespective of whether they have been granted self-government. The resolution of such inconsistency would seem to depend on the statutory construction of the grants of the respective legislative powers entrusted to the law making authorities for those Territories. Although the Australian Parliament has the capacity to provide otherwise given the plenary grant of power in s 122, it seems reasonable to presume that in the absence of express provisions to the contrary, it intends to adopt the same solutions as those proposed for the resolution of inconsistency between legislation passed by two or more States.

VI COMMONWEALTH LEGISLATIVE POWER

Our solutions to inconsistency only operate in the absence of federal legislation which prescribes uniform choice of law rules. It is undesirable to constitutionalise what are essentially private law rules. While acknowledging the need to imply from the *Constitution* some solution to resolve inconsistency, it is also important to ensure that a legislative power exists to override our solutions to inconsistency where this is thought to be desirable. Being implied from the federal nature of the *Constitution*, those solutions would restrict the legislative authority of only the States and the self-governing Territories. We support the existence of a federal legislative power to prescribe uniform choice of law rules derived from the powers contained in:

- s 51(xxv) of the *Constitution* for the recognition of State legislation;
- s 51(xxxix), if necessary, for the recognition of State and Territory legislation in the exercise of federal jurisdiction; [79] and
- s 122 for recognition of Territory legislation.

In *Breavington* Mason CJ suggested the possibility of treating s 51(xxv) as a source of legislative power to prescribe choice of law rules, when, in the course of declining to accord to s 118 a largely substantive interpretation in relation to the recognition of laws, he observed:

> It is preferable that Parliament should provide a solution by an exercise of legislative power, if that be legitimate, than that the Court should spell out a rigid and inflexible approach from the language of s 118.[80]

Further reflection since those observations were made, has only confirmed the correctness of this view.

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79 Despite doubts expressed in the past about the constitutional basis for ss 79 and 80 of the *Judiciary Act 1903* (Cth), s 79 was supported under s 51(xxxix) of the *Constitution*: *ASIC v Edensor Nominees P/L* (2001) 204 CLR 559, 587 [57] (Gleeson CJ, Gaudron and Gummow JJ). We respectfully agree and can see no reason for taking a different view in relation s 80: cf Selway, above n 68, 36–7.

80 (1988) 169 CLR 41, 83.

Ideally such a legislative power has the potential for dealing with the problem of inconsistency between State laws. But it does not avoid the need to devise the solutions canvassed in this essay because there is no guarantee that the power will be exercised. Although those solutions operate in default of such legislation they could also lay the basis, and inform the nature, of, legislation that is passed to deal with the problem of inconsistency.

Our view of the power conferred by s 51(xxv) is supported in some measure by what was said in the Convention Debates in an exchange that took place between Isaacs and Barton. In that exchange Barton suggested that s 118 was only concerned with matters of evidence, while what became s 51(xxv) 'might take the matter further into the realm of substance'.[81] Isaacs asked Barton to look at the power in question and suggested that the provisions which defined the power might confer on the Australian Parliament the power to enact legislation which required the judgments of State courts to be accorded the same effect in another State. Barton agreed and said:

> It is more than possible that the hon member's suggestion is correct. One clause means that as a matter of evidence judicial notice is to be taken; the other means that there is a legislative power, not only to define the manner in which it shall be done, but it may also mean further than that, that there is a legislative power to cause recognition of these matters in substance as well as in evidence.[82]

It is true that the passage only goes some of the way towards supporting a substantive operation of the legislative power since, as was seen with the guarantee created in s 118, it is possible to accord a substantive operation in favour of the recognition of *judgments* and not *laws*, and the context of the exchange between Barton and Isaacs suggests they were dealing with judgments. The force of the view we take has been widely acknowledged even if it has not attracted unanimous support.[83]

Assuming a law could be made under s 51(xxv) to alter our solutions to inconsistency it would prevail over any State or Territory legislation which would otherwise apply in the event of inconsistency with other State or Territory legislation. This outcome would follow from s 109 in the case of State laws; and from s 122 in the case of a Territory law.[84] The power to prescribe choice of law rules in substitution for our solutions should however be confined to prescribing uniform rules which do not discriminate in favour of or against the laws of a particular State and which treat all States equally. The same could be said about the need to ensure that the laws of a self-governing Territory are not treated more favourably than those of the States. The basis

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81 *Official Report of the National Australasian Convention Debates* (Adelaide, 1897) 1005–6 and Zelman Cowen, 'Full Faith and Credit: The Australian Experience' in R Else Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 293, 300.

82 Convention Debates above n 81, 1006.

83 Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) [3.24]; Gummow, above n 51, 1010–1; Gageler, above n 62, 188; Leeming, above n 27, 119; Nygh, above n 43, 432–4 (but support for the power confined to giving primacy to the law of a State operating within its own territory); Michael Pryles and Peter Hanks, *Federal Conflict of Laws* (1974) 173–4 and cf *Sweedman* (2006) 226 CLR 362, 422 [104] (Callinan J) dissenting; Selway, above n 68, 36 (who curiously asserted that to prescribe choice of law rules would not constitute the recognition of the laws chosen under those rules).

84 Lindell, above n 5, 26–7.

for this possible interpretation, as will be mentioned later, is found in s 118 and an implication from the *Constitution*.[85]

VII EFFECT OF INCONSISTENCY AND RETROSPECTIVITY

A brief reference needs to be made to the effect of inconsistency and retrospectivity. First, it makes sense to assume that the effect of inconsistency is not invalidity but the non-application of the inconsistent law in the same way that s 109 operates.[86] Secondly, as a result of *University of Wollongong v Metwally,*[87] there is a question whether a State can *retrospectively* create or remove inconsistent State legislation. Although we have difficulties with that decision it seems safe to assume that whatever view is taken in relation to s 109 and retrospectivity should be taken in relation to inconsistency between State and Territory legislation.

VIII JURISDICTION OF COURTS

There is also the conceptually challenging question concerning the jurisdiction of courts to deal with State and Territory legislation which operates extraterritorially in another State or Territory. There is little difficulty in accepting that courts of the enacting jurisdiction are capable of being vested with the jurisdiction to deal with matters arising from such legislation. It is likely that the only limitation is the need for the vesting legislation to satisfy the weak nexus required for all extraterritorial legislation as was illustrated in *Lipohar*.[88]

The more difficult question relates to the jurisdiction of the courts in the State or Territory (the forum) in relation to legislation of another State or Territory that purports to operate extraterritorially of its own force and not by virtue of the common law choice of law rules, whether or not such legislation clashes with that of the forum State or Territory.[89]

At first sight covering clause 5 may suggest that if ss 106–8 and 122 play a part in the extraterritorial operation of such laws, the courts of the forum have the same jurisdiction to apply those laws as they do when they are bound to exercise their own jurisdiction or federal jurisdiction under s 77(iii) of the *Constitution*. However covering clause 5 only makes the *Constitution* binding according to its own tenor. That tenor may perhaps encompass the principles of implied intergovernmental immunity which we have so far assumed preclude one State (or Territory) from conferring jurisdiction on courts of other States (or Territories) without their consent in matters involving the

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85 Below, see text accompanying n 139.

86 See, eg, *Butler v Attorney-General (Vic)* (1961) 106 CLR 268.

87 (1984) 158 CLR 447.

88 (1999) 200 CLR 485. The question was raised in argument without being decided whether a State could authorise its courts or tribunals to conduct their proceedings outside the territorial limits of that State in *Schultz* (2004) 221 CLR 400, 427 [29] (Gleeson CJ, McHugh and Heydon JJ), 443 [92]–[94] (Gummow J), 454 [130], 461 [152] (Kirby J), 468–9 [178]–[179] (Hayne J), 471–2 [189], [191]–[192], 474 [202] (Callinan J).

89 This issue is addressed in Kirk, above n 49, 290–4**.** However this was done on the assumption that such laws are required by the forum to be given an extraterritorial operation by reason of s 118 of the *Constitution*. Use was made by analogy of the case law dealing with the venue provisions of the *Judiciary Act 1903* (Cth) ss 79 and 80.

extraterritorial operation of the laws of the first mentioned State (or Territory).[90] If this analysis is sound it means that State and Territory civil and criminal legislation can, subject to s 111, have an extraterritorial operation which involves vesting jurisdiction in the courts of other States (or Territories) with the authority to deal with matters arising under those laws when this occurs with the consent of those States (or Territories).

But intergovernmental immunity should not preclude the enacting State from passing extraterritorial legislation which operates in another State (forum) where the only courts capable of exercising jurisdiction to deal with matters arising from those laws are the courts of the enacting legislature if this results from the unwillingness of the forum State to consent to the vesting of jurisdiction in its own courts. This is so notwithstanding any resulting apparent discrimination between the courts of the enacting State and those of the other States merely because the enacting State has no power to confer jurisdiction on the courts of other polities without their consent; or alternatively because the discrimination results from the action of the forum State. Any impermissible discrimination presupposes the ability to confer such jurisdiction on both the courts mentioned.

Even if the consent of the relevant State or Territory is forthcoming, this possibility raises the constitutional authority of the legislature of the forum to grant the consent in question. It may at first seem odd and novel for the legislature of the forum to agree to its own courts being vested with the authority to apply the laws of another jurisdiction in the absence of the kind of arrangements which exist for the vesting of federal jurisdiction under Ch III of the *Australian Constitution* and in particular s 77(iii). There is here a haunting but only an apparent resemblance between this issue and that dealt with in *Wakim*. The problem revealed by that case was specifically related to the restrictive implications drawn from Ch III of the *Constitution* which are not involved here.[91]

But covering clause 5 may have a wider effect. It may require extraterritorial legislation to be given effect if that clause is construed as requiring *all* courts to give effect to such legislation in the exercise of their ordinary jurisdiction — assuming it is otherwise available. In other words, extraterritorial legislation would have to be applied by any court of competent jurisdiction in the course of determining the rights or duties of the parties before it, regardless of whether the same court was vested with jurisdiction by the enacting legislature — with or without the consent of the forum legislature — in cases involving both civil and criminal jurisdiction. If covering clause 5 is construed in this way, it would result in a duality of jurisdiction similar to, but not the same as, the concurrent jurisdiction of State courts to deal with the same matters

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90 See the remarks in *Wakim* (1999) 198 CLR 511, 573 [107]–[108] (Gummow and Hayne JJ). When read with the qualification indicated in the text regarding 'the consent of the other States or Territories' they do not appear to fall foul of the forceful criticisms directed at them in Dennis Rose, 'The Bizarre Destruction of Cross-Vesting' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 186, 189–191.

91 The validity of the present cross-vesting arrangements as between the Supreme Courts of the States and Territories hinges on the soundness of this view.

arising in the exercise of both federal and State jurisdiction[92] before federal jurisdiction was made exclusive under s 77(ii) of the *Constitution* in respect of such matters.[93] Accordingly, the failure of the State whose laws operate extraterritorially to vest jurisdiction to deal with matters arising under those laws in courts of the States in which those laws operate extraterritorially, would not prevent those courts from dealing with and giving effect to those laws in the exercise of their own jurisdiction by reason of covering clause 5.[94] As with State courts exercising federal jurisdiction, the appropriate law enforcement authority of the forum would institute in the forum courts proceedings for contempt of those courts which arise in relation to the exercise by them of the jurisdiction to apply the extraterritorial legislation of a sister State or Territory.[95] The normal rule which allows any person to institute prosecutions for offences[96] could only be reversed by the forum legislature in relation to offences under such legislation heard by a forum court.

The question remains whether the wider effect of covering clause 5 could be avoided by the enacting legislature ensuring that only its own courts can exercise civil and criminal jurisdiction to deal with matters which arise under the extraterritorial legislation in its application to the territory of the forum. Jeremy Kirk recognises this possibility. On his view the question whether the legislation could operate in that way would be one of statutory construction.[97] On balance, that view should be rejected because it fails to give effect to the uncompromising provisions of covering clause 5. They state, amongst other things, that the *Constitution* 'shall be binding on the courts, judges and people of every State'. Further, the Kirk view seemingly allows the enacting legislature to discriminate against the courts of the forum in relation to the operation of legislation in the territory of the forum — at least where the enacting legislature seeks to prevent the courts of the forum exercising jurisdiction regardless of the presence or absence of the consent of the forum.[98] Arguably the federal nature of the *Constitution* impliedly forbids such discrimination.

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92 See, eg, in *Lorenzo v Carey* (1921) 29 CLR 243, 252, 254–5; *Booth v Shelmerdine Bros Pty Ltd* [1924] VLR 276 and Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002), 235–8. But see also below n 94.

93 See *Felton v Mulligan* (1971) 124 CLR 367.

94 As regards the effect of cov cl 5 in requiring State Courts to give effect to the *Constitution* and Commonwealth laws applicable to matters competently before them see W Harrison Moore, *The Commonwealth of Australia* (2nd ed, 1910) 80–1, 212, 418 and Inglis Clark, *Studies in Australian Constitutional Law* ((1901) Reprint 1997) 177, who emphasised that the duty operates even in the absence of federal legislation vesting State Courts with the jurisdiction to deal with such matters. We refrain from determining whether the jurisdiction derived from cov cl 5 would supplant that of any cross-vested jurisdiction or whether litigants could elect to invoke either of those jurisdictions as was previously assumed to be the case with the analogous situation dealt with in the cases cited above in n 92.

95 *R v B* [1972] WAR 129 and the Australian Law Reform Commission, *Contempt*, Report No 35 (1987) 268–70 [464].

96 *Brebner v Bruce* (1950) 82 CLR 161.

97 Except as regards Federal and State cooperative schemes, he favoured a court specific presumption in relation to criminal but not civil legislation: Kirk, above n 49, 291–2, 293–4.

98 It may also conflict with the limits Kirk himself acknowledged on the extent to which a State can interfere with the proceedings of courts in other States: above n 49, 290 referring to *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 547 and 574–5; see also Gageler to a similar effect and the possibility of falling foul of s 106, above n 62, 188.

The view which gives wider effect to covering clause 5 is also supported by the importance that should be attached to the primacy to be accorded to the legislative, executive and judicial authority of the jurisdiction in which the extraterritorial legislation seeks to operate. The recognition of that *dual* judicial authority to deal with matters arising under such laws should be seen as the price paid by the enacting legislature for being able to make its laws operate in another State.

Similar but not identical considerations should also apply in relation to the jurisdiction exercised by courts with respect to Territory legislation which is enacted by a self-governing Territory and operates extraterritorially in a State or *vice versa* if State legislation is otherwise capable of operating in a Territory and not precluded from doing so by s 111. Perhaps those considerations may also apply in relation to Territory legislation which operates extraterritorially in another Territory subject only in that case to any inconsistent legislation passed by the Australian Parliament under s 122 of the *Constitution*.

There remains federal jurisdiction. At first sight it may seem that a court exercising such jurisdiction can only give effect to the legislation of the State or Territory in the State or Territory 'in which the jurisdiction is exercised' under both ss 79 and 80 of the *Judiciary Act 1903* (Cth). This would appear to exclude the operation of legislation of another State or Territory which purports to operate extraterritorially in the former State or Territory. However further reflection suggests that the relevant provisions of the *Judiciary Act 1903* (Cth) will not have that restrictive effect, assuming that the extraterritorial legislation is otherwise valid, because ss 79 and 80 are subject to 'the Constitution or the laws of the Commonwealth'.[99] In other words there can be no objection to a court of the forum giving effect to the extraterritorial legislation of another jurisdiction even when a court exercises federal jurisdiction if this is required either by the *Constitution* under covering clause 5 or a law made under s 122.

In conclusion it is true that complications can arise from the existence of dual courts to deal with the same matters — namely, the courts of the enacting jurisdiction and the courts of the forum. But those complications can be accommodated by the normal rules governing the commencement and maintenance of actions in more than one court, the rules relating to estoppel and the avoidance of double jeopardy remembering, of course, the availability of the ultimate right of appeal to the highest court in the land. If such an appeal should ever be heard by the High Court, there can only be one outcome if our solutions to inconsistency are accepted.

IX CONSTITUTION SECTION 118: FULL FAITH AND CREDIT

A Reasons for resort to s 118

The foregoing discussion has addressed the extraterritorial operation of legislation passed by sister States and Territories by virtue of its own force and independently of s 118. We now explain why s 118 does not either avoid or resolve the problem addressed in this essay by requiring a court of the forum to give effect to such legislation in preference to that of the forum and irrespective of whether giving effect to the former legislation conforms to the common law choice of law rules.

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99 This was recognised in *Sweedman* (2006) 226 CLR 362, 402–3 [33]–[34] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

The temptation to resort to s 118 is partly prompted by the ability of the forum legislature to vary the choice of law rules in Australia, thereby giving rise to the possibility that conflicting legislation will produce different outcomes when parallel proceedings are commenced in more than one venue.

However, in Australia, the rules which presently govern the choice of venue when combined with the rules of estoppel may assist in eliminating this problem of different outcomes in parallel proceedings. The venue rules are to be found in s 5 of the national cross-vesting Acts (which apply to the Supreme Courts of the States and Territories) and s 20 of the *Service and Execution of Process Act 1992* (Cth) (which applies to *inferior* courts in the States or Territories), together with existing court case management procedures. These rules and procedures should ensure that either only one action will be prosecuted to judgment in relation to the same dispute,[100] or that the judgments, if there is more than one, will be consistent. Once final judgment has been entered in an action the common law rules of *res judicata* and issue estoppel should prevent the re-litigation of the dispute resolved by the judgment and other matters which could have been properly agitated in the proceedings in which that judgment was entered.

Although inconsistent forum legislation can override the common law rules, s 118 of the *Constitution* or federal legislation may preclude this possibility if the judgments are registered under Part 6 of the *Services and Execution of Process Act 1992* (Cth).

In the light of these considerations it seems that the application of legislation by virtue of the common law choice of law rules will ultimately favour either:

(a) legislation of the venue which was chosen to *commence* the proceedings that were taken to judgment before any other proceedings were commenced anywhere else; or

(b) legislation of the venue which was chosen and subsequently *maintained* as the venue for any litigation if two proceedings were commenced in courts of different jurisdictions before either of them was taken to judgment.

It has also been suggested that the obligation of a court of a forum to give effect to its own legislation could place the High Court as the nation's final court of appeal in

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100 The latter provision only applies if a defendant is served interstate under that Act while proceedings commenced in inferior courts and tribunals can be removed into a Supreme Court to enable them to be transferred under s 5 of the national cross-vesting Acts: see, eg, *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) and (Cth) s 8. Professor Lindell has suggested that the power to transfer cases to a more appropriate court applies to courts exercising federal jurisdiction: Geoffrey Lindell, 'The Cross-vesting Scheme and Federal Jurisdiction Conferred Upon State Courts by The Judiciary Act 1903 (Cth)' (1991) 17 *Monash University Law Review* 64, 76. The High Court is in a special position because it is not covered by the cross-vesting scheme but it does have the power to remit cases to other more appropriate courts by virtue of s 44 of the *Judiciary Act 1903* (Cth). He has also argued that the High Court's present attitude to the exercise of that power which was formulated before the introduction of the national cross-vesting scheme should now be reassessed in the light of the introduction of that scheme in order to produce uniform results for all Australian courts: Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997) 112 [2.3.34] (5).

the position of making mutually inconsistent orders on appeals heard from courts in different States.[101]

For reasons already given, the possibility of inconsistent judgments can be discounted. The point remains, however, that because the application of the common law choice of law rules will result in the application of the legislation applied in the first proceedings taken to judgment, exclusive reliance on the common law choice of law rules as a means of resolving the application of conflicting legislation will reward forum shopping. This is undesirable.[102]

B Current view of s 118

According to Quick and Garran s 118 'contains a constitutional declaration in favour of inter-state official and judicial reciprocity which the federal Parliament and the States may assist to effectuate but which they cannot prejudice or render nugatory…'.[103] The section provides:

> 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.

Given its literal operation it is not surprising that some have seen in it an authority for the application of legislation of a sister State. The problem is that the meaning and effect of this guarantee has always been and continues to be subject to great uncertainty.

There were six possible views of the effect of s 118 before the High Court's decision in *Breavington.*[104]

1 Section 118 is confined to evidentiary matters while s 51(xxv) authorises the federal Parliament to make substantive choice of law rules.

2 Section 118 prevents some aspects of the common law rules in relation to conflict of laws from applying to cases which involve interstate elements, for example the rules which exclude the application of penal or revenue legislation of other jurisdictions and legislation which is contrary to the public policy of the forum.

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101 See, eg, *Breavington* (1988) 169 CLR 41, 123–4 where Deane J referred to the accepted principles in a society governed by the rule of law that an individual should not be exposed to the injustice of being subjected to the requirements of contemporaneously valid but inconsistent laws; and also described the existence of the High Court's appellate jurisdiction under s 73 of the *Constitution* as having the effect of imposing an ultimate unity upon distinct court systems; and also Selway, above n 68, 39.

102 A view seemingly accepted by Gummow, above n 51, 1005 (eighth comment). Our main solution cannot avoid forum shopping in relation to differences which result from legislation that deals with *procedural* matters ie, those that govern the way litigation is conducted: *Pfieffer* (2000) 203 CLR 503, 543-4 [99]-[100]. But it does in relation to differences which result from legislation that is applied in the litigation and deals with *substantive* matters. The distinction between the two matters referred to here is used in the sense known in conflict of laws.

103 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1900) 961.

104 (1989) 169 CLR 41. As to the first five views see Australian Constitutional Commission, *Final Report* (1988) vol 2, 705–6 [10.344]. The other was discussed in Sykes and Pryles, above n 57, 331.

3 Section 118 imposes on the States substantive choice of law rules which may be the existing rules of the common law.[105]

4 Section 118 imposes substantive choice of law rules which are to be fashioned by the courts having regard to the fact that the States are part of a federal nation.

5 Section 118 requires the courts to examine the interests of the States whose laws are potentially applicable to the resolution of a conflict of laws problem which involves an interstate element ('interest weighing').

6 Section 118 requires effect to be given to the laws of that State which, independently of the rules of the common law, has the most real and substantial connection with the issue for decision.

Our concern here is with the effect of s 118 on the common law choice of law rules as distinct from the impact of that section on evidentiary laws and other matters, namely the recognition and enforcement of judgments and the status of criminal convictions and acquittals. The guarantee of full faith and credit is likely to have a greater effect on those other matters than the choice of law rules. So far, there seems to be nothing to suggest that the High Court is willing to accord to s 118 anything other than a relatively minimal effect on choice of law. The Court has not regarded s 118 as displacing, except in a relatively minor respect, the common law choice of law rules; nor has it regarded the section as requiring compliance with those rules in intra-national cases; nor is the section taken to determine what law should apply in such cases. Authority for the statement in the preceding sentence is to be found in the judgment in *McKain v R W Miller (SA) Pty Ltd*[106] even though that case has, of course, been decisively overruled in relation to intra-national torts choice of law rules. But no interest was shown in departing from this view in *Sweedman*.[107]

The Court has also made it clear that s 118 precludes reliance on public policy as a ground for refusing to recognise and apply the laws of other States in Australia.[108] But this interpretation of s 118 falls short of treating the section as displacing in any other respect the operation of the common law choice of law rules in cases which involve an interstate element. Furthermore it does not follow that acceptance of the view that s 118 has some substantive effect necessitates the acceptance of other substantive effects either logically or as a matter of policy.

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105 See, eg, Moore, above n 94, 265–6 who suggested that the rules of private international law may assist in ascertaining the limits of the legislative powers of a State and the unsuccessful attempt made by Griffith CJ and Barton J to use those rules as a means of circumscribing those powers in *Delaney v Great Western Milling Co Ltd* (1916) 22 CLR 150 discussed in David Kelly, *Localising Rules in the Conflict of Laws* (1974), 70–2 and Detmold, above n 52, 140–1.

106 (1991) 174 CLR 1, 36–7 (Brennan, Dawson, Toohey and McHugh JJ); cf 45 (Deane J), 54 (Gaudron J). Even before that case a majority of the Court refused to accord a substantive operation to s 118 leaving aside its effect on the inability of States to refuse to recognise the laws of a sister State on the grounds of public policy: *Breavington* (1988) 169 CLR 41 (Mason CJ, Brennan, Dawson and McHugh JJ); cf Wilson, Gaudron and Deane JJ. See now *Pfieffer Pty Ltd* (2000) 203 CLR 503 where admittedly the Court left open whether the new choice of law rule it adopted was constitutionally mandated by s 118: at 534 [65] and 535 [70].

107 *Sweedman* (2006) 226 CLR 362, 407 [49], 433 [134], 440 [157].

108 *Pfieffer* (2000) 203 CLR 503, 533-4 [64], *Sweedman,* (2006) 226 CLR 362, 403–4 [35].

C Effect of current view of s 118

As Mason CJ pointed out in *Breavington*, '[h]istorically Australian courts have approached choice of law questions within Australia on the footing that they are to be resolved by the common law principles of private international law.'[109] The minimal operation of s 118 encompassed by the first and some aspects of the second possible views summarised above, has been described by one commentator as the traditional narrow view which gives s 118 little substantive operation.[110] According to the same author it denudes an apparently significant constitutional guarantee of content and has the following other disadvantages: it facilitates non-uniform results which will depend on where the proceedings are commenced, it deviates from the principles of parliamentary supremacy and representative democracy and it is based on the false premise that States are foreign entities.[111]

We have already acknowledged that, so far as non-uniform results are concerned, the effect of applying common law choice of law rules is more likely to accord primacy to legislation applied in the first of any proceedings involving the application of conflicting legislation if the proceedings are taken to judgment; and that to place sole reliance on those rules as a means of resolving the application of conflicting legislation is to reward forum shopping which seems to us to be undesirable.[112] Although a broad interpretation of s 118 might offer a solution to this problem, it should be rejected.

The main reason for rejecting a broad interpretation lies in the rigidity and inflexibility arising from constitutionalising the common law choice of law rules which, as we have emphasised before, are essentially concerned with matters of private law. Attributing to s 118 a substantive operation is to put the operation of those rules and the ability to change them beyond the legislative competence of both the Commonwealth and the State Parliaments. There is nothing to support the view that s 118 only binds the States either as a matter of policy or law. The *Constitution* takes care to make specific and clear provision when a section is to apply to either the Commonwealth or the States only.[113] In the absence of such a provision s 118 must be read as binding the Commonwealth as well as the States.

D The unitary national law theories

The imaginative attempts made by the minority judges in *Breavington* to find a solution to intra-national choice of law problems in s 118 and other provisions of the *Constitution* have some attractions which, if soundly based, could provide answers to questions posed by the operation of State legislation wherever those questions are litigated in Australia. The dissatisfaction with the application of common law principles in this area is understandable.

There are also obvious advantages in seeking to avoid the difficulties arising from the operation of the common law principles in this area and in ensuring that, as a general rule, the same law, including statutory law, should be applied wherever a

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109 (1988) 169 CLR 41, 69 (Mason CJ).
110 Kirk, above n 49, 248.
111 Ibid 262.
112 See above, text at paragraph accompanying n 102.
113 *James v The Commonwealth* (1936) 55 CLR 1, 59–60.

cause of action is litigated in Australia. In essence, the mechanism advocated by Deane J in *Breavington*[114] to resolve conflicts between competing State laws seems to be found:

- in the territorial confinement of their operation; or
- in the case of multi-State conflicts, in the determination of a predominant territorial nexus — in respect of which, although not directly applicable, the common law rules of private international law will be of assistance in identifying the predominant territorial nexus (since those rules seek to identify the application of non-forum law by reference to the place where acts are done or where property or domicile exist).

It would avoid inconsistency between competing State laws since there will never be any overlap either because of the territorial nature of his view or the selection of the jurisdiction which has the predominant territorial nexus where the legislation of two or more jurisdictions competes for application. Although not covered by s 118, the position of Territory laws would be accommodated to the same principles by cutting back on the legislative power of the Commonwealth Parliament and its delegates under s 122 and not relying on s 118.[115] The views of Wilson and Gaudron JJ in the same case are broadly similar but without being developed in the same detail.[116] The essential focus of this approach is to limit the ability of State and Territory legislatures to legislate extraterritorially. This is the reason why that approach is sometimes described as a territorial nexus test.

These views have attracted favourable attention.[117] But they did not find acceptance in *Breavington* or in any case since. Moreover, they cannot be sustained without contradicting the clear modern judicial acceptance of the ability of the States to legislate with extraterritorial effect in other States and Territories. They have other disadvantages: they would undermine the legitimate interests of States in passing laws having extraterritorial operation, they do not seem to provide clear criteria for identifying the applicable law where a dispute is connected to two jurisdictions and they may also be difficult to apply in areas other than tort.[118] Added to that is the desirability, already mentioned, of not constitutionalising judicial solutions to problems posed by the conflict of laws rules which are essentially concerned with disputes in private law matters so as to place those solutions beyond the reach of Parliament. Some other commentators have also rejected the predominant territorial nexus test.[119]

Finally in this regard we agree that there is no firm basis to support the contention that the Australian legal system in multi-State cases is built on a constitutional pillar of uniformity of outcomes, despite the position of the High Court as the ultimate court of

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114 (1988) 169 CLR 41, eg, at 129, 135, 137, 138–9. See also before that case was decided as regards the territorial confinement of State laws: Detmold, above n 52, 136–141, 144–5, 154–5, 157.

115 Ibid 137–8.

116 Ibid 98.

117 For example, Gummow, above n 51, 1006–12 although not necessarily implying their acceptance.

118 Kirk, above n 49, 248, 265, 268, 282–3.

119 Apart from Kirk, Nygh, above n 43, 422–25, 428–32; James Stellios, 'Choice of Law and the Australian Constitution: Locating the Debate' (2005) 33 *Federal Law Review* 7, 28–32.

appeal and even though that has involved the development of a single Australian common law.[120]

E The literal interpretation of s 118 in relation to the application of legislation

More recently a different and deceptively simple literal interpretation of s 118 has been advanced in regard to its application to both civil and criminal legislation.[121] According to this interpretation, each State and Territory court is required to apply according to their tenor otherwise valid extraterritorial sister State and Territory legislation.[122] Unlike the territorial nexus views of Wilson, Deane, and Gaudron JJ, s 118 would be limited to giving effect to otherwise valid *legislation* and not extend to the *common law*,[123] a distinction which seems curious given the emphasis placed on giving literal effect to s 118 and the fact that the uniformity of the Australian common law was not recognised at the time of federation.

This interpretation assumes that s 118 does not purport to avoid or resolve any problem of inconsistency[124] and instead reinforces the need to resolve inconsistency by reference to tests derived from other parts of the *Constitution*.[125] What is meant by the literal interpretation of s 118 is by no means clear. One view is that full effect is given to all 'valid applicable laws', seemingly including both the legislation of a sister State and that of the forum. The second view, which is the stronger of the two, is that s 118 is not directed to legislation of the forum but is directed to sister State legislation and gives that legislation the same force and effect as it has in the territory of its enactment.

The first view is unpersuasive for several reasons. First, it is distinctly odd to attribute to s 118 an intention to give legal force to all legislation of the forum in the forum when that legislation has legal effect there anyhow.[126] Secondly the effect of the interpretation is to give forum legislation constitutional force in the forum with unexpected consequences for the exercise of federal jurisdiction.

The second view fails to explain why the interpretation does not have the effect of giving primacy to the legislation of the sister State given the constitutional force to be ascribed to s 118. Section 118 applies only to the laws of a sister State and not those of the forum and would therefore only be available to require the application of the legislation of such a State but at the expense of that of the forum.[127]

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120 Stellios, above n 119, 23, 27. It was, amongst other things, seen as inconsistent with *Leeth v The Commonwealth* (1992) 174 CLR 455 and *Putland v The Queen* (2004) 218 CLR 174 and Kirby J is said to have rejected the argument as well in *Pfieffer* (2000) 203 CLR 503, 546 [108] n 212: Stellios, above n 119, 25.

121 Gageler, above n 62 and Kirk, above n 49.

122 Although the recognition of Territory laws comes about independently of s 118 — an issue not pursued here.

123 Kirk, above n 49, 283–4.

124 Gageler, above n 62, 187–8 and Kirk, above n 49, 285.

125 Kirk adopts the closer connection test and Gageler adopts the principles of implied repeal and the relationship between general and special statutory provisions. The reasons for rejecting them as the main solution to inconsistency have already been explained: see above, text at paragraphs containing nn 47–51 and 62–3, respectively.

126 See *Re Stubberfield's Application* (1996) 70 ALJR 646.

127 This recalls the difficulty ascribed to the US full faith and credit clause under which it is asserted that 'to require each State to apply the law of the other is absurd': Laycock, above

On either view, the literal interpretation of s 118 is unpersuasive also because reliance on the constitutional guarantee contained in it carries with it a consequence already mentioned, namely, that it would bind both the Commonwealth and the States. It is true that this interpretation, unlike the other broader interpretations of s 118, does not extend to the operation of *non-statutory* law. But it would still place beyond the reach of all Australian parliaments — except of course for the parliament which enacted them — the ability to displace the operation of State *legislation* which is required to be applied by s 118[128] even though much of it would be concerned with matters of private law.

F The Full Faith and Credit Guarantee in the United States

Leaving aside the novel nature of the Commonwealth legislative power in s 51(xxv), it is well known that s 118 was substantially modelled on the much older guarantee found in Article IV, s 1 of the *United States Constitution* in the context of the accompanying legislative power of Congress.[129] It has been said of that provision that 'there are few clauses of the *Constitution*, the merely literal possibilities of which have been so little developed as the Full Faith and Credit Clause'.[130]

The initial willingness of the United States Supreme Court to accord to the American guarantee a substantive effect on choice of law issues, with its accompanying reliance on the weighing of conflicting governmental interests of competing State laws and the subsequent retreat from that approach, has been well recounted elsewhere and is not repeated here.[131]

The retreat from the earlier approach was confirmed in more recent times in *Franchise Tax Board of California v Hyatt*[132] where the Supreme Court repeated that:

(i) the full faith and credit clause requires a more exacting standard with respect to final judgments and less demanding with respect to choice of law;

(ii) the clause does not compel a State to substitute the legislation of other States for its own legislation dealing with a subject matter concerning which it is competent to legislate: *Sun Oil Co v Wortman*;[133]

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n 23, 297 cited with approval in *State Authorities* (1996) 189 CLR 253, 286 n 131 (McHugh and Gummow JJ) and *Sweedman* (2006) 226 CLR 362, 433 [134] (Callinan J).

128 Notwithstanding the possible contrary assumption in Kirk, above n 49, 279–80 and see also Gageler, above n 62, 188.

129 See, eg, Cowen above n 81, 295–6, 298–30; Pryles and Hanks, above n 83, 66.

130 Johnny H Killian, George A Costello, Kenneth R Thomas (eds), *The Constitution of the United States of America Analysis and Interpretation* (2002) [908] <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_documents& docid=f:sd017.pdf> at 30 September 2010. As updated by Kenneth R Thomas (ed), *The Constitution of the United States of America Analysis and Interpretation (2008 Supplement)* [45]–[46] <http://gpoaccess.gov/constitution/pdf2002/2008supplement.pdf > at 30 September 2010.

131 See, eg, *Breavington* (1988) 169 CLR 41, 81–2 (Mason CJ); Gummow, above n 51, 1014–23; Opeskin, above n 78, 173–7; and Davies, Ricketson and Lindell, above n 100, 48–53 [2.2.20]–[2.2.26].

132 538 US 488 (2003) ('*Franchise Tax Board Case*').

133 486 US 717 (1988).

(iii) for the substantive law of a State to be selected in a constitutional manner, the State must have a significant contact or aggregation of contacts such that its choice of law is neither arbitrary nor fundamentally unfair: *Allstate Insurance Co v Hague*;[134]

(iv) this represented a retreat from the earlier willingness to appraise and balance state interests to resolve conflicts between overlapping laws of coordinate States; and

(v) there was, instead, a recognition that under the same clause a court can lawfully apply either the law of one State or the contrary law of another State.[135]

The current interpretation followed in the United States gives primacy to the legislation of the forum chosen as the venue for the litigation and thus effectively rewards forum shopping. This is because there are only minimal restraints on the forum not applying its own legislation in preference to that of other States.[136]

G Concluding remarks on s 118

Although not the focus of this essay, it is strongly arguable that s 118 has a substantive effect in relation to the binding effect of civil judgments[137] and criminal convictions and acquittals in order to protect individuals against double jeopardy.[138] Although it is also arguable that s 118 prohibits discrimination so as to ensure the even-handed application of choice of law rules to all the States,[139] it is possible that the prohibition on discrimination may follow from broader or more general doctrines implied from the federal nature of the *Constitution*.

X CONCLUSIONS

Current arrangements for resolving inconsistency between State and Territory legislation favour forum shopping since the operation of the existing choice of law rules (when combined with the rules of estoppel) allow primacy to be accorded to legislation of the chosen forum which is capable of overriding legislation of other jurisdictions.

The main solution advanced in this essay would greatly reduce if not eliminate forum shopping. It is a solution which recognises the capacity of the Australian sister States and Territories to enact legislation which operates in the forum by virtue of its

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134 449 US 302 (1981).

135 The same understanding was expressed in the 2008 Supplement to the Annotated Constitution cited above n 130, 45–6; cf the reference to the older cases which supported a weighing of conflicting governmental interests which however no longer seem to be in vogue as having been overtaken by more modern cases such as the *Franchise Tax Board Case* and *Baker v General Motors*, 522 US 222 (1998).

136 This assessment appears to accord with that made by Gummow, above n 51, 1022–3 and see also Opeskin, above n 78, 176.

137 A possibility recognised by Fullagar J despite his reliance on federal legislation rather than s 118 in *Harris v Harris* [1947] VLR 44, 56, 59.

138 *Lipohar* (1999) 200 CLR 485, 534 [120] (Gaudron, Gummow and Hayne JJ) as regards double jeopardy.

139 Hill, above n 64, 93 and Stellios, above n 119, 40–3 who also calls in aid s 117 which prohibits discrimination against residents of other States.

own force.[140] The proposed solution will ensure that if inconsistency arises in the broadest sense of that concept, primacy will be accorded to legislation passed by the State or Territory which is primarily responsible for legislating in the same geographical area in which the legislation operates. This has the desirable effect of restoring primacy to the State or Territory which should be seen as enjoying the predominant territorial concern for legislating within its own territory without detracting from the ability of other States or Territories legislating within the same area except in the case of any inconsistency between legislation passed by the legislatures of the former and latter States and Territories.

We acknowledge that this solution does not accord with the current rejection by the High Court of the indirect or covering the field notion of inconsistency for these purposes. But there are strong grounds for thinking that that rejection is unsound and that there are major disadvantages associated with the adoption of the closer connection test as the primary solution for the resolution of inconsistency. That test has some role to play but its use should be confined to resolving inconsistency between legislation of different States and Territories which operate in the offshore areas and outside of Australia.

Finally the solutions advanced in this essay would operate in the absence of federal legislation to the contrary and would substantially reduce the possibility of constitutionalising rules of essentially private law by recognising the ability of the Australian Parliament to change in a uniform and non-discriminatory manner the common law choice of law rules.

140 With the exception of State legislation operating in a Territory surrendered under *Australian Constitution* s 111.