Private International Law

Full Faith and Credit: A Constitutional Rule for Conflict Resolution

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INTRODUCTION

The existence of eight territorial units within Australia[1] has been a fruitful source of conflict. Because of the essential unity of the common law as declared ultimately by the High Court of Australia, it may not have been as rich and varied as in the United States, but an uneven pattern of law reform has meant that the one factual situation might give rise to different solutions depending on the law of the relevant states and territories to be applied. Conflicts may therefore arise in Australia either because one jurisdiction has reformed the common law and the other has remained loyal to it, or each has enacted different solutions for the same problem.

In the 1960s conflict was caused by the slowness of New South Wales in departing from the common law rule that the contributory negligence of the plaintiff was an absolute bar to his or her recovery.[2] Even when that State introduced the principle of comparative negligence, it did so in a manner which produced further dissonance.[3] The 1970s were marked by conflicts arising out of different amendments to the common law principle of interspousal immunity.[4] And in the last decade conflicts have arisen out of different schemes for limiting the liability of insurers in respect of physical injury caused by automobile accidents.[5] Other problems have been caused by different periods in statutes of

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[1] This does not include the inhabited external territories of Norfolk Island, Cocos (Keeling) Islands and Christmas Island.

[2] *Anderson v. Eric Anderson Radio and TV Pty Ltd* (1965) 114 C.L.R. 20; *Hartley v. Venn* (1967) 10 F.L.R. 151.

[3] *Kolsky v. Mayne Nickless Ltd* (1970) 72 SR (NSW) 437.

[4] *Warren v. Warren* [1972] Qd R 386; *Schmidt v. Government Insurance Office of New South Wales* [1973] 1 N.S.W.L.R. 59; *Corcoran v. Corcoran* [1974] V.R. 164.

[5] *Breavington v. Godleman* (1988) 88 A.L.R. 362; *Perrett v. Robinson* (1988) 88 A.L.R. 441.

limitation;[6] different rules in relation to defamation[7] and, more recently, different methods of discounting damages awarded for future economic loss.[8]

The purpose of this paper is to discuss to what extent a solution to the conflict of laws between the various states and territories can be found in the Australian Constitution. The paper is only concerned with conflict between the laws, common law or statutory, of these jurisdictions. I do not propose to deal with the question of recognition and enforcement of judgments. Furthermore, the discussion will be confined to the resolution of conflicts between states and territories *inter se*. The resolution of any conflict between federal and state law is governed by s. 109 of the Constitution and territorial legislatures must submit to federal paramountcy.

Commentators and courts have in the past looked for an answer, if any, to these problems in section 118 of the Constitution, commonly known as the "full faith and credit clause", and the related section 18 of the *State and Territorial Laws and Records Recognition Act* 1901 (Cth.), hereinafter referred to as the *Recognition Act*. The discussion in this paper will therefore be mainly concerned with those provisions, especially the constitutional clause. However, it will become apparent that the full faith and credit clause cannot by itself provide a complete answer. Hence we may have to look at other possible grounds for delimitation, such as those found in the state constitutions preserved by section 106 of the Constitution or solutions imposed by the federal Parliament in pursuance of s.51 pl.(xxv) of the Constitution.

THE TRADITIONAL APPROACH

Until 1988, it would be fair to describe as the prevailing judicial view, that Australian courts should apply to conflicts arising within the federation the same rules as are applicable to international conflicts. As Mason, C.J. remarked in *Breavington v. Godleman*[9]: "Historically Australian courts have approached choice of law questions within the federation on the footing that they are to be resolved by the common law principles of private international law".

Basically that view assumes that each of the constituent units of the federation are separate and distinct law areas, or, in the words of Brennan, J. in *Breavington v. Godleman*[10]:

[6] *Pedersen v. Young* (1964) 110 C.L.R. 162; *Kerr v. Palfrey* [1970] V.R. 825; *Commonwealth v. Dixon.* (1988) 82 A.L.R. 193; *Byrnes v. Groote Eylandt Mining Co Pty Ltd* (1989) 95 F.L.R. 69 (Court of Appeal NSW) unreported 2 Feb 1990.

[7] *Gorton v. Australian Broadcasting Commission* (1973) 22 F.L.R. 181; *Comalco Ltd v. Australian Broadcasting Corpn* (1986) 64 A.C.T.R. 1; *Smith v. John Fairfax Ltd* (1988) 81 A.C.T.R. 1; *Bogusz v. Thomson* (1989) 95 F.L.R 167.

[8] *Amor v. Macpak Pty Ltd* (1989) 95 F.L.R. 10, at 13 per Allen J..

[9] (1988) 88 A.L.R. at 366.

[10] *Id.*at 393.

> Prior to federation, the legal systems of the Australian Colonies were independent one of another. The preservation of the Constitutions of the several States by s.106 of the Constitution ensured that *inter se*, the mutual independence of the States was maintained except to the extent (subject to this Constitution) that the Constitution affected their mutual independence or exposed that independence to affection by federal law. Therefore each State is 'a distinct and separate country or law area': *Laurie v. Carroll* (1958) 98 C.L.R. 310 at 331.

This means that the law of another state is foreign law which must be pleaded, if not proved, by the party seeking to rely on it.[11] It also means that each unit is free, subject to the Constitution and overriding federal law, to amend the common law rules of private international law to provide a solution which favours the application of its own law.[12]

Of course, the fact that Australia is a federation is not without significance. The law areas may be distinct but they are not foreign to each other. As Marks, J. said in *Borg Warner (Aust) Ltd v. Zupan*[13]:

> Having regard to the present-day mobility of people and traffic in and out of the Australian States and Territories individual schemes must be seen as operating together to form something in the nature of a single interlocking structure for the nation. The application of private international law rules as though each scheme was that of a sovereign state at arm's length tends to frustrate their planned operation, and increases the likelihood of unintended windfalls and losses.

The Full Faith and Credit Provisions

There are three relevant provisions: the full faith and credit clause itself, the head of legislative power conferred by s.51 pl.(xxv) and section 18 of the *Recognition Act*. Of these the most prominent is section 118 of the Constitution which provides that:

> Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

In addition, pl.(xxv) of section 51 of the Constitution enables the Commonwealth Parliament to make laws with respect to:

> The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.

[11] *Walker v. WA Pickles Pty Ltd* [1980] 2 N.S.W.L.R. 281 (Hutley and Glass JJ.A; contra: Mahoney, JA.

[12] This is the view expressed forcefully by Brennan, J. in *Breavington v. Godleman* (1988) 80 A.L.R. 362 at 393.

[13] [1982] V.R. 437, at 460, 461.

In pursuance thereof, and in conjunction with its territorial power under section 122 of the Constitution, the Parliament has enacted the *Recognition Act*, section 18 of which now provides:

> All public acts records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

All of these provisions follow United States precedents. Article IV, section 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

In pursuance of the authority given thereby, the Congress has enacted that:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[14]

It may be noted from a comparison of the various provisions cited above that both the full faith and credit clause and pl. (xxv) in the Australian Constitution refer to "laws" as a category distinct from "public Acts and records". The United States full faith and credit clause on the other hand refers only to "public Acts". There has never been any doubt in that country that this included a reference to the statute law of the states.[15] Section 18 of the *Recognition Act*, on the other hand, has only purported to exercise the legislative power with respect to "public acts and records" and makes no mention of "laws".

It was at one stage assumed that there was no distinction in point of terminology between the use of the word "laws" in pl. (xxv) and section 118 of the Constitution and the reference only to "public acts" in s. 18 of the *Recognition Act*. The main difference was thought to be in geographical scope: the full faith and credit clause commanded respect only for state laws but extended throughout the Commonwealth, ie. including the internal territories which form part of the Commonwealth of Australia. Section 18 of the *Recognition Act* had to be relied upon

[14] Title 28, United States Code s.1738. The present law dates from 1948. Previous legislation enacted in 1790 and 1804, respectively, only required faith and credit to be given to the records and judicial proceedings of states.

[15] *Bradford Electric Co v. Clapper* (1932) 286 U.S. 145 at 154, 155 per Brandeis, J.

if full faith and credit was sought in respect of the statute law of the territories in other states and territories.[16] In other words, it was assumed that, as in the United States, the words "public acts" embraced statutes.

This assumption has now been shown to be incorrect. As Wilson and Gaudron, J.J. pointed out in *Breavington v. Godleman*,[17] the words "public acts" as used in section 18 refer to such matters as proclamations, commissions, orders, regulations and by-laws. They do not refer to the statutes of the states and territories.[18]

It must now be accepted that the *Recognition Act* has no bearing on the resolution of conflicts between the laws of the several states and territories, whatever its effect may be on the recognition and enforcement of judgments.[19] However, it may be that an obligation on state courts to give full faith and credit to territorial statutes as laws made under the ultimate authority of the Parliament of the Commonwealth can be derived from covering clause 5 of the Constitution. As Deane, J. said in *Breavington v. Godleman*[20] such laws "enjoy the authority of a law made by the Parliament and, as such, are binding throughout the Commonwealth pursuant to Covering Cl. 5".[21]

The question remains whether the constitutional requirement to give full faith and credit, howsoever derived, has any substantive effect on choice of law rules. Prior to its decision in *Breavington v. Godleman* it looked as if the High Court had given a negative answer to that question.

The issue was raised before the High Court in *Anderson v. Eric Anderson Radio and TV Pty Ltd.*[22] In that case the plaintiff had been injured in the Australian Capital Territory through the negligence of the defendant. The plaintiff brought action in New South Wales. It was found that he was guilty of contributory negligence. The common law rule that contributory negligence constituted a complete defence was still in force in New South Wales. In the Territory it was provided by s. 15 of the Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.) that the plaintiff's claim should no longer be defeated by reason of his own fault but that in such a case the amount of the damages should be apportioned.

[16] *Harris v. Harris* [1947] V.L.R. 44 at 46 per Fullagar, J.. The same assumption was made by Dunphy, J. at first instance in *Permanent Trustee Co (Canberra) Ltd v. Finlayson* (1967) 9 F.L.R. 424, and by the High Court on appeal (1968) 122 C.L.R. 338 at 343, per Barwick, C.J., McTiernan, Kitto, Menzies, Windeyer and Owen JJ., and earlier by the High Court in *Anderson v. Eric Anderson* (Radio and TV) Pty Ltd (1965) 114 C.L.R. 20.

[17] (1988) 80 A.L.R. 362 at 384.

[18] That view was shared by Mason, C.J. at 373, by Brennan, J. at 399, by Dawson, J. at 424, and Toohey, J. at 436, 437. Deane, J. at 418 left the matter open.

[19] *Harris v. Harris* [1947] V.L.R. 44, at 59 per Fullagar, J.

[20] (1988) 80 A.L.R. 362, at 414.

[21] A similar view was expressed by Wilson and Gaudron, JJ. at 385, by Brennan, J. at 399, 400, and by Dawson, J. at 424, although the justices differed as to degree of faith and credit which has to be given.

[22] (1965) 114 C.L.R. 20.

The High Court held that under the common law conflicts rule applicable to foreign torts, as then understood,[23] the defendant could rely on the defence of contributory negligence as it existed under the law of New South Wales. The plaintiff argued that the effect of s. 18 of the *Recognition Act* was to eliminate the need to consult the *lex fori* and to make the *lex loci delicti* solely applicable. All of their Honours rejected this argument. They took the view that on its proper construction the right given by s.15 of the Ordinance was enforceable only in proceedings commenced in the courts of the Territory.[24] Full faith and credit could not be invoked to make a territorial provision, applicable in its own terms only in territorial courts, part of New South Wales law and as such applicable in New South Wales courts. As Kitto, J. pointed out: " . . . whatever may constitute giving faith and credit to the laws of the Territory, it is faith and credit to those laws, as they stand, not as notionally altered . . . ".[25]

The implication from that remark is that full faith and credit is not due to an interstate statute till the choice of law rules of the forum make it relevant to the issue before the court. On that view, full faith and credit does not affect the common law rules of choice of law nor limit the power of each state to alter those rules by legislation. Of course, the High Court in that case purported to interpret s. 18 of the *Recognition Act* on the assumption, now shown to be mistaken, that it applied to legislation. But shortly afterwards in *Permanent Trustee Co (Canberra) Ltd v. Finlayson*,[26] the High Court had to deal with the application of the *Stamp Duties Act*, 1920 (NSW) to assets situated in the Australian Capital Territory, a situation where full faith and credit would be commanded by section 118. Their Honours, in holding that there was no obligation on the courts of the Territory to give effect to the New South Wales statute, repeated the language used by Kitto, J. in *Anderson's Case*:

> . . . it is one thing to give faith and credit to the New South Wales *Stamp Duties Act* as achieving all that it purports to achieve as an alteration of the law of New South Wales, and quite another thing to treat it as producing an extra-territorial result which on its true construction it does not purport to have and could not constitutionally have, namely to alter the law of the Territory as to Territory administrations.[27]

Since on any view of extraterritoriality, the New South Wales legislature cannot alter the law in and for another state or territory, on this view of the full faith and credit clause its operation only becomes

[23] That is, prior to the High Court's decision in *Breavington v. Godleman* (1988) 80 A.L.R. 362.
[24] (1965) 114 C.L.R. 20, at 24 per Barwick, C.J., at 37 per Taylor, J., at 45 per Windeyer, J.
[25] *Id.* at 33.
[26] (1968) 122 C.L.R. 338.
[27] *Id.* at 343 per Barwick, C.J., McTiernan, Kitto, Menzies, Windeyer and Owen, JJ.

relevant once the law of the forum makes the law of another state applicable. Once that law does become relevant full faith and credit may compel the forum to apply it, depriving the forum of the "reserve power" of public policy. This had already been indicated by the High Court in *Merwin Pastoral Co v. Moolpa Pastoral Co.*[28] where the High Court had reversed the decision of a Victorian judge who had refused to apply a New South Wales statute on the ground that it was contrary to the public policy of Victoria. This public policy objection was untenable in any event, but Rich, Dixon and Evatt, J.J. also expressed the view that section 118 prevented one state from setting up its public policy as a bar to the enforcement of the law of another state.[29] That view, although *obiter*, was endorsed by most justices in *Breavington v. Godleman.*[30]

The answer therefore prior to 1988 was that, with that limited exception, the full faith and credit clause of the Constitution had no impact on the resolution of interstate conflicts. The matter, however, was reconsidered by the High Court in *Breavington v. Godleman.*

Breavington v. Godleman

In that case Mr Breavington commenced an action in the Supreme Court of Victoria to recover damages sustained by him in a motor vehicle accident in the Northern Territory. It was alleged that the accident had been caused through the negligence of one or more of the defendants. Section 5 (2) of the *Motor Accidents (Compensation) Act* 1979 (N.T.) which a court of the Territory would have applied, effectively excluded any entitlement to recover damages in an action in the Territory for loss of earnings or loss of earning capacity. The plaintiff brought action in Victoria because, under the common law still applicable in that State, such damages were recoverable, and sought to rely upon the Rule in *Phillips v. Eyre,*[31] as interpreted by the High Court in *Anderson v. Eric Anderson Radio and TV Pty Ltd*[32] for the proposition that once wrongfulness was established under the law of the Territory, the heads of damages recoverable were determined by the law of Victoria.

The last proposition was not accepted by any of their Honours and consequently all agreed that the plaintiff in his Victorian action could not recover damages for loss of earnings or earning capacity when the right to recover the same had been abolished by the *lex loci delicti.* However, the reasons for coming to that conclusion varied. Whilst much of the argument centred on the correct interpretation of the Rule in *Phillips v. Eyre* following the decision of the House of Lords in *Chaplin v. Boys,*[33]

[28] (1933) 48 C.L.R. 565.
[29] *Id.* at 577 per Rich and Dixon, JJ., at 588 per Evatt, J.
[30] (1988) 80 A.L.R. 362, at 374 per Mason, C.J., at 385, 386 per Wilson and Gaudron, JJ., at 400 per Brennan, J., at 415 per Deane, J., and at 425 per Dawson, J.
[31] (1870) L.R. 6 QB 1.
[32] (1965) 114 C.L.R. 20.
[33] [1971] A.C. 356.

an important part of the submissions of the defendants was that the full faith and credit provisions mandated the application of section 5 (2) of the *Motor Accidents (Compensation) Act* 1979 (N.T.) by the Victorian Supreme Court to the proceedings before it.

As mentioned earlier, the Court came to the conclusion that s. 18 of the *Recognition Act* did not apply to the statutes of the Territory. Since section 118 does not in terms apply to the laws of the territories either, this made it unnecessary in the view of Toohey, J. to consider what effect, if any, that section would have upon the laws of the states.[34] Of the six remaining justices, three would not accord full faith and credit beyond the existing jurisprudence and three would give it a more substantive effect than had hitherto been the case.

The existing view was put by Dawson, J. when he said[35]:

> In my opinion, the requirement that full faith and credit be given to the law of a State, statutory or otherwise, throughout the Commonwealth, affords no assistance where there is a choice to be made between conflicting laws. Once the choice is made, then full faith and credit must be given by the law chosen but the requirement of full faith and credit does nothing to effect a choice.

Brennan, J. expressed a similar view.[36] The Chief Justice did not see either the United States or the Australian clause as "the solvent of inter-State conflicts", or indeed, a rigid interpretation of section 118 as desirable.[37]

A more substantive effect was favoured by Wilson and Gaudron, J.J. in their joint judgment and by Deane, J.. The latter gave the issue the most extensive attention. In his view, there is implicit in Part V of the Constitution, of which section 118 forms a part, a system of choice of law preference based on the principle of the territorial competence of local legislatures.[38] In that scheme the common law rules of private international law have no direct relevance or application.

Fundamental to this scheme is the proposition that the Constitution divides legislative competence horizontally as between the Commonwealth and the states and vertically as between the states and the territories. Section 109 of the Constitution resolves conflicts between valid state and federal laws on the basis of federal supremacy. Section 118 seeks to resolve conflict between state laws on the basis of equality and territorial competence. The constitutional policy implicit in that clause is "that as between the States and in the absence of some overriding territorial nexus, legislative competence with respect to what happens within the territory of a particular State lies with that State".[39]

[34] (1988) 80 A.L.R. 362 at 435 - 437.
[35] *Id.* at 425.
[36] *Id.* at 400.
[37] *Id.*at 375.
[38] *Id.* at 414-416.
[39] *Id.* at 415

The application by the forum of its own procedural laws in relation to claims arising out of interstate matters does not infringe section 118. Each state is competent to prescribe the procedure of its own courts. However, in relation to questions of substance, a state cannot normally invoke its law to impose legal liability for conduct and consequences which are wholly within the territory of another state "in the absence of some overriding territorial *nexus*".[40] Conversely, the forum cannot refuse to give effect to the substantive law of another state on the ground of public policy in relation to an action arising in the territory of that state.[39] Covering Clause 5 of the Constitution, combined with the territorially limited competence of the territorial legislatures, has an effect similar to section 118.[41]

The difficulty, as his Honour recognises, lies in the situation where the action is connected with several states or territories. He comments on this as follows:

> While the private international law rules of the common law will not be directly applicable to resolve such difficulty, they will be of assistance in identifying what is, for relevant purposes, the predominant territorial nexus in that they will provide 'a relevant and enlightening body of experience and authority to provide analogies . . . '.[42] Except where they discriminate in favour of the law of the forum, the common law rules of private international law are traditionally based on notions of territoriality. Thus, for example, private international law rules aimed at identifying an applicable non-forum law will ordinarily operate by reference to the place where the acts are done or where property or domicile exists. Such rules are likely to be relevant, by way of analogy, to the identification of the applicable substantive law to be applied in a case involving circumstances (eg. acts, property, status or choice of law by the parties) connected with more than one State.[43]

There are a number of consequences that flow from this view.

In the first place conflicts between state and territorial laws will be resolved by limiting the territorial competence of local legislatures. As remarked earlier, a conflict as between the common law systems of the various units is not possible in Australia. If different interpretations of the common law do occur, the High Court will eventually resolve the issue. A conflict of laws will arise because a statute of one unit differs from the statute of another or from the common law still in force in another. If each such law seeks to regulate the same factual situation, a substantive interpretation of full faith and credit may lead to the absurd

[40] *Id.* at 415.
[41] *Id.* at 416.
[42] Citing Justice Robert Jackson "Full Faith and Credit—The Lawyer's Clause of the Constitution" (1945) 45 Columbia L.R. 1, at 30.
[43] (1988) 80 A.L.R. 362, at 415, 416.

situation where each state would have to give way to the law of the other.[44] Deane, J. would avoid that situation by giving preference to the state with the greater territorial nexus.

Secondly, whilst the common law rules of choice of law are set aside, his Honour would consult them in determining which state has the greater territorial nexus. It has been long acknowledged that the common law rules may be used as a guide in the interpretation of a statute where the legislature has not otherwise defined its ambit,[45] but it has not so far been suggested that they should operate as constitutionally mandated rules and have effect outside the competence of either state or federal parliaments to provide for them or alter them. Furthermore, they have been notoriously deficient in providing for causes of action created by statute, such as workers' compensation laws.[46]

Finally, Deane, J. qualifies his propositions by reference to "the absence of some relevant overriding territorial nexus". It is not quite certain what is meant thereby. Does it, for instance, mean that a local legislature may in such a case derogate from the national scheme and insist that its law be applied in its courts even though the law of another state or territory might otherwise have applied? What happens then to the national system of territorial competence? Indeed such an escape hatch, if indeed it is, has allowed the United States Supreme Court to retreat from the high water mark of its substantive full faith and credit doctrine in *Bradford Electric Light Co v. Clapper*[47] to the present situation where a state may oppose any sufficiently substantial local interest in opposition to the application of interstate law.[48]

The views of Wilson and Gaudron, J.J.,[49] although less elaborate, are somewhat similar to those of Deane, J.. They also see in section 118 the solution for the resolution of interstate conflicts and a directive "that one set of facts occurring in a State would be adjudged by one body of law and thus give rise to only one legal consequence regardless of where in the Commonwealth the matter fell for adjudication".[50]

Unlike Deane, J. they do not speculate how such choice of law rules should be ascertained, nor would they give such rules the force and effect of a constitutional provision which lies beyond the reach of the federal parliament. They confine themselves to the question at hand of defining the relevant choice of law rule relating to interstate torts by noting:

[44] See the discussion by Zelling, J. in *Hodge v. Club Motor Insurance Agency Pty Ltd* (1974) 2 A.L.R. 421, at 435.

[45] See eg: *Wanganui-Rangatikei Electric Power Board v. AMP Society*. (1934) 50 C.L.R. 581, at 601. But this is only a guide which can be overridden by a consideration of the purpose and object of the statute: *Kay's Leasing Corpn v. Fletcher* (1964) 116 C.L.R. 124, at 143 per Kitto, J.

[46] Eg. *Mynott v. Barnard* (1939) 62 C.L.R. 68; *Borg Warner (Australia) Ltd v. Zupan* [1982] V.R. 437.

[47] (1932) 286 U.S. 145.

[48] *Richards v. United States* (1962) 369 U.S. 1, at 15, and see the discussion of the United States authorities by Mason, C.J. in *Breavington v. Godleman* (1988) 80 A.L.R. 362, at 374, 375.

[49] (1988) 80 A.L.R. 362, at 368, 387.

[50] *Id.* at 386.

> that effect is given to the requirement flowing from s.118 that there should be only one body of State law determining the legal consequences attaching to a set of facts occurring in a State only by the adoption of an inflexible rule that questions of liability in tort be determined by the substantive law that would be applied if the matter were adjudicated in a court exercising the judicial power of the State in which the events occurred.[51]

It would seem that their Honours see in the full faith and credit provisions a general directive of federal comity to legislators and courts in their lawmaking capacity that they should aim at solutions which will avoid conflicts, but which does not impose a rigid structure delimiting power and jurisdiction. A similar point although inferred from the general nature of Australian federalism rather than s. 118 is made by the Chief Justice[52] and Toohey, J..[53]

The High Court in *Breavington v. Godleman* has not resolved the issue of whether full faith and credit has a substantive effect on the choice of law within Australia. In so far as the High Court previously gave a firm negative answer, it cannot be said that this has been overruled by the contrary views of three out of seven justices. In any event, as a matter of policy, there is much to be said for the view of the Chief Justice that: "It is preferable that Parliament should provide a solution by the 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".[54]

However, the reasoning of members of the Court has suggested three possible sources for the solution of interstate conflicts: the notion of federal comity, the limits on the extraterritorial competence of state and territorial legislatures, and the exercise of legislative power by the federal Parliament pursuant to pl. (xxv). The firstnamed may operate to modify common law choice of law rules, the second may permit the High Court to resolve conflicts between statutes, and the last-named may provide a comprehensive solution.

The Implications From Federal Comity

The rather vague term of "federal comity" has been used to acknowledge the consensus of at least six of the justices in *Breavington v. Godleman* that the common law choice of law rules as applicable to international conflicts had to be modified in their application to purely intra-Australian conflicts.[55] If one accepts the views of Mason, C.J., Dawson and Toohey,

[51] *Id.* at 386, 387.
[52] *Id.* at 372.
[53] *Id.*at 437. See also Dawson, J. at 423.
[54] *Id.* at 376.
[55] Only Brennan, J. at (1988) 80 A.L.R. 362, 396 stresses "the mutual legal independence of the several Australian States and Territories".

J.J.[56] as the lowest common denominator one has authority for the proposition that this "federal comity" militates against the "homeward trend" implicit in many common law rules which allow the forum to avoid the application of foreign law.[57]

The most obvious example of common law rules with a homeward trend are those which allow the forum to refuse to apply foreign laws on the ground that they offend against local public policy, or are of a revenue or penal character.

As has been remarked earlier, there exists already High Court authority for the proposition that one Australian forum cannot object to the application of the law of another Australian law area on the ground of public policy.[58] In *Permanent Trustee Co (Canberra) Ltd v. Finlayson*[59] Dunphy, J. held that the common law objection to the enforcement of foreign revenue laws did not apply within Australia. He therefore allowed the New South Wales Commissioner of Stamp Duties to enforce a claim for death duties in the Australian Capital Territory.[60]

Breavington v. Godleman itself concerned the continued application in intra-Australian conflicts of the so-called first limb in *Phillips v. Eyre.*[61] It is beyond the scope of this article to set out the convoluted history of the interpretation of this rule.[62] It suffices to state that it requires the application of the *lex fori* although it is a matter of debate to what extent, if any, the application of that law is to be restricted by the *lex loci delicti.*[63] The High Court by a definite majority, albeit for different reasons, has abolished the reference to the *lex fori* in matters other than procedural, at least in relation to intra-Australian conflicts.[64] In so doing it has fulfilled the prediction made by Cowen in 1952 that "it cannot be consistent with full faith and credit to require that every tort claim

[56] (1988) 80 A.L.R. 362, at 372 per Mason, C.J., at 423 per Dawson, J., at 437 per Toohey, J.

[57] A similar view was put forward by Cowen in "Full Faith and Credit, the Australian Experience" (1952) 6 *Res Judicatae* 27, and repeated in the essay of the same title published in Essays on the *Australian Constitution*, 1956, Else-Mitchell ed. at 293. Marks,J. in *Borg Warner (Aust) Ltd v.Zupan* [1982] V.R. 37, at 461 describes it as the "negative directive of non obstruction".

[58] *Merwin Pastoral Co Pty Ltd v.Moolpa Pastoral Co Pty Ltd* (1933) 48 C.R.5.5, at 577 per Rich and Dixon, JJ. at 587, 588 per Evatt,J.

[59] (1967) 9 F.L.R. 424. His Honour followed similar authority in the United States: *State ex rel Oklahoma Tax Commission v. Rogers* (1946) 193 S.W. 2d 919; *Ohio ex rel Duffy v. Arnett* (1950) 234 SW 2d 722; *Detroit v. Gould* (1957) 146 N.E. 2d 61. In Canada for a similar view, see: *Weir v. Lohr* (1967) 65 D.L.R. (2d) 717, at 723 per Tritschler, C.J. (Manitoba QB).

[60] On appeal to the High Court (1968) 122 C.L.R. 338, at 346 per Barwick, C.J., McTiernan, Menzies, Kitto, Windeyer and Owen, J.J. See also: *Miller v. Teale.* (1954) 92 C.L.R. 406, at 415; *O'Sullivan v. Dejneko* (1964) 110 C.L.R. 498.

[61] (1870) L.R. 6 Q.B. 1, at 28, 29 per Willes, J.

[62] See: Nygh, *Conflict of Laws in Australia*, 4th edn. Ch.18 for an extensive discussion.

[63] See the reformulation of the Rule in *Phillips v. Eyre* by Lord Wilberforce in *Chaplin v. Boys* [1971] A.C. 356, at 389-392.

[64] (1988) 80 A.L.R. 362, at 368-373 per Mason, C.J., at 380-383 per Wilson and Gaudron, JJ., at 433 per Toohey, J. Deane, J. at 409, considered that "the Constitution leaves no room for the direct intrusion of private international principles". Brennan, J. at 398 would not reduce the role of the *lex fori* and Dawson, J. at 422, applied the Wilberforce formula which still leaves a negative role for the lex fori. See: Pryles, "The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?" (1989) 63 *A.L.J.* 158.

must be strained through the sieve of actionability by the *lex fori*, however remote may be the nexus of the cause of action with the forum".[65]

Another category where the homeward trend is very evident is seen in the classification of certain laws as procedural and hence governed by the *lex fori*, even though the application of those laws, or the failure to apply them, may result in the defeat within the forum of the right based on foreign law or in such a right being successfully asserted in the forum even though a claim based on it could not have succeeded in the country of origin. The most obvious examples are statutes of limitation which the High Court following English authority has generally characterized as being procedural in character.[66] In consequence a state such as New South Wales which has a more liberal period of limitation than most, has become a haven for those who have seen the period for action expire in the more natural forum.

Although the members of the High Court in *Breavington v. Godleman* specifically preserved the role of the *lex fori* in relation to procedure,[67] they did not deal with the definition of that concept. It could be argued that the basic principle underlying the reasoning of the majority in that case, namely that the outcome of litigation should be the same throughout Australia whatever the forum chosen, will require a reconsideration of the earlier classification.

This aspect was condidered by the New South Wales Court of Appeal in *Byrnes v. Groote Eylandt Mining Co Pty Ltd.*[68] In that case the plaintiff brought action in New South Wales claiming damages from his employer in the Northern Territory for personal injuries allegedly suffered in an industrial accident in the Territory. The defendant sought to rely on s.23 of the Workmen's Compensation Ordinance (N.T.) which barred an action at common law if not brought within three years of the date on which the workman received his first compensation payment. That period had expired when the plaintiff brought action in New South Wales.

Carruthers, J. at first instance,[69] followed the traditional approach by classifying s.23 as procedural and hence inapplicable in New South Wales proceedings. The Court of Appeal by majority (Kirby, P. and Hope, A.J.A., Mahoney, J.A. dissenting) reversed that decision. After referring to the reasoning in *Breavington v. Godleman* Kirby, P. said:

> In the determination of what is a 'question of substantive law', neither Mason, C.J. nor Deane, J. adopted a narrow view. The 'substantive law' includes those matters which determine whether the plaintiff

[65] "Full Faith and Credit, the Australian Experience", *supra.* n.57. at 325.

[66] *Australian Iron and Steel Ltd v. Hoogland* (1962) 108 C.L.R. 471, at 483, 484; *Pedersen v Young* (1964) 110 C.L.R. 162, at 166, 167.

[67] (1988) 80 A.L.R. 362, at 373 per Mason, C.J.; at 402, 403 per Brennan, J., at 414, 415 per Deane, J., at 422 per Dawson, J., at 440 per Toohey, J.

[68] New South Wales Court of Appeal, 2 Feb 1990 unreported.

[69] (1989) 95 F.L.R. 69.

> would recover in the forum where the tort occurred. They leave to the law of the forum in which the action is brought purely the application of 'adjectival or procedural law'. Only in this way is the spectre of forum shopping which concerned all the justices in *Breavington* to be avoided. Therefore, for the characterisation of substantive and procedural laws, what is in issue is not classification for other purposes but the characterisation of the law in question for the determination of the rule that determines the substance of whether the plaintiff will recover or not.[70]

Applying the "outcome determination" test to the classification process,[71] his Honour concluded that the relevant provisions of s.23 of the Workmen's Compensation Ordinance (N.T.) were to be classified as substantive.[72]

There is therefore some support for the view that implications from our federal structure, as evidenced by provisions such as section 118 of the Constitution, may have the effect of modifying, but not abrogating, the common law choice of law rules. If that view were accepted, the effect would be that common law rules and classifications which prevent the application of the law of another state or territory which would otherwise be applicable to the substantive issue, are not to be applied in the case of a purely intra-Australian conflict.

TERRITORIAL RESTRICTIONS ON LEGISLATIVE COMPETENCE

If the foregoing argument be accepted, it becomes necessary to meet the question posed by Wilson and Gaudron, J.J. in *Breavington v. Godleman*:

> But if s. 118 may displace non-statutory law, there is no reason it might not displace statute law, or operate as a limitation on the power of the States to legislate with respect to the law to be applied in the courts of that State in matters involving an interstate aspect.[73]

It has long been acknowledged that there exists some limitation on the territorial scope of the legislative powers of the states.[74] There is a similar limitation on the powers of territorial legislatures either because it is implicit in the grant of legislative power by the Commonwealth, or because there exists a limitation on the power of the federal Parliament under s.122 of the Constitution itself.[75] Deane, J. referred to this in *Breavington v. Godleman* in the following terms:

[70] *supra.* n. 68, at 18.

[71] As suggested by Cook, *Logical and Legal Bases of the Conflict of Laws*, 1942, Ch. 6. See also: Bellini, "Evidence in Comparative Private International Law", (1953) 2 *U. West. Aust. L.R.* 330.

[72] *supra.* n. 68, at 22, 23. Hope, A.J.A. reached a similar conclusion but did not refer to the federal implications.

[73] (1988) 80 A.L.R. 362, at 386.

[74] See: D.P. O'Connell, "The Doctrine of Colonial Extra-Territorial Incompetence" (1959) 75 *L.Q.R.* 318.

[75] As held by Fox, J. in *Cotter v. Workman* (1972) 20 F.L.R. 318, at 329. But see now: *Seymour-Smith v. Electricity Trust of South Australia* (1989) 17 N.S.W.L.R. 648, at 655 per Rogers, C.J. CommD.

> . . . the Constitution was framed in the context of the traditional view that Colonial (and State) legislative powers were confined by strict territorial limitations which precluded the extraterritorial operation of laws. Viewed in that traditional context, the constitutional solution of competition and inconsistency between purported laws of different States as part of the national law must, where the necessary nexus for prima facie validity exists, be found either in the territorial confinement of their application or, in the case of multi-State circumstances, in the determination of predominant territorial nexus. That would have been the position under the provisions of the Constitution (in particular, ss.106, 107 and 108) even if those provisions had not included s.118. The presence of s.118 serves to make that position plain.[76]

There has been considerable controversy about the source of this limitation on state legislative power.[77] It is beyond the scope of this paper to enter into that dispute, but it can be stated with some confidence that until 1988, s.118 had not been put forward as a candidate.[78] Even Deane, J. in the passage just cited is careful to base the doctrine outside s. 118, although he sees its role as confirmatory.[79] Indeed, as he points out, it predates the Constitution.

The territorial confinement of the legislative power of a state parliament was not seen, prior to 1986, as too restrictive. Certainly it did not prevent a state from imposing a liability on persons outside the state or in relation to events occurring outside the state, as long as there was a sufficient connection with matters of concern to the state. The leading definition of that nexus requirement was given by Dixon, J. in *Broken Hill South Ltd v. Commr of Taxation* (N.S.W.),[80] where he said:

> The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicil, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any

[76] (1988) 80 A.L.R. 362, at 409, 410.

[77] See: Trindade, "The Australian States and the Doctrine of Extra-territorial Legislative Incompetence" (1971) 45 *A.L.J.* 233; Moshinsky, "State Extraterritorial Legislation and the Australia Acts 1986" (1987) 61 *A.L.J.* 779; Gilbert, "Extraterritorial State Laws and the Australia Acts" (1987) 17 *Fed. L.R.* 25; Killey, "Peace, Order and Good Government: A Limitation on Legislative Competence" (1989) 17 *M.U.L.R.* 24; Moshinsky, "State Extraterritorial Legislation—Further Developments" (1990) 64 *A.L.J.* 42.

[78] A suggestion that s. 118 is a limitation on the legislative competence of both the federal and the state legislatures is put forward by Ziegler in "A Proposed Reinterpretation of Section 118 of the Constitution" (1989) 63 *A.L.J.* 814, but his argument is more concerned with a reservation of powers to the states than the resolution of conflicts between them.

[79] However, his Honour at 414 goes on to speak of "the mandatory directive of s.118 (in the case of competition or conflict between the laws of different States)", which suggests a more positive role.

[80] (1937) 56 C.L.R. 337, at 375.

> other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers . . . But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen.

This passage makes it clear that a considerable latitude is left to state legislatures. Certainly there is in that passage no suggestion that a state should have a predominant territorial nexus before it can legislate extraterritorially. Consequently states may, by selecting different connecting factors, seek to regulate the same factual situation. Thus it has been long recognised that a state may regulate the terms of a contract of which its law is the proper law even though it may have been entered into outside the state.[81] Conversely, the High Court has also held that a state may regulate the terms of a contract entered into within the state although its proper law is that of another state.[82] If each statute seeks to regulate the same contract, a conflict arises which the giving of full faith and credit cannot resolve, except in the farcical way of each forum applying the law of the other.[83]

Although s.2 (1) of the *Australia Act* 1986 (Cth.) and complementary legislation[84] declares and enacts 'that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation', the High Court has not interpreted that provision as abolishing the nexus requirement. In *Union Steamship Co. of Australia Pty Ltd v. King*[85] the Court said:

> And, as each State Parliament in the Australian federation has power to enact laws for its State, it is appropriate to maintain the need for some territorial limitation . . . notwithstanding the recent recognition in the constitutional rearrangements for Australia made in 1986 that State Parliaments have power to enact laws that have extraterritorial operation:

However, that requirement should be liberally applied and "even a remote and general connection between the subject matter of the

[81] *Barcelo v. Electrolytic Zinc Co of Australia Ltd* (1932) 48 C.L.R. 391.

[82] *Kay's Leasing Corpn Ltd v. Fletcher* (1964) 116 C.L.R. 124.

[83] *Alaska Packers Assn v. Industrial Accident Commission* (1935) 294 U.S. 532, at 547 per Stone, J., cited with approval by Mason, C.J. in *Breavington v. Godleman* (1988) 80 A.L.R. 362, at 375.

[84] It is arguable that so far as the states are concerned, the relevant provision is s.2 (1) of the *Australia Act* 1986 (UK) enacted by the Westminster Parliament at the request of each of the states in statutes entitled *Australia Acts (Request) Act* 1985 and the *Commonwealth in Australia (Request and Consent) Act* 1985.

[85] (1988) 82 A.L.R. 43, at 50.

legislation and the State will suffice".[86] That test cannot therefore be more restrictive than the one laid down by Dixon, J.. It follows that the territorial restrictions upon the legislative competence of the states cannot resolve conflicts between state statutes, except in the rare cases where the boundaries set by Dixon, J. are clearly exceeded.[87] Yet the High Court has recently in an admittedly *obiter* statement indicated that conflicts between inconsistent state legislation can be resolved.

The issue before the Court in *Port Macdonnell Professional Fishermen's Assn Inc v. South Australia*[88] concerned the power of the South Australian legislature to regulate fisheries in extraterritorial waters adjacent to that State. The Court held this to be a law for the peace, welfare and good government of South Australia. Their Honours went on to say:

> A problem of greater difficulty would have arisen if the fishery defined by the arrangement had a real connection with two States, each of which enacted a law for the management of the fishery. The Constitution contains no express paramountcy provision by reference to which conflicts between competing laws of different States are to be resolved. If the second arrangement had been construed as extending to waters on the Victorian side of the line of equidistance, there would obviously have been grounds for arguing that the Victorian nexus with activities in these waters was as strong as or stronger than the South Australian nexus. As has been seen, however, the second arrangement does not extend into such waters. Where, as here, there is no suggestion of the direct operation of the law of one State in the territory of another, the problem of conflicting State laws arises only if there be laws of two or more States which, by their terms of operation, affect the same persons, transactions or relationships. In the present case, there is no competing law of a State other than South Australia purporting to apply to or in relation to the fishery to which the second arrangement applies. That being so, there is no real question of any relevant inconsistency between the law of South Australia and the law of another State.[89]

It may be noted that their Honours do not say that they would have allowed the Victorian nexus to prevail over South Australia, had a conflict arisen. But the statement posits the question of inconsistency between state laws and does not merely say that this is a political issue to be resolved between state governments. It is therefore at least open for argument in an appropriate case.

In such a case the Court would have to reconcile its earlier statements in favour of a broad extraterritorial power with the search for a predominant

[86] *Id.* at 51.
[87] Eg: *Cox v. Tomat.* (1972) 126 C.L.R. 105; *Robinson v. Western Australian Museum* (1977) 138 C.L.R. 283.
[88] (1989) 63 A.L.J.R. 671.
[89] *Id.* at 682.

nexus. It would also have to explain how the *Australia Act* 1986 despite its language, not only failed to expand the extraterritorial power of the states but preceded a contraction. It is strongly submitted that the High Court should let the temptation to interfere pass by. No doubt any court in the land will use the well established canons of statutory interpretation reinforced by notions of federal comity to avoid a possible conflict. There should be a strong presumption that states do not lightly interfere in the affairs properly (ie territorially) belonging to the other. It may also be that territorial legislatures, being subordinate, have more stringent requirements imposed upon them. But if a state clearly and deliberately uses its extraterritorial power in conflict with a statute of another state, the issue should be resolved by the political rather than the legal process.

The answer to the apparent illogicality raised by Wilson and Gaudron, J.J. at the beginning of this discussion is simply this: there is in Australia only one common law, and that law was preserved by section 108 of the Constitution "subject to the Constitution" of which section 118 forms part, let alone federal implications. There are, on the other hand, six state legislatures whose powers are preserved by section 107 unless vested exclusively in the Commonwealth or withdrawn from the Parliament of the State. Section 118 does not withdraw legislative power from the Parliament of a state.[90] The better view therefore is that, subject to the exercise of any power of the federal Parliament under s.51 pl.(xxv), the full faith and credit clause leaves the states free to apply and frame their own conflicts rules.

FEDERAL LEGISLATION

In *Breavington v. Godleman* Mason, C.J. concluded his judgment with the following remarks:

> If any provision in the Constitution is to be regarded as the source of a solution to inter-jurisdictional conflicts of law problems in Australia, it is perhaps s. 51 (xxv). 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.[91]

Following that decision the federal Attorney General has referred the question of federal and territory choice of law rules to the Australian Law Reform Commission.[92] The question remains whether the Commonwealth Parliament could enact a solution to interstate conflicts as well. It is clear from the above passage that the Chief Justice did not commit himself to a definite view. The Commission in its Issues

[90] *Breavington v. Godleman* (1988) 80 A.L.R. 362, at 400, 401 per Brennan, J., see also Mason, C.J. at 375, and Dawson, J. at 425, 426.

[91] (1988) 80 A.L.R. 362, at 376. See also in support: Wilson and Gaudron, J.J. at 385.

[92] Reference dated 16 December 1988. The Commission is to report no later than 30 June 1991.

Paper expressed an initial view that "the legislative power of the federal Parliament extends to the making of laws with respect to choice of law throughout the Commonwealth".[93] But, as it acknowledged, pl. (xxv) has received very little judicial attention.

A contrary view has been expressed by Dr Wynes:

> The Commonwealth power under par. (xxv) being limited to 'recognition', it can under this power do no more than prescribe the manner of proof and effect of recognition, defining how far such recognition shall be effective, subject to s.118.[94]

Although the issue has not been considered directly, there is a line of authority which has ascribed a substantive effect to s. 18 of the *Recognition Act* supporting thereby, at least by inference, a role for pl.(xxv) which goes beyond matters of proof. That line starts with the decision of Fullagar, J. when a judge of the Supreme Court of Victoria in *Harris v. Harris.*[95] His Honour there held that s.18 overrode the traditional common law requirements for the recognition of a foreign judgment, if that judgment was rendered in another state.

That interpretation of s.18 has been accepted by some courts[96] and rejected by others,[97] but throughout the discussion it has not been suggested that s.18 could not be given substantive effect as opposed to merely providing for the proof of public acts, records and judgments. That s.18 was not merely an evidentiary provision, but has some, albeit unspecified, substantive effect, was also acknowledged by Wilson and Gaudron, J.J. in *Breavington v. Godleman.*[98] Nor is there any suggestion in the judgments in that case that *Harris v. Harris* was wrongly decided.[99]

There is no doubt a distinction between the proposition that the recognition of judgments includes their enforcement and the much wider proposition that the recognition of laws embraces the definition of the circumstances in which they are to be applied. The United States provision in Art IV s.1 is clearer by authorising Congress to provide for both the proof and the effect thereof.[100] There is also a tension between any power the federal Parliament may have to prescribe the application of interstate laws and the legislative power of the states to prescribe solutions in and for their territories in matters within their legislative competence. The federal Parliament could clearly not provide that in all matters affecting contracts, the courts of the states shall apply the statute law of Victoria

[93] A.L.R.C. Issue Paper 8, Federal and Territory Choice of Law Rules, at 6.
[94] *Legislative, Executive and Judicial Powers in Australia*, 5th Edn. 1976, at 174.
[95] [1947] V.L.R. 44.
[96] In the Estate of Searle [1963] S.A.S.R. 303; *G v. G* (1986) 10 Fam. L.R. 718, at 719 per McLelland, J.
[97] In the Estate of Hancock [1962] N.S.W.R. 1171, at 1174 per Myers, J.
[98] (1988) 80 A.L.R. 362, at 384. See also: at 374 per Mason, C.J.
[99] *Ibid* at 374 per Mason, C.J., at 384 per Wilson and Gaudron, J.J., at 413 per Deane, J.
[100] Support for the view in the United States that this provision enables Congress to enact choice of law rules is found in: *Yarborough v. Yarborough* (1933) 290 U.S. 202 n.2, per Stone, J. See also: Cook, *supra.* n.71, at 103-105, and Currie, *Selected Essays on the Conflict of Laws*, at 273.

for the simple reason that pl.(xxv) cannot authorise it to give Victorian statutes a wider reach than they can have under Victorian law.

The federal Parliament may under pl.(xxv) be able to enact legislation which gives primacy to the law of a state validly operating within its territory upon acts or events taking place there or upon persons resident or domiciled there. Thus it could direct that in cases affecting contracts, recognition and effect be given throughout the Commonwealth to the internal law of the place of contracting, or in the case of tort, to the internal law of the place of commission of a tort. A statute of the forum which sought to apply a different law by reason of another connecting factor would have to give way pursuant to s.109 of the Constitution. It could thereby resolve the conflict which results from the adoption of different connecting factors by state statutes.

CONCLUSION

It is the conclusion of this writer that the full faith and credit clause does not operate by itself as a solution of conflicts of law between the several Australian states and territories. It is at best an expression of what would in any event be implicit in the fact of federalism, that choice of law rules developed at common law to protect the forum from undue invasion by foreign law have no place in the federal structure of which the states and territories form part.

It is further the conclusion of this writer that the full faith and credit clause cannot be interpreted as a limitation on the legislative powers of the states. Such restrictions as exist flow from provisions in the state constitutions themselves as preserved by section 106 of the Constitution and subject to s.2 (1) of the *Australia Act* 1986. Those restrictions are extremely flexible and allow for legislative conflicts between the states rather than seek to prevent them. If such conflicts do occur and cannot be circumvented by the ordinary process of statutory construction, they must be resolved by political means.

Finally, the Commonwealth Parliament may pursuant to s.51 pl.(xxv), have the legislative power to resolve potential conflicts by prescribing the territorial connecting factors which must be used in choice of law issues. Beyond that it cannot restrict or expand the legislative powers of the states.