Developments in Australian Private International Law 2018–2019

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This chapter that seeks to survey, in a qualitative way, some recent developments in Australian private international law, owes much to the authors' public and private sector experience.[7] The authors represent branches of the Australian legal profession dealing with conflicts issues on a regular basis and are relevantly interested in how the Australian rules of private international law not only apply currently, but are also evolving at common law and through legislation. The rules of private international law in Australia are a blend of the common law and legislation. The Australian choice of law in tort[8] is one of the clearest examples of how Australia has not embraced the statutory approaches more recently favoured by other common law countries such as the United Kingdom[9] and New Zealand.[10]

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7 See, eg, Andrew Lu, Kent Anderson and Kim Pham, '2008 Survey of Developments in Australian Private International Law' (2010) 29 *Australian Year Book of International Law* 385; Andrew Lu et al, 'Survey of Developments in Australian Private International Law 2009–2012' (2013) 31 *Australian Year Book of International Law* 421; Andrew Lu et al, 'Survey of Developments in Australian Private International Law' 2013 (2014) 32 *Australian Year Book of International Law* 533; Andrew Lu et al, 'Developments in Australian Private International Law 2014–2015' (2015) 33 *Australian Year Book of International Law* 517; Andrew Lu et al, 'Developments in Australian Private International Law 2015–2016' (2016) 34 *Australian Year Book of International Law* 477; Andrew Lu et al, 'Developments in Australian Private International Law 2016–2017' (2017) 35 *Australian Year Book of International Law* 509.

8 Doing away with the old English 'double actionability' rule for foreign torts from *Phillips v Eyre* (1870) LR 6 QB 1, in favour of *lex loci delicti with renvoi*: see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (*'Renault v Zhang'*); *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 (*'Neilson'*).

9 *Private International Law* (*Miscellaneous Provisions*) *Act 1995* (UK).

10 *Private International Law* (*Choice of Law in Tort*) *Act 2017* (NZ).

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The taking of evidence, the service of documents in civil proceedings, and questions about enforcement are regularly encountered by those with legal qualifications who have any involvement in preventing or managing legal disputes. Digital communication and e-commerce (to say nothing about smart contracts and blockchain) are impacting on and elevating the need for civil and commercial lawyers to possess a sound understanding of the rules of private international law. Cross-border transactions occur on smartphones as we book our next vacation whilst riding the bus home from work, or download video games, and the jurisdiction clause in the terms and conditions where a New South Wales holidaymaker might willingly and knowingly submit to the exclusive jurisdiction of courts in Singapore will be upheld. Characterising the dispute as tortious or contractual makes a difference to the rules that apply whenever there is a connection to a foreign law area. It also makes a difference to what a party to a dispute must be prepared to plead and prove.[11]

An overarching contemporary theme in Australian private international law has been harmonisation and uniformity. That is why the work of the United Nations Commission on International Trade Law ('UNCITRAL') is important. Harmonisation can be observed in the recent decision taken by the Council of Chief Justices of Australia and New Zealand to favour uniform rules for service out of the forum, and the amendments to the civil procedure rules that have occurred. As Justice Rares recently observed, the likely origin of private international law was 'commercial disputes that arose out of trading relationships between nationals of different States in the ancient world'.[12] The availability of assets against which to enforce a judgment is a commercial consideration that ranks coequally with the enforceability of a judgment before instructions to serve out of the forum can even be obtained.

This year, we focus on policy developments, followed by a look at jurisdiction and choice of law cases, reflecting recent judicial and scholarly perspectives on commercial and other issues in Australian private international law.

1 Policy Developments

The Australian Government continues to actively participate in and contribute to efforts to unify and harmonise private international law and commercial law

11 *Neilson* (n 8) 370 [115]–[116].

12 Justice Steven Rares, 'Commercial Issues in Private International Law' (Speech, University of Sydney Law School Conference, 16 February 2018) [1].

between States. The following is a review of policy developments in 2018 in relation to Australia's engagement with organisations that are focused on achieving this goal internationally. These organisations are the International Institute for the Unification of Private Law ('UNIDROIT'), UNCITRAL and the Hague Conference on Private International Law ('HCCH').

Australia's contribution to the work of UNIDROIT continued in 2018. Former Secretary of the Attorney-General's Department, Mr Roger Wilkins, attended the 97th session of the Governing Council of UNIDROIT in May 2018. Mr Wilkins' five-year term on the Governing Council expired at the end of 2018. The Australian Government expressed its gratitude to Mr Wilkins for his leadership, skills and experience in international legal policy development which has significantly contributed to UNIDROIT's mission to modernise, harmonise and co-ordinate private international law and international commercial law. Australia also attended the 77th session of the General Assembly of UNIDROIT in December 2018.

In 2018, the UNIDROIT Governing Council approved the convening of a Diplomatic Conference in 2019 to formally adopt the draft *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment* ('*MAC Protocol*').[13] The *MAC Protocol* is an extension of the *Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment* ('*Cape Town Convention*').[14] The *Cape Town Convention* is designed to establish an international legal regime for the creation, enforcement, registration and priority of security interests in categories of high-value, uniquely identifiable mobile equipment. It is designed to bring significant economic benefits to countries at all stages of economic development, particularly to developing countries by facilitating access to commercial finance for mobile equipment previously unavailable or available only at relatively high cost.[15] Mr Bruce Whittaker has significantly contributed to the development of the draft *MAC Protocol* in his

13 UNIDROIT Governing Council, 'Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment', *UNIDROIT MAP Protocol Diplomatic Conference* (Web page, 4 November 2019) <https://www.unidroit.org/english/documents/2018/study72k/dc/s-72k-dc-03-e.pdf>.

14 *Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment* ('*Cape Town Convention*'), opened for signature 16 November 2001, [2015] ATS 11 (entered into force 1 March 2006).

15 'Study LXXII K—Development of a Fourth Protocol to the Cape Town Convention on Matters Specific to Mining, Agricultural and Construction Equipment', *UNIDROIT* (Web Page, 11 October 2019) <https://www.unidroit.org/work-in-progress/mac-protocol>.

capacity as an Australian expert in this field. A Diplomatic Conference will be held in November 2019 where the *MAC Protocol* will be finalised.

As a member of UNCITRAL, Australia continues to contribute to the development of instruments aimed at furthering the modernisation and harmonisation of rules on international business. Work on the existing topics of Micro, Small and Medium-Sized Enterprises (Working Group I), Dispute Settlement (Working Group II), Investor-State Dispute Settlement Reform (Working Group III), Electronic Commerce (Working Group IV), Insolvency Law (Working Group V), and Security Interests (Working Group VI) continued throughout 2018. The Private International and Commercial Law Section of the Attorney-General's Department maintains productive and positive working relationships with UNCITRAL member States and the Secretariat. Its role includes arranging delegates for Working Groups II and VI. Australian practitioners with significant expertise in these fields participated in Working Groups II, III and VI as delegates of the Australian Government.

At the close of its 68th session, Working Group II requested that the Secretariat prepare a draft Convention and amended Model Law ('draft instruments') on the enforcement of international commercial settlement agreements resulting from mediation. Working Group II also requested that the Secretariat circulate the draft instruments to Governments for their comments ahead of consideration by UNCITRAL at its 51st session in July 2018. Australia was an active contributor to Working Group II (Dispute Settlement), including assisting and leading the negotiation of these draft instruments. UNCITRAL recommended the General Assembly consider the draft Convention with a view to adopting the Convention, and that all States give favourable consideration to enacting the *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation*.[16] The General Assembly adopted the Convention on 20 December 2018. The Convention will open for signature at a signing ceremony to be held on 7 August 2019 in Singapore and will be known as the *Singapore Convention on Mediation*.

In July 2018, representatives from Australia attended UNCITRAL's 51st Commission to discuss the finalisation and adoption of instruments on international commercial settlement agreements resulting from mediation, Investor-State Dispute Settlement ('ISDS') reform and the work programme of the Commission. In response to concerns about investor-state arbitration, UNCITRAL Member States granted Working Group III a mandate in July 2017 to: (i) identify

16 GA Res 73/199, 6th comm, 73rd sess, 62nd plen mtg, Agenda Item 80, UN Doc A/Res/73/199 (3 January 2019, adopted 20 December 2018).

and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group concludes that reforms are desirable, develop any relevant solutions to be recommended to UNCITRAL. Australia has participated actively in these discussions, including most recently in Vienna (from 29 October – 2 November 2018), where participants decided that reform was desirable in light of the concerns identified in earlier sessions. The 37th session will be held in New York from 1–5 April 2019. Australian Representatives will continue to engage closely as this Working Group continues into 2019. The Australian Government continues to engage in discussions on ISDS reforms in other fora, including within the Organisation for Economic Co-operation and Development ('OECD') and as a contracting member State of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.[17]

In 2018, the Australian Government delegate, Mr Bruce Whittaker, continued his role as the appointed Chair of Working Group VI. Mr Whittaker has been closely involved in developing a draft Practice Guide to the UNCITRAL *Model Law on Secured Transactions*.[18] The draft Practice Guide will be submitted to UNCITRAL for consideration at its 52nd session in July 2019.

The year 2018 also marked the 60th anniversary of UNCITRAL's *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* ('*New York Convention*').[19] The success of international arbitration is attributed to the *New York Convention*. As part of its 60th anniversary celebrations, Australian Professor Khory McCormick presented at the UN Headquarters in New York on the draft *Singapore Convention on Mediation.*

As a member of the HCCH, Australia is continuing to negotiate a private international law convention for the recognition and enforcement of civil and commercial judgments (the 'Judgments Project'). The aim of the Judgments Project is to create a uniform legal framework that will provide greater ability for judgments to be enforced abroad between contracting Member States and is intended to reduce legal obstacles encountered by individuals and corporations in their cross-border transactions. Australian delegations have

17 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

18 *Model Law on Secured Transactions*, GA Res 71/136, 6th Comm, 71st sess, 62nd plen mtg, Agenda Item 76, UN Doc A/Res/71/136 (19 December 2016, adopted 13 December 2016).

19 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*').

contributed to HCCH work on the Judgments Project throughout 2018. A Diplomatic Session will be convened in The Hague in June 2019 to finalise the *Singapore Convention on Mediation*.

Australia also continues to work towards implementing the *Convention on Choice of Court Agreements* ('*Choice of Court Convention*')[20] through a new Commonwealth International Civil Law Bill. Although the Bill is initially intended to implement the *Choice of Court Convention*, it is envisaged that it will also provide the foundations for a new, comprehensive private international law regime in Australia. The *Choice of Court Convention* will be complemented by work being progressed through the Judgments Project.

Australia's current and future work program also includes consideration by the Australian Parliament, through the Joint Standing Committee on Treaties, of ratification of the United Nations *Convention on Transparency in Treaty-Based Investor-State Arbitration*[21] ('*Mauritius Convention*') following the Australian Government's signing of the Convention on 18 July 2017. The *Mauritius Convention* extends the operation of the UNCITRAL *Rules on Transparency for Treaty-Based Investor-State Arbitration*,[22] a set of arbitration rules setting out a framework for disclosure of information connected to the arbitration.

Additionally, the Australian Government continues work to make it easier and more reliable to use electronic communications in business and personal transactions. The Attorney-General's Department administers the *Electronic Transactions Act 1999* (Cth) ('*ETA*'), which ensures that a transaction under a Commonwealth law will not be invalid simply because it was conducted through electronic communication. The *ETA* applies to all Commonwealth laws unless they are specifically exempted by the *Electronic Transactions Regulations 2000* (Cth) ('*Regulations*'). In 2018, progress has continued on the review of the *Regulations* to determine any amendments necessary to facilitate the increased use of electronic communications. The Australian Government

20 *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) ('*Choice of Court Convention*').

21 *Convention on Transparency in Treaty-Based Investor-State Arbitration*, opened for signature 17 March 2015, [2019] ATNIF 13 (entered into force 18 October 2017) ('*Mauritius Convention*').

22 *Rules on Transparency for Treaty-Based Investor-State Arbitration* GA Res 68/109, 6th Comm, 68th sess, 68th plen mtg, Agenda Item 79, UN Doc A/Res/68/109 (18 December 2013, adopted 16 December 2013).

is also working to implement the United Nations *Convention on the Use of Electronic Communications in International Contracts*.[23]

The implementation of the *Choice of Court Convention*, and its potential value and impact if Australia does accede to it, is a topic of much interest among practitioners and academics.[24] Among the benefits of accession is a change in the common law discretion to decline to exercise jurisdiction, even though Australian courts seldom exercise that discretion. If a jurisdiction clause nominates an Australian court, the *Choice of Court Convention* provides that the chosen court cannot decline jurisdiction in favour of a foreign court, adding greater certainty and predictability.

II Jurisdiction

Following traditional conflicts order, we turn to jurisdiction. As Mary Keyes observes, 'at common law jurisdiction is ultimately a procedural question which is not contractible'.[25] Recent cases on jurisdiction have tended to focus on the enforceability of judgments or decisions rather than on the establishment of jurisdiction per se. That might be partly because jurisdiction is regulated, in a practical sense for cases litigated in Australian courts, by rules of court procedure. The proposal is to implement across the Australian states the harmonised rules[26] or a version of them[27] for service of documents extraterritorially, by means of amendment to the court procedure rules. This is part of the movement towards harmonisation since reform of the *Uniform Civil Procedure Rules 2005* (NSW) ('*UCPR*') in New South Wales in 2016, and subsequently in Victoria, South Australia and Tasmania.

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23 *Convention on the Use of Electronic Communications in International Contracts*, opened for signature 23 November 2005, 2898 UNTS 3 (entered into force 1 March 2013) ('*Electronic Communications Convention*').

24 Brooke Adele Marshall and Mary Keyes, 'Australia's accession to the *Hague Convention on Choice of Court Agreements*' (2017) 41(1) *Melbourne University Law Review* 246.

25 Ibid 255.

26 In New South Wales by insertion of a new div 1A in pt 11 and sch 6 to the *Uniform Civil Procedure Rules 2005* (NSW). Similar amendments have been endorsed in Victoria by order 7 of the *Supreme Court* (*General Civil Procedure*) *Rules 2015* (Vic), South Australia in pt 4 of the *Supreme Court Civil Rules 2006* (SA) and Tasmania in div 10 of the *Supreme Court Rules 2000* (Tas).

27 In the Australian Capital Territory, by amendment to the *Court Procedures Rules 2006* (ACT) div 6.8.9.

(a) *Abuse of Process*

The Australian *forum non conveniens* approach, established long ago in *Voth v Manildra Flour Mills*,[28] focusses on whether international litigation amounts to an abuse of process in the sense of being vexatious and oppressive as the basis of granting a permanent stay.

The High Court of Australia recently handed down a decision adding to the body of cases concerning abuse of process in civil procedure. The decision in *UBS AG v Tyne*[29] cautions Australian legal practitioners to ensure that they are complying with the overarching purpose of resolving disputes quickly, inexpensively and efficiently, and ensuring that adequate consideration is given to what claims should be brought together. It also affirms the conventional approach taken by Australian courts when considering abuse of process.

Mr Scott Francis Tyne, in his capacity as trustee of the Argot Trust ('the Trust'), brought proceedings against the appellant, UBS AG ('UBS') in the Federal Court of Australia, claiming damages and equitable compensation arising from advice and representations made by UBS to Mr Tyne and his affiliated entities, namely the former trustee of the Trust (ACN 074) and an investment company (Telesto) which were in control of Mr Tyne at all material times. Telesto used the Argot Trust's assets to secure the liabilities of Telesto under the credit facilities extended to Telesto by UBS. The claimed losses arose in connection with the Argot Trust's assets.[30]

UBS had brought a claim in the High Court of Singapore against Telesto (as principal debtor) and Mr Tyne (as guarantor) alleging that Telesto had defaulted on the credit facilities. ACN 074 was not a party to those proceedings. Before the Singapore proceedings were finalised, Mr Tyne, Telesto and ACN 074 commenced proceedings in the Supreme Court of New South Wales. UBS sought a permanent stay of those proceedings. However, only a temporary stay was granted on the basis that there was not sufficient evidence to substantiate that there would be an overlap between the New South Wales proceedings and the Singapore proceedings. Further, leave was also granted to amend the pleadings and accordingly, Mr Tyne and ACN 074 discontinued their claims and were removed as plaintiffs in the New South Wales proceedings. The Singapore proceedings were concluded in favour of UBS and UBS subsequently obtained

28 (1990) 171 CLR 538.
29 (2018) 360 ALR 184.
30 Ibid 187 [2].

a permanent stay of the proceedings on the basis that the Singapore proceedings had already canvassed the claims brought by Telesto.[31]

Mr Tyne, as trustee of the Argot Trust, commenced proceedings in the Federal Court making the same claims as the earlier New South Wales proceedings.[32] UBS applied for a permanent stay of the proceedings arguing an abuse of process, which was granted by the primary judge on the basis that the allegations were the same allegations made by the Trust in the New South Wales proceedings before the claims were discontinued with no proper explanation for doing so. This was appealed to the Full Court. The primary judge, and subsequently the Full Court of the Federal Court, held that as the Trust's claims had not been decided on their merits in the New South Wales proceedings, consequently there was no unfairness suffered by UBS in having to respond to the claims in the Federal Court proceedings.[33]

On appeal, the High Court reiterated that the timely, cost-effective, and efficient conduct of modern civil litigation does not only take into account the interest of the parties in dispute, but also considerations of the maintenance of public confidence in the administration of justice. Discontinuing the Trust's claim in the New South Wales Supreme Court proceedings only to bring it in another court after the determination of those proceedings was contrary to the duty imposed on parties under s 37N of the *Federal Court of Australia Act 1976* (Cth) to act consistently with the overarching purpose in facilitating the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.[34] The High Court affirmed the primary judge's assessment that Mr Tyne's conduct was an abuse of process and held that the proceedings should be permanently stayed.

(b) *Exclusive Jurisdiction Clauses*

As Australia moves towards acceding to the *Choice of Court Convention* and expands judicial scope to exercise jurisdiction over defendants located in foreign law areas via amended rules of civil procedure,[35] how our courts respond to exclusive jurisdiction clauses remains variable. However, when jurisdiction clauses exclusively direct parties to an Australian court, they are almost always upheld. If clauses direct parties to a foreign court in the absence of legislation directing otherwise, Australian courts also tend to uphold them.

31 Ibid 190 [14], 191 [19], 193 [30].
32 Ibid 220 [131].
33 Ibid 220 [132]–[134].
34 *Federal Court of Australia Act 1976* (Cth) s 37N.
35 See, eg, *Uniform Civil Procedure Rules 2005* (NSW).

With online purchases expected to grow significantly in the coming years, it has become increasingly important for courts to provide clarity on how online contracts with inconspicuous terms and conditions are to be dealt with. Among those terms and conditions is likely to be an exclusive jurisdiction clause specifying that all disputes are to be submitted to a foreign court. For Australian consumers contracting online by clicking to book online, the decision of *Gonzalez v Agoda Co Pte Ltd*[36] falls within the growing body of cases considering this practical issue in international e-commerce.

Agoda Co Pte Ltd ('Agoda'), the defendant company, was a foreign company incorporated in Singapore in the business of facilitating reservations of hotel accommodation around the world. Ms Gonzalez was in the midst of planning a holiday in France and accessed the Agoda website to book accommodation for herself and her family. She accessed the website via her home computer in Sydney, Australia. In securing her accommodation, Ms Gonzalez used the standard online booking process and entered her desired destination, her preferred dates, and the number of guests. Once she found a property that met her requirements, she provided her personal information and payment details to secure the booking. The Payment Details page provided a link to Agoda's standard terms and conditions associated with the booking. The terms and conditions provided that Singaporean law was to govern the terms and conditions, as well as Agoda's provision of services. Further, the terms included an exclusive jurisdiction clause designating the courts of Singapore as the forum for resolving any disputes. Ms Gonzalez confirmed the booking by clicking a 'book now' button. Above the button appeared the words 'I agree with the booking conditions and general terms by booking this room'.[37]

The booking was subsequently confirmed, and both Ms Gonzalez and her husband travelled to France for their holiday. Whilst on holiday, Ms Gonzalez slipped and fell when she came out of the shower in her hotel bathroom, resulting in fractures to the tibia and fibula in the vicinity of her left knee, and requiring surgery in Paris and the insertion of metal work in her left knee. Ms Gonzalez reported that the shower screen was not correctly fitted, causing water to leak on to her floor, causing her to slip and fall.[38]

Once she returned to Sydney, she had the metal work removed from her knee and underwent an arthroscopy, eventually leading to a total left knee replacement. Ms Gonzalez claimed she was experiencing ongoing pain, mental health issues and an inability to perform her usual domestic tasks, which

36 [2017] NSWSC 1133 ('*Gonzalez*').
37 Ibid [3]–[13].
38 Ibid [18]–[19].

eventually led to her filing a Statement of Claim in the Supreme Court of New South Wales.[39] Ms Gonzalez claimed damages under the Australian Consumer Law[40] and the implied terms of the contract, asserting that Agoda was required to exercise due care and skill in its services by ensuring that the hotel room provided to Ms Gonzalez was fit for purpose.[41]

Agoda submitted that the Court should decline to exercise jurisdiction as it was a 'clearly inappropriate forum', having regard to the exclusive jurisdiction clause. In line with the decision in *Oceanic Sun Line Shipping Company Inc v Fay* ('*Oceanic*'),[42] Agoda was required to show that the continuation of the New South Wales proceedings would be oppressive in the sense of being 'seriously and unfairly burdensome, prejudicial or damaging'.[43] Counsel for Agoda argued that the operation of the exclusive jurisdiction clause placed the onus on Ms Gonzalez to show strong cause for departing from the exclusive jurisdiction and to show that it was more appropriate for her claim to be heard in the Supreme Court of New South Wales.[44]

Counsel for Ms Gonzalez submitted that the foreign exclusive jurisdiction clause was not incorporated into the contract and was not operative as Ms Gonzalez was not required to tick a box explicitly accepting the terms. Further, Counsel for Ms Gonzalez argued that there was no signature confirming that she had explicitly agreed to the terms of the agreement. It was also submitted that Agoda's website did not provide reasonably sufficient notice of the terms in accordance with the test set out in *L'Estrange v Graucob,*[45] there was no prominently displayed 'I agree' button to be clicked, and there was an inconsistent use of pronouns during the booking process and the terms.[46]

Counsel also argued that in circumstances where the Court accepted the argument that the exclusive jurisdiction clause was incorporated into the contract, New South Wales would not be a clearly inappropriate forum since Singapore had no connection with the cause of action, both Ms Gonzalez and Agoda had already engaged lawyers in New South Wales, certain features of the contract suggested that the contract was at least formed in New South Wales, a number of witnesses Ms Gonzalez intended to call were all located in Australia,

39 Ibid [21]–[23].
40 *Competition and Consumer Act 2010* (Cth) sch 2.
41 *Gonzalez* (n 36) [104].
42 (1988) 165 CLR 197 ('*Oceanic*').
43 Ibid 247 (Deane J).
44 *Gonzalez* (n 36) [118]–[121].
45 [1934] 2 KB 294.
46 Ibid [66]–[112].

and that Agoda would not suffer significant inconvenience if the matter was to be heard in New South Wales.

Button J subsequently held that the exclusive jurisdiction clause was in fact incorporated into the contract, requiring Ms Gonzalez to persuade the Court as to why she should be permitted to litigate the matter in the Supreme Court of New South Wales as opposed to litigating in the courts of Singapore.[47] Further, the Court accepted that the law of the contract was that of Singapore.

Whilst the Court did note that it was significant that Ms Gonzalez was not called upon to explicitly 'tick a box', the Court found that the terms were incorporated by signature and by reference to Agoda's terms and conditions.[48] With regards to the terms being incorporated by signature, the Court held that the terms were readily available to Ms Gonzalez and that Agoda did not try to hide the terms and conditions. Accordingly, her failure to read and comprehend the terms was immaterial.

Having considered the claim, Ms Gonzalez would have to pursue her claim against the hotel in France as the fall occurred in Paris, that is where the allegedly defective shower screen caused the injury, and applicable standards regarding shower screens were those of France. Consequently, neither the courts of Australia nor the courts of Singapore were the ideal fora to deal with the practices of France.[49]

The Court did note that if it found that the jurisdiction clause was not incorporated into the contract, it would not have been satisfied that the Court was a clearly inappropriate forum: Agoda had chosen to carry on business in New South Wales and provide its service to countless people who lived there; Agoda had the financial resources to engage in litigation in New South Wales; a significant number of the witnesses were located in New South Wales; and with access to modern technology, the inconvenience to Agoda being called to defend the claim would not be onerous.[50]

The substantial number of commercial transactions occurring via the internet renders it important to ensure that the terms associated with internet purchases are as clear as possible. This clarity benefits both parties, and the Supreme Court of New South Wales has been prepared to uphold the exclusive jurisdiction clause in an online agreement and decline jurisdiction in favour of Singaporean courts.

47 *Gonzalez* (n 36) [121].
48 Ibid [123].
49 Ibid [137].
50 Ibid [142]–[152].

(c) *Forum* non conveniens

The occasions when an Australian court will decline the exercise of jurisdiction on the grounds that Australia is a 'clearly inappropriate forum' because proceedings in the forum are 'vexatious and oppressive' remain rare. Financial hardship on a foreign defendant to proceedings in Australian court, through lack of insurance, will not be sufficient for a finding of oppression.

The decision in *Hardaker v Mana Island Resort (Fiji) Ltd*[51] is in line with cases discussed in past chapters canvassing the assessment of *forum non conveniens* in the context of tortious claims arising out of incidents occurring overseas. This case was brought about from a boating collision at the Mana Island Resort in Fiji, where Mark Hardaker, Vanessa Leigh Hardaker (the first plaintiff in the proceedings), and their three children (the second, third and fourth plaintiffs) were holidaying. The collision caused Mr Hardaker to sustain significant injuries, resulting in his death.

A Statement of Claim was filed in the Supreme Court of New South Wales for damages against the Mana Island Resort, and Mr Jim Bete, the resort employee in charge of the vessel involved in the collision ('the defendants'). The plaintiffs pleaded a claim in negligence on the basis that the Mana Island Resort owed each member of the Hardaker family a duty to take reasonable care for their safety whilst they were guests of the resort. The Statement of Claim also pleaded breach of contract between the plaintiffs and Mana Island Resort, having paid money for accommodation, entertainment, and services at the resort during their stay. The plaintiffs argued that it was an implied term of the contract that Mana Island Resort would conduct its operations in a safe, proper and seamanlike manner. Finally, the proceedings were also brought pursuant to the *Compensation to Relatives Act 1971* [*Cap 29*] (Fiji).[52]

Mana Island Resort and Mr Bete argued that the forum was inappropriate and sought to stay the proceedings pursuant to s 67 of the *Civil Procedure Act 2005* (NSW). The defendants bore the onus of establishing that the Supreme Court of New South Wales was a 'clearly inappropriate forum' and that it would be vexatious or oppressive for the proceedings to continue in NSW.[53]

The defendants made submissions in accordance with the *forum non conveniens* assessment laid down by the High Court in *Oceanic*.[54] In particular, the defendants argued that the number and location of witnesses, the location of

51 [2018] NSWSC 1863 ('*Hardaker*').
52 Ibid [20]–[21].
53 Ibid [24].
54 Ibid [25], citing *Oceanic* (n 42).

the incident and the law governing the claim supported the conclusion that the proceedings should be dealt with in Fiji. Counsel for the defendants also submitted that Mana Island Resort was not insured for the claim to be litigated in Australia as the relevant insurance policy had a territorial limit exclusion which applied to claims made and actions instituted outside of the Republic of Fiji. Further, it was submitted that Mr Bete did not have the financial means to participate in a hearing held in the Supreme Court of New South Wales.[55] The defendants argued that these factors were sufficient evidence of oppression if the stay was not granted in accordance with the principles set out in *Regie National Des Usines Renault SA v Zhang*.[56]

The plaintiffs argued that the damage suffered by them was in New South Wales, and that whilst the incident occurred in Fiji, the contract with Mana Island Resort for accommodation and consequent payment was made in New South Wales, which was governed by an international treaty in force in both New South Wales and Fiji. The plaintiffs also submitted that both the residence of the plaintiffs and the law of the contract were fixed to New South Wales. In response to Mr Bete's submissions regarding his financial means, the plaintiffs argued that the financial plight of the first plaintiff was at least equal to that of Mr Bete.[57]

The Court, having considered the arguments raised before it, concluded that the defendants failed to demonstrate that New South Wales was a wholly inappropriate forum and failed to persuade the Court that it would be oppressive and vexatious for the proceedings to remain in the jurisdiction.[58]

Whilst the defendants appeared to face many practical barriers in having the proceedings litigated in New South Wales and the absence of insurance, from a pragmatic standpoint, might make litigation in Australia impractical for plaintiffs seeking recovery of substantial damages, these were not sufficient to persuade the Court to grant a stay of the proceedings in New South Wales. This is a classic example of a forum court retaining jurisdiction after balancing the competing interests. An Australian court seised of jurisdiction rarely relinquishes a matter on *forum non conveniens* grounds.

The mere presence of an exclusive jurisdiction clause is insufficient to determine it should apply to a dispute without evidence that the parties agreed to be bound by it. Decisions under the *Trans-Tasman Proceedings Act 2010* (Cth) ('*TTP Act*'), such as that in *Australian Gourmet Pastes Pty Ltd v IAG New Zealand*

55 *Hardaker* (n 51) [55].
56 *Renault v Zhang* (n 8).
57 *Hardaker* (n 51) [71].
58 Ibid [110]–[113].

Ltd,[59] which concerned an application for leave to stay proceedings, illustrate how courts apply the *TTP Act* in practice. This decision raises two primary questions. At first instance, was the primary judge correct in determining that he was bound to stay the Australian proceeding, and leave it to a New Zealand court to determine the matters in dispute? Second, did the grant of the stay involve a miscarriage of discretion?

By way of background, Australian Gourmet Pastes Pty Ltd ('AGP') brought an application to appeal a decision of the Victorian County Court.

At first instance, AGP commenced proceedings against Endeavour Packaging Pty Ltd ('Endeavour') claiming damages for loss of stock, loss of profits and product recall costs, arising out of allegations that Endeavour's packaging products were not fit for purpose. AGP subsequently joined IAG New Zealand ('IAG'), Endeavour's insurer, to the proceeding, wanting to claim directly on Endeavour's insurance policy.[60]

IAG sought to stay the proceeding by relying on provisions of the *TTP Act*, arguing that a New Zealand court was the more appropriate court to determine the dispute. IAG submitted that Endeavour's policy contained an exclusive choice of court and choice of law clause which required the Court to stay the proceedings. The judge at first instance found an exclusive choice of court clause that obliged the Court to stay the proceedings in accordance with s 20 of the *TTP Act*.[61]

AGP argued that the exclusive choice clause was not part of an agreement between AGP and IAG. Further, AGP submitted that the matters in dispute were not restricted to the policy itself, and that the exclusive choice clause could not be enforced by an Australian court as it was contrary to s 8 of the *Insurance Contracts Act 1984* (Cth).[62] However, the judge rejected the first submission and found that AGP was only able to bring a proceeding against IAG as it had been granted the right to do so under a deed of variation allowing it to stand in the position of Endeavour. Further, the Court held that whilst it was accepted that the matters in dispute were not restricted to the policy, the principal issue was the issue of indemnification under the policy.[63]

In accordance with the discretion provided for in s 19 of the *TTP Act*, and having had regard to the criteria set out in the *TTP Act*, the proceeding was stayed on the basis that Endeavour's right to bring a claim against IAG had

59 (2017) 321 FLR 345.
60 Ibid 346 [2].
61 Ibid 352 [31].
62 Ibid 352 [32].
63 Ibid 353 [34]–[35].

been subrogated to AGP, and the exclusive choice of court and choice of law clause set out in the policy chose New Zealand as the exclusive jurisdiction. The primary judge, Judge Anderson found that even if the exclusive choice clauses were not in the policy, the New Zealand court would be the more appropriate court to determine the dispute.[64]

AGP appealed the stay of proceedings, submitting that the primary judge erred in finding that AGP acquired its rights against IAG pursuant to rights of subrogation. Therefore, as a result of the doctrine of privity, there was an exclusive choice of jurisdiction clause in the policy which engaged the operation of s 20 of the *TTP Act*.[65] Second, AGP also submitted that the primary judge erred in concluding that the principal issue for determination was whether Endeavour/AGP were entitled to be indemnified by the policy. Third, AGP submitted that the judge erred in concluding that he was obliged to stay the proceeding in accordance with the *TTP Act* on the basis that AGP was not subject to the exclusive choice of jurisdiction provision, and that the exclusive choice of jurisdiction clause did not apply.[66] It was also submitted that the judge failed to exercise his discretion judicially as he was mistaken regarding the facts in question.

IAG submitted that if it was not accepted that AGP acquired its rights against IAG pursuant to rights of subrogation, the policy nevertheless contained an exclusive choice of court agreement which was applicable to the matters in dispute as the relief sought by AGP was only available pursuant to the policy.[67]

Tate, Santamaria and Beach JJA held that the primary judge erred in concluding that the exclusive choice of court agreement applied to AGP, as AGP was not a party to the contract of insurance.[68] There was no exclusive choice of court agreement between AGP and IAG, the parties to the proceeding, which accordingly failed to engage the relevant sections of the *TTP Act*. Accordingly, the primary judge erred in concluding that he was bound to stay the proceeding. Further, Tate, Santamaria and Beach JJA concluded that the primary judge erred in his exercise of his discretion and that the matter needed to be considered afresh.[69]

In exercising the discretion afresh, Tate, Santamaria and Beach JJA accepted that the principal claims related to the liability of Endeavour to AGP and the

64 Ibid 358 [47].
65 Ibid 359 [49].
66 Ibid.
67 Ibid 359–60 [51]–[52].
68 Ibid 363 [67].
69 Ibid 365 [78].

wrongful refusal of IAG to indemnify in light of that liability. Further, their Honours also acknowledged the factors that tied the matter to Australia, namely the principal place of business of AGP and of Endeavour; the places of residence of the witnesses likely to be called in the proceeding; and the place where the subject matter of the proceeding was situated.[70] Tate, Santamaria and Beach JJA were of the view that all these factors supported the refusal of a stay.[71] Tate, Santamaria and Beach JJA concluded that the factors supporting the refusal of a stay significantly outweighed any factors in favour of the grant of the stay of proceedings and allowed the appeal.[72]

(d) *Anti-Suit Injunctions*

In *Home Ice Cream Pty Ltd v McNabb Technologies LLC,*[73] the Federal Court considered an interlocutory application for the grant of an anti-suit or anti-anti-suit injunction (amongst other orders) to restrain McNabb Technologies ('McNabb') from continuing proceedings commenced in the Circuit Court of Cook County, Illinois.

By way of background, Home Ice Cream commenced proceedings against McNabb on the basis that McNabb had contravened the misleading and deceptive conduct provisions set out in s 18 of the *Australian Consumer Law* (*Competition and Consumer Act 2010* (Cth) sch 2) ('*ACL*'). The claim was filed with the Federal Court on 27 April 2018 and unsealed copies of the originating application and statement of claim were sent by email to McNabb. Read receipts confirmed that McNabb was aware of the proceedings.[74]

Subsequently, McNabb commenced proceedings in the Circuit Court of Cook County, Illinois against Home Ice Cream, arguing that Home Ice Cream should not proceed against it in a legal action in any other court as it would violate the parties' agreement. The relevant contract contained a choice of law and choice of court clause as follows:

> *CHOICE OF LAW*. THS [sic] AGREEMENT SHALL BE CONSTRUED AND THE LEGAL RELATIONS BETWEEN THE PARTIES DETERMINED IN ACCORDANCE WITH THE LAWS OF THE STATE OF ILLINOIS, USA, WITHOUT GIVING EFFECT TO ANY CHOICE OF LAW RULES WHICH MAY DIRECT THE APPLICATION OF THE

70 Ibid 366 [83].
71 Ibid 366 [84].
72 Ibid 367 [88].
73 [2018] FCA 1033 ('*Home Ice Cream*').
74 Ibid [5]–[11] (Greenwood ACJ).

> LAWS OF ANY OTHER JURISDICTION. Any legal action, including any injunctive or other equitable relief, shall be brought in a court of competent jurisdiction sitting in Cook County, Illinois.[75]

In considering the application, the Court noted that the causes of action and remedies sought by Home Ice Cream had a statutory foundation in Commonwealth law.[76] They were not available in the State of Illinois. Further, it was noted that an exclusive jurisdiction clause in an agreement did not supersede statutory protective provisions of Commonwealth statutes.[77] The only court which was capable of determining the questions which Home Ice Cream wanted to litigate was the Federal Court of Australia, or a court vested with the judicial power of the Commonwealth under legislation enacted in reliance upon the *Australian Constitution*.[78] The Court also noted that a choice of court clause cannot circumvent Home Ice Cream's rights available to it under a Commonwealth Act nor can such a clause be used to contract out of any liability arising out of potential breaches of the ACL by McNabb.

Relying on the principles set out in *CSR Ltd v Cigna Insurance Australia Ltd* ('*CSR*'),[79] which were discussed and affirmed in *Herold v Seally* [*No 2*],[80] the court granted Home Ice Cream's Application on the basis that there was a genuine fear that McNabb would seek an anti-suit or anti-anti-suit injunction by way of an application before the Circuit Court of Cook County.[81]

The matter was brought to the Federal Court again in order for Home Ice Cream to seek a final anti-suit injunction and obtain a final judgment in the proceeding, in which McNabb did not make an appearance.[82] Reiterating what was noted in the interlocutory application, the Court found that the evidence demonstrated that Home Ice Cream could not bring a claim under the ACL in the Illinois Court. In this regard, the Court acknowledged that Home Ice Cream had regularly engaged with the jurisdiction of the Federal Court in order to agitate issues over which the Federal Court had jurisdiction. The Court also acknowledged that a contravention of s 18 of the ACL was not an issue that could be litigated in the Illinois Court.

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75 Ibid [16] (emphasis in original).
76 Ibid [17].
77 Ibid [19].
78 Ibid.
79 (1997) 189 CLR 345 ('*CSR*').
80 [2017] FCA 543.
81 *Home Ice Cream* (n 73) [27].
82 *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [*No 2*] [2018] FCA 1093 ('*Home Ice Cream* [*No 2*]').

Home Ice Cream submitted that the Australian Court must be satisfied that it is not a clearly inappropriate forum. The answer to this question was determined by considering the nexus between the forum engaged by the applicant and the subject matter of the proceeding itself, principles espoused in *CSR*.[83]

The Court reiterated that the Australian legal position is that an exclusive jurisdiction clause cannot be used to circumvent litigation where the cause of action relied upon by a particular party cannot be litigated in a foreign court: 'A proceeding in an Australian court will not be stayed in favour of a foreign jurisdiction … where there is a legislative protective provision in the local jurisdiction which would be defeated or avoided if a stay were to be granted of the proceeding'.[84] Doing so would deprive a party of its rights and remedies if its claim is established. Whilst it is possible for both proceedings to proceed in the ordinary course, the foreign proceeding would undercut the Australian proceeding by seeking to address matters which would not take into account any aspect of the submissions made by Home Ice Cream in the Federal Court proceedings. Consequently, the Illinois proceedings would be considered vexatious and oppressive because they would challenge the decisions regarding the rights and remedies asserted in the Australian proceeding. In this regard, it was obvious that Australia was not a clearly inappropriate forum for the determination of the claims in issue.

With regards to the content of the claims alleged by Home Ice Cream, namely that McNabb contravened the misleading and deceptive conduct provisions of the *ACL*, the Court held that the oral and electronic representations made by McNabb to Home Ice Cream were made 'into Australia', engaging the relevant Australian legislation.[85] Based on the evidence available, the Court relevantly ordered that McNabb be permanently restrained from prosecuting or continuing with the proceedings in the Circuit Civil Court of Cook County, Illinois or seeking relief arising out of substantially the same facts or circumstances. Further, the Court also ordered judgment in favour of Home Ice Cream.[86]

(e) *Child Abduction*

In *Commonwealth Central Authority & Sangster* [*No 2*],[87] Bennett J handed down an *ex tempore* judgment in relation to the exceptional circumstances

83 *CSR* (n 79) 362–72.
84 *Home Ice Cream* [*No 2*] (n 82) [19].
85 Ibid [23].
86 Ibid [28].
87 [2018] FamCA 894 ('*Sangster*').

required to discharge an order to return abducted children to the Netherlands. This case concerned an Australian mother, who abducted her three children and took them away from their father who was residing in the Netherlands. In previous proceedings, Bennett J had made a return order requiring two of the children to return to the Netherlands and live with their father, subject to certain conditions. These conditions included that the father pay €3000 for the mother and children's flights to the Netherlands, and that the children's mother obtain certain safeguarding orders from a competent court in the Netherlands. These orders and conditions were made pursuant to s 111B of the *Family Law Act 1975* (Cth), the purpose of which is relevantly 'to enable the performance of the obligations of Australia under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 …'[88]

Accordingly, Bennett J considered these were proceedings that 'are not parenting proceedings … It is private international law underpinned by reciprocity and a respect for the legal systems of other contracting states'.[89]

On this basis, the Court considered it necessary to determine whether Australia was the appropriate forum to hear the proceeding.[90] Despite the presence of extensive evidence in the Netherlands, hearing the dispute in the Netherlands would likely cause hardship and disruption to the lives of the children, rendering the Netherlands an inappropriate forum.[91]

Having decided Australia to be the appropriate forum, Bennett J then considered the merits of the application to discharge the order for the return of the children to the Netherlands. Apart from requiring that circumstances rise to the description of 'exceptional', the relevant rules were otherwise silent as to the nature of the circumstances which may give rise to the discharge of the return order.[92] The Court adopted the view that '"the discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]" enable it to be said that a particular consideration is extraneous. That subject matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion'.[93]

88 Ibid [13].

89 Ibid [13], citing *Department of Family and Community Services & Smollett* [2018] FamCA 372 (McClelland J).

90 *Sangster* (n 87) [51].

91 Ibid.

92 Ibid [17].

93 Ibid [17], quoting *De L v Director-General, NSW Department of Community Services* [1996] 187 CLR 640 Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

It is generally considered to be in a child's best interests to be returned promptly to the place from which they have been wrongfully removed or retained. This is because courts in that jurisdiction generally have access to better evidence, and it may avoid one parent selecting another forum to the disadvantage of the other parent.[94] As Garnett has said, forum shopping in Australia is a 'cardinal sin'.[95]

However, it was appropriate to have regard to the best interests of the children as well as events or matters arising since the wrongful removal and after the decision to return, which encompassed the children's need for certainty.[96] Having lived in Australia for 20 months since the children's father obtained the return order, during which time the father had not complied with the conditions of the return order, the children were found to have formed a new habitual residence in Australia. Their young ages (7 and 4 years old) meant a not insubstantial portion of their lives had been spent in Tasmania, during which time they had established some degree of integration into their schooling, family, and social environment.[97] In essence, at the time of the return order, the habitual residence was found to be the Netherlands, however, the passage of time meant that the new place of habitual residence became Tasmania and, in these exceptional circumstances, the return order could be discharged.[98]

III Choice of Law

The most interesting choice of law decision to have emerged within the period covered by this survey was the appellate decision in *Valve Corporation v Australian Competition and Consumer Commission* ('*Valve v* ACCC').[99] The first instance decision was noted in a previous survey.[100] Video gamers, including Australian gamers, paid a fee to use the appellant's platform to download and play video games. The contractual terms included a clause stating that fees were non-refundable. This is a common example of a commercial cross-border transaction where the rules of private international law must be considered.

94 *Sangster* (n 87) [16].
95 Richard Garnett, 'The dominance of uniformity of outcome in Australian choice of law: Is it time to relax the grip?' (2013) 37(2) *Australian Bar Review* 192, 193.
96 *Sangster* (n 87) [29].
97 Ibid [35].
98 Ibid [38].
99 (2017) 351 ALR 584 ('*Valve v* ACCC').
100 Andrew Lu et al, 'Developments in Australian Private International Law 2016–2017' (2017) 35 *Australian Year Book of International Law* 509.

Dowsett, McKerracher and Moshinsky JJ considered the operation of the conflict of laws provision in *ACL*, finding certain consumer guarantees applied to supplies even where United States law was found to be the proper law of the relevant supply contract.

It is helpful to first understand some background information about Valve Corporation ('Valve'). Valve, a company based in Washington State, operates an online game distribution website known as Steam. Steam has more than two million Australian subscriber accounts, used by consumers to purchase and download video games.

At various times, Valve represented to consumers that no refunds were available for purchases made via Steam. The Australian Competition and Consumer Commission ('ACCC') alleged the representations were misleading and deceptive in breach of s 18(1) of the *ACL*, or alternatively, false or misleading in respect of the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy, in breach of s 29(1)(m) of the *ACL*.

At first instance, Edelman J found that the *ACL* applied, and ordered Valve to pay $3 million in fines. On appeal, Valve argued, inter alia, that Edelman J had erred in failing to find the choice of law provision contained in s 67 of the *ACL* 'preserves and respects' the law with the closest and most real connection to the contract, in this case the law of Washington State in the United States, and thus excluded the application of the *ACL*.[101] In a unanimous verdict, the appeal court found against Valve on the basis that the text, context, and purpose of s 67 were inconsistent with Valve's construction.[102]

Section 67 of the *ACL* states:

> If:
> (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
> (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:
> (i) the provisions of the law of a country other than Australia;
> (ii) the provisions of the law of a State or a Territory;
> the provisions of this Division apply in relation to the supply under the contract despite that term.

101 *Valve v ACCC* (n 99) 613 [98].
102 Ibid 619 [111]–[115].

Valve argued neither sub-ss (a) nor (b) applied. Subsection (a) did not apply, Valve argued, because (and their Honours agreed) the 'proper law of the contract' was the law of the US.[103] More controversially, Valve also submitted sub-s (b) was not engaged because the proper law of the contract was the US, so the contract (in which the parties chose US law to be the law of the contract) did not 'substitute' Australian law for another law. Instead, the contract merely reflected the congruency between the proper and chosen laws of the contract.[104]

Their Honours accepted the contrary submission of the ACCC: that Valve's analysis would 'elevate' s 67 to a provision that limited the scope of the *ACL*.[105] This construction was found to be inconsistent with the text, context and purpose of the provision, which pointed to a more limited purpose of preventing parties from contracting out of the *ACL*.[106]

Their Honours commenced their analysis by finding the *ACL*'s scope of application would ordinarily be presumed not to extend outside Australia, subject to contrary provisions in the statute.[107] As s 5 of the *Competition and Consumer Act (2010)* (Cth) extends the application of the *ACL* to conduct outside of Australia, their Honours applied the common law choice of law presumption in reverse, finding the *ACL* should apply because of, and not in spite of, the absence of a provision in the *ACL* that preserved the parties' choice of law:

> It is important to emphasise that no provision of the Australian Consumer Law expressly … states that, where the supply of goods or services is made pursuant to a contract, the provisions of the Division apply only if the law with which the contract has its closest and most real connection is the law of Australia or of a part of Australia.[108]

Their Honours then considered the text of *ACL* s 67, which relies on the legislative mechanism of 'guarantees'. The relevant guarantees apply to the supply of goods or services, as opposed to contracts. Their Honours found this mechanism reflects an intention for the guarantees to apply irrespective of the

103 Ibid 615–17 [101].
104 Ibid.
105 Ibid 619 [112].
106 Ibid 619 [111]–[113].
107 Ibid 617–18 [105], citing *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 363 (O'Connor J); *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 423–5 (Dixon J); *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 600–1 (Dixon J).
108 *Valve v ACCC* (n 99) 618 [110].

applicable law of the contract, unlike alternative provisions of the *ACL* which take effect as implied contractual terms.[109]

Their Honours then considered the legislative context of s 67, finding that the provisions surrounding s 67 are designed to prevent parties from 'opting out' of the consumer guarantees. In this respect, their Honours pointed specifically to ss 64 and 276, the purpose of which 'is to ensure that parties cannot "contract out" of the consumer guarantees'.[110]

The appeal court held that the context and legislative purpose of s 67 was to 'ensure the full reach' of the relevant consumer guarantees,[111] and that Valve's construction would limit the application of the *ACL* in a manner that was inconsistent with the statutory scheme and the statutory purpose of the *ACL*. For these reasons, the appeal was dismissed, and an application for special leave to the High Court was refused in April 2018.

Ultimately, the first instance and appeal decisions in *Valve v ACCC* reinforce that while a choice of law clause may determine the law applicable to a contract, it cannot render parties invulnerable to scrutiny from Australian regulators like the ACCC. Mandatory laws of the forum may be upheld even where contracts purport to exclude them.

In *Huntingdale Village Pty Ltd* (*rec and mgr apptd*) *v Corrs Chambers Westgarth*,[112] the Supreme Court of Western Australia addressed a similar issue in a domestic context. The Court considered whether the parties' choice of law (being the law of New South Wales) or the law of the forum (being the law of Western Australia) would apply to the treatment of legal costs.

All members of the Court found the New South Wales Act (the *Legal Profession Act 2004* (NSW) ('*NSW Act*')) applied, rather than the Western Australia Act (the *Legal Practice Act 2003* (WA) ('*WA Act*')). A majority of the Court preferred an analysis which did not rely on choice of law rules and instead turned on statutory interpretation. Their Honours delivered their decisions in twin judgments: the first written by Martin CJ and a second joint judgment prepared by Mitchell and Beech JJA.

Before delving into these judgments, it is helpful to understand the first instance decision, in which Le Miere J adopted a traditional conflicts analysis to find that the *NSW Act* applied. His Honour reasoned that the dispute was properly characterised as a restitutionary claim arising in relation to a retainer agreement, and therefore the proper law was the law chosen in the contract,

109 Ibid 618 [106].
110 Ibid 618 [107], 619 [112].
111 Ibid 619 [114].
112 (2018) 128 ACSR 168 ('*Huntingdale*').

being the law of New South Wales.[113] For completeness, his Honour's reasoning in relation to the *WA Act* was that as it did not manifest an intention to override the application of choice of law rules, it did not apply.[114]

On appeal, the appellants argued that the primary judge erred by failing to find the *WA Act* was a mandatory law of the forum and would therefore exclude the operation of normal choice of law rules.[115] Although each justice ultimately found for the respondents, in the words of Mitchell and Beech JJA each judgment took 'a different pathway' in reaching that conclusion.[116] Accordingly, each judgment will be considered below.

His Honour Martin CJ found for the respondents by considering the 'inappropriate consequences' that would arise were the *WA Act* construed as a mandatory law of the forum.[117] Before conducting his statutory interpretation, his Honour first emphasised the high bar facing litigants seeking to exclude the parties' choice of law, which is generally binding unless excluded by statute.[118]

His Honour then commenced his analysis of the *WA Act*. His Honour found the *WA Act* did not contain an express or implied intention to exclude the choice of law rules,[119] and so turned to consider the consequences that may arise were the statute read as though it did. Specifically, his Honour found if the *WA Act* were a mandatory law of the forum, all services rendered by any practitioner who comes within the definition of 'legal practitioner' (being any practitioner whose name is on the Roll of Practitioners in Western Australia) would be subject to the *WA Act*, 'even if conducting practice in … London, providing services exclusively in London to London clients'.[120] His Honour found this interpretation 'should not be objectively attributed to the legislature'[121] in light of the text of the *WA Act*, which precluded the statute from applying to work done by interstate practitioners outside Western Australia.[122] The appellant suggested different mechanisms that would reconcile this discrepancy, including a construction that would limit the application of the *WA*

113 Ibid 195 [119].
114 Ibid.
115 Ibid 195–6 [120].
116 Ibid 201 [149].
117 Ibid 127 [131], citing *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 (Dixon J); *Old UGC Inc v Industrial Relations Commission of New South Wales* (2006) 225 CLR 274 (Kirby J).
118 *Huntingdale* (n 112) 197 [125]–[126].
119 Ibid 198 [130]–[131].
120 Ibid 198–9 [132].
121 Ibid 198 [131].
122 Ibid 199 [133].

Act to services rendered having some connection with Western Australia or, more narrowly, to services rendered within Western Australia. However, his Honour rejected these propositions because they did not draw any support from the language of the statute.[123]

His Honour also rejected the appellants' argument that the court's 'inherent jurisdiction' to supervise its officers meant the *WA Act* was a mandatory rule incapable of being excluded by choice of law rules.[124] His Honour distinguished between the Court's inherent jurisdiction and the *WA Act*,[125] finding that the Court's inherent powers would exist irrespective of the *WA Act*. Further, his Honour defined the inherent powers of the Court narrowly, confining them to the regulation and supervision of the provision of legal services which was unrelated to the immediate question, being the question of which law ought to be applied.[126] Finally, his Honour found that the inherent jurisdiction to supervise the conduct of its officers would not apply to interstate practitioners in respect of the provision of legal services outside Western Australia, which was the issue at the heart of the legal costs dispute.[127]

For these reasons, his Honour dismissed the appeal and found the *WA Act* was not a mandatory law of the forum.[128]

Turning to the judgment of Mitchell and Beech JJA, their Honours rejected the contention that there was a 'conflict of laws' between the *NSW Act* and the *WA Act*.[129] Their Honours found '[b]oth regimes may co-exist as available alternatives', a possibility that was not antithetical to Australia's *Constitution* or federal system of government.[130] Their Honours' basis for this was that

> the laws of two States may provide for mechanisms for assessing legal costs, both of which may be applicable to particular work done under the same retainer … [s]o in this case there is no 'clash' … between the provisions of the [WA] Act and the NSW Act dealing with the assessment or taxation of costs.[131]

Their Honours then observed that while some judicial authority supports the existence of a presumption to apply the law as determined by the common law

123 Ibid 198–9 [132].
124 Ibid 199 [135].
125 Ibid 199 [137].
126 Ibid 199 [138].
127 Ibid 199–200 [139].
128 Ibid 199 [134].
129 Ibid 202–3 [155].
130 Ibid 204 [161].
131 Ibid 203–4 [159], 204 [160].

choice of law rules,[132] 'the subject matter of the legislation is of the first importance in identifying, by a process of construction, the territorial reach or criterion of operation of the legislation'.[133] In the pursuit of statutory interpretation, their Honours found (contrary to the decision of Martin CJ, above) the presumption 'will often be of very limited, if any, assistance'.[134]

In place of the presumption, their Honours found 'the criterion of operation of the statute' should be considered by 'a process of proper construction, paying close attention to the subject matter, purpose and context of the Act in question'.[135] On this basis, their Honours turned to the text and structure of each statute, ultimately finding, similar to the reasoning of Martin CJ, the application of the *WA Act* to legal practitioners outside of Western Australia would require 'an unacceptable degree of rewriting of the text of the Act' in light of the same inconsistency observed by Martin CJ.[136] Accordingly, their Honours found the *NSW Act* applied and the *WA Act* did not.

IV Commercial Issues in Private International Law

Although the foregoing commentary makes it apparent that basic knowledge of private international law is valuable, the subject is not compulsory and is not even available at some of the 40 or so Australian law schools. It is compulsory at Sydney Law School. In February 2018, Sydney Law School hosted a conference on 'Commercial Issues in Private International Law'. Taking place within the period of this survey chapter, it brought together conflicts scholars to discuss current issues in Australian private international law. Australia's proposed accession to the *Choice of Court Convention* and the *Hague Principles of*

132 Ibid 205 [165], citing *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 (Dixon J).

133 *Huntingdale* (n 112) 205 [166], citing *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124, 142 (Kitto J).

134 *Huntingdale* (n 112) 206 [167].

135 Ibid 207 [173], citing *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418; *Old UGC Inc v Industrial Relations Commission of New South Wales* (2006) 225 CLR 274; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149.

136 *Huntingdale* (n 107) 209–10 [185]–[187]. Their Honours provided an example of s 230(1) of the *WA Act*, which if read in the manner proposed by the appellant, would have had the effect of lifting a prohibition on WA registered solicitors, practicing overseas, from suing for the recovery of fees until a bill has been served, while solicitors practicing in WA continued to face the prohibition. Similarly, their Honours found that the interpretation would prevent the *WA Act* from applying to national or international retainers where legal work was performed by WA solicitors outside of WA. Their Honours found it objectively unlikely such a highly inconvenient result could have been intended, per [187].

Choice of Law in International Commercial Contracts, and their impact upon Australian law, were among the topics discussed with key outputs published in 2019.[137] Accession to the *Choice of Court Convention* is being actively considered, but at the time of writing, a bill to give effect to recommendations that Australia accede to the convention has not passed through the federal legislature and we are in a holding pattern. That being said, aspects of the *Choice of Court Convention* are already reflected in the *TTP Act*, that being the legislation that gives effect to the treaty between Australia and New Zealand on jurisdiction in disputes involving our two countries. The proceedings of that conference are being written up and are to be available as a valuable record of the papers prepared and shared by some of the more active conflicts scholars in Australia. It is indeed a great step forward that the conflict of laws in Australia has a sufficient number of champions and a national conference of practitioners and researchers.

Through the bringing together of perspectives from in-house, private sector, academic and public sector lawyers (including from the Private International Law section of the Attorney-General's Department), we recognise the continued relevance of a brief annual discussion of perspectives on Australian private international law. This will necessarily be only a small part of a Year Book that collects current thinking on issues of both public and private law but may hopefully still be of use to audiences dipping in and out of the conflict of laws in contemporary legal practice: even if it is just to advise on cross-vesting or on remedies, when online gamers are dissatisfied with their game and demand a refund and to apply the consumer guarantee provisions of Australian law extraterritorially.

137 Steven Rares et al, *Commercial Issues in Private International Law: A Common Law Perspective*, (Hart Publishing, 2019).