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## INTRODUCTION

- *Re Canavan* [2017] HCA 45
  - S 44 Constitution:
    - Any person who:
      - (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; ...
      - shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
  - Senator Nick Xenophon
    - Born in Australia to parents who were born in Cyprus when it was under British occupation.
    - Had British overseas citizenship (cf British citizenship, where there is a right to be in UK).
    - British law was proven as a matter of fact (via expert evidence). Don't assume Australian judges have knowledge of foreign law.
    - If the person has taken reasonable steps to discharge their foreign citizenship, it's OK – this satisfies the constitution.
- *Oceanic Sun Line Special Shipping Co v Fay* [1988] HCA 32
  - Facts:
    - Dr Fay, a Qld resident, made a booking in NSW for a cruise in Greece.
    - The vessel was owned by a Greek sub of a Delaware parent-co.
    - Fay got injured on the cruise.
    - Fay sued the Greek sub for negligence in NSWSC.
    - Greek sub applied for a stay.
  - Held: Application for stay dismissed.
    - 1. Lex fori (i.e. Law of Australia) applied to determine preliminary question of incorporation not putative law of contract (which was Greek)
    - 2. Contract of carriage concluded in NSW not Greece [whole of court] (Brennan, Wilson and Toohey JJ expressed view that proper law of the K was Greek)
      - Toohey and Wilson: 'notwithstanding our conclusion that the contract was made in NSW, ... prima facie the proper law of the contract is the law of Greece. The test for discovering the proper law of the contract – that is, in general terms, the substantive law of the country which the parties have chosen as that by which their mutually enforceable rights are to be ascertained'
    - 3. Conditions printed on ticket not part of contract (whole of court)
    - 4. Court should decline to exercise jurisdiction if Australia is a 'clearly inappropriate forum' (Brennan, Deane and Gaudron JJ)
    - 5. Majority decision not to follow UK case of *Spiliada v Cansulex* [1987]: rejected 'more appropriate forum' test (Wilson and Toohey JJ dissented: Greek courts were more appropriate)
- Foreign elements that can be important in the course of litigation
  - Originating process
  - Service
  - Appearances
  - Interlocutory proceedings
  - Pleadings
  - Hearing
  - Judgment

- Enforcement

## TERMINOLOGY

- 'Choice of law' v 'conflict of laws'
  - *Pfeiffer* at CLR 527 [43]:
    - [T]he only "conflict" possible is that in the mind of the judge who is to decide which system of law to apply to the facts before the court, whereas the term "choice of law" correctly indicates the existence of the possibility of the application of one or other system of law to the facts of the case under consideration.
- 'Private international law' v 'public international law'
  - Private international law is part of domestic, private law
  - Not truly international:
    - Can involve issues between parties of different Australian States or territories
    - Main source is domestic (general) law
- 'Foreign' has a broad meaning in PrIL
  - 'Countries' or 'law areas' for our purposes include:
    - States of Australia
    - Territories of Australia
    - Commonwealth of Australia
  - Foreign countries or 'law areas':
    - E.g. UK is 'cut' into England and Wales, Scotland and Northern Ireland
    - E.g. US is 'cut' into states, territories and federal
- Sources of Australian private international law
  - Case law (main source)
  - Legislation
  - Subsidiary legislation, especially court rules
  - The Constitution
  - International conventions that are adopted here

## SOURCES OF LAW AND DOCTRINE OF STARE DECISIS

### WITHIN AUSTRALIA

- A seriously considered High Court obiter is binding on a NSW court ([Farah Constructions](#)).
  - Problem: almost all High Court obiter is seriously considered.
- NSWCA is bound to follow other intermediate appellate courts, unless they're plainly wrong ([Farah Constructions](#)).
- [Farah Constructions Pty Ltd v Say-Dee Pty Ltd \[2007\] HCA 22, \[134\]-\[135\]](#)
  - Court of Appeal abandoned the notice test for the first limb of *Barnes v Addy*. In doing so, it was 'flying in the face' of the received view of the first limb, and obiter dicta of the HCA in *Consul Development* (which was decided on the **second limb**). Instead of bearing 'indirectly' on the matter, this dicta was **seriously considered**, and was shared by the entire majority (three judges).
  - Intermediate appellate courts and trial judges in Australia shouldn't depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Cth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.
- [Gett v Tabet \[2009\] NSWCA](#) – medical negligence case

- In order for an intermediate appellate court to depart from a previous decision, the later court must have a strong conviction that the earlier judgment was erroneous, not merely that the earlier court exercised an approach which was open to it but which was no longer to be preferred, and the nature of the error can be clearly demonstrated.
- The fact that an intermediate appellate court forms the view that a previous decision was clearly or plainly wrong is a necessary, but not sufficient, condition to justify a departure from that previous decision.
- Here:
  - Damages were not awarded for the loss of chance of a better medical outcome. Earlier decisions to the contrary were plainly wrong as a matter of principle and policy and did not reflect a recognised line of authority.
  - The TJ didn't err in not making a discrete allowance as a separate head of damages for loss of marriage benefits. It was appropriate and consistent with authority to reflect this factor as an allowance for vicissitudes in relation to the claim for loss of earning capacity.

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## OVERSEAS JUDGMENTS

- **Cook v Cook [1986] HCA 73**
  - Following the abolition of appeals to the Privy Council, there is no rule that a state court should, on the absence of controlling Australian authority, accept the reasoning of the English Court of Appeal.
  - The precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.
- **Union Shipping New Zealand Ltd v Morgan [2002] NSWCA 124**
  - Where a tort was committed entirely on board a foreign ship while moored in territorial waters and in the process of unloading coal in a continuous ship to shore operation, the applicable law was the law of NSW as the law of the littoral state and not the law of the flag.
  - The vessel had reached its destination. It was fulfilling the core purpose for which the voyage had been undertaken. It was unloading the imported coal into NSW soil in a continuous process which couldn't be severed in any way. There was nothing accidental or adventitious or fortuitous about the presence of the vessel. It cannot be said that NSW, whose citizens were receiving the coal, had no concern with the presence of the vessel. It is difficult to see how anything in the nature of an onerous or disruptive burden would be created by applying NSW law. Assuming, though not deciding, that there is a valid distinction between 'external torts' and 'internal torts', the conduct in the course of which the alleged tort was committed had an external characteristic, and was not limited to the internal workings of the vessel.
  - Conduct of primary judge was correct and legitimate, and consistent with *Cook v Cook*, in view of:
    - The quality of the court which decided *MacKinnon's* case, the absence of contrary authority in the British Cth, the fact that US cases are based on a process of statutory construction and a 'proper law of the tort' theory which was not part of the intra-Australian conflict of laws, the general acceptance of *MacKinnon's* case, though subject to criticism, as stating the law, and his own position as a primary judge.

## INTRODUCTION TO JURISDICTION

- What is 'jurisdiction'?
  - A generic term that is used in a variety of senses
  - Horizontal definitions
    - A geographic area over which a court presides
    - A particular place/country/State/territory
  - Vertical definitions

- Constitutional, federal, State
  - Appellate, original
- Main distinction for this course
  - Personal jurisdiction
  - Subject matter jurisdiction
- Personal jurisdiction is our focus
  - Amenability of a defendant to a court's orders and proceedings
  - Personal jurisdiction at common law
  - Personal jurisdiction in interstate cases (largely statute)
  - Personal jurisdiction in international cases (largely statute)
- Subject matter jurisdiction
  - Authority to decide actions of a particular subject matter
  - Few limitations on the subject matter jurisdiction of a State supreme court
- Federal jurisdiction
  - Ch III of Constitution
  - We only have time to cover some trivial issues
  - Parliament can invest courts with federal jurisdiction: Cth Constitution s 77
    - **Power to define jurisdiction**
      - With respect to any of the matters mentioned in the last two sections the Parliament may make laws:
        - (i) defining the jurisdiction of any federal court other than the High Court;
        - (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
        - (iii) investing any court of a State with federal jurisdiction.
  - Some 'heads' of federal jurisdiction
    - See ss 75 and 76 of Cth Constitution
      - Diversity: inter-state matters
      - Federal question: federal law matters
      - Suits by or against the Cth or a State
      - Admiralty
- Cross vesting
  - The complaint: that certain courts could not hear certain matters for a lack of "jurisdiction" is just pointless "technicalities".
  - Came the Cross-Vesting Scheme: all federal, state and territory superior courts to "share" their jurisdictions (for the most part)
  - One of the most popular ideas in AU political (and legal) history
  - Held to be partly unconstitutional in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511
    - Where in Cth Constitution does it say State can invest fed court with non-fed jurisdiction?

## PERSONAL JURISDICTION

- P prepares the 'initiating process' (a writ, application, claim, originating summons, motion or petition) and has that document filed and checked (for formalities) in the court registry. If the initiating process is in order, the court registry dates and stamps it. At that point, initiating process is 'issued'. P must then arrange for the initiating process to be 'served' on D.
- Service: the act of delivering or exhibiting an originating process or order by an authorised person to a person party to an official proceeding.
- Does the court have authority to determine **this kind of claim**, in respect of **this particular matter**?
- **Will** the court exercise its authority in this matter?
- **Mobil Oil Australia Ltd v Victoria [2002] HCA 27 at [10] (Gleeson CJ)**
  - Historically, the primary basis of the court's jurisdiction in an action in personam was service of originating process on a D within the jurisdiction.
  - The *Service and Execution of Process Act 1992* (Cth) extended the area within which service on a D may be effected, and there are rules of court relating to substituted service and service outside the jurisdiction. Subject to immaterial exceptions, the rules relating to the amenability of a D to the jurisdiction of the Supreme Court in group proceedings are the same as those applicable in any other proceedings, including proceedings commenced as representative actions under the old rules.
- UCPR
  - r 10.20 (when is personal service required)
    - Originating process in all courts (except local courts) must be personally served (10.20(2)(a))
  - r 10.21 (how is service effected)
    - Leaving a copy of document with person
    - If person doesn't accept, then put copy down in person's presence and tell them of nature of document
    - If person serving is prevented by violence/threat of violence from serving, then leave it as near as practicable to person being served
    - This constitutes personal service
  - r 10.14
    - Substituted service is a method of formal delivery of docs other than by personal service.
    - (1) If a document that is required or permitted to be served on a person in connection with any proceedings:
      - (a) cannot practicably be served on the person, or
      - (b) cannot practicably be served on the person in the manner provided by law,
    - the court may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned.
    - (2) Court order can direct that document 'taken to have been served on the person concerned' 'on the happening of a specified event or on the expiry of a specified time' (eg Facebook)
    - (3) If steps have been taken, otherwise than under an order under this rule, for the purpose of bringing the doc to the notice of the person concerned, the court may, by order, direct that the document be taken to have been served on that person on a date specified in the order.
    - (4) Service in accordance with this rule is taken to constitute personal service.
    - **NB:** Substituted service is allowed only if permissible as a matter of law to serve D by personal service; D must be amenable to the court's jurisdiction. Leeming p. 186: 'The solution to the problem caused by a defendant outside of a court's territorial jurisdiction is not substituted service, but service out'.
  - r 10.6(1). Parties can be served by each other in accordance with any agreement or binding undertaking.
    - "The Parties agree to the exclusive jurisdiction of the courts of New South Wales to resolve their disputes"