

PLEADING AND PROVING FOREIGN LAW IN AUSTRALIA

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[Foreign law lies at the heart of private international law. After all, a true conflict of law cannot be resolved unless and until the content of foreign law is established. Despite this, the pleading and proof of foreign law remain among the most under-explored topics in Australian private international law. In light of the High Court of Australia's significant change of direction on choice of law since 2000, most notably in cases such as John Pfeiffer Pty Ltd v Rogerson, Regie Nationale des Usines Renault SA v Zhang and Neilson v Overseas Projects Corporation of Victoria Ltd, it is all the more important to answer some of the basic questions about the pleading and proof of foreign law. Who pleads foreign law? What law do they plead? Are they obliged to do so? How do they prove its content? When can local law be applied in the place of foreign law? This article addresses these and related questions with a particular focus on Australian law as it has developed since 2000. It concludes that Australian courts take a more robust and pragmatic approach to these issues than might be supposed. In particular, the so-called presumption of identity is a label that masks a much richer and more complex reality.]

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I INTRODUCTION

When an Australian judge decides a case involving an international element, Australian choice of law rules will sometimes indicate that the applicable law is to be found in a foreign legal system, and not in the law of Australia. How, though, is the content of that foreign law to be determined? This is a central question of private international law: without knowledge of the content of foreign law, the very concept of a true conflict of law becomes meaningless. While international legal harmonisation can remove differences between national laws,¹ and while the enactment of mandatory rules of the forum can obviate the need to prove foreign law at all,² the reality is that foreign law is often applicable and often differs markedly from its local counterpart. Whenever a party wishes to rely on such a difference, the pleading and proof of foreign law comes into play.

When foreign law is applicable, one must always bear in mind that it is applicable only because, and only to the extent that, the law of the forum permits it to be so. Australian choice of law rules and Australian rules about pleading and proving foreign law all go towards answering Walter Wheeler Cook's question, namely '[h]ow far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?'³ In each case, Australian rules provide the reason for, and the manner of, applying foreign law. While comity and the desire to avoid forum shopping are justifications for those rules, they are not by themselves reasons why foreign law should be applied of its own force. Rather, Australian law always sets the outer limits for the application of foreign law. The actual application of that law in the particular case is a matter for the choice of the parties, subject to the Australian rules of pleading and proof.

Despite the centrality of this issue to private international law, very little has been written on the subject in Australia, and Australian lawyers are largely reliant on the valuable but limited treatment of the subject in the main textbooks.⁴ Ironically, as Edward I Sykes and Michael C Pryles note:

¹ In this regard, the most significant efforts are those which unify substantive law, such as the *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 58 (entered into force 1 January 1988) ('*Vienna Convention*'). On this point: see, eg, James J Fawcett, Jonathan M Harris and Michael Bridge, *International Sale of Goods in the Conflict of Laws* (2005) ch 16. Other conventions harmonise aspects of choice of law but not the underlying substantive law, such as the *Convention on the Law Applicable to Trusts and on Their Recognition*, concluded 1 July 1985, 1664 UNTS 322 (entered into force 1 January 1992). Each of these conventions has been incorporated into Australian law: *Sale of Goods (Vienna Convention) Act 1987* (Vic); *Trusts (Hague Convention) Act 1991* (Cth).

² Some mandatory rules of the forum cover large swathes of the law: see, eg, *Carriage of Goods by Sea Act 1991* (Cth) s 11; *Insurance Contracts Act 1984* (Cth) s 8; *Trade Practices Act 1974* (Cth) s 67. Other mandatory rules are more particularised in scope: see, eg, *Gambling Regulation Act 2003* (Vic) s 4.3.19; *James Hardie (Civil Liability) Act 2005* (NSW) s 4.

³ Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 166.

⁴ P E Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) ch 17; Edward I Sykes and Michael C Pryles, *Australian Private International Law* (3rd ed, 1991) 267–78; R G Mortensen, *Private International Law in Australia* (2006) ch 8.

Proof of foreign law is often treated as a procedural matter of little importance. In fact its importance can hardly be overstated. The choice of law rules, and the underlying purpose of private international law, can only be effectively implemented if the applicable foreign law is adequately proved or otherwise ascertained.⁵

Thankfully, the subject has received greater attention in other jurisdictions. Things have certainly improved since Arthur Nussbaum complained in 1943 that it was symptomatic of the

lack of realism in traditional learning on Private International Law that treatises and textbooks ordinarily make short work of, and not infrequently omit, the subject of proof of foreign law, leaving its treatment to the writers on evidence (procedure).⁶

Any writer touching on English law owes a very great debt to Richard Fentiman;⁷ US scholarship has for several decades produced a rich literature on the subject;⁸ and there are many valuable sources of international or comparative analysis.⁹

Australian lawyers have traditionally been happy to proceed on the basis of a few, largely unquestioned, propositions. First, there is no obligation to allege, let alone prove, foreign law. Secondly, foreign law is a matter of fact to be proved by expert evidence. Thirdly, the burden of such proof lies upon whoever claims that foreign law departs from the law of the forum. Fourthly, in the absence of proof to the contrary, foreign law is presumed to be the same as local law. As we shall see, however, none of these propositions are as straightforward as one might suppose, and the reality is a lot more nuanced than is commonly assumed.

In addition, many traditional attitudes towards foreign law are now open to question after a series of important appellate decisions since 2000 which have had the effect of expanding the amount of potentially applicable foreign law. For example, the adoption in *John Pfeiffer Pty Ltd v Rogerson* ('*John Pfeiffer*')¹⁰ and

⁵ Sykes and Pryles, above n 4, 278.

⁶ Arthur Nussbaum, *Principles of Private International Law* (1943) 248.

⁷ Richard Fentiman, *Foreign Law in English Courts* (1998). Also warranting mention is Professor Adrian Briggs, author of the chapter on the proof of foreign law in Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) ch 9 ('Dicey and Morris'). See also Adrian Briggs, *The Conflict of Laws* (2002) 3–8.

⁸ Arthur Nussbaum, 'The Problem of Proving Foreign Law' (1941) 50 *Yale Law Journal* 1018; William B Stern, 'Foreign Law in the Courts: Judicial Notice and Proof' (1957) 45 *California Law Review* 23; Arthur R Miller, 'Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine' (1967) 65 *Michigan Law Review* 613; Milton Pollack, 'Proof of Foreign Law' (1978) 26 *American Journal of Comparative Law* 470; Stephen L Sass, 'Foreign Law in Federal Courts' (1981) 29 *American Journal of Comparative Law* 97; Roger J Miner, 'The Reception of Foreign Law in the US Federal Courts' (1995) 43 *American Journal of Comparative Law* 581.

⁹ See especially Sofie Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (2004); Trevor C Hartley, 'Pleading and Proving Foreign Law: The Major European Systems Compared' (1996) 45 *International and Comparative Law Quarterly* 271; Stephen L Sass, 'Foreign Law in Civil Litigation: A Comparative Survey' (1968) 16 *American Journal of Comparative Law* 332; O Kahn-Freund, *General Problems of Private International Law* (1976) ch 11; Martin Wolff, *Private International Law* (2nd ed, 1950) ch 17.

¹⁰ (2000) 203 CLR 503.

Regie Nationale des Usines Renault SA v Zhang ('Zhang')¹¹ of the *lex loci delicti* rule led to the applicability of interstate and foreign law in a way that was not required by the former double actionability rule.¹² Likewise, the characterisation of more issues as being substantive, including limitation periods, has led to a corresponding expansion in the potentially applicable foreign substantive law. In *Neilson v Overseas Projects Corporation of Victoria Ltd* ('Neilson'),¹³ the pleading and proof of foreign law was extended to encompass foreign choice of law rules in addition to foreign substantive or domestic law. Conversely, the important New South Wales Court of Appeal decision in *Damberg v Damberg* ('Damberg')¹⁴ indicated that local law cannot be applied by default in all cases, and that there will be situations in which parties will be obliged to plead and prove foreign law if they wish to succeed.

Of course, the full effect of some of these recent developments remains to be seen. For example, the High Court has explicitly reserved its opinion about whether the expanded definition of 'substance' will encompass certain aspects of international — as opposed to intranational — litigation.¹⁵ The relevance of foreign choice of law rules in non-tort cases is uncertain,¹⁶ as is the relevance of foreign rules of characterisation.¹⁷ The default application of local law is also a matter of controversy and flux.¹⁸ Despite these uncertainties, the growing importance of foreign law since 2000 makes it timely to reassess this significant but under-discussed area.

As a result, this article aims to provide a useful survey of the pleading and proof of foreign law in Australian courts since 2000. By comprehensively analysing the decided cases, it aims to bring some conceptual clarity to this field by answering the following questions:

- Who pleads foreign law, and why?
- Is there any obligation to plead foreign law?
- What foreign law is pleaded and proven?
- Is foreign law really a question of fact?

¹¹ (2002) 210 CLR 491.

¹² *Phillips v Eyre* (1870) LR 6 QB 1; *Koop v Bebb* (1951) 84 CLR 629; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20; *Breavington v Godleman* (1988) 169 CLR 41; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.

¹³ (2005) 223 CLR 331.

¹⁴ (2001) 52 NSWLR 492.

¹⁵ *Zhang* (2002) 210 CLR 491, 520 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁶ See *O'Driscoll v J Ray McDermott SA* [2006] WASCA 25 (Unreported, Malcolm CJ, McLure JA and Murray AJA, 22 February 2006) ('*O'Driscoll*'). Cf *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 437–8 (Evatt J); *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 61–2 (Lord Diplock); *Re United Railways of Havana and Regla Warehouses Ltd* [1960] Ch 52, 96–7 (Jenkins and Romer LJ).

¹⁷ *O'Driscoll* [2006] WASCA 25 (Unreported, Malcolm CJ, McLure JA and Murray AJA, 22 February 2006); *Hamilton v Merck & Co Inc* (2006) 66 NSWLR 48. Internationally, cf *Society of Lloyd's v Price* [2006] SCA 87 (Unreported, Supreme Court of Appeal of South Africa, Howie P, Scott, Zulman and van Heerden JJA and Cachalia AJA, 3 March 2006); *Harding v Wealands* [2005] 1 All ER 415; revd [2006] 4 All ER 1.

¹⁸ See below Part VII.

- How is the content of foreign law proven?
- When can Australian law be applied in the place of foreign law?

In summary,

- Foreign law is mainly pleaded defensively.
- There is no obligation to plead foreign law, but the lack of any such obligation sometimes causes unfairness.
- Parties plead and prove a remarkably wide variety of foreign law.
- Foreign law is a question of fact, albeit a highly anomalous one.
- The content of foreign law can be proven with greater flexibility than is commonly supposed.
- Australian law can often be applied as a default rule, although not invariably so. The language of presumption is best forgotten.

II WHO PLEADS FOREIGN LAW AND WHY?

After cases like *Zhang*, one could well imagine that a flood of plaintiffs have pleaded and proven the *lex loci delicti* to obtain judgment on the merits in claims arising out of foreign torts. The reality, though, is very different: since they have no obligation to do so, plaintiffs almost never invoke foreign law, and the application of foreign law almost never results in a judgment on the merits. Moreover, tort is scarcely the only type of foreign law that arises. While plaintiffs sometimes succeed in cases where foreign law governs some issues, it seems exceptionally rare that they ever do so in a case wholly governed by foreign law. Rather, the typical assertion of foreign law is defensive and interlocutory.

The recent case law provides many examples. At the outset, foreign law might be invoked to justify a stay of proceedings on the grounds of *forum non conveniens*. Although the High Court has clearly stated that '[a]n Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the *lex causae*',¹⁹ and although this reasoning has been followed and applied by lower courts on many occasions since,²⁰ some courts have

¹⁹ *Zhang* (2002) 210 CLR 491, 521 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). Callinan J dissented on this point at 563:

I cannot accept, however, as the Court of Appeal did, that a judgment that a particular foreign law should be the law to determine the parties' rights and obligations is irrelevant to the question of appropriateness ... No doubt, courts in Australia can and do regularly apply foreign law, but it would be vain to claim that they can, or would do it with the same familiarity and certainty as the courts of the jurisdiction in which it was created.

²⁰ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690; *Pacific Petroleum Corporation v Nauru Phosphate Corporation* [2002] QSC 389 (Unreported, Mullins J, 26 November 2002); *DrillTec Gut GmbH Grossbohr-und-Umwelttechnik v Campbell* [2002] NSWSC 1173 (Unreported, Macready AJ, 10 December 2002) ('DrillTec'); *Australian Power & Water Pty Ltd v Independent Public Business Corporation of Papua New Guinea* [2003] NSWSC 1227 (Unreported, McDougall J, 19 December 2003); *Mills v Commonwealth* [2003] Aust Torts Reports ¶81-714; *El-Kharouf v El-Kharouf* [2004] NSWSC 187 (Unreported, Burchett AJ, 23 June 2004); *Colosseum Investment Holdings Pty Ltd v Vanguard Logistics Services Pty Ltd* [2005] NSWSC 803 (Unreported,

recently held that foreign law is of itself a reason to grant a stay even in cases in which Australia is not otherwise a clearly inappropriate forum.²¹ Also, in the case of a contract governed by a foreign proper law, parallel proceedings in that foreign jurisdiction might justify a stay on *lis alibi pendens* grounds.²² Foreign law can likewise be an element that goes towards showing why a judgment entered in default of appearance should be set aside.²³

Most obviously, foreign law is often relied upon by defendants as a substantive defence. The foreign limitation period may have expired;²⁴ there may be a statutory bar to the plaintiff's claim under a no-fault scheme;²⁵ the plaintiff may lack standing to sue under the foreign law;²⁶ or the foreign law may offer some other form of defence or justification.²⁷

Similar arguments are made in the criminal law context, as the proof of foreign law depends on the same rules of evidence and upon the same doctrinal principles in both the civil and criminal law.²⁸ Indeed, the proof of foreign law is one of the few areas of the law of evidence that is more developed in the civil than in the criminal sphere. For example, defendants argue that foreign law creates a procedural impediment to the prosecution;²⁹ that the offence is not known to the foreign law;³⁰ or that foreign law either negates an essential element of the crime or else creates a substantive defence.³¹ Foreign law is also sometimes cited in a plea in mitigation.³² Of course, not all such defences succeed.

Palmer J, 10 August 2005); *Murakami v Wiryadi* [2006] NSWSC 1354 (Unreported, Gzell J, 7 December 2006); *Zhang v Zemin* [2007] NSWSC 229 (Unreported, Harrison Ass J, 19 March 2007).

²¹ *Amwano v Parbery* (2005) 148 FCR 126; *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370 (Unreported, Harper J, 13 October 2006) ('Puttick'); *McGregor v Potts* [2005] NSWSC 1098 (Unreported, Brereton J, 31 October 2005). See also *Murakami v Wiryadi* [2006] NSWSC 1354 (Unreported, Gzell J, 7 December 2006).

²² *DrillTec* [2002] NSWSC 1173 (Unreported, Macready AJ, 10 December 2002).

²³ *Singh v Singh* [2006] WASC 182 (Unreported, Simmonds J, 24 August 2006).

²⁴ *Neufeld v OZ-US Film Productions Pty Ltd (in liq)* [2002] NSWCA 335 (Unreported, Spigelman CJ, Hodgson and Beazley JJA, 2 October 2002) ('Neufeld'); cf *Gray v Gray* (2004) 12 BPR 22 755.

²⁵ *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690.

²⁶ *Dachser GmbH & Co KG v Waco Australia Pty Ltd* [2000] NSWSC 1049 (Unreported, Rolfe J, 16 November 2000) ('Dachser').

²⁷ *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 (Unreported, Allsop J, 15 August 2005); *International Entertainment (Aust) Pty Ltd v Churchill* [2002] QSC 317 (Unreported, Holmes J, 11 October 2002). Sometimes, the 'defence' arises because the foreign law lacks or does not recognise the relevant legal principle: see, eg, *Evalena Pty Ltd v Rising Sun Holdings Pty Ltd* [2003] NSWSC 306 (Unreported, Young CJ in Eq, 11 April 2003) (claim that Japanese law did not recognise trusts); *Bank Polska v Opara* [2007] QSC 1 (Unreported, Chesterman J, 11 January 2007) (claim that Polish law lacked an equivalent of the principle in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395).

²⁸ See Fentiman, above n 7, 78–80; Dicey and Morris, above n 7, ch 9. The extent to which the criminal cases rely on civil law precedents is amply demonstrated in *R v Mokbel (Ruling No 4)* [2006] VSC 137 (Unreported, Gillard J, 16 March 2006) ('Mokbel'). It must also be noted that foreign criminal law can arise incidentally in Australian civil litigation. In many such cases, the issue is resolved by the default application of Australian law: see below Part VII.

²⁹ *R v Turner [No 4]* (2001) 10 Tas R 81.

³⁰ *R v Rigney-Hopkins* (2005) 154 A Crim R 433.

³¹ *Mokbel* [2006] VSC 137 (Unreported, Gillard J, 16 March 2006).

³² *Zeng v The Queen* [2005] NSWSC 1344 (Unreported, McClellan CJ at CL, 16 December 2005).

The defensive use of foreign law is not always at the hands of actual defendants. One surprisingly common context in which foreign law arises is in the defence of applications for security for costs. In such cases, the overseas-based plaintiff (as respondent to the application) frequently invokes the supposed ease with which an Australian judgment could be enforced in the foreign jurisdiction.³³ While such attempts are usually unsuccessful, they demonstrate the way foreign law can be used as a shield and not a sword, even by plaintiffs.³⁴

Foreign law also arises in another context; one almost completely overlooked by private international lawyers. Immigration cases present an important contrast to the situations mentioned above as the strict rules of evidence do not apply.³⁵ An applicant might use foreign law to substantiate their well-founded fear of persecution;³⁶ to resist deportation on character grounds;³⁷ or to establish their citizenship or lack thereof.³⁸

The prevalence of civil interlocutory decisions involving foreign law raises an important point: quite independently of the foreign law issue, it is the general law of civil procedure that will determine the applicant's success. For example, while foreign law may be relevant in setting aside a judgment entered in default of appearance,³⁹ it is the law of procedure — and nothing special pertaining to foreign law — that governs the success or failure of the application.⁴⁰ The same is true of applications to strike out a claim or defence;⁴¹ applications for summary judgment;⁴² and, following the High Court's decision in *Agar v Hyde*,⁴³

³³ For some reason, the law of France arises comparatively frequently in this regard: see, eg, *Welcome Real-Time SA v Catuity Inc [No 2]* [2002] FCA 258 (Unreported, Heerey J, 27 February 2002); *Klein v Botsman* [2003] TASSC 106 (Unreported, Blow J, 20 October 2003); *Compagnie Maritime Des Isles v Bureau Veritas-Registre International de Classification de Navires et d'Aeroneufs 'Société Anonyme A Directoire et Conseil de Surveillance'* [2005] FCA 1063 (Unreported, Kiefel J, 3 August 2005) ('*Compagnie Maritime*'). Cases concerning other countries include: *Fina Research SA v Halliburton Energy Services Inc* [2002] FCA 1331 (Unreported, Moore J, 29 October 2002) (Belgium); *Limberis v N Limberis & Sons Pty Ltd* [2004] SASC 186 (Unreported, Gray J, 25 June 2004) (Greece); *Soh v Commonwealth* (2006) 231 ALR 425 (Korea); *Aopi v Rapke* [2002] NSWSC 711 (Unreported, Levine J, 15 August 2002) (PNG); *Knott v Signature Security Group Pty Ltd* (2001) 104 IR 84 (US, Illinois).

³⁴ The invocation of Illinois law succeeded in *Knott v Signature Security Group Pty Ltd* (2001) 104 IR 84, even without proof of the content of that law. An invocation of Korean law *with* proof was successful in *Soh v Commonwealth* (2006) 231 ALR 425.

³⁵ *Migration Act 1958* (Cth) s 420(2)(a).

³⁶ *Aala v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 204 (Unreported, Gray, Carr and Goldberg JJ, 21 June 2002).

³⁷ *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326.

³⁸ *Applicants in V 722 of 2000 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1059 (Unreported, Ryan J, 18 September 2002); *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239 (Unreported, Weinberg J, 17 March 2006).

³⁹ *Singh v Singh* [2006] WASC 182 (Unreported, Simmonds J, 24 August 2006).

⁴⁰ See, eg, the classic statement of Jordan CJ in *Vacuum Oil Pty Co Ltd v Stockdale* (1942) 42 SR (NSW) 239, 243–4.

⁴¹ *DrillTec* [2002] NSWSC 1173 (Unreported, Macready AJ, 10 December 2002); *Mills v Commonwealth* [2003] Aust Torts Reports ¶81-714; *Puttick* [2006] VSC 370 (Unreported, Harper J, 13 October 2006).

⁴² *Boele v Norsemeter Holding AS* [2002] NSWCA 363 (Unreported, Handley, Beazley and Giles JJA, 13 November 2002); *AEP Belgium SA v Packaging House Aust Pty Ltd* [2003] VSC 174 (Unreported, Habersberger J, 3 June 2003); *OW Bunker & Trading Co Ltd A/S v 'Mawashi Al Gasseem'* [2005] FCA 1041 (Unreported, Finn J, 26 July 2005); *O'Driscoll* [2006] WASCA 25 (Unreported, Malcolm CJ, McLure JA and Murray AJA, 22 February 2006).

applications to set aside service out of the jurisdiction.⁴⁴ In each of these cases, the moving party bears a strong burden of persuasion,⁴⁵ but that burden exists quite independently of the foreign law involved.

That said, while the relevant test alters neither the burden of proof on the merits, nor the standard or manner of proving foreign law, the presence of a foreign law element sometimes affects the court's decision on whether to grant or deny the motion. Courts are thus reluctant, for example, to strike out a defence based on foreign law if a fuller hearing on that issue will clarify matters in the defendant's favour,⁴⁶ and the absence of evidence of foreign law may be relevant when deciding whether to grant or refuse an injunction.⁴⁷ In each case, the relevant test is prescribed by the general law of procedure, and not by the presence of the foreign law element.

Whatever the type of case, more often than not it is in neither party's interest to plead or prove foreign law, even when the case has obvious connections with a foreign jurisdiction. Judges frequently observe that the applicable foreign law has not been pleaded or proven,⁴⁸ and the absence of such proof had led some judges to speculate about what the relevant principles of foreign law might be. In some cases, this is a matter of drawing plausible inferences from the facts of the particular case,⁴⁹ and in others, judges draw general conclusions about the legal system in question.⁵⁰ Some cases reveal more fanciful forms of speculation.⁵¹

⁴³ (2000) 201 CLR 552, 576 (Gaudron, McHugh, Gummow and Hayne JJ).

⁴⁴ See, eg. *Neufeld* [2002] NSWCA 335 (Unreported, Spigelman CJ, Hodgson and Beazley JJA, 2 October 2002).

⁴⁵ See, eg. *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62.

⁴⁶ *DrillTec* [2002] NSWSC 1173 (Unreported, Macready AJ, 10 December 2002) [23]. The same is true of applications for summary judgment: *AEP Belgium SA v Packaging House Aust Pty Ltd* [2003] VSC 174 (Unreported, Habersberger J, 3 June 2003).

⁴⁷ *Cosmetic Equipment Co Pty Ltd v Mobile Cosmetic Treatment Pty Ltd* [2007] VSC 194 (Unreported, Williams J, 27 April 2007).

⁴⁸ *Joondalup Country Club Holdings Ltd v Basuki* [2000] WASC 251 (Unreported, Master Sanderson, 17 October 2000) (Singapore); *Knott v Signature Security Group Pty Ltd* (2001) 104 IR 84 (US, Illinois); *Pico Holdings Inc v Dominion Capital Pty Ltd* [2001] VSC 334 (Unreported, Bongiorno J, 30 August 2001) (US, California); *Quanta Software International Pty Ltd v Computer Management Services Pty Ltd* [2001] AIPC ¶91-757 (NZ); *Versace v Monte* [2001] FCA 1572 (Unreported, Tamberlin J, 6 November 2001) (Italy); *International Entertainment (Aust) Pty Ltd v Churchill* [2002] QSC 317 (Unreported, Holmes J, 11 October 2002) (NZ); *CTA International Pty Ltd v Sichuan Changhong Electric Co Ltd* [2002] VSC 374 (Unreported, Byrne J, 6 September 2002) (People's Republic of China); *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108 (Unreported, Hansen J, 24 April 2003) (Japan, Malaysia and Singapore); *Government of Japan v Global Air Leasing Pty Ltd* [2003] QSC 221 (Unreported, Muir J, 17 July 2003) (Jordan); *Klein v Botsman* [2003] TASSC 106 (Unreported, Blow J, 20 October 2003) (France); *Official Trustee v Pastro* [2004] FCA 713 (Unreported, Mansfield J, 9 June 2004) (Italy); *Zhu v Treasurer (NSW)* (2004) 218 CLR 530 (PRC); *The Society of Lloyd's v Marich* (2004) 139 FCR 560 (England); *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* (2004) 141 FCR 29 (Liberia); *JL and PTL* [2006] FamCA 445 (Unreported, Carmody J, 1 June 2006) (Ghana).

⁴⁹ *Fina Research SA v Halliburton Energy Services Inc* [2002] FCA 1281 (Unreported, Moore J, 21 October 2002) (Norwegian patents law); *Ye v Crown Ltd* [2003] FCA 507 (Unreported, Gyles J, 23 May 2003) (Chinese foreign exchange controls).

⁵⁰ For example, that the State of Illinois is an important commercial centre which 'could be presumed therefore to have a legal system of some sophistication and efficiency' (*Knott v Signature Security Group Pty Ltd* (2001) 104 IR 84, 94 (Wright J)), or that France is not

III IS THERE ANY OBLIGATION TO PLEAD FOREIGN LAW?

In *Zhang*, the High Court adopted a strict *lex loci delicti* rule — the law of the place where a wrong is committed — for which there was no ‘flexible exception’.⁵² Despite this, their Honours held that

there is no obligation upon either party to plead foreign law in order to render a claim or cross-claim justiciable. If, however, either party seeks to rely on foreign law, rules of court and general principles of pleading may oblige the party to plead the relevant foreign law.⁵³

Their Honours went on to hold that in order to establish a cause of action, it is not necessary for a plaintiff to plead that any particular foreign law was applicable.⁵⁴ Indeed, their Honours quoted one case with apparent approval to the effect that it is not even necessary for the plaintiff to plead that the facts giving rise to the cause of action occurred in any particular law area.⁵⁵

There is thus an apparent inconsistency between the seemingly ‘absolute’ choice of law rule and the absence of any obligation to apply it. The consequence of this discrepancy is that Australian law can often apply by default notwithstanding the choice of law rule.⁵⁶ In addition, as Richard Fentiman and Peter North observe, a further consequence of the non-mandatory nature of Australian and English choice of law rules is that a failure to plead foreign law effects an implied but permissible choice of law in favour of the *lex fori*.⁵⁷

For this reason — and despite Mary Keyes’ assertion to the contrary⁵⁸ — Australian choice of law rules are not mandatory: even if the relevant choice of law rule contains no flexible exception, a plaintiff will not be non-suited merely because they fail to plead and prove foreign law.⁵⁹ Each party has the right, but not the obligation, to plead foreign law. This principle can be contrasted with the ‘vested rights’ approach to private international law in which choice of law rules are indeed mandatory. When that approach held sway in the United States of America, the proof of foreign law was indeed an essential element of a cause of

a paradise for foreign judgment creditors: *Klein v Botsman* [2003] TASSC 106 (Unreported, Blow J, 20 October 2003).

⁵¹ See, eg, the suggestion by one judge that under Malaysian law a contract could be enforced despite a lack of privity, discussed in *Malaysia International Shipping Corporation Bhd v VISA Australia Pty Ltd* [2003] VSCA 64 (Unreported, Phillips, Buchanan and Chernov JJA, 30 May 2003). Malaysian law does in fact recognise the doctrine of privity: *Kepong Prospecting Ltd v Schmidt* [1968] AC 810 (on appeal from the Federal Court of Malaysia).

⁵² *Zhang* (2002) 210 CLR 491, 520 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁵³ *Ibid* 517 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁵⁴ *Ibid* 518 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁵⁵ *Walker v W A Pickles Pty Ltd* [1980] 2 NSWLR 281, 284–5 (Hutley JA).

⁵⁶ See below Part VII.

⁵⁷ Fentiman, above n 7, 70–4; Peter North, ‘Choice in Choice of Law’ in Peter North (ed), *Essays in Private International Law* (1993) 171, 179–81.

⁵⁸ Mary Keyes, ‘Foreign Law in Australian Courts: *Neilson v Overseas Projects Corporation of Victoria Ltd*’ (2007) 15 *Torts Law Journal* 9, 27–8.

⁵⁹ *Neilson* (2005) 223 CLR 331, 372 (Gummow and Hayne JJ), approving *Zhang* (2002) 210 CLR 491, 518–19 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). For an early and very direct illustration of this point: see *Wright, Heaton & Co v Barrett* (1892) 13 NSWLR 206.

action governed by that foreign law, such that the plaintiff's case would be dismissed if the foreign law were not proven.⁶⁰

By contrast, the modern Australian approach means that a party need only plead foreign law in certain limited circumstances. If a plaintiff wishes to rely on a particular aspect of foreign law that confers an advantage not contained in local law, then they must plead it.⁶¹ Likewise, where a defendant wishes to rely upon the applicable foreign law by way of defence, 'then, in the ordinary way, it is for the defendant to allege and prove that law as an exculpatory fact.'⁶² If the defendant chooses to plead and prove foreign law which offers them a good defence, the plaintiff cannot complain if their suit is then dismissed on the merits. However, that dismissal arises only because of the defendant's successful proof, and not because of any mandatory obligation imposed on the plaintiff by the choice of law rule itself.

The Australian approach to foreign law issues is shaped by its approach to litigation procedure more generally. For better or worse, it is hardly surprising that the parties have more flexibility in an adversarial system than under a system in which the judge has greater inquisitorial powers.⁶³ As Gummow and Hayne JJ remarked in *Neilson*:

It is for the parties and their advisers to decide the ground upon which their battle is to be fought. The trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues that the parties tender for decision by the court.⁶⁴

Likewise, Gleeson CJ observed that the trial judge was obliged to decide the issues raised by the parties on the evidence that they presented, even if that evidence were incomplete:

This is adversarial litigation, and the outcome of such litigation is commonly influenced by the way in which the parties have chosen to conduct their respective cases. Decisions about such conduct may have been based on tactical and other considerations which are unknown to a trial judge or an appellate court.⁶⁵

So far as the technical rules of pleading are concerned, foreign law is an uneasy fit. Despite its 'legal' content, foreign law is treated as a matter of fact and

⁶⁰ See, eg, *Cuba Railroad Co v Crosby*, 22 US 473 (1912) (failure to prove Cuban law); *Walton v Arabian American Oil Co*, 223 F 2d 541 (2nd Cir, 1956) (failure to prove Saudi Arabian law). The vested rights theory has been rejected in Australia. In the private international law context see: *Zhang* (2002) 210 CLR 491, 517 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). In the constitutional context: see *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 573 (Gummow and Hayne JJ).

⁶¹ *Zhang* (2002) 210 CLR 491, 518–19 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁶² *Ibid* 518. See, eg, *Idoport Pty Ltd v National Australia Bank Ltd [No 14]* [2000] NSWSC 1141 (Unreported, Einstein J, 7 December 2000).

⁶³ Cf Geeroms, above n 9, ch 2.

⁶⁴ *Neilson* (2005) 223 CLR 331, 370.

⁶⁵ *Ibid* 338. On this point, Kirby J was certainly correct to observe that the unsatisfactory nature of the evidence of Chinese law 'probably originates in an erroneous assumption on the part of the appellant's advisers (evident in the pleadings) that it was sufficient for the appellant to rely on the substantive law of the Western Australian forum': at 395. This assumption may have been erroneous but it was certainly understandable, as Mrs Neilson commenced her case in 1997, well before either *John Pfeiffer* (2000) 203 CLR 503 or *Zhang* (2002) 210 CLR 491 were decided.

is thus subject to the normal rules about pleading and particularising material facts.⁶⁶ However, even if foreign law were a true matter of ‘law’, this would not prevent a party from raising it in the pleadings. Rule 13.02 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) is typical:⁶⁷

- (1) Every pleading shall —
 - (a) contain in a summary form a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved;
 - (b) where any claim, defence or answer of the party arises by or under any Act, identify the specific provision relied on;
 - (c) state specifically any relief or remedy claimed.
- (2) A party may by that party’s pleading —
 - (a) raise a point of law;
 - (b) plead a conclusion of law if the material facts supporting the conclusion are pleaded.

One consequence of the designation of foreign law as a question of fact is that it will not suffice to plead merely the conclusion of foreign law upon which the party relies. Rather, the contents and substance of the foreign law are material facts that must be set out with appropriate particulars.⁶⁸ In *Zhang*, the following passage from *Bullen and Leake and Jacob’s Precedents of Pleadings* was approved:⁶⁹

Where a party relies on foreign law to support his claim or as a ground or defence thereto, he must specially plead the foreign law relied on in his statement of claim or defence, as the case may be, and he should give full particulars of the precise statute, code, rule, regulation, ordinance or case law relied on, with the material sections, clauses or provisions thereof.⁷⁰

As with other questions of fact, one does not plead the evidence by which the foreign law will be proven. In *Neilson*, for example, the defendant might have pleaded that the Chinese limitation period for tort is one year and pleaded art 136 of the *Principles of Civil Law of the People’s Republic of China* (1986) (‘*General Principles*’) as the particular: it would not have been obliged to plead that the evidence for this would be expert testimony.

Given the non-mandatory nature of Australian choice of law rules and the ability of parties to rely on the default application of Australian law, it is very

⁶⁶ *Allstate Life Insurance Co v ANZ Banking Group Ltd* (Unreported, Federal Court of Australia, Beaumont J, 13 September 1994). See below Part V for the status of foreign law as a question of fact.

⁶⁷ See also *Federal Court Rules 1979* (Cth) O 11; *Uniform Civil Procedure Rules 2005* (NSW) pt 14; *Uniform Civil Procedure Rules 1999* (Qld) r 149; *Supreme Court Civil Rules 2006* (SA) r 98; *Supreme Court Rules 2000* (Tas) div 17; *Rules of the Supreme Court 1971* (WA) O 20.

⁶⁸ On the other hand, one should avoid pleading a ‘prolix smorgasbord of particulars’: *Amaca Pty Ltd v Frost* [2006] NSWCA 173 (Unreported, Spigelman CJ, Santow and McColl JJA, 4 July 2006) [24] (Spigelman CJ).

⁶⁹ (2002) 210 CLR 491, 517–18 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁷⁰ Sir Jack I H Jacob and Iain S Goldrein (eds), *Bullen and Leake and Jacob’s Precedents of Pleadings* (13th ed, 1990) 1170. On the current English position: see Sir Jack I H Jacob and Iain S Goldrein (eds), *Bullen and Leake and Jacob’s Precedents of Pleadings* (15th ed, 2004) vol 1, 20–1.

difficult to mount a successful challenge to a party's pleading — or failing to plead — foreign law.⁷¹ On the other hand, even though the High Court has affirmed that a plaintiff has no obligation to plead the applicable foreign law, justice requires certain limitations to this principle. Few would disagree with Mason P's observation in *Dyno Wesfarmers Ltd v Knuckey* ('*Dyno*') that the High Court was not 'advising pleaders to refrain from pleading the foreign place of tort if it may take the defendant by surprise.'⁷² Young CJ in Eq seems to have gone further, saying that a plaintiff will be *obliged* to plead foreign law where 'an opponent might be caught by surprise' were it not pleaded.⁷³

While the remarks in *Dyno* were obiter,⁷⁴ other cases have forced courts to confront the problem of the non-obvious *lex causae* more directly. Some courts have adhered to the High Court's decision in *Zhang* very strictly, even when the consequences might seem unjust. For example, in *Australian Wool Innovation Ltd v Newkirk [No 2]*, the applicant alleged that the respondent animal rights activists had committed the tort of intimidation in various foreign jurisdictions, without alleging any particular governing law. Despite the unfairness of obliging the respondents to defend themselves under numerous foreign laws — which might or might not have recognised the tort of intimidation at all — Hely J rejected the respondents' application to strike out the statement of claim,

as there is no obligation to plead foreign law in order to render a claim justiciable or to establish a cause of action. It is only necessary for a party to adduce evidence of foreign law if an applicant seeks to rely on a particular advantage or a respondent on a specific defence ...⁷⁵

A similar case was *Darcy v Medtel Pty Ltd [No 3]*; a products liability class action concerning pacemakers manufactured in one or other of several US states.⁷⁶ Sackville J frankly conceded that it was 'impossible on the evidence before me to ascertain the *lex loci delicti*'.⁷⁷ Even so, his Honour allowed amendments to the pleadings without the respondent being able to know whether or not the new claims were statute-barred under the *lex loci delicti*.

In *Spotwire Pty Ltd v Visa International Service Association [No 2]*,⁷⁸ a different sort of factual lacuna arose. In that case, the plaintiff, Spotwire Pty Ltd, alleged that the defendant had committed the tort of inducing breach of contract. While the relevant contract was governed by German law, the plaintiff gave no hint about the place of the alleged tort, nor any other means to ascertain the *lex*

⁷¹ See, eg, *Neufeld* [2002] NSWCA 335 (Unreported, Spigelman CJ, Hodgson and Beazley JJA, 2 October 2002) [26] (Hodgson JA); *Hewitt v ATP Tour Inc* (2004) 236 LSJS 1, 17–18 (Mullighan J).

⁷² [2003] NSWCA 375 (Unreported, Mason P, Handley JA and Young CJ in Eq, 17 December 2003) [26].

⁷³ *Ibid* [55].

⁷⁴ *Dyno* [2003] NSWCA 375 (Unreported, Mason P, Handley JA and Young CJ in Eq, 17 December 2003) was a case in which it was obvious that PNG law applied, and thus amendments to the pleadings to identify the *lex causae* were not strictly necessary.

⁷⁵ *Australian Wool Innovation Ltd v Newkirk [No 2]* [2005] FCA 1307 (Unreported, Hely J, 16 September 2005) [68].

⁷⁶ [2004] FCA 807 (Unreported, Sackville J, 25 June 2004).

⁷⁷ *Ibid* [20].

⁷⁸ [2004] FCA 571 (Unreported, Bennett J, 7 May 2004).

causae. Bennett J was of the view — contrary to that of the NSW Court of Appeal in *Dyno* — that the decision in *Zhang* meant that the plaintiff was *never* obliged to plead the applicable law. Nonetheless, her Honour held that the defendant had the right to

sufficient particulars to determine questions of the applicability of foreign law but [*Zhang*] is clear on the obligations of the applicant in its pleading. Spotwire is not obliged to plead this issue but is, in my view, obliged to provide sufficient information by way of material facts and particulars to enable Visa to form a view. It is no answer to say that Visa can make its own enquiries.⁷⁹

This seems fair: elementary justice requires that defendants not be left guessing as to the law under which they are obliged to defend themselves. Even where the plaintiff is happy to have Australian law apply to their claim (and thus does not plead foreign law), it is essential for the defendant to know the governing law, which might offer a defence unavailable under Australian law. While many defendants will already know (or be able to surmise) the law under which they are liable, this cannot be assumed in every case. Given that it is usually defendants — and not plaintiffs — who raise foreign law issues, this is a point of some importance. Thus, even if the non-mandatory nature of Australian choice of law rules does not oblige plaintiffs to plead the applicable law, they should certainly be obliged to plead sufficient facts to allow the defendant to identify the applicable law and plead any defences that may arise thereunder.

IV WHAT SORT OF FOREIGN LAW IS PROVEN?

Parties before Australian courts have invoked an astonishing array of foreign legal issues. While there is nothing new about the application of even quite exotic foreign law,⁸⁰ the increased internationalisation of Australian litigation is readily apparent from the recently decided cases. As we shall see, parties often invoke foreign law without offering any proof of its contents, but in each of the cases cited below, proof of the relevant foreign law was in fact tendered. This is not to say that the court was satisfied with this proof in every case, nor that the same techniques of proof were adopted in all cases.

While the recent High Court cases might suggest that tort is the only aspect of foreign law that is brought before the Australian courts, the contrary is true — a wide variety of foreign law is raised in Australia, including:

- tort (including accidents compensation and products liability);⁸¹

⁷⁹ Ibid [94].

⁸⁰ See, eg, the early use of Chinese law in *Re Will of John Lee Hing* (1901) 18 WN (NSW) 239, and Japanese law in *Bowden Bros & Co v Imperial Marine & Transport Insurance Co* (1905) 5 SR (NSW) 614.

⁸¹ *Mills v Commonwealth* [2003] Aust Torts Reports ¶81-714 (Cambodia); *Neilson* (2005) 223 CLR 331 (PRC); *Penn v Caprioglio* (Unreported, County Court of Victoria, Judge Wodak, 12 September 2002) (England); *Zhang* (2002) 210 CLR 491 (France, but note that the High Court specifically drew attention to the paucity of evidence on this point: at 500 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ)); *Morgan v Union Shipping (NZ) Ltd* [2001] NSWSC 325 (Unreported, Sperling J, 4 May 2001); affd *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690 (NZ); *Amaca Pty Ltd v Frost* [2006] NSWCA 173 (Unreported, Spigelman CJ, Santow and McColl JJA, 4 July 2006) (NZ); *Puttick* [2006] VSC 370 (Unreported,

- contract;⁸²
- trusts;⁸³
- real property;⁸⁴
- commercial law (including corporations law, incorporated associations and restraint of trade);⁸⁵
- maritime law;⁸⁶
- financial law (including consumer credit, guarantees and currency conversion);⁸⁷
- regulatory law (including natural resources and telecommunications regulation);⁸⁸
- family law;⁸⁹
- succession;⁹⁰

Harper J, 13 October 2006) (NZ); *Dyno* [2003] NSWCA 375 (Unreported, Mason P, Handley JA and Young CJ in Eq, 17 December 2003) (PNG).

- ⁸² *New Zealand Pelt Export Co Ltd v Trade Indemnity New Zealand Ltd* [2002] VSC 570 (Unreported, Warren J, 18 December 2002) (NZ); *Rataplan Pty Ltd v Federal Commissioner of Taxation* (2004) 56 ATR 407 ('*Rataplan*') (US, Texas); *O'Driscoll* [2006] WASCA 25 (Unreported, Malcolm CJ, McLure JA and Murray AJA, 22 February 2006) (Singapore); *Hume Computers Pty Ltd v Exact International BV* [2006] FCA 1440 (Unreported, Jacobson J, 25 October 2006) (Netherlands); *Garsec v His Majesty the Sultan of Brunei* [2007] NSWSC 882 (Unreported, McDougall J, 15 August 2007) (Brunei).
- ⁸³ *Goldwyn v Mazal* [2003] NSWSC 427 (Unreported, Bryson J, 16 May 2003) (Israel); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 228 ALR 174 (Vanuatu).
- ⁸⁴ *China Construction Realty Ltd v Sino Business Services Pty Ltd* [2004] VSC 91 (Unreported, Byrne J, 26 March 2004) (PRC); *Power v Tabain* [2006] WASC 59 (Unreported, Simmonds J, 5 April 2006) (Croatia).
- ⁸⁵ *Arkin v Tridon Australia Pty Ltd* (2002) 43 ACSR 610 (Canada, Ontario); *Granite Springs Pty Ltd v Intercooler Water Dispensers Pty Ltd* [2000] VSC 224 (Unreported, Warren J, 5 June 2000) (Canada, Quebec); *Western Ventures Pty Ltd v Resource Equities Ltd* (2005) 53 ACSR 568 (PRC, Hong Kong Special Autonomous Region); *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 (Unreported, Allsop J, 15 August 2005) (Cook Islands); *Yoon v Song* (2000) 158 FLR 295 (Korea); *International Entertainment (Aust) Pty Ltd v Churchill* [2002] QSC 317 (Unreported, Holmes J, 11 October 2002) (NZ); *Virgtel Ltd v Zabusky* (2006) 57 ACSR 389 (Nigeria); *SPI Spirits (Cyprus) Ltd v Diageo Australia Ltd [No 2]* (2006) 155 FCR 150 (Russia); *Dachser* [2000] NSWSC 1049 (Unreported, Rolfe J, 16 November 2000) (Switzerland); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 406 (Unreported, Hely J, 8 April 2005) (Vanuatu).
- ⁸⁶ *OW Bunker & Trading Co Ltd A/S v 'Mawashi Al Gasseem'* [2005] FCA 1041 (Unreported, Finn J, 26 July 2005) (Denmark).
- ⁸⁷ *Re S A Cryonic Medical* [2002] VSC 338 (Unreported, Nettle J, 22 August 2002) (France); *DrillTec* [2002] NSWSC 1173 (Unreported, Macready AJ, 10 December 2002) (Germany); *Penhall-Jones v Stiftung Ausbildungsfonds Jung'she Psychologie* [2004] NSWSC 789 (Unreported, Hoeben J, 24 August 2004) ('*Penhall-Jones*') (Switzerland).
- ⁸⁸ *Martech International Pty Ltd v Energy World Corporation Ltd* [2006] FCA 1004 (Unreported, French J, 3 August 2006) (India); *Gilsan (International) Ltd v Optus Networks Pty Ltd [No 2]* [2005] NSWSC 38 (Unreported, McDougall J, 11 February 2005) (US); *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402 (Unreported, Hargrave J, 1 November 2006) (US, New York).
- ⁸⁹ *S and D* [2005] FamCA 1035 (Unreported, Warnick J, 13 October 2005) (PRC); *DP v Commonwealth Central Authority* (2001) 206 CLR 401 (Greece); *Hooshmand and Ghasmezadegan* [2000] FLC ¶93-043 (Iran); *Lo Surdo v Public Trustee* [2003] NSWSC 837 (Unreported, Hamilton J, 17 September 2003) (Italy); *Lo Surdo v Public Trustee* [2005] NSWSC 1186 (Unreported, Hamilton J, 23 November 2005) (Italy); *EJK and TSL* (2006) 35 Fam LR 559 (Korea); *JVH and ACNG* [2006] FMCA Fam 551 (Unreported, Laphorn FM, 15 September 2006) (Singapore).

- immigration and citizenship;⁹¹ and
- criminal law and procedure (including forfeiture).⁹²

Not to mention law relating to the legal process such as

- general civil procedure;⁹³
- service of process;⁹⁴
- limitation of actions;⁹⁵
- enforcement of judgments;⁹⁶
- *res judicata*;⁹⁷ and
- alternative dispute resolution.⁹⁸

⁹⁰ *Murakami v Murakami* [2005] NSWSC 953 (Unreported, Windeyer J, 26 September 2005) (Indonesia); *Gray v Gray* (2004) 12 BPR 22 755 (NZ); *Re Will of Ulvstig (Dec'd)* [2000] QSC 66 (Unreported, Williams J, 24 March 2000) (Sweden).

⁹¹ *MZXLT v Minister for Immigration and Citizenship* [2007] FMCA 799 (Unreported, McInnis FM, 29 May 2007); *SZBPO v Minister for Immigration* [2004] FMCA 1015 (Unreported, Raphael FM, 22 December 2004) (PRC); *Re SRPP* (2000) 62 ALD 758 (Indonesia and Portugal); *Applicants in V 722 of 2000 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1059 (Unreported, Ryan J, 18 September 2002) (Italy).

⁹² *Appellant V324 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 259 (Unreported, Hill, Stone and Allsop JJ, 20 September 2004) (PRC); *Zeng v The Queen* [2005] NSWSC 1344 (Unreported, McClellan CJ at CL, 16 December 2005) (PRC); *Von Arnim v Federal Republic of Germany [No 2]* [2005] FCA 662 (Unreported, Finkelstein J, 3 June 2005) (Germany); *Singh v Minister for Immigration and Multicultural Affairs [No 2]* [2001] FCA 327 (Unreported, Heerey J, 30 March 2001) (India); *SZCAQ v Minister for Immigration* [2006] FMCA 229 (Unreported, Raphael FM, 24 February 2006) (India); *Aala v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 204 (Unreported, Gray, Carr and Goldberg JJ, 21 June 2002) (Iran); *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326 (Italy); *R v Lodhi* (2006) 199 FLR 328 (Pakistan); *Dutton v O'Shane* (2003) 200 ALR 710 (South Africa); *Mokbel* [2006] VSC 137 (Unreported, Gillard J, 16 March 2006) (US); *Evans v European Bank Ltd* (2004) 61 NSWLR 75 (Vanuatu); *Savic v Minister for Immigration and Multicultural Affairs* [2001] FCA 1787 (Unreported, Mansfield J, 18 December 2001) (Yugoslavia).

⁹³ *Boele v Norsemeter Holding AS* [2002] NSWCA 363 (Unreported, Handley, Beazley and Giles JJA, 13 November 2002) (Norway); *Schnabel v Yung Lui* [2002] NSWSC 15 (Unreported, Bergin J, 1 February 2002) (US).

⁹⁴ *Channar Mining Pty Ltd v CMIEC (Channar) Pty Ltd* [2003] WASC 253 (Unreported, Pullin J, 18 December 2003) (PRC); *Standard Commodities Pty Ltd v Société Socinter Department Centragel* (2005) 54 ACSR 489 (France); *Rasmussen v Eltrax Systems Pty Ltd [No 4]* [2006] NSW IR Comm 225 (Unreported, Marks J, 14 July 2006) (US, Georgia and Minnesota); *McGrath v National Indemnity Co* (2004) 182 FLR 309 (US, Nebraska).

⁹⁵ *Gray v Gray* (2004) 12 BPR 22 755; *O'Driscoll* [2006] WASCA 25 (Unreported, Malcolm CJ, McLure JA and Murray AJA, 22 February 2006) (Singapore); *Neufeld* [2002] NSWCA 335 (Unreported, Spigelman CJ, Hodgson and Beazley JJA, 2 October 2002) (US, California).

⁹⁶ *Fina Research SA v Halliburton Energy Services Inc* [2002] FCA 1331 (Unreported, Moore J, 29 October 2002) (Belgium); *MindShare Communications Ltd v Orleans Investments Pty Ltd* [2000] FCA 521 (Unreported, Katz J, 20 April 2000) (PRC, HK SAR); *Welcome Real-Time SA v Catuity Inc [No 2]* [2002] FCA 258 (Unreported, Heerey J, 27 February 2002) (France); *Compagnie Maritime* [2005] FCA 1063 (Unreported, Kiefel J, 3 August 2005) (France); *Limberis v N Limberis & Sons Pty Ltd* [2004] SASC 186 (Unreported, Gray J, 25 June 2004) (Greece); *Soh v Commonwealth* (2006) 231 ALR 425 (Korea); *Aopi v Rapke* [2002] NSWSC 711 (Unreported, Levine J, 15 August 2002) (PNG).

⁹⁷ *Raveh v The Official Receiver of the State of Israel in His Capacity as Liquidator North America Bank Ltd (in liq)* [2002] WASCA 27 (Unreported, Parker and Templeman JJ and Olsson AUJ, 27 February 2002) (Israel).

⁹⁸ *Australian Power & Water Pty Ltd v Independent Public Business Corporation of Papua New Guinea* [2003] NSWSC 1227 (Unreported, McDougall J, 19 December 2003) (PNG).

V IS FOREIGN LAW A QUESTION OF FACT?

A 'A Question of Fact of a Peculiar Kind'

In Australian courts, foreign law is a question of fact, not of law.⁹⁹ The historical reason for this probably lies in the common law's limited doctrine of judicial notice, and the consequent need to prove by evidence those matters lying outside its scope.¹⁰⁰ One theoretical rationale for the position is that stated by Joseph H Beale:

since the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law. ... [T]he terms of the foreign law constitute a fact to be considered in the determination of the case. ... The law of the forum is the only law that prevails as such. The foreign law is a fact in the transaction.¹⁰¹

Despite this factual characterisation, it has been said that the question of foreign law is 'a question of fact of a peculiar kind'.¹⁰² This peculiarity stems from the essentially legal nature of the question notwithstanding its traditional designation as fact.¹⁰³ The 'peculiarity' of foreign law is manifested in a number of ways. First, despite being a question of fact, foreign law is always determined by the judge, even in jury trials.¹⁰⁴ As Gillard J noted in *Mokbel*: 'Once the judge determines the effect of the foreign law, the judge directs the jury as to what the foreign law is and its application and the jury decides what effect the law, as stated, has on the facts as found by them.'¹⁰⁵

Secondly, appellate courts are more likely to interfere with trial judges' findings on foreign law than they are with findings on other questions of fact.¹⁰⁶ Thirdly, new evidence of foreign law is not uncommonly received even after the trial decision,¹⁰⁷ although some courts have a more conservative attitude on this

⁹⁹ For an early English expression of the doctrine: see *Mostyn v Fabrigas* (1774) 1 Cowp 160, 174; 98 ER 1021, 1028 (Lord Mansfield).

¹⁰⁰ Fentiman, above n 7, 5, 66–7. Nussbaum proposes an alternative historical reason, namely that '[t]he type of case which first induced English courts to take cognizance of foreign law ... makes it clear that it was not foreign law as such but its formative role in a given setting of facts which was contemplated by the courts', and that a 'factual' tradition was thereby created: Nussbaum, above n 6, 249.

¹⁰¹ Joseph H Beale, *A Treatise on the Conflict of Laws* (1935) vol 1, 53.

¹⁰² *Parkasho v Singh* [1968] P 233, 250 (Cairns J).

¹⁰³ Cf the observation of Williams J in *Baron de Bode's Case* that '[t]here is, in [foreign law], little analogy with the proof of facts ordinarily so called': (1845) 8 QB 208, 260; 115 ER 854, 873.

¹⁰⁴ *Evidence Act 1995* (Cth) s 176; *Evidence Act 1995* (NSW) s 176; *Evidence Act 1929* (SA) s 63A; *Evidence Act 2001* (Tas) s 176; *Supreme Court Civil Procedure Act 1932* (Tas) s 36; *Supreme Court Act 1986* (Vic) s 39; *Supreme Court Act 1935* (WA) s 172. Oddly, neither Queensland nor the NT have such a provision. See also *R v Hammer* [1923] 2 KB 786, discussing *Administration of Justice Act 1920* (UK) c 81, s 20.

¹⁰⁵ [2006] VSC 137 (Unreported, Gillard J, 16 March 2006) [19].

¹⁰⁶ *Parkasho v Singh* [1968] P 233.

¹⁰⁷ *Aala v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 204 (Unreported, Gray, Carr and Goldberg JJ, 21 June 2002); *Channar Mining Pty Ltd v CMIEC (Channar) Pty Ltd* [2003] WASC 253 (Unreported, Pullin J, 18 December 2003); *European Bank Ltd v Citibank Ltd* (2004) 60 NSWLR 153; *Gilsan (International) Ltd v Optus Networks Pty Ltd [No 2]* [2005] NSWSC 38 (Unreported, McDougall J, 11 February 2005); *S and D* [2005] FamCA 1035 (Unreported, Warnick J, 13 October 2005); *O'Driscoll* [2006] WASC 25 (Unreported, Malcolm CJ,

point.¹⁰⁸ Finally, the traditional common law rule was that foreign law, unlike other questions of fact, could be proved only by expert evidence and not by direct evidence such as by producing a copy of the relevant statute itself. As Lord Brougham said in the *Sussex Peerage Case*, the court ‘has not the organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it.’¹⁰⁹

The decision to classify foreign law as a question of fact has a number of consequences. First, where a right of appeal is restricted to questions of law, the misapplication of foreign law is an error of fact, and is therefore unreviewable.¹¹⁰ Secondly, to the extent that there is a distinction between errors of fact and errors of law, relief can be granted for the consequences of a mistake of foreign law, but not domestic law.¹¹¹ Thirdly, decisions on foreign law carry no precedential value:¹¹² as Lord Wright said in *Lazard Bros v Midland Bank*, ‘[n]o earlier decision of the court can relieve the judge of the duty of deciding the question on the actual evidence given in the particular case.’¹¹³

The non-precedential nature of foreign law sometimes leads to Australian courts giving conflicting interpretations of the same law, such as has occurred with s 394 of the *Accident Insurance Act 1998* (NZ).¹¹⁴ In light of these sorts of problem, it may be desirable to enact a local equivalent of s 4(2) of the *Civil Evidence Act 1972* (UK) c 30, which provides that where a question of foreign law has previously been determined, that determination becomes admissible — but rebuttable — prima facie evidence of the relevant foreign law. Such a provision might in theory reduce the possibility of conflicting decisions and avoid the need to reinvent the wheel. However, as Fentiman points out, the

McLure JA and Murray AJA, 22 February 2006); *Optus Networks Pty Ltd v Gilsan (International) Ltd* [2006] NSWCA 171 (Unreported, Beazley, Hodgson and McColl JJA, 5 July 2006).

¹⁰⁸ See, eg, *United States Trust Co of New York v Australia & New Zealand Banking Group Ltd* (1995) 37 NSWLR 131, 148 (Sheller JA), referring to *Supreme Court Act 1970* (NSW) s 75A(8).

¹⁰⁹ (1844) 11 Cl & F 85, 115; 8 ER 1034, 1046. But see below Part VI on the modern modes of proof.

¹¹⁰ This point is significant in Australian migration law: see, eg, *Singh v Minister for Immigration and Multicultural Affairs [No 2]* [2001] FCA 327 (Unreported, Heerey J, 30 March 2001). However, it is also important in those European jurisdictions whose highest courts proceed by way of cassation for error of law alone: Wolff, above n 9, 223. A similar issue arises on appeal from arbitrators’ decisions: cf *Re Independent State of Papua New Guinea [No 2]* [2001] 2 Qd R 162; *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402 (Unreported, Hargrave J, 1 November 2006).

¹¹¹ See, eg, *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd; The Amazonia* [1990] 1 Lloyd’s Rep 236; *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] 1 WLR 1784. But see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

¹¹² *Neilson* (2005) 223 CLR 331, 370 (Gummow and Hayne JJ). But see *Puttick* [2006] VSC 370 (Unreported, Harper J, 13 October 2006) [35], implausibly suggesting that a local decision on foreign law could be ‘binding on Australian courts’.

¹¹³ [1933] AC 279, 297–8.

¹¹⁴ That section prevents any proceedings ‘in any court in New Zealand’ arising out of personal injury, otherwise than in accordance with the Act. In NSW, this has been held to be a substantive bar on proceedings even outside New Zealand (*Amaca Pty Ltd v Frost* [2006] NSWCA 173 (Unreported, Spigelman CJ, Santow and McColl JJA, 4 July 2006)), whereas in Victoria it is no bar and does ‘no more than recognise that the New Zealand Parliament cannot prevent claims being made in foreign jurisdictions’: *Puttick* [2006] VSC 370 (Unreported, Harper J, 13 October 2006) [30]. Harper J in fact referred to s 394 of the *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ), but it seems clear that his Honour had in mind the predecessor of that statute, namely the *Accident Insurance Act 1998* (NZ).

practical use of the section is limited: if the parties actually agree that the foreign law is to a given effect, they are likely to admit as much in the pleadings; and if they disagree, then one or other of them is likely to tender evidence to prove the content of foreign law and thus displace the statutory presumption.¹¹⁵ Nonetheless, the real value of the section may actually arise before the parties even think about pleadings and evidence as it offers a small measure of assistance to the parties in predicting how a local court is likely to treat the particular foreign law should a litigious dispute arise.

Ultimately, however, it may be best to reconceptualise foreign law as a true matter of law. Even within the bounds of the traditional English rule, Martin Wolff was able to say that:

What the court applies to the facts laid before it is ‘law’, not mere fact. It is meaningless to say that a judge applies a ‘fact’ to facts. Every judicial decision constitutes a syllogism; its major premise is a legal rule and cannot be anything else, its minor is a set of facts.¹¹⁶

Martin Davies has pointed to the US experience in doing away with the traditional rule,¹¹⁷ and suggests that the change to treating foreign law as a matter of ‘law’ is ‘more daunting in prospect than in fact.’¹¹⁸ That is probably correct, and treating foreign law as ‘law’ may indeed remove many of the ‘peculiarities’ listed above. However, Davies’ argument is more directed towards a liberalisation of the means by which foreign law can be established; a matter that has little to do with the distinction between fact and law. In this regard, Australia’s rules about the means by which foreign law can be established are actually far more liberal than is commonly supposed, and are indeed based on US precedents.¹¹⁹ However, one problem remains: even in the US, the plaintiff has no obligation to allege — let alone prove — the content of foreign law.¹²⁰ Thus unlike all other questions of law, it is not essential for the success of the plaintiff’s case.¹²¹ It is

¹¹⁵ Fentiman, above n 7, 223.

¹¹⁶ Wolff, above n 9, 217.

¹¹⁷ *Federal Rules of Civil Procedure* r 44.1 (2005) provides that ‘[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the *Federal Rules of Evidence*. The court’s determination shall be treated as a ruling on a question of law.’

¹¹⁸ Martin Davies, ‘*Renvoi* and Presumptions about Foreign Law’ (2006) 30 *Melbourne University Law Review* 244, 265.

¹¹⁹ The forerunner of the present ss 174–5 of the uniform *Evidence Acts* was s 11 of the *Criminal Law and Evidence Amendment Act 1891* (NSW), which was drawn from the *Code of Procedure 1848* (New York) s 426. See John Townshend (ed), *The Code of Procedure of the State of New York* (7th ed, 1860), referred to in the marginal note to the 1891 NSW Act. The historical curiosity is that the current Australian legislation is derived from US and New Zealand models, but not from s 38 of Sir James Stephen’s *Indian Evidence Act 1872*. That Act also forms the basis of the law in much of South and Southeast Asia: see, eg, *Evidence Act 1950* (Malaysia) s 38; *Evidence Act 1990* (Singapore) c 97, s 40.

¹²⁰ In other words, *Cuba Railroad Co v Crosby*, 22 US 473 (1912) is no longer good law: see Charles Allen Wright and Arthur R Miller, *Federal Practice and Procedure* (2nd ed, 1995) vol 9, 658–60 and the cases there cited. As in Australia, the modern US position is that in the absence of proof of foreign law, local law can apply by default: see, eg, *Vishipco Line v Chase Manhattan Bank NA*, 660 F 2d 854 (2nd Cir, 1981); *Bartsch v Metro-Goldwyn-Mayer Inc*, 391 F 2d 150 (2nd Cir, 1968).

¹²¹ As Albert A Ehrenzweig notes, the complexity of the US approach to the ‘factual’ nature of foreign law stems in large part from the consequences of accepting, and then rejecting, the

certainly debatable whether it is preferable to replace an anomalous question of fact with an anomalous question of law.

B *Fact, Application and the 'Ultimate Issue'*

One curious feature of Australian law is the apparent principle — frequently asserted in the cases, but seldom explained — that the *application* of foreign law to the particular facts and circumstances of the case is a question of law for the court, upon which evidence is not receivable. In the latest edition of *Conflict of Laws in Australia*, P E Nygh and Martin Davies say that:

A distinction must ... be drawn between the content of foreign law, which is a question of fact on which evidence is receivable, and the application of that foreign law, once its content has been ascertained, to the facts of the instant case. The latter is a matter for the forum to determine.¹²²

This statement first appeared in the fourth edition of the text, with a citation to *United States Surgical Corporation v Hospital Products International Pty Ltd*.¹²³ From then on, a great many cases have endorsed the proposition,¹²⁴ most without any comment or analysis.

So, what was it that *Hospital Products* decided?¹²⁵ McLelland J held that while the 'content of the foreign law ... is to be treated in this Court as an issue of fact upon which evidence is receivable', the same was not true of the application of that law to the particular facts of the case.¹²⁶ The latter was 'a question of law for

'vested rights' approach to private international law: Albert A Ehrenzweig, *A Treatise on the Conflict of Laws* (1961) 360–1. Of course, Ehrenzweig's own view of the status of foreign law is very much coloured by his *lex fori* approach generally.

¹²² Nygh and Davies, above n 4, 329.

¹²³ P E Nygh, *Conflict of Laws in Australia* (4th ed, 1984) 200, citing *United States Surgical Corp v Hospital Products International Pty Ltd* (Unreported, Supreme Court of New South Wales, McLelland J, 19 April 1982) ('*Hospital Products*'). The actual citation in Nygh is to [1982] *Australian Current Law Digest* 350.

¹²⁴ See, eg, *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209 (a decision of Gummow J, who was likely to have had a better recollection of *Hospital Products* (Unreported, Supreme Court of New South Wales, McLelland J, 19 April 1982) than most); *United States Trust Co of New York v Australia & New Zealand Banking Group Ltd* (1995) 37 NSWLR 131, 146 (Sheller JA); *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 6]* (1996) 64 FCR 79, 82 (Lindgren J); *Dachser* [2000] NSWSC 1049 (Unreported, Rolfe J, 16 November 2000) [39]; *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 644 (Einstein J, another judge likely to have a good recollection of *Hospital Products*); *Neilson* (2005) 223 CLR 331, 371 (Gummow and Hayne JJ); *Hermanowski v United States of America* (2006) 149 FCR 93, 126 (Gyles, Conti and Graham JJ); *Mokbel* [2006] VSC 137 (Unreported, Gillard J, 16 March 2006) [13]–[15]. Also, a notably early endorsement of the principle was the decision of Powell J in *Scruples Imports Pty Ltd v Crabtree & Evelyn Pty Ltd* (1983) 1 IPR 315.

¹²⁵ The decision has never been reported, although it is often mistaken for the one reported at [1982] 2 NSWLR 766: see, eg, P E Nygh, *Conflict of Laws in Australia* (6th ed, 1995) 268; Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997) 411. The correct judgment is exceedingly difficult to obtain: it is not accessible through the normal electronic repositories of unreported judgments, and it appears to be available only from the Law Courts Library in Sydney. I am therefore very grateful to the staff of the Allens Arthur Robinson library in Sydney for their assistance in obtaining a copy.

¹²⁶ *Hospital Products* (Unreported, Supreme Court of New South Wales, McLelland J, 19 April 1982) 1–2.

this Court upon which evidence is not receivable.¹²⁷ The source of this distinction was said to be the decision of the House of Lords in *Di Sora v Phillipps* ('*Di Sora*'),¹²⁸ a case concerning 'the proper scope of expert evidence in respect of the construction of a foreign contract'.¹²⁹ McLelland J acknowledged that some more recent English cases such as *Camille & Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* ('*Dreyfus Foundation*')¹³⁰ 'may suggest a wider area for expert evidence than is consistent with the distinction I have just mentioned', but he concluded that the true rule was 'the principle established in *Di Sora*'.¹³¹

For all its repetition in subsequent cases, is this principle correct? It is submitted, with respect, that it is not. First, the principle is not securely derived from authority. *Di Sora* was a case about the parol evidence rule as it applies to the interpretation of contracts, and the case is not authority for any proposition about the proof of foreign law more generally. The trial judge, Wood V-C, was quite explicit about the question in issue, namely 'the extent to which I ought pay any attention to the parol testimony in this case'; that parol testimony being the evidence of foreign lawyers about the meaning of the contract under foreign law.¹³² On appeal, Lord Cranworth said that once the judge has had assistance on the relevant foreign law and rules of construction, 'the Court must interpret the contract itself on ordinary principles of construction'.¹³³ Lord Chelmsford said that

it is difficult to understand how the construction of a contract can be a question of fact ... The meaning of a foreign instrument, therefore (cleared of the difficulty of technical terms), cannot be a fact to be proved; it is at the utmost merely a probable opinion of the witnesses as to the construction which would likely to be put upon it by the foreign tribunal.¹³⁴

His Lordship concluded that '[t]he office of construction of a written instrument, whether foreign or domestic, brought into controversy before our tribunals, properly belongs to the Judge'.¹³⁵

Nothing in *Di Sora* addresses the application of foreign law outside the construction of contracts, and English private international law has consistently distinguished such construction from the application of foreign law more

¹²⁷ *Ibid* 2.

¹²⁸ (1863) 10 HLC 624; 11 ER 1168.

¹²⁹ *Hospital Products* (Unreported, Supreme Court of New South Wales, McLelland J, 19 April 1982) 2.

¹³⁰ [1954] 1 Ch 672.

¹³¹ *Hospital Products* (Unreported, Supreme Court of New South Wales, McLelland J, 19 April 1982) 2.

¹³² *Di Sora* (1863) 10 HLC 624, 627; 11 ER 1168, 1169. Subsequent cases have cited *Di Sora* as authority on the parol evidence rule: see, eg, *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60, 79 (Isaacs J); *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227, 244 (Mahoney JA); cf *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306, 342 (Pincus JA).

¹³³ *Di Sora* (1863) 10 HLC 624, 633; 11 ER 1168, 1172.

¹³⁴ *Ibid* 638; 1174.

¹³⁵ *Ibid* 639; 1174.

generally.¹³⁶ *Dreyfus Foundation*, for example, was not a contractual case, and thus it was ‘competent [for] a New York lawyer to state, as an expert, his opinion on the question how in the circumstances of the present case they would be construed by the Superior Courts of New York State’,¹³⁷ and it was ‘well within the competence of a witness as to the operation of a given instrument under foreign law to state the content of the relevant law and to add his opinion as to the effect attributable under that law to the instrument in question.’¹³⁸ Likewise, in *A/S Tallinna Laevauhisus v Estonian State Steamship Line*, it was said that it is

the function of the expert witness to interpret [the] legal effect [of foreign law] in order to convey to the English court the meaning and effect which a Court of the foreign country would attribute to it if it applied correctly the law of that country.¹³⁹

It therefore seems that the Australian version of the ‘no evidence of application’ principle is a uniquely broad interpretation of old English authority that is not followed even in England itself.

A second and more fundamental objection to the supposed principle is that, even regarding the interpretation of contracts, it is inconsistent with modern Australian authority on the role of the court when applying foreign law. The High Court in *Neilson* emphasised that an Australian judge is obliged to do precisely what Lord Chelmsford deprecated in *Di Sora*, namely to discern the ‘opinion of the witnesses as to the construction which would likely to be put upon it by the foreign tribunal’.¹⁴⁰ In Australia, the manner in which foreign law would be applied by the foreign court is a question of fact, and an Australian judge is not authorised to ‘apply’ foreign law as if they were themselves a foreign judge. As Gummow and Hayne JJ said in *Neilson*:

an Australian court applying the common law rules of choice of law applies Australian law, but it derives the content of the rights and obligations of the parties by reference to the chosen foreign law. That process is radically different from treating the foreign law as giving to Australian courts powers or discretion under that foreign law which then fall to be exercised by the Australian court according to Australian principles.¹⁴¹

¹³⁶ Dicey and Morris, above n 7, 265. See also Fentiman, above n 7, 178, 251–7. On the construction of documents: see, eg, *King v Brandywine Reinsurance Co* [2005] 1 Lloyd’s Rep 655, 669–70 (Waller LJ); *Evalis SA v SIAT* [2003] 2 Lloyd’s Rep 377, 387 (Andrew Smith J). On the application of foreign law more generally: see, eg, *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd’s Rep 284, 300 (Moore-Bick J).

¹³⁷ [1954] 1 Ch 672, 692 (Evershed MR).

¹³⁸ *Ibid* 709 (Jenkins LJ).

¹³⁹ *A/S Tallinna Laevauhisus v Estonian State Steamship Line* (1946) 80 Ll L Rep 99, 107 (Scott LJ).

¹⁴⁰ *Di Sora* (1863) 10 HLC 624, 638; 11 ER 1168, 1174.

¹⁴¹ *Neilson* (2005) 223 CLR 331, 369.

Or, as Kirby J said:

the duty of the primary judge in the forum was not ... to step into the shoes of a foreign judge, exercising that judge's powers as if sitting in the foreign court. Instead, it was to ascertain, according to the evidence or other available sources, how the foreign court itself would have resolved the substantive rights of the parties ...¹⁴²

In light of this, a supposed rule that prevents the court hearing evidence of how a foreign court would actually deal with the facts of the case is hardly conducive to accurate fact-finding.¹⁴³ The need for such evidence may be particularly apparent in those cases in which the question of foreign law is novel or difficult, or in which there is no pattern of overseas decision-making that would assist the Australian judge to determine how a power or discretion would be exercised by the foreign court.¹⁴⁴

This reasoning explains why Lindgren J was mistaken in *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 6]* when his Honour held that 'expert legal opinion which impinges upon the essential curial function of applying law, whether domestic or foreign, to facts' was inadmissible as it would 'permit abdication of the judicial duty and usurpation of the judicial function'.¹⁴⁵ Central to his Honour's reasoning was the belief that 'foreign law remains law to be applied by the Court'.¹⁴⁶ However, as Einstein J pointed out in *Idoport Pty Ltd v National Australia Bank Ltd [No 12]*, foreign law and its application is a question of fact, and '[e]xpert evidence on such a question is necessary to inform the court of a matter in respect of which it is, ex hypothesi, ignorant.'¹⁴⁷

Foreign law being a question of fact, the abolition of the ultimate issue rule in the uniform *Evidence Acts* makes it clear that evidence of the application of foreign law is not inadmissible merely because it relates to an 'ultimate issue'.¹⁴⁸ More difficult questions may arise in those jurisdictions that have not abolished the rule,¹⁴⁹ but it is doubtful that the weak form in which the modern rule is expressed provides much of a barrier to the admission of evidence about the application of foreign law,¹⁵⁰ especially in light of the High Court's insistence in *Neilson* on the proper role of evidence regarding foreign law.

Thus, notwithstanding its frequent invocation since 1982, the supposed rule that any evidence of the application of foreign law to the facts is inadmissible

¹⁴² Ibid 392–3.

¹⁴³ As Einstein J noted in *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 644, the supposed rule means that in a case where a discretion arises under foreign law, 'evidence of how a discretion would in fact be exercised in the instant case would not be admissible.'

¹⁴⁴ Cf *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209.

¹⁴⁵ *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 6]* (1996) 64 FCR 79, 83.

¹⁴⁶ Ibid.

¹⁴⁷ *Idoport Pty Ltd v National Australia Bank Ltd [No 12]* (2000) 50 NSWLR 640, 657.

¹⁴⁸ *Evidence Act 1995* (Cth) s 80(a); *Evidence Act 1995* (NSW) s 80(a); *Evidence Act 2001* (Tas) s 80(a).

¹⁴⁹ Cf *Neilson* (2005) 223 CLR 331, 371.

¹⁵⁰ On the modern form of the rule: see LexisNexis, *Cross on Evidence*, vol 1 (at 83) ¶29 105–25.

has no firm basis in authority, principle or logic, and is best discarded. Although they have no obligation to do so, parties should be free to introduce relevant evidence on the application of foreign law.

VI HOW IS FOREIGN LAW PROVEN?

Unlike in most civil law countries, in Australia it is up to the parties to provide their own proof of foreign law, as Australian judges have no obligation to apply or ascertain foreign law *ex officio*.¹⁵¹ Neither do US judges, despite the characterisation of foreign law in that country as a matter of ‘law’.¹⁵² Foreign law, being a question of fact in Australia, must be proved by evidence unless the law permits it to be ascertained in some other way. Indeed, even if foreign law were reconceptualised as a true matter of ‘law’, this would not avoid the need to devise means by which its content can be ascertained:¹⁵³ the classification of something as a matter of law — even domestic law — does not necessarily avoid the need for adequate proof of its contents.¹⁵⁴

The rules governing proof of foreign law in Australia are more liberal than many would assume. In all Australian jurisdictions except Victoria, foreign statutes can be proved without the necessity for expert evidence.¹⁵⁵ Likewise, in all jurisdictions except Victoria and Queensland, foreign unwritten law can be proved in a similar manner. Special provisions also exist for the proof of New Zealand materials.¹⁵⁶ The practical consequence of these provisions is that, in a

¹⁵¹ That said, a handful of contrary examples can be found in which adventurous Australian judges have undertaken their own research into foreign law: see, eg, *Moonlighting International Pty Ltd v International Lighting Pty Ltd* [2000] FCA 41 (Unreported, Finkelstein J, 31 January 2000); *European Bank Ltd v Citibank Ltd* (2004) 60 NSWLR 153; *We Two Pty Ltd v Shorrock [No 2]* (2005) 220 ALR 749. On the European position: see generally Geeroms, above n 9, ch 2; Hartley, above n 9.

¹⁵² See, eg, *Gilson v Republic of Ireland*, 606 F Supp 38 (D DC, 1984); *affd* 787 F 2d 655 (DC Cir, 1985); *Clarkson Co Ltd v Shaheen*, 660 F 2d 506 (2nd Cir, 1988); *Seattle Totems Hockey Club Inc v National Hockey League*, 783 F 2d 1347 (9th Cir, 1986); *Luckett v Bethlehem Steel Corporation*, 618 F 2d 2373 (10th Cir, 1980).

¹⁵³ This is perhaps the true significance of *Federal Rules of Civil Procedure* r 44.1 (2005). That rule allows the court to consider ‘any relevant material or source, including testimony, whether or not submitted by a party or admissible under the *Federal Rules of Evidence*’. Nonetheless, it would be wrong to overstate the degree to which that rule has altered US practice in cases governed by foreign law. In most such cases, US judges ascertain foreign law by techniques that would be familiar to their Australian counterparts: see, eg, Committee on International Commercial Dispute Resolution, Association of the Bar of the City of New York, *Proof of Foreign Law after Four Decades with Rule 44.1 FRCP and CPLR 4511* (2006). See also *Ganem v Heckler*, 746 F 2d 844, 853–4 (Mikva J) (DC Cir, 1984). For an example of expert evidence being received on Australian law: see *Conservation Council of Western Australia Inc v Aluminum Co of America*, 518 F Supp 270 (WD Pa, 1981).

¹⁵⁴ For example, in Hong Kong, traditional Chinese law and custom has the force of domestic law in some circumstances. Nonetheless, its content is proven by expert evidence. For a colourful illustration: see *Suen Toi Lee v Yau Yee Ping* [2002] 1 HKLRD 197.

¹⁵⁵ One might add that this returns the law to the position that existed prior to *Baron de Bode’s Case*: see John Westlake, *A Treatise on Private International Law* (1st ed, 1858) 394. The inability to tender statutes without expert evidence was one mischief that led to the enactment of the *Evidence Amendment Act 1891* (NSW). Regarding that mischief: see *Graham v Proudfoot* (1886) 2 WN (NSW) 109.

¹⁵⁶ *Evidence and Procedure (New Zealand) Act 1994* (Cth) pt 6. This provides all courts with a simplified means of establishing the content of NZ statutory materials and other public docu-

great many cases, foreign law can be adequately proved without any need for expert testimony. Given this, it is somewhat surprising that leading texts nonetheless portray expert testimony as being the primary mode of proof.¹⁵⁷ The correct view is that the statutory provisions have the leading role in most cases, and that expert testimony has a gap-filling and subsidiary function.¹⁵⁸ As Ryan J said, referring to the provisions of the *Evidence Act 1995* (Cth):

If ... the text of a presumably relevant statute of that country or an authoritative statement in a legal text book or other authority appears to suggest with sufficient precision the effect of the law in question, the court or tribunal is entitled, in the absence of contradictory expert evidence, to make a finding accordingly ...¹⁵⁹

A *The Uniform Evidence Acts*

The uniform *Evidence Acts* apply in the federal courts, the Australian Capital Territory, NSW and Tasmania. Interestingly, neither of the Australian Law Reform Commission draft Bills that preceded the enactment of the uniform Acts contained any provisions regarding foreign law.¹⁶⁰ Rather, the present provisions first appeared in the Evidence Bill 1993 (Cth), and were derived from the *Evidence Act 1971* (ACT).¹⁶¹

Section 174 of the uniform *Evidence Acts* provides that:

- (1) Evidence of a statute, proclamation, treaty or act of state of a foreign country may be adduced in a proceeding by producing:
 - (a) a book or pamphlet, containing the statute, proclamation, treaty or act of state, that purports to have been printed by the government or official printer of the country or by authority of the government or administration of the country; or
 - (b) a book or other publication, containing the statute, proclamation, treaty or act of state, that appears to the court to be a reliable source of information; or

ments. See, eg, *Wenceslas* [2007] FamCA 398 (Unreported, Finn, May and Thackray JJ, 30 April 2007).

¹⁵⁷ Nygh and Davies, above n 4, 329–34; Mortensen, above n 4, 230–2.

¹⁵⁸ The statutory provisions modify but do not oust the common law, and expert evidence is thus still admissible on points covered by the statute: *Subbotovsky v Waung* [1968] 2 NSWLR 261.

¹⁵⁹ *Applicants in V 722 of 2000 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1059 (Unreported, Ryan J, 18 September 2002) [33]. This statement has been approved subsequently: see, eg, *VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 80; *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239 (Unreported, Weinberg J, 17 March 2006). But see *Boele v Norsemeter Holding AS* [2002] NSWCA 363 (Unreported, Handley, Beazley and Giles JJA, 13 November 2002), in which the appellant suggested that notwithstanding s 174 of the *Evidence Act 1995* (NSW) evidence of foreign statutes could only be tendered by an appropriately qualified expert. While Giles JA did not accede to this argument, it seems to have given his Honour some pause for thought: at [34]. See also *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 406 (Unreported, Hely J, 8 April 2005) (tender of Vanuatu statutes).

¹⁶⁰ Law Reform Commission, *Evidence*, Interim Report No 26 (1985); Law Reform Commission, *Evidence*, Report No 38 (1987). The relevant provisions of the ACT legislation in turn appear to have been derived from their NSW counterparts.

¹⁶¹ See Geoff Bellamy and Peter Meibusch, Civil Law Division, Attorney-General's Legal Practice, *Commonwealth Evidence Law* (1995) 154.

- (c) a book or pamphlet that is or would be used in the courts of the country to inform the courts about, or to prove, the statute, proclamation, treaty or act of state; or
 - (d) a copy of the statute, proclamation, treaty or act of state that is proved to be an examined copy.
- (2) A reference in this section to a statute of a foreign country includes a reference to a regulation or by-law of the country.¹⁶²

This provision has been interpreted liberally: for example, foreign statutes have been proved simply by reference to internet sites.¹⁶³ However, the generality of the provision is not unlimited, and the text that is sought to be proved must fall within the statutory description.¹⁶⁴ Of course, judges must also consider the currency of any written law they consult, although the ‘presumption of continuance’ can be used to establish this.¹⁶⁵

So far as non-statutory law is concerned, s 175 of the uniform *Evidence Acts* provides that:

- (1) Evidence of the unwritten or common law of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.
- (2) Evidence of the interpretation of a statute of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the interpretation of the statute.¹⁶⁶

There is a curious apparent discrepancy between ss 174 and 175. While s 174 of the Acts allows the admission of ‘book[s] or pamphlet[s]’ that would ‘inform the courts about’ the content of foreign statute law, such materials are apparently not admissible to prove the content of foreign *unwritten* law under s 175 unless they are ‘reports of judgments’. A foreign textbook is not a report of judgments,

¹⁶² *Evidence Act 1995* (Cth) s 174; *Evidence Act 1995* (NSW) s 174; *Evidence Act 2001* (Tas) s 174.

¹⁶³ *MindShare Communications Ltd v Orleans Investments Pty Ltd* [2000] FCA 521 (Unreported, Katz J, 20 April 2000) (Hong Kong); *Rasmussen v Eltrax Systems Pty Ltd [No 4]* [2006] NSWIRComm 225 (Unreported, Marks J, 14 July 2006) (US, Minnesota and Georgia). See also *R v Turner [No 4]* (2001) 10 Tas R 81, in which Blow J relied on s 40 of the *Evidence and Procedure (New Zealand) Act 1994* (Cth) to use the internet in order to inform himself of a NZ statute. Curiously, his Honour also seemed to think that s 175 of the *Evidence Act 1995* (Cth) was relevant to the case, presumably because it was in federal jurisdiction. However, that Act applies to federal courts, not to non-federal courts exercising federal jurisdiction.

¹⁶⁴ *In Marriage of Khademollah* (2000) 159 FLR 42, 85 (Kay and Holden JJ). In that case, a document issued by the Iranian Embassy in Canberra listing the requirements before it would register a foreign decree did not amount to proof of the Iranian law of divorce as it was not a statute, regulation or by-law.

¹⁶⁵ *Optus Networks Pty Ltd v Gilsan (International) Ltd* [2006] NSWCA 171 (Unreported, Beazley, Hodgson and McColl JJA, 5 July 2006) [89] (Hodgson JA). One imagines that such a presumption will be more easily applied in the case of enduring texts like European civil codes as compared with more ephemeral sources of law.

¹⁶⁶ *Evidence Act 1995* (Cth) s 175; *Evidence Act 1995* (NSW) s 175; *Evidence Act 2001* (Tas) s 175. Subsection 2 of s 175 responds to the defect in the *Evidence Amendment Act 1891* (NSW), which was revealed in *Homeward Bound Gold Mining Co NL v McPherson* (1896) 17 NSW 281.

but it nonetheless ‘inform[s] the courts about’ foreign law: is it thus admissible to prove the content of foreign statutes, but not unwritten law?¹⁶⁷

While it may sometimes be necessary to offer proof that particular books are in fact used in the courts of the foreign country, it is also possible to take judicial notice of this. For example, judicial notice has been taken of the fact that the Federal Reporter contains the decisions of the US Courts of Appeal, and is used in those courts in the requisite manner.¹⁶⁸ One imagines that judicial notice could be taken of other authorised or well-known report series.¹⁶⁹

B Statutory Provisions in Other Jurisdictions

In South Australia and Western Australia, publications (whether official or not) of foreign written laws may be referred to in order to prove foreign law, but the judge ‘shall not be bound to accept or act on the statements in any such books as evidence of such laws.’¹⁷⁰ So far as officially printed statutes are concerned, WA provides that such publications ‘shall’ constitute ‘prima facie evidence’ of foreign law.¹⁷¹

A more restrictive approach is taken in Queensland and the Northern Territory. In both jurisdictions, officially printed statutes are admissible as proof of foreign law, but an unofficial publication is only admissible in Queensland if it ‘appears to the court to be a reliable source of information containing the statute’.¹⁷² It is only admissible in the NT if it ‘is proved to the satisfaction of the Court to be commonly admitted as evidence of it in the courts of that place.’¹⁷³

The precise phraseology used to describe foreign written laws differs a little between jurisdictions,¹⁷⁴ although it is unlikely that a court would refuse to accept proof of a foreign written law merely because of a discrepancy in nomenclature.¹⁷⁵

¹⁶⁷ Cf *Evidence Act 1929* (SA) s 63; *Evidence Act 1906* (WA) s 71.

¹⁶⁸ *Optus Networks Pty Ltd v Gilsan (International) Ltd* [2006] NSWCA 171 (Unreported, Beazley, Hodgson and McColl JJA, 5 July 2006) [87] (Hodgson JA).

¹⁶⁹ For example, one can scarcely imagine that evidence would ever need to be given that the All England Reports or the Dominion Law Reports are used by the courts of England and Canada respectively, despite the fact that neither is an authorised report. Law reports from civil law jurisdictions would raise more complex questions: given the low precedential value of case law in France, could judicial notice be taken of the way the *Recueil Dalloz* is used by the French courts, or would evidence need to be tendered on this point?

¹⁷⁰ *Evidence Act 1929* (SA) s 63; *Evidence Act 1906* (WA) s 71.

¹⁷¹ *Evidence Act 1906* (WA) s 70. See, eg, *Hooshmand and Ghasmezhadegan* [2000] FLC ¶93-043.

¹⁷² *Evidence Act 1977* (Qld) s 68(f).

¹⁷³ *Evidence Act 1939* (NT) s 63(1).

¹⁷⁴ *Evidence Act 1929* (SA) s 63 and *Evidence Act 1906* (WA) s 70 refer to ‘statutes, ordinances or other written laws’; *Evidence Act 1977* (Qld) s 68(a) refers to a ‘statute, proclamation, treaty or act of state’; and *Evidence Act 1939* (NT) s 63 refers to a ‘statute, code or other written law’. It has been held under the former *Evidence Act 1898* (NSW) that ‘written law’ encompassed regulations and orders made under statute: *Walt Disney Productions v H John Edward Publishing Co Pty Ltd* (1954) 71 WN (NSW) 150. Cf s 174(2) of the uniform *Evidence Acts*.

¹⁷⁵ To take but one example, Italian law has an astonishing hierarchy of normative texts (*Legge, Decreto Legge, Decreto Legislativo, Decreto del Presidente della Repubblica, Decreto del Presidente del Consiglio dei Ministri, Decreto Interministeriale, Decreto Ministeriale* and *Circolare*), not all of which are statutes passed by Parliament. Nonetheless it seems doubtful that a Queensland court would reject proof of an Italian law merely because it was not a ‘statute’.

In the NT, evidence of the unwritten law of foreign countries may be given ‘by the production of books purporting to contain reports of cases decided in the courts of that place and textbooks treating of the laws of that place.’¹⁷⁶ In SA and WA, the equivalent provision is phrased somewhat differently. There,

books purporting to contain reports of decisions of courts or judges in such country, and text books treating of the laws of such country, may be referred to by all courts for the purpose of ascertaining the laws in force in such country; but such courts shall not be bound to accept or act on the statements in any such books as evidence of such laws.¹⁷⁷

Thus, by contrast with the uniform *Evidence Acts*, in SA, WA and the NT, textbooks *are* admissible to prove foreign unwritten law.

The SA and WA provisions mirror s 40 of the *Evidence Act 1908* (NZ),¹⁷⁸ which was considered by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*,¹⁷⁹ a NZ case concerning a franchise agreement governed by NSW law in which the trial judge had, at the invitation of the parties, determined certain questions of NSW law without the benefit of expert evidence. The Privy Council held that

the main purpose of s 40 is to give the Judge the power to decide questions of foreign law in the absence of other expert evidence. [It] states that such materials may (not must) be looked at for the purpose of ascertaining the laws in force in such country. If that is the purpose of looking at the foreign sources it must be the necessary conclusion that the Judge can ascertain and find the law.¹⁸⁰

However, given the controversial and complex legal question involved — namely, the existence or otherwise of a general contractual duty of good faith under NSW law — their Lordships considered that the trial judge ‘erred in the exercise of his discretion in seeking to determine this difficult question of NSW law without proper expert evidence.’¹⁸¹ This sentiment is understandable, but it is perhaps excessively self-denying. After all, the NSW law of contract is hardly likely to be the most ‘difficult’ or ‘foreign’ law faced by the NZ courts. If s 40 cannot be invoked in order to prove the law of NSW, when else could it be? Moreover, at least where the foreign law is from a familiar common law jurisdiction, the trial judge is surely as well equipped as any expert to read and interpret the relevant authorities.

Curiously, Victoria lacks any such statutory provisions, and evidence of foreign law must therefore be proved by expert evidence according to the common

¹⁷⁶ *Evidence Act 1939* (NT) s 63(2).

¹⁷⁷ *Evidence Act 1929* (SA) s 63; *Evidence Act 1906* (WA) s 71.

¹⁷⁸ These provisions share a common history: all are ultimately derived from s 4 of the *Evidence Further Amendment Act 1885* (NZ). That provision was re-enacted as s 40 of the *Evidence Act 1905* (NZ) and again as s 40 of the present *Evidence Act 1908* (NZ). Section 71 of the *Evidence Act 1906* (WA) was directly copied from the 1905 NZ Act. Section 71 of the WA Act was in turn copied by s 21 of the *Evidence Amendment Act 1925* (SA), which was re-enacted as the present s 63 of the *Evidence Act 1929* (SA).

¹⁷⁹ [2004] 1 NZLR 289.

¹⁸⁰ *Ibid* 308 (Lord Browne-Wilkinson).

¹⁸¹ *Ibid* 309 (Lord Browne-Wilkinson).

law rules.¹⁸² The only exception is that Victorian courts, like their counterparts in WA,¹⁸³ are able to take judicial notice of the statutes of the United Kingdom, NZ and Fiji.¹⁸⁴

C Expert Proof

In the absence of statutory modifications, the traditional common law rule is that foreign law can only be established by the opinion evidence of a suitably qualified expert in that foreign law.¹⁸⁵ Like any other expert witnesses, experts on foreign law must establish their expertise in order for their opinion evidence to be admissible.¹⁸⁶ That said, it is exceedingly rare for an expert's testimony to be rejected for lack of expertise.¹⁸⁷ indeed, some evidence is admitted where the witness's claim to expertise is marginal in the extreme.¹⁸⁸

Practical experience of the particular foreign law is not essential. For example, testimony on current Croatian law was accepted from a former Yugoslav lawyer now living in Australia,¹⁸⁹ and evidence is frequently taken from academics who are expert in the foreign law, whether they are Australian or from the relevant overseas jurisdiction.¹⁹⁰ Of course, academic expertise is no guarantee that a court will accept the witness's conclusions, and courts have indeed rejected such

¹⁸² See, eg, *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175 (Unreported, Hollingworth J, 4 December 2006) [76]. But see *Penn v Caprioglio* (Unreported, County Court of Victoria, Judge Wodak, 12 September 2002) for an example of the use of foreign law apparently without expert proof.

¹⁸³ *Evidence Act 1906* (WA) s 53(1)(b).

¹⁸⁴ *Evidence Act 1958* (Vic) ss 59–61, 77. The inclusion of NZ and Fiji is a curious relic of the era of the Federal Council of Australasia. These provisions first entered Victorian law as the *Evidence Act 1898* (Vic). Cf *Federal Council Evidence Act 1886* 49 Vict 2 (Federal Council of Australasia). The limited scope of the latter Act was made clear in: *Guthrie v Guthrie* (1890) 16 VLR 280; *Picturesque Atlas Co Ltd v Searle* (1892) 18 VLR 633.

¹⁸⁵ *Sussex Peerage Case* (1844) 11 Cl & F 85; 8 ER 1034; *Baron de Bode's Case* (1845) 8 QB 208; 115 ER 854.

¹⁸⁶ Likewise, experts on foreign law must comply with the courts' usual procedures for dealing with expert testimony: see, eg, *Arkin v Tridon Australia Pty Ltd* (2002) 43 ACSR 610.

¹⁸⁷ See, eg, *Clyne v Federal Commissioner of Taxation [No 2]* (1981) 57 FLR 198, in which a Sydney barrister was insufficiently qualified to give evidence on Liechtenstein law.

¹⁸⁸ See, eg, *Mills v Commonwealth* [2003] Aust Torts Reports ¶81-714, a case concerning Cambodian civil law in which it appeared that neither expert had ever practised civil law. See also *Hooshmand and Ghazmezagagan* [2000] FLC ¶93-043, where Penny J admitted testimony on Iranian law from a lawyer practising in WA who, although born in Iran, had left that country at 10 years of age and had never practised there. The witness's testimony was admitted in part because it was buttressed by written sources of Iranian law admitted under s 71 of the *Evidence Act 1906* (WA): see above Part VII(B).

¹⁸⁹ *Power v Tabain* [2006] WASC 59 (Unreported, Simmons J, 5 April 2006).

¹⁹⁰ *Re SRPP* (2000) 62 ALD 758 (an Australian professor of Indonesian law and a Portuguese professor of international refugee law); *Dachser* [2000] NSWSC 1049 (Unreported, Rolfe J, 16 November 2000) (reliance on the opinion of Swiss professors); *Arkin v Tridon Australia Pty Ltd* (2002) 43 ACSR 610 (Canadian professor); *Lo Surdo v Public Trustee* [2003] NSWSC 837 (Unreported, Hamilton J, 17 September 2003) (Italian professor); *China Construction Realty Ltd v Sino Business Services Pty Ltd* [2004] VSC 91 (Unreported, Byrne J, 26 March 2004) (Chinese professor who also practised privately); *Rataplan* (2004) 56 ATR 407 (US professors); *Re Murakami*; *Murakami v Murakami* [2005] NSWSC 953 (Unreported, Windeyer J, 26 September 2005) (Australian professor of Indonesian law); *O'Driscoll* [2006] WASC 25 (Unreported, Malcolm CJ, McLure JA and Murray AJA, 22 February 2006) (Singaporean professor).

testimony for a variety of reasons unconnected with the witness's qualifications.¹⁹¹

At common law, evidence of foreign law is to be derived from the expert's opinion, rather than directly from the primary sources of foreign law.¹⁹² This means that courts have sometimes accepted expert evidence that contradicts or disregards apparently authoritative foreign decisions.¹⁹³ Experts on foreign law are able to give evidence that the applicable foreign law would be developed a certain way, or even that applicable foreign decisions were wrongly decided and would be overruled. Evidence to that effect is sometimes rejected because it lacks credibility,¹⁹⁴ but it is not inadmissible merely because it relates to the expert's opinion about what the foreign courts *would* do when faced with the issue, as opposed to what they have previously done.¹⁹⁵

The archetype of the use of expert testimony occurs in cases in which both sides call well-qualified and dispassionate witnesses who are then cross-examined, leaving the judge to make a well-informed determination about the application of foreign law. While such cases do occur,¹⁹⁶ other cases indicate that foreign law can be proved in far more casual ways, especially in interlocutory matters in which hearsay evidence is admissible.¹⁹⁷ Examples include proof of Danish and Japanese law by hearsay,¹⁹⁸ proof of French law by reference to an email from a French lawyer,¹⁹⁹ or proof of Norwegian law by tendering a letter from a Norwegian judge to the litigants in earlier related proceedings.²⁰⁰ In cases before the various migration tribunals — in which the strict rules of evidence do

¹⁹¹ See, eg, *Mond v Berger* (2004) 10 VR 534 (US professor of Rabbinical law); *S and D* [2005] FamCA 1035 (Unreported, Warnick J, 13 October 2005) (Chinese professor); *Mokbel* [2006] VSC 137 (16 March 2006) (US professor).

¹⁹² *Nelson v Bridport* (1845) 8 Beav 527, 539–41; 50 ER 207, 212 (Lord Langdale MR); *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, 208 (Lord Wright).

¹⁹³ *Guaranty Trust of New York v Hannay & Co* [1918] 2 KB 623, 638 (Pickford LJ), 667 (Scrutton LJ); *Bumper Development Corporation Ltd v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362, 1368–71 (Purchas LJ).

¹⁹⁴ See, eg, *Islamic Republic of Iran v Berend* [2007] EWHC 132 (QB) (Unreported, Eady J, 1 February 2007).

¹⁹⁵ Cf Justice P W Young, 'English and Australian Law as to Trusts Affecting Shares' (1998) 72 *Australian Law Journal* 116, 117. Justice Young's comments were directed at the use of such evidence in English litigation concerning Australian law: *Re Harvard Securities Ltd* [1997] 2 BCLC 369, 384–5 (Neuberger J). As it turns out, the experts' prediction may not have been accurate: see *White v Shortall* (2006) 206 FLR 254.

¹⁹⁶ See, eg, *Dachser* [2000] NSWSC 1049 (Unreported, Rolfe J, 16 November 2000) (Swiss law); *Schnabel v Yung Lui* [2002] NSWSC 15 (Unreported, Bergin J, 1 February 2002) (US federal law); *DrillTec* [2002] NSWSC 1173 (Unreported, Macready AJ, 10 December 2002) (German law); *Rataplan* (2004) 56 ATR 407 (Texas law).

¹⁹⁷ See, eg, *Evidence Act 1995* (Cth) s 75; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 43.03(2).

¹⁹⁸ *OW Bunker & Trading Co Ltd A/S v 'Mawashi Al Gasseem'* [2005] FCA 1041 (Unreported, Finn J, 26 July 2005) (Danish law); *Anabelle Bits Pty Ltd v Fujitsu Ltd* [2007] FCA 1190 (Unreported, Graham J, 26 July 2007) (Japanese law). Cf *Raveh v The Official Receiver of the State of Israel in His capacity as Liquidator North America Bank Ltd (in liq)* [2002] WASCA 27 (Unreported, Parker and Templeman JJ and Olsson AUJ, 27 February 2002), in which the sufficiency of such evidence was doubted.

¹⁹⁹ *Welcome Real-Time SA v Catuity Inc [No 2]* [2002] FCA 258 (Unreported, Heerey J, 27 February 2002).

²⁰⁰ *Norsemeter Holding AS v Boele [No 1]* [2002] NSWSC 370 (Unreported, Einstein J, 19 April 2002).

not apply — foreign law has been established through media reports,²⁰¹ consular sources,²⁰² or through inferences drawn from physical evidence such as passports.²⁰³

D Problems with Proof: Translated Texts

Where foreign law is in a language other than English, the need for translation may complicate the proof of that law. In *Neilson*, Kirby J was well aware of the ‘nuances and difficulties that exist because of the need to translate the Chinese law into the English language’.²⁰⁴ Gummow and Hayne JJ likewise observed that

an English translation of the text of foreign written law is not necessarily to be construed as if it were an Australian statute. Not only is there the difficulty presented by translation of the original text, different rules of construction may be used in that jurisdiction.²⁰⁵

In every case in which non-English language foreign law is provided to the court in written form, there is always the risk that the translation will be either inaccurate or unhelpful. In *Mills v Commonwealth*, the Court was presented with material that ‘border[ed] on the incomprehensible’,²⁰⁶ and in another case corrections needed to be made to remove a significant mistranslation.²⁰⁷ In other cases, each party relied upon different and potentially incompatible translations of the same text.²⁰⁸

In *Neilson*, a more fundamental problem was revealed, namely that there is no guarantee that the meaning of the relevant law is clear even in its original language, let alone in translation. Article 146 of the *General Principles* is vague even in Chinese,²⁰⁹ so it is hardly surprising that the publicly available English translations of it differ markedly.²¹⁰ The level of precision that might be expected of an Australian parliamentary draughtsperson is hardly likely to be found in the

²⁰¹ *Savic v Minister for Immigration and Multicultural Affairs* [2001] FCA 1787 (Unreported, Mansfield J, 18 December 2001).

²⁰² *NAFG v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 57.

²⁰³ *V\$AB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239 (Unreported, Weinberg J, 17 March 2006).

²⁰⁴ *Neilson* (2005) 223 CLR 331, 394.

²⁰⁵ *Ibid* 370.

²⁰⁶ [2003] Aust Torts Reports ¶81-714, 64 405 (Master Malpass).

²⁰⁷ *Lo Surdo v Public Trustee* [2003] NSWSC 837 (Unreported, Hamilton J, 17 September 2003) [7]–[8].

²⁰⁸ *DrillTec* [2002] NSWSC 1173 (Unreported, Macready AJ, 10 December 2002) [22]; *Channar Mining Pty Ltd v CMIEC (Channar) Pty Ltd* [2003] WASC 253 (Unreported, Pullin J, 18 December 2003) [21].

²⁰⁹ Notice that art 146 appears to adopt three simultaneous and contradictory choice of law rules: a strict *lex loci delicti* rule in the first clause; an ‘interests analysis’-style flexible exception in the second clause (cf *Babcock v Jackson*, 191 NE 2d 279 (NY, 1963)); and a double actionability rule in the third clause (cf *Phillips v Eyre* (1870) LR 6 QB 1).

²¹⁰ I am very grateful to Chris Carr for his assistance on this point. Contrast the translation cited in *Neilson* (2005) 223 CLR 331 with the apparently official translation available from the site of the Chinese National People’s Congress: National People’s Congress <<http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=2204&articleId=344984>>. The original Chinese text can be consulted at <http://www.law-lib.com/law/law_view.asp?id=3633&page=6>.

early efforts of a developing civil law system,²¹¹ and this should counsel against the sort of narrow grammatical parsing attempted by McHugh J in that case.²¹²

E *Problems with Proof: Expert Evidence*

It is frequently said that courts should accept uncontradicted expert evidence of foreign law unless there is strong reason not to do so,²¹³ such as where the evidence is glaringly improbable.²¹⁴ However, statements of this kind perhaps give a misleading impression of the deference with which courts treat evidence of foreign law. The truth is that such evidence (whether contradicted or not) is frequently questioned, criticised and disregarded by Australian courts. Since evidence of foreign law is generally led for self-interested and defensive purposes, it should come as no surprise that genuinely dispassionate and comprehensive evidence of foreign law is relatively rare. Inadequate evidence at trial is also one of the reasons why new evidence is quite often tendered on appeal.

Not all experts offer complete or fully reasoned evidence on foreign law,²¹⁵ and some offer no analysis or explanation beyond reciting the provisions of foreign statutes.²¹⁶ Other experts present the court with texts or reports that are of doubtful accuracy or utility.²¹⁷ Some would-be experts admit that they are not giving evidence in their primary area of expertise,²¹⁸ and others admit that they have not been able to do as comprehensive research as they would have liked.²¹⁹ Worse, some experts' testimony is disregarded because of its partiality.²²⁰

The inadequacy of expert evidence is rarely as glaringly apparent as it was in *Mokbel*, a case in which foreign law was alleged to create a defence to a charge of drug importation. The defendant's expert — a US professor — referred only to isolated provisions in a statute and not the whole enactment, even though he believed that there were relevant definitional provisions that he had not checked.²²¹ The professor also failed to refer to any legislation relating to controlled law enforcement operations.²²² Most astonishingly, the professor was explicitly instructed by the defence team to ignore any relevant case law con-

²¹¹ When they were drafted in 1986, the *General Principles* were among the very first civil laws enacted in the PRC. Chinese drafting technique has certainly grown in sophistication since that time.

²¹² *Neilson* (2005) 223 CLR 331, 349.

²¹³ *Ibid* 389–91 (Kirby J), 404–6 (Callinan J); cf *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231 (Unreported, McKechnie J, 2 October 2002) [186].

²¹⁴ See the authorities collected in Dicey and Morris, above n 7, 263.

²¹⁵ See, eg, *Goldwyn v Mazal* [2003] NSWSC 427 (Unreported, Bryson J, 16 May 2003).

²¹⁶ *Limberis v N Limberis & Sons Pty Ltd* [2004] SASC 186 (Unreported, Gray J, 25 June 2004).

²¹⁷ *Gilsan (International) Ltd v Optus Networks Pty Ltd [No 2]* [2005] NSWSC 38 (Unreported, McDougall J, 11 February 2005); *Singh v Minister for Immigration and Multicultural Affairs [No 2]* [2001] FCA 327 (Unreported, Heerey J, 30 March 2001).

²¹⁸ *Dachser* [2000] NSWSC 1049 (Unreported, Rolfe J, 16 November 2000); *Mills v Commonwealth* [2003] Aust Torts Reports ¶81-714.

²¹⁹ *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 (Unreported, Allsop J, 15 August 2005) [98].

²²⁰ *Virgtel Ltd v Zabusky* (2006) 57 ACSR 389, 395 (de Jersey CJ).

²²¹ *Mokbel* [2006] VSC 137 (Unreported, Gillard J, 16 March 2006) [34].

²²² Gillard J had in mind legislation equivalent to pt 1AB of the *Crimes Act 1914* (Cth).

cerning the proper interpretation of the Act, even though he believed that such case law existed.²²³

In light of this highly unsatisfactory testimony, Gillard J concluded that ‘it was obvious to all who heard [the professor’s] evidence that there were serious gaps in it.’²²⁴ However, in order to make any determination of foreign law, his Honour considered it necessary to be satisfied that he had ‘all relevant US law bearing on the subject’,²²⁵ but instead the Court was ‘left in a complete state of uncertainty as to what was the relevant law at the time.’²²⁶ His Honour thus declined to accept that US law offered the defendant any defence.

Mokbel may be an extreme example, but it illustrates a broader problem with some expert evidence on foreign law, namely that such evidence does not always meet the standards required of expert evidence more generally. To be admissible, the evidence must normally demonstrate the factual and methodological basis on which the expert forms her or his opinion,²²⁷ but not all expert testimony on foreign law meets this standard. This was illustrated in *Mond v Berger*,²²⁸ an appeal from an arbitrator’s decision in which Rabbinical law was applied. All parties agreed that Rabbinical law was to be proved like that of any other foreign legal system. However, Dodds-Streeton J concluded that:

The value of expert evidence on foreign law depends upon the stated assumptions of fact. Where incomplete facts were assumed, rather than a complex web of facts in context, little weight could be attributed to [the expert’s] evidence. Further, his affidavit in many instances failed to expose the basis of the expert’s conclusions for critical assessment by the court. It frequently failed to define key terms with sufficient precision to allow the court to ascertain the relevance of any conclusion to the disputed issues before it.²²⁹

Ultimately, the expert’s evidence was so unsatisfactory that the defendant was unable to prove that Rabbinical law was to the effect alleged.²³⁰

Cases like these serve as a salutary reminder that the proof of foreign law is not always an easy task. They also illustrate a good reason why pleading and proving foreign law is not obligatory: very often, the simplest approach for both plaintiff and defendant is to rely on local law.

VII WHEN CAN AUSTRALIAN LAW BE APPLIED IN THE PLACE OF FOREIGN LAW?

Few areas of Anglo-Australian private international law cause as much consternation as the so-called presumption of identity. This is the principle that in the absence of sufficient proof of foreign law, the court will apply local law to

²²³ *Mokbel* [2006] VSC 137 (Unreported, Gillard J, 16 March 2006) [34].

²²⁴ *Ibid* [40].

²²⁵ *Ibid* [52].

²²⁶ *Ibid* [53].

²²⁷ *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705. As to the status of this principle: see Lee Aitken, ‘Expert Evidence and *Makita* — “Gold Standard” or Counsel of Perfection?’ (2006) 28 *Australian Bar Review* 207.

²²⁸ (2004) 10 VR 534.

²²⁹ *Ibid* 561.

²³⁰ *Ibid* 582–3 (Dodds-Streeton J).

resolve the issues before it. Traditionally, this has been described as a presumption of fact, albeit a highly implausible one.²³¹ The most extraordinary recent example of this ‘presumption’ occurred in *In Marriage of Khademollah*, in which Kay and Holden JJ felt themselves constrained to presume that the Sharia law of Iran was the same as the family law of Australia:

Absent any expert evidence, as a general rule there is a presumption that the law of a foreign country is the same as that of the forum. The application of this presumption has certain surreal qualities about it when dealing with non-common law countries, especially those which profess to be ruled by religious codes, but be that as it may, the principle still applies ...²³²

Nonetheless, their Honours went on to complain that:

In the age of the Internet and CNN, the time must be near when a Family Court Judge in Australia can take judicial notice that in countries ruled by religious law the rights of men and women to share in each other’s property after divorce are likely to be dramatically different than they are in Australia.²³³

Others share their Honours’ concerns, and the so-called presumption has been called ‘nonsense’,²³⁴ a ‘truly grotesque proposition’,²³⁵ a ‘regrettable solution’,²³⁶ ‘unrealistic’ and ‘incredible’.²³⁷ In light of this, many commentators now take a more direct route, saying that local law is applied ‘to fill the gap’,²³⁸ ‘to complete the legal framework’,²³⁹ as a ‘default position’,²⁴⁰ ‘as the residual law’,²⁴¹ or as ‘the only law available.’²⁴² Adrian Briggs states that:

In default of proof of the content of foreign law, an English judge still has to adjudicate; and his default position is that he will apply English law, *faute de mieux*. ... To purport to justify this with the presumption that the relevant foreign law just happens to be identical to English domestic law only goes to weaken the sensible answer already sufficiently justified.²⁴³

This approach seems to have found favour with at least some judges of the High Court in *Neilson*. Gummow and Hayne JJ expressed the simple and pragmatic

²³¹ See, eg, *Lloyd v Guibert* (1865) LR 1 QB 115; *The Parchim* [1918] AC 157; Nygh and Davies, above n 4, 325–7; Mortensen, above n 4, 226–8. Early Australian cases applying the presumption include: *Wright, Heaton & Co v Barrett* (1892) 13 NSW 206; *Bowden Bros & Co v Imperial Marine & Transport Insurance Co* (1905) 5 SR (NSW) 614.

²³² *In Marriage of Khademollah* (2000) 159 FLR 42, 84.

²³³ *Ibid* 85. Despite all this, one can surely sympathise with Finn J’s ‘difficulty in understanding why the question of the differences, if any, between the matrimonial law of Iran and that of Australia was of any great significance in this case’: at 44. The case was a stay application in which it was doubtful that any finding about Iranian law needed to be made at all.

²³⁴ Briggs, *The Conflict of Laws*, above n 7, 6.

²³⁵ Adrian Briggs, ‘The Meaning and Proof of Foreign Law’ [2006] *Lloyd’s Maritime and Commercial Law Quarterly* 1, 4.

²³⁶ Wolff, above n 9, 222.

²³⁷ *Neilson* (2005) 223 CLR 331, 395–6 (Kirby J).

²³⁸ Kahn-Freund, above n 9, 279.

²³⁹ Andrew Dickinson, ‘*Renvoi*: The Comeback Kid?’ (2006) 122 *Law Quarterly Review* 183, 188.

²⁴⁰ Briggs, *The Conflict of Laws*, above n 7, 6.

²⁴¹ Sykes and Pryles, above n 4, 276.

²⁴² J-G Castel, *Canadian Conflict of Laws* (4th ed, 1997) 162. See generally Dicey and Morris, above n 7, 225–6.

²⁴³ Briggs, *The Conflict of Laws*, above n 7, 6.

view that ‘absent proof of, or agreement about, foreign law, the law of the forum is to be applied.’²⁴⁴ Indeed, this seems to be the surest response to McHugh and Kirby JJ’s concern about the unreality of the traditional ‘presumption’,²⁴⁵ or to Gleeson CJ’s concern that the presumption will be ‘devoid of content’ in the particular case.²⁴⁶ Put simply, no presumption was needed after all.

Whatever appellation is given to the reasons why they do so, the fact remains that Australian courts quite frequently apply Australian law to issues that arise in overseas jurisdictions, which would on ordinary choice of law principles be governed by foreign law. Thus, Australian courts have applied Australian law by default in cases that would otherwise have been governed by:

- Canadian law relating to choses in action;²⁴⁷
- Californian law of fiduciary duty²⁴⁸ and promissory notes;²⁴⁹
- Cayman Islands law of contract;²⁵⁰
- Chilean law relating to directors’ duties;²⁵¹
- Chinese law of contract;²⁵²
- Dutch law of contract;²⁵³
- German criminal procedure;²⁵⁴
- HK SAR defamation law;²⁵⁵
- Indian law of contract;²⁵⁶
- Indonesian law relating to domicile;²⁵⁷
- Iranian family law;²⁵⁸
- Italian criminal law²⁵⁹ and law of negligence;²⁶⁰
- Liberian shipping law;²⁶¹

²⁴⁴ *Neilson* (2005) 223 CLR 331, 370.

²⁴⁵ *Ibid* 348–9 (McHugh J), 395–6 (Kirby J).

²⁴⁶ *Ibid* 342.

²⁴⁷ *R v Rigney-Hopkins* (2005) 154 A Crim R 433.

²⁴⁸ *Neufeld* [2002] NSWCA 335 (Unreported, Spigelman CJ, Hodgson and Beazley JJA, 2 October 2002).

²⁴⁹ *Pico Holdings Inc v Dominion Capital Pty Ltd* [2001] VSC 334 (Unreported, Bongiorno J, 30 August 2001).

²⁵⁰ *Eagle v Delta Haze Corporation* [2000] VSC 513 (Unreported, Mandie J, 8 December 2000).

²⁵¹ *Errigal Ltd v Equatorial Mining Ltd* [2006] NSWSC 953 (Unreported, White J, 6 September 2006).

²⁵² *World of Technologies (Aust) Pty Ltd v Tempo (Aust) Pty Ltd* (2007) 71 IPR 307.

²⁵³ *Hume Computers Pty Ltd v Exact International BV* [2007] FCA 478 (Unreported, Jacobson J, 3 April 2007).

²⁵⁴ *Von Arnim v Federal Republic of Germany [No 2]* [2005] FCA 662 (Unreported, Finkelstein J, 3 June 2005).

²⁵⁵ *National Auto Glass Supplies (Australia) Pty Ltd v Nielsen & Moller Autoglass (NSW) Pty Ltd* (2006) 156 FCR 148.

²⁵⁶ *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2007] FCA 881 (Unreported, Gilmour J, 7 June 2007).

²⁵⁷ *Re SRPP* (2000) 62 ALD 758.

²⁵⁸ *In Marriage of Khademollah* (2000) 159 FLR 42.

²⁵⁹ *Versace v Monte* [2001] FCA 1572 (Unreported, Tamberlin J, 6 November 2001).

²⁶⁰ *Proctor & Gamble Pty Ltd v Australian Slatwall Industries Pty Ltd* [2001] NSWSC 398 (Unreported, Bergin J, 18 May 2001).

- Macedonian criminal law;²⁶²
- New York law of contract²⁶³ and criminal law;²⁶⁴
- NZ law of contract and promissory estoppel,²⁶⁵ copyright²⁶⁶ and criminal procedure;²⁶⁷
- Ohio defamation law;²⁶⁸ and
- Singapore law of contract.²⁶⁹

On the other hand, the application of Australian law to ‘foreign’ cases is not universal, and there are a handful of recent examples where courts have refused to do so. Courts have thus been unwilling to apply Australian law to cases that would otherwise have been governed by German revenue law,²⁷⁰ Norwegian civil procedure,²⁷¹ Swiss consumer credit law,²⁷² the Vanuatu law of trusts,²⁷³ or the Philippines law relating to judgment debtors.²⁷⁴

A Drawing the Proper Distinctions

How are we to explain these various cases? Intuitively, it seems odd that Australian law can *ever* apply to a case that ‘should’ be governed by foreign law according to normal choice of law rules. However, we have already seen that the plaintiff does not need to allege let alone prove foreign law in order to maintain a valid and justiciable cause of action, since Australian choice of law rules are not mandatory in character.²⁷⁵ Significantly, there is also no obligation to plead and particularise the Australian law that is said to apply by default.²⁷⁶

²⁶¹ *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* (2005) 143 FCR 43.

²⁶² *Markisic v Today-Denes* [2005] NSWSC 1276 (Unreported, Simpson J, 9 December 2005); affd *Markisic v AEA Ethnic Publishers Pty Ltd* [2006] NSWCA 378 (Unreported, Beazley, Tobias and Basten JJA, 20 December 2006).

²⁶³ *Eagle v Delta Haze Corporation* [2000] VSC 513 (Unreported, Mandie J, 8 December 2000).

²⁶⁴ *Versace v Monte* [2001] FCA 1572 (Unreported, Tamberlin J, 6 November 2001).

²⁶⁵ *New Zealand Pelt Export Co Ltd v Trade Indemnity New Zealand Ltd* [2002] VSC 570 (Unreported, Warren J, 18 December 2002).

²⁶⁶ *Quanta Software International Pty Ltd v Computer Management Services Pty Ltd* [2001] AIPC ¶91-757.

²⁶⁷ *R v Turner [No 4]* (2001) 10 Tas R 81.

²⁶⁸ *Hewitt v ATP Tour Inc* (2004) 236 LSJS 1.

²⁶⁹ *Joondalup Country Club Holdings Ltd v Basuki* [2000] WASC 251 (Unreported, Master Sanderson, 17 October 2000).

²⁷⁰ *Damberg* (2001) 52 NSWLR 492.

²⁷¹ *Boele v Norsemeter Holding AS* [2002] NSWCA 363 (Unreported, Handley, Beazley and Giles JJA, 13 November 2002).

²⁷² *Penhall-Jones* [2004] NSWSC 789 (Unreported, Hoeben J, 24 August 2004).

²⁷³ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 228 ALR 174.

²⁷⁴ *Martyn v Graham* [2003] QDC 447 (Unreported, Shanahan DCJ, 13 November 2003).

²⁷⁵ Cf Fentiman, above n 7, 63:

the problem is not whether English law and foreign law are similar. It is whether litigants are always free to circumvent the foreign element in proceedings. The question is not whether it is plausible to equate English law with foreign laws that which are unlikely to be similar ... It is whether the relevant rules for choice of law are mandatory in character.

²⁷⁶ *Markisic v AEA Ethnic Publishers Pty Ltd* [2006] NSWCA 378 (Unreported, Beazley, Tobias and Basten JJA, 20 December 2006) [171] (Tobias JA).

That being so, it is important to distinguish four different factual circumstances in which the application of Australian law can arise:

- 1 cases in which the plaintiff does not attempt to establish the content of foreign law at all;
- 2 cases in which the plaintiff attempts to establish the content of foreign law, but their proof is deficient in some respect;
- 3 cases in which the defendant attempts to establish the content of foreign law by way of defence, but their proof is deficient in some respect; and
- 4 cases in which both parties plead foreign law and attempt to prove it, but both attempts at proof are deficient.

1 *Where the Plaintiff Does Not Establish the Content of Foreign Law*

For better or worse, plaintiffs are not obliged to plead foreign law, and even if they do plead it, they are not obliged to prove its contents. A ‘failure to plead’ and a ‘failure to prove’ may well lead to a similar outcome, but it is important to recognise the conceptual differences between the two. If a plaintiff does not plead foreign law, then Australian law will apply in its own right, and there is therefore no question of such a plaintiff ‘presuming’ that foreign law is the same as Australian law. By contrast, where a plaintiff pleads foreign law but neglects to prove its content, Australian law will also apply, but only by default. In such cases, serious questions can be raised about the fairness or legitimacy of this ‘default’ application of Australian law. In both types of case, two questions arise: first, can the plaintiff succeed as a matter of Australian law; and secondly, even if they can succeed, is there some reason why the otherwise applicable Australian law should be disapplied?

Both of these questions arose for determination in *Damberg*, a case concerning a resulting trust said to arise over German land by virtue of Australian law.²⁷⁷ A father purchased the land in the name of his children, and the essential question was whether the father was debarred from relying on the resulting trust because of his avoidance of German tax. While the Court was not prepared to assume that German revenue law had the same consequences as Australian law,²⁷⁸ if this case were truly about presumptions of foreign law it would be a very peculiar case indeed. This was because on the one hand, the Court was happy to apply the Australian law of resulting trusts to German land when it is well known that Germany has no law of resulting trusts;²⁷⁹ but on the other it was unwilling to presume that the consequences of tax avoidance under German law were similar to those under Australian law, when in fact the law of the two countries is not radically different on this point.²⁸⁰

²⁷⁷ *Damberg* (2001) 52 NSWLR 492. The presumption of advancement was rebutted by the father’s contrary intention.

²⁷⁸ *Ibid* 522 (Heydon JA).

²⁷⁹ It is true that German law recognises the *Treuhand*, a form of express trust, but it certainly contains no law of resulting or constructive trusts.

²⁸⁰ *Abgabenordnung* (Tax Procedure Act), 1 January 1977, BGBl I S 613, § 42; *BFH Urteil*, 26 March 1996, IX R 51/92; *BFH Urteil*, 14 January 2003, IX R 5/00; *BFH Urteil*, 17 December 2003, IX R 56/03.

However, the case was not ultimately about the presumption of identity. Rather, the case turned on the first question mentioned above, namely whether the plaintiffs could succeed under Australian law at all. For Heydon JA, the ‘decisive factor’ was that Australian law requires attention to the policy of the relevant statute under which the illegality was said to arise, but the children never presented evidence of *any* statute, let alone its policy.²⁸¹

The High Court majority in *Nelson v Nelson* called for a close analysis of the relevant German statutory provisions. To substitute for an analysis of relevant German statutory provisions an analysis of irrelevant Australian statutory provisions is simply to fail to carry out the mandate of *Nelson v Nelson*.²⁸²

The children’s claim thus necessarily failed as a matter of Australian law.

The second question also arose in *Damberg*: if the children’s argument had succeeded, it would have meant enforcing foreign revenue law, as Australian law would have obliged the father to repay the German tax he had attempted to avoid.²⁸³ As the children cited no evidence of German law that would ‘exclude the risk that the doctrine of *Nelson v Nelson* would result in the enforcement of a foreign revenue law’, their claim was disallowed.²⁸⁴ Thus, even where a plaintiff in a ‘foreign’ case relies solely on Australian law, exclusionary doctrines (such as the rule against enforcement of foreign revenue laws) may result in the dismissal of their claim.

A number of rules of this kind can prevent the default application of Australian law. *Damberg* specifically addressed foreign revenue law, but Heydon JA expressed a broader concern about applying Australian law by default in areas of law that do not rest on ‘great and broad principles likely to be part of any given legal system.’²⁸⁵ Later cases have developed this theme and it has been held, for example, that ‘[i]t is particularly difficult to presume that a foreign court’s procedural law is the same as the law of the forum’,²⁸⁶ and that unique local statutory regimes cannot be applied by default.²⁸⁷

One imagines that further examples of this kind will be developed in the future which will go some way towards remedying the traditional excesses of the presumption of identity, especially in those areas of the law where Australian law is notably more favourable to plaintiffs than foreign law. This is notoriously true of the law of defamation (especially as compared with US law),²⁸⁸ but courts are not yet willing to override the default application of Australian law in such cases.²⁸⁹

²⁸¹ Cf *Martin v Martin* (1959) 110 CLR 297; *Nelson v Nelson* (1995) 184 CLR 538.

²⁸² (2001) 52 NSWLR 492, 523 (Heydon JA).

²⁸³ *Ibid.*

²⁸⁴ *Ibid* 525 (Heydon JA).

²⁸⁵ *Ibid* 522.

²⁸⁶ *Boele v Norsemeter Holding AS* [2002] NSWCA 363 (Unreported, Handley, Beazley and Giles JJA, 13 November 2002) [40] (Giles JA).

²⁸⁷ *Penhall-Jones* [2004] NSWSC 789 (Unreported, Hoeben J, 24 August 2004). See below Part VII(A)(3).

²⁸⁸ Cf *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

²⁸⁹ See, eg, *Hewitt v ATP Tour Inc* (2004) 236 LSJS 1.

2 *Where the Plaintiff Pleads Foreign Law, but Offers Deficient Proof*

A plaintiff will normally only plead foreign law when that foreign law confers a necessary juridical advantage. In such cases, the threat of Australian law applying by default is a real and substantial incentive for plaintiffs to offer the best available proof of foreign law, as the failure to prove foreign law results in the failure of a necessary part of the plaintiff's case. In such situations, the traditional presumption of identity does indeed operate against, not in favour of, the party whose obligation it is to prove foreign law.²⁹⁰

However, even where a plaintiff makes a sincere attempt to establish the content of foreign law, there is no guarantee that the proof will be free from defects. Sometimes the plaintiff's proof, although generally sound, contains gaps or inadequacies: the existence of such gaps is hardly surprising given the complexity, novelty and obscurity of the legal issues that some plaintiffs are forced to prove.²⁹¹ One common problem is that although the plaintiff might provide satisfactory evidence of the main or determinative issues of foreign law, this evidence might not cover every incidental point of foreign law that arises along the way.²⁹²

In such cases, Australian courts have applied a number of techniques by which the content of foreign law can be inferred or assumed, thus filling the gap. This accords with the purpose of the rules of private international law, which is not to create a perfect replica of foreign law but rather to apply as plausible an approximation of foreign law as the forum's rules will allow.²⁹³ As Briggs observes, 'to insist that the foreign law must be completely proved, failing which it will be wholly discarded, is to make the best the enemy of the good.'²⁹⁴

Where the substance or gist of foreign law is established, Australian law has developed a number of techniques that can help overcome incidental gaps or inadequacies in its proof. While some might label these as 'presumptions of identity', it seems preferable to view them as involving either the application of Australian law as an incidental default rule,²⁹⁵ or else as situations in which an Australian court is willing to make an assumption or inference about the actual content of foreign law. The doctrine of judicial notice may also justify such assumptions in the case of notorious facts.

²⁹⁰ Cf *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496, 503 (Hunt J).

²⁹¹ See, eg, *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284 (meaning of a term completely undefined in the Civil Code of Fujairah); *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488 (obscure aspects of Norwegian reinsurance law); *Re Duke of Wellington* [1947] 1 Ch 506 (attitude of the Spanish Supreme Court to *renvoi* when the only law on the subject was contained in two contradictory decisions of lower courts). *Neilson* (2005) 223 CLR 331 was also such a case.

²⁹² See, eg, *Western Ventures Pty Ltd v Resource Equities Ltd* (2005) 53 ACSR 568.

²⁹³ Cf Fentiman, above n 7, 20: 'the true measure of any technique for proving foreign law is not its capacity to excavate objective legal truth. It consists merely in its ability to reproduce the circumstances in which law is determined in the foreign jurisdiction whose law is in dispute.'

²⁹⁴ Briggs, 'The Meaning and Proof of Foreign Law', above n 235, 6. By contrast, McHugh J's suggestion in *Neilson* (2005) 223 CLR 331, albeit in dissent, that the tendering of evidence of foreign law *automatically* debars one from relying on the incidental use of local law seems both unorthodox and unduly strict: at 349.

²⁹⁵ Cf Kahn-Freund, above n 9, 276–85.

Under these principles, it is thus perfectly legitimate to apply incidental points of Australian law while simultaneously accepting evidence of the main issue of foreign law.²⁹⁶ Given the widespread admissibility of documentary evidence of foreign law, one of the most helpful incidental applications of local law is the use of Australian principles of construction to interpret foreign instruments or legislation.²⁹⁷ Likewise, courts can assume that the substantive law of a country is of a certain effect because of its notoriety,²⁹⁸ because it shares common historical origins with Australian law,²⁹⁹ or because its content can be inferred from other testimony in the case.³⁰⁰ It is also permissible to assume that a particular law continues in force.³⁰¹ Other assumptions relate more directly to application or consequences of foreign law, such as the assumption that a foreign law is one of general and non-discriminatory application,³⁰² that a particular law report is used in the courts of that country,³⁰³ or that the meaning of defamatory material published in a foreign jurisdiction is to be adjudged by the ordinary reasonable reader having ‘no particular geographical location’.³⁰⁴

It is important, however, to emphasise the incidental and gap-filling role of these techniques, which do not replace the need to prove the substance of the foreign law. In *Neilson*, for example, McHugh J vehemently objected to the use of any presumption of similarity on the basis that the substance of the Chinese choice of law rule had been shown to differ from Australian law.³⁰⁵ However, his Honour seems to have been mistaken about the presumption or inference that the majority was prepared to apply. Rather than making any presumption about the *substance* of Chinese law,³⁰⁶ Gummow, Hayne, Callinan and Heydon JJ simply used incidental techniques to arrive at a proper construction of that law. For

²⁹⁶ *Re SRPP* (2000) 62 ALD 758; *Rataplan* (2004) 56 ATR 407; *R v Rigney-Hopkins* (2005) 154 A Crim R 433; *Amaca Pty Ltd v Frost* [2006] NSWCA 173 (Unreported, Spigelman CJ, Santow and McColl JJA, 4 July 2006).

²⁹⁷ *Neilson* (2005) 223 CLR 331, 411 (Callinan J), 419–20 (Heydon J); *Joondalup Country Club Holdings Ltd v Basuki* [2000] WASC 251 (Unreported, Master Sanderson, 17 October 2000). Cf *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145.

²⁹⁸ *Saxby v Fulton* [1909] 2 KB 208.

²⁹⁹ *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* (2004) 141 FCR 29; affd (2005) 143 FCR 43.

³⁰⁰ *Ye v Crown Ltd* [2003] FCA 507 (Unreported, Gyles J, 23 May 2003); affd [2004] FCAFC 8 (Unreported, Sackville, Selway and Lander JJ, 23 January 2004); *Singh v Singh* [2006] WASC 182 (Unreported, Simmonds J, 24 August 2006).

³⁰¹ *Optus Networks Pty Ltd v Gilsan (International) Ltd* [2006] NSWCA 171 (Unreported, Beazley, Hodgson and McColl JJA, 5 July 2006). Cf Wolff, above n 9, 221.

³⁰² *Hartej Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 482 (Unreported, Ryan J, 27 April 2001).

³⁰³ *Optus Networks Pty Ltd v Gilsan (International) Ltd* [2006] NSWCA 171 (Unreported, Beazley, Hodgson and McColl JJA, 5 July 2006).

³⁰⁴ *National Auto Glass Supplies (Australia) Pty Ltd v Nielsen & Moller Autoglass (NSW) Pty Ltd* (2006) 156 FCR 148, 155.

³⁰⁵ *Neilson* (2005) 223 CLR 331, 348 (McHugh J); cf at 394–6 (Kirby J).

³⁰⁶ Cf *ibid* 353 (McHugh J):

In the absence of evidence, this court would ordinarily assume that Chinese law is identical to Australian law. ... [T]he court would presume that Chinese law concerning the applicability of renvoi to the choice of law rule in tort was the same as under Australian law. Hence, if the Australian choice of law in tort selects “the whole of the law of that place”, then the Chinese choice of law in tort would be presumed to select also “the whole of the law” of its chosen country.

Callinan and Heydon JJ, this involved the incidental use of Australian law, namely the application of Australian principles of statutory construction.³⁰⁷ Gummow and Hayne JJ took a more indirect approach, drawing upon the evidence of Chinese law and its surrounding context in order to make an inference about what a Chinese court would actually do in the circumstances of the case.³⁰⁸ It must be emphasised that none of the judges in the majority had any need to ‘presume’ that the substance of Chinese choice of law rules — or the Chinese attitude to *renvoi* — was identical to Australian law.

Despite the use of these incidental techniques, there will still be cases in which foreign law cannot be ascertained. In such cases, Australian law will apply by default and the plaintiff will be deprived of any juridical advantage arising under foreign law. The question then reverts to the one discussed in Part VII(A)(1) above, namely whether the plaintiff can succeed under Australian law or whether Australian law otherwise requires the dismissal of the plaintiff’s case.

3 *Where the Defendant Pleads Foreign Law, but Offers Deficient Proof*

Where a defendant seeks a juridical advantage in foreign law, failure to establish the content of that law will mean the failure of the defence.³⁰⁹ The plaintiff will therefore succeed if its claim is otherwise good in law. Of course, Australian judges are also able to apply the techniques of inference to claims of foreign law raised by defendants, although such inferences have also been used to undermine (and not merely bolster) the defendant’s attempt at proof.³¹⁰ In *Mokbel*, for example, Gillard J was prepared to infer that US law contained provisions similar to Part 1AB of the *Crimes Act 1914* (Cth) dealing with covert operations. This inference was one of the factors that led to the failure of the defendant’s foreign law argument.

Conversely, where a defendant raises Australian law in defence to a claim governed by foreign law, it is open to the judge to find that the Australian law is not of a kind that can be applied by default. The modern restrictions on the so-called presumption of identity affect defendants as much as plaintiffs. This occurred in *Penhall-Jones*, a case governed by Swiss law, where the Court held that the *Contracts Review Act 1980* (NSW) was ‘not the sort of provision where the presumption that Swiss law was the same as New South Wales law could apply’, but was instead ‘a special provision peculiar to New South Wales’.³¹¹

4 *Where Neither Party Succeeds in Establishing the Content of Foreign Law*

A rarer problem arises when both parties attempt to prove the foreign law, but neither succeeds in establishing its content: the plaintiff cannot establish that the foreign law recognises their claim, but the defendant cannot establish that such a claim would be rejected. As Fentiman points out, such cases are rare because in most circumstances a judge is able to prefer the evidence of one party about the

³⁰⁷ Ibid 411 (Callinan J), 419–20 (Heydon J).

³⁰⁸ Ibid 373–4.

³⁰⁹ *Mokbel* [2006] VSC 137 (Unreported, Gillard J, 16 March 2006).

³¹⁰ Ibid [47].

³¹¹ [2004] NSWSC 789 (Unreported, Hoeben J, 24 August 2004) [16], [20].

content of foreign law, thereby avoiding a failure of proof.³¹² However, in those rare cases of mutual failure of proof, the only fair result is to apply Australian law by default.

This type of situation has a particular relevance for Australia given its proximity to South East Asia. While the region contains many legal systems of great sophistication and maturity, it also contains jurisdictions in which the law — especially civil law — is in a far more rudimentary state. One such jurisdiction, Cambodia, was considered in *Mills v Commonwealth*, a case about liability for nervous shock in which even the plaintiff's expert admitted that 'to date no case of nervous shock has been brought', and that 'there is little civil work (especially torts)' before the Cambodian courts.³¹³ However, the evidence of the defendant's expert was no better, and both experts had 'shortcomings in skill, training and experience' and they each fell 'well short of providing the best possible evidence.'³¹⁴ The Master before whom the case was heard concluded that it was impossible to discern the content of Cambodian law on point:

the content of the law ... falls within the contemplation of unchartered territory. It is a fertile area for competing views. The prospects of rendering things less uncertain seems to be in the realm of speculation. On the evidence before me, the law may be described as unsettled or perhaps even presently unknown.³¹⁵

In such circumstances, the only fair solution is to apply Australian law by default, not by way of any 'presumption': after all, even the unsatisfactory evidence in *Mills* was enough to belie any presumption that Cambodian and Australian law were actually the same.³¹⁶

B *Is the Default Application of Australian Law Unfair to Defendants?*

One consistent and probably deserved criticism of the traditional English presumption of identity is that it is systematically unfair to defendants, and provides a 'daunting tactical ploy' by which the plaintiff can compel the defendant to incur the expense of disproving the presumption.³¹⁷ In the US, where the presumption of identity has always had a more doubtful status,³¹⁸ Beale argued that its effect 'is to shift the burden of proving the foreign law to the defendant if he is to establish a defence under that law; and ... this is extremely unfair unless

³¹² Fentiman, above n 7, 182.

³¹³ [2003] Aust Torts Reports ¶81-714, 64 403-4 (Master Malpass).

³¹⁴ Ibid 64 405 (Master Malpass).

³¹⁵ Ibid 64 406 (Master Malpass).

³¹⁶ As it happened, the plaintiff also brought a contractual action against the Commonwealth, but there was also a dispute about the governing law: the contract was held by the Master to be governed by Australian law, but an appeal to the Supreme Court resulted in the application of Cambodian law: *Commonwealth v Mills* [2004] NSWSC 1042 (Unreported, M W Campbell AJ, 10 November 2004).

³¹⁷ Supreme Court Procedure Committee, Lord Chancellor's Department, United Kingdom, *Report on Practice and Procedure in Defamation* (1991) 47; cf Fentiman, above n 7, 144; Davies, above n 118, 264.

³¹⁸ Eugene F Scoles et al, *Conflict of Laws* (4th ed, 2004) 544-6, 553-6.

there is some good reason to believe that the presumption agrees with the fact.³¹⁹

There are a number of possible responses to this type of argument. The first, rather defensive, response is to argue that while the law obliges the plaintiff to make good their claim, it does not otherwise oblige the plaintiff to pre-emptively negate the defendant's potential defences. Therefore, one could argue that there is nothing anomalous about obliging the defendant to raise and prove their own defence, especially as proving foreign law is not necessarily more difficult than proving the factual or legal validity of any other defence arising under domestic law.

A second response gets nearer to the heart of the matter: the problem of the unfair application of Australian law arises because of the lack of any obligation upon the plaintiff to plead and establish the content of foreign law. This issue is conceptually distinct from the presumed or 'default' application of Australian law, and the surest solution to the problem would be to fix the cause (that is, the absence of any obligation to plead) rather than the symptom (unfair presumptions). However, imposing an absolute obligation on plaintiffs to prove the content of foreign law may be a disproportionate response to the problem, as there are a great many cases in which both plaintiff and defendant are content to apply local law, or else in which foreign law arises only as a tangential or subsidiary issue.³²⁰

Thirdly, one might point to the fact that the most extreme form of the problem is closely linked to the choice of law rule for defamation. So long as the plaintiff has a cause of action in *every* jurisdiction in which the defamatory material is published — and in the internet era, this is a daunting prospect indeed — then the default application of Australian law will have far-reaching consequences. This is because the one plaintiff is able to assert multiple causes of action that would otherwise have been governed by multiple different laws, some of which might exculpate the defendant. By contrast, even in a major international products liability case each individual plaintiff will generally only have a single cause of action against the defendant. Significantly, the recent uniform Australian *Defamation Acts* respond to this problem by abolishing the common law rules, instead giving the plaintiff a single cause of action governed by the law of the place 'with which the harm occasioned by the publication ... had its closest connection'.³²¹ This reform applies only to publications within Australia,³²² but if it were adopted for international cases it would go a long way towards remedying the most notorious example of unfairness that arises from the default application of local law.

The fourth response to the perceived unfairness is to make pragmatic adjustments to the default rule so as to restrict the circumstances in which local law will automatically apply. This is the response that the Australian courts have already begun to employ, and one can readily envisage that the categories of

³¹⁹ Beale, above n 101, vol 3, 1681.

³²⁰ See generally Fentiman, above n 7, chs 3–4.

³²¹ See, eg, *Defamation Act 2005* (Vic) s 11(2).

³²² *Defamation Act 2005* (Vic) s 11(5).

non-application of the default rule will expand in the years to come. If so, the principle of non-application will gradually but selectively undermine the old rule that pleading and proving foreign law is voluntary, without causing the disruption and inconvenience that would result from the wholesale abolition of the old rule. To the extent that a plaintiff falls within an area of non-application, then it will be obliged to plead and prove foreign law. While it is early days yet, it certainly seems like Australian law is set on this course, and this is probably the best and most pragmatic response to a difficult problem.

VIII CONCLUSION

The increasingly internationalised nature of Australian litigation means that disputes with an overseas connection arise quite frequently in the Australian courts. As a result, issues relating to the pleading and proof of foreign law arise more commonly than is often supposed, and are of significant practical importance.

As we have seen, the absence of any general obligation upon plaintiffs to plead or prove foreign law means that foreign law issues are normally raised defensively, and are typically raised in an interlocutory setting. While tort cases have been most prominent in the High Court, a vast array of foreign law has been pleaded and proven over the last seven years.

The designation of foreign law as a question of fact raises a number of complexities, not all of which would be alleviated if foreign law were redesignated as a true matter of law. While foreign law — and its application — can still be proved by expert evidence, all Australian jurisdictions except Victoria have beneficial statutory provisions that ease the task of proving foreign law. If these became better known, the application of foreign law may become a less daunting prospect than it commonly seems at present.

Conversely, once the true principles behind the default application of Australian law are better understood, much of the absurdity of the old ‘presumption of identity’ can be avoided. In many cases where the substance or gist of foreign law is proven, various incidental techniques can be used to fill any remaining gaps. On the other hand, Australian courts do sometimes insist that foreign law be applied where the application of Australian law would be surprising, unjust or glaringly improbable.

Foreign law plays a central but under-acknowledged role in Australian private international law. Once the centrality of foreign law is recognised, the scholarly neglect of this topic becomes all the more noteworthy. This article, then, is a small attempt to redress the situation.