# Annual Survey of Recent Developments in Australian Private International Law 2006

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## I. Introduction

After a number of major High Court of Australia decisions in the first half of the decade, 2006 proved a quiet year both in the number of reported decisions and major judgments in the area of private international law. The most significant trend was lower courts trying to work through the practical application of the seemingly bright lines drawn by the High Court in decisions such as *John Pfeiffer Pty Ltd v Rogerson*,[1] *Regie National des Usines Renault SA v Zhang*,[2] and *BHP Billiton Ltd v Schultz*.[3] For example, this year found Supreme Courts in Western Australia and New South Wales trying but failing to give clarity to the seemingly crystal declaration about substance versus procedure and where exactly the *lex loci delicti* is. Similarly, the confusion identified in last year's survey[4]continued regarding the application of the inter-state transfer rules despite the apparent clarification of *Schultz*. The remainder of decisions and developments tended to be of the nature that provides contemporary examples and fine-tuning of the established rules of the conflict of laws, or fills in minor unique lacunae in the law. One major exception signalled in 2006 that may eventuate later in the decade is a draft Trans-Tasman proposal that has the potential to bring Australia and New Zealand as close in private international law terms as the states within Australia.

The methodology and scope of this year's review is the same as for the past four surveys. First, the review spans from 1 January to 31 December 2006. Second, we identify relevant developments through searches of computer databases such as Westlaw, Lexis and AGIS, as well as traditional research methods. As in the past, given the necessarily non-comprehensive nature of this methodology, we repeat our call to colleagues to alert us to developments whether they be reported or unreported cases, diplomatic developments, or academic research. We continue to differ from the American quantitative approach pioneered by Symeonides[5] for a qualitative approach of sifting through all identified cases to review only those that

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1 (2000) 203 CLR 503 (*Pfeiffer*).

2 (2002) 210 CLR 491 (*Zhang*).

3 (2004) 221 CLR 400 (*Schultz*).

4 K Anderson and J Davis, 'Annual Survey of Recent Developments in Australian Private International Law 2005' (2007) 26 *Aust YBIL* 425, 427-29.

5 S C Symeonides, 'Choice of Law in the American Courts in 2006: Twentieth Annual Survey' (2006) 54 *American Journal of Comparative Law* 697.

we believe advance the law in the area or provide particularly interesting examples of established rules. As in the past, we confess at the outset the subjective nature of this approach, but rely on our accumulated experience to guide us. In this regard, the project is enhanced this year with the addition of a third expert, Kim Pham, to the team.

The article is organised following roughly the numbering of past surveys. Section II reviews developments in jurisdiction, particularly discretionary exercise of jurisdiction such as transfers of cross-vested cases and *forum non conveniens*. Section III examines the developments in substantive choice of law questions, in particular applying the *Pfeiffer* and *Zhang* lessons to specific fact patterns. Section IV considers enforcement of foreign decisions with developments in non-monetary judgment areas. The survey briefly concludes by suggestion that 2006 indicates the seemingly clear cut rules handed down by the High Court will continue to occupy lower courts for the foreseeable future.

## II. Jurisdiction

### (a) Existence of jurisdiction[6]

#### In rem *proceedings*

In the past two surveys we asserted that jurisdiction cases over property were rare, as there was little to upset the very settled and straight-forward rule of *lex situs*. 2006 proves us wrong again with the alerting of a House of Lords development that may bode more to come. At its heart, *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[7] involved a dispute between the charterers and the owners of a ship over the breach of the charter agreement. The case is interesting from a conflict of laws perspective for the rare grant of an anti-anti-suit injunction, discussed below. Further, when the matter reached the Full Court of the Federal Court, the charterers asserted that the owners' proceeding *in rem* against the ship amounted to proceeding against the charterers personally and thereby avoided the charter agreement's arbitration clause.

Traditionally, of course, courts have considered that an action *in rem* is an action against the identified property itself, in this case a ship.[8] As such, *in rem* proceedings are usually considered separate from actions *in personam* against the relevant parties. However, the charterers in this case put forward the House of Lords' decision *Republic of India v India Steamship Co (The India Grace) (No 2)*[9] where the English Court concluded that 'the notion of an action against an

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6 For academic commentary in 2006 considering jurisdiction, see C McLachlan, 'From Savigny to Cyberspace: Does the Internet Sound the Death-Knell for the Conflict of Laws?' (2006) 11 *Media and Arts Law Review* 418; M Richardson and R Garnett, 'Towards and Beyond an Australian Private International Law of Cross-Border Communications Disputes' (2006) 11 *Media and Arts Law Review* 331.

7 (2006) 157 FCR 45 (*Comandate (Full Court)*).

8 See, eg, *Aichhorn & Co KG v The Ship MV Talabot* (1974) 132 CLR 449, 455-56.

9 [1998] AC 878.

inanimate object was a fiction which had outlived its useful life'.[10] Thus, an action *in rem* was in fact an action between the plaintiff and the 'relevant person' from the moment that the Court was seized with jurisdiction.

In response, Allsop J[11] recognised that '[t]he utmost respect, of course, must be paid to the reasoning of such an eminent court; and the need for consistent doctrine in international shipping law so far as is possible must be recognized',[12] but he considered that separate proceedings *in rem* were a 'necessary tool of international maritime commerce'.[13] He concluded, '[u]ntil the High Court of Australia says otherwise, the law of Australia is that the action *in rem*, at least prior to the unconditional appearance of a relevant person, is an action against the ship, not the owner or demise charterer of the ship.'[14] Barring a detailed explanation regarding why the traditional maritime approach of *in rem* jurisdiction is failing in modern conditions, Allsop J's assertion that courts and lawyers are sophisticated enough to deal with the legal fiction of proceedings against objects rather than persons seems eminently reasonable.

### (b) Discretionary exercise of jurisdiction

#### *(i) Transfers under Cross-Vesting Scheme within Australia*

Within Australia, under the cross-vesting scheme a state Supreme Court with jurisdiction over a matter may decline to hear the case and transfer the matter to another state.[15] In *Schultz*,[16] the High Court clarified the test for granting a transfer under the scheme was the *Spiliada*[17]-inspired, whether the other forum was 'more appropriate', rather than the *Voth*[18]-like, whether the other forum was 'clearly inappropriate'. Despite this apparent clarity, we pointed out in the 2005 review[19] that courts have continued to struggle with the case-by-case analysis of factors necessary in applying the test. In fact, the Supreme Court of Victoria and the Supreme Court of New South Wales reached directly opposite results applying the supposedly clear standard to almost identical facts.[20]

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10 *Comandate (Full Court)* (2006) 157 FCR 45, 74 [100].
11 Finkelstein J agreeing. Finn J did not find it necessary to express an opinion on this issue.
12 *Comandate (Full Court)* (2006) 157 FCR 45, 75 [105].
13 Ibid 79 [118].
14 Ibid 81 [128].
15 See, eg, *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 5(2).
16 (2004) 221 CLR 400.
17 *Spiliada Maritime Corp v Cansulex* [1987] 1 AC 460.
18 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
19 Anderson and Davis, '2005 Survey', above n 4, 427-29.
20 *Ewins v BHP Billiton Ltd* [2005] VSC 4; *BHP Billiton Ltd v Utting* [2005] NSWSC 260.

This confusion has continued into 2006.[21] An impressive recent comprehensive empirical examination of all transfer decisions following Schultz has shown that whether or not cases were transferred did not depend on significant factual differences between the cases, but rather on more idiosyncratic factors that were given priority by the particular judges. All judges admitted that the traditional connecting factors pointed to the other forum as being the natural forum, but those judges who refused a transfer emphasised the plaintiff's life expectancy and the need for expeditious proceedings.[22] In short, particularly in New South Wales, this results in a bias in favour of the Dust Disease Tribunal. Until there is some guidance from an appellate court as to how the factors should be weighed, decisions under the cross-vesting scheme are likely to continue to create uncertainty and inequality for parties, particularly in dust diseases cases.

### *(ii)* Forum non conveniens

If cross-vesting legislation is not available, a court can decline jurisdiction under the doctrine of *forum non conveniens*. For Australia, *Voth v Manildra Flour Mills Pty Ltd*[23] established a strict 'clearly inappropriate forum' test for *forum non conveniens*. The case of *Murakami v Wiryadi*,[24] a probate case, is one of the relatively rare examples where a court found that strict standard met. The plaintiff, a resident of California, was a child of the deceased from an earlier relationship. The defendants were the deceased's ex-wife, a resident of Indonesia, and the children of that marriage, one of whom was an Indonesian resident and the other an Australian resident. The deceased's will left all his property to the plaintiff and her brother. Prior to his death, the deceased and other members of his families had been engaged in litigation in Indonesia concerning the division of marital property after the deceased and the defendant's divorce.

The plaintiff sought a declaration that the defendant held a share in real estate and bank accounts situated in Australia on trust for the plaintiff. She alleged that

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21 See *Holt v Forehan* [2006] VSC 148; *Benlair Pty Ltd v Terrigal Grosvenor Lodge Pty Ltd* [2006] NSWSC 339; *Fenedisto Pty Ltd v Brott* [2006] VSC 379; *Australian Rail Track Corp v Mineral Commodities Ltd* [2006] SASC 27; *Crompton Specialties Pty Ltd v BASF Australia Ltd* [2006] SASC 39; *MC v South Australia* (2006) 196 FLR 470; *Alstom Power Ltd v Yokogawa Australia Pty Ltd* [2006] SASC 74; *Retail Enterprise Developments Pty Ltd v Harris Scarfe Pty Ltd* [2006] VSC 82; *Kodak (Australasia) Pty Ltd v AWA Davis Pty Ltd* [2006] VSC 111; *Covus Corporation Pty Ltd v A J Lucas Drilling Pty Ltd* [2006] WASC 154; *National Australia Bank v Grose* [2006] NSWSC 979; *Trilogy Corporate Solutions Pty Ltd v Fitzroy Shopfitting and Building Pty Ltd* [2006] NSWSC 1026; *Snowy Mountains Organic Dairy Products Pty Ltd v Wholefoods Pty Ltd* [2006] FCA 1361; *Carslake v Gadens Lawyers* [2006] SASC 9; *Plantagenet Wines Pty Ltd v Lion Nathan Wine Group Australia Ltd* (2006) 229 ALR 327; *Le Busque v ACP Publishing Pty Ltd* [2006] ACTSC 46; *Simpson v Francke* [2006] VSC 200; *Re Westgate Wool Co Pty Ltd (in liq)* [2006] SASC 372.

22 See M de Garis, *In the Interests of Justice? Forum Transfer in Dust Disease Litigation: An Examination of* BHP Billiton Ltd v Schultz *and Section 5 of the* Jurisdiction of Courts (Cross-Vesting) Act 1987 (Honours Thesis, Australian National University, 2008).

23 (1990) 171 CLR 538.

24 [2006] NSWSC 1354.

the defendant had been obliged by Indonesian law, or by Indonesian custom and business efficacy, to reveal the existence of the Australian property in the Indonesian divorce proceedings and that failure to do so amounted to embezzlement under Indonesian law. Alternatively, she argued that the deceased had had a constructive trust in the property. The defendants sought a stay of proceedings in favour of the Indonesian proceedings based on *forum non conveniens*.

Justice Gzell of the Supreme Court of New South Wales weighed up the connecting factors, finding that: there was limited juridical advantage in New South Wales; neither the plaintiff nor two of the three defendants lived in New South Wales; the relevant events had taken part as much in Indonesia as in New South Wales; and the governing law was Indonesian. In addition, Gzell J noted that the pleadings alleging a breach of Indonesian custom or business efficacy were matters 'peculiarly within the purview of the Indonesian courts',[25] difficult for an expert to prove as a question of fact. Thus, in Gzell J's view, these considerations 'far outweigh[ed]' other factors, including the likely need for further proceedings in New South Wales to enforce the Indonesian judgment, the lack of the concept of a trust under Indonesian law and the fact that the *forum non conveniens* application had been made well after the defendants had unconditionally accepted the Court's jurisdiction.[26] As such, the Court found continuation of the New South Wales proceedings would be vexatious or oppressive, and granted a permanent stay, subject to an undertaking by the defendants that they would allow the plaintiff to use evidence subpoenaed in these proceedings in the Indonesian proceedings.

The Supreme Court of Victoria also found the strict *Voth* test for *forum non conveniens* satisfied in *Puttick v Fletcher Challenge Forests Ltd*.[27] The plaintiff had been employed by Tasman Pulp and Paper, a subsidiary of the defendant company, both incorporated in New Zealand. The plaintiff contracted mesothelioma during visits to factories in Belgium and Malaysia, which he had been directed to visit during his employment. The plaintiff resided in New Zealand during his employment, but the illness did not become symptomatic until after he moved to Melbourne. After contracting the disease, he applied to, and received, compensation from the New Zealand Accident Compensation Commission. He also brought an action in the Victorian Supreme Court against the defendant, arguing that the defendant controlled Tasman Pulp and Paper to such an extent that it owed him a duty of care as one of Tasman's employees. After the plaintiff passed away, the action was continued by his wife.

The defendant applied for a *forum non conveniens* stay. Justice Harper examined the usual connecting factors. He noted the plaintiff's wife, as the sole employee of a business and the sole carer for her children, would have difficulties attending a long trial in New Zealand. However, the defendant and Tasman Pulp were both based in New Zealand, and the relevant witness and evidence relating to the companies' relationship and work systems were all in New Zealand. While

25 Ibid [50].
26 Ibid [51].
27 [2006] VSC 370 (*Puttick*).

these factors made New Zealand a more appropriate forum, they did not make Victoria a clearly inappropriate forum.[28]

The governing law of the claim, however, was also New Zealand.[29] Justice Harper pointed out that the application of foreign law as the *lex causae* would not be enough on its own to render the Australian court a clearly inappropriate forum. Particularly where the foreign law had much in common with Australian law, its application would not give rise to great difficulty. However, in this case, the relevant New Zealand law was a statutory compensation scheme that had been in place since the 1970s: 'Its proper operation depends upon the proper construction and application of not only the governing legislation, but also the statutory and other law with which it interacts. This kind of foreign law is generally best applied by foreign courts.'[30] Based on these factors, Harper J stayed the proceedings.

For both the Supreme Courts of New South Wales and Victoria, the key factor in exercising restraint under *forum non conveniens* in *Murakami* and *Puttick* was the fact that the proceedings involved complex questions of foreign law in which the domestic courts were reluctant to pontificate. Given the practical difficulty of proving foreign law in Australian courts and the complicated nature of the foreign law in complex litigation, this deference to foreign courts seems sensible, indeed enlightened. It also seems like a possible emerging trend that stands counter to the strictest understanding of *Voth* as well as the High Court's indirect mandate of increased proof of foreign law raised by introduction of *renvoi* in *Neilson v Overseas Projects Corporation of Victoria Ltd*[31] in 2005.

### *(iii) Anti-suit injunctions*

In addition to the relatively recent endorsement of *forum non conveniens* even under the strict *Voth* standard, it is now undisputed that Australian courts have the jurisdiction to grant anti-suit injunctions against parties to foreign proceedings to protect Australian process.[32] While mostly left to the fearful fretting of academic commentary and occasionally considered by slick transnational lawyers, the next step in this progression would be an injunction against a party to prohibit the latter from seeking an anti-suit injunction in a foreign court, the dreaded 'anti-anti-suit injunction'.[33] In 2006, the Federal Court of Australia granted one of these rarities in *Pan Australia Shipping Pty Ltd v The Ship 'Comandate'*.[34]

As outlined above in section II (a), the case concerned a dispute over the breach of a charter agreement for the ship *Comandate*. After bringing *in rem* proceedings

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28 Ibid [18]-[21].
29 This aspect of the case is discussed below in relation to the choice of law for torts.
30 *Puttick* [2006] VSC 370, [16]-[17].
31 (2005) 223 CLR 331 (*Neilson*).
32 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.
33 See, eg, *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 16)* (Unreported, Federal Court of Australia, Lindgren J, 22 September 1995); *Cigna Insurance Australia Ltd v CSR Ltd* (Unreported, New South Wales Supreme Court, Rolfe J, 20 February 1996); *National Australia Bank Ltd v Idoport Pty Ltd* [2002] NSWSC 623.
34 [2006] FCA 881 (*Comandate (Federal Court)*).

to seize the *Comandate*, the plaintiff made an application for an anti-anti-suit injunction against the *Comandate's* owners to give the plaintiff time to investigate whether it had grounds to bring an *in personam* claim against the owners under the Trade Practices Act 1974 (Cth) (TPA). Under the charter agreement, disputes arising out of the charter were to be resolved by arbitration in London. The Court found that the evidence established the defendants were likely to bring an anti-suit injunction against the plaintiffs in the English courts unless restrained and that the English courts would be likely to grant such an anti-suit injunction.

Based on this, Rares J held that his Court had the power to grant an anti-suit injunction against the parties who might raise an anti-suit injunction in England: 'Just as the court can protect the efficacy of execution in proceedings which it has not yet decided, it can also protect the ability of persons to approach the court who seek the regular invocation and exercise of its jurisdiction.'[35] He drew an analogy with *Akai Pty Ltd v People's Insurance Co Ltd*,[36] where the High Court held that parties could not contract out of statutory jurisdiction of Australian courts under the Insurance Contracts Act 1984 (Cth). Similarly, he considered it was a matter of public policy that the plaintiff be able to access its rights under the TPA:

> If [the defendant were granted an anti-suit injunction in English courts] then these [Australian] proceedings would be unable to be pursued by the plaintiff at all and such rights as the plaintiff may have under the laws passed by the Parliament …, and which the public policy of this nation regards as being ones which ought to be availed of by persons who come before courts in this country, will be set at nought.[37]

In a hearing the next day,[38] Rares J affirmed the grant of the anti-anti-suit injunction, again emphasising the importance of the Court's jurisdiction to hear TPA claims.[39]

By way of commentary, first, it is interesting to note again the conflict of laws difficulties that are raised by mandatory laws such as the trade practices acts.[40] Indeed, in this case, Rares J was willing to grant the anti-anti-suit injunction to protect *potential* claims under the TPA. Second and more significantly, it is relevant to note the difference between what has been called the 'defensive' use of anti-suit injunctions to protect local proceedings, and the 'offensive' use of injunctions that 'quash the practical power' of foreign courts from hearing matters undisputedly within their control.[41] In no better cases do the underlying philosophical principles of comity raise their head than when an Australian court decides that a sister English court is not to be trusted to even consider *forum non conveniens* but must peremptorily be prevented from considering an anti-injunction.

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35 Ibid [23].
36 (1996) 188 CLR 418.
37 *Comandate (Federal Court)* [2006] FCA 881 [31].
38 *Pan Australia Shipping Pty Ltd v The Ship 'Comandate' (No 2)* [2006] FCA 1112.
39 Ibid [116].
40 See, eg, P E Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) 364-67.
41 *Laker Airways Ltd v Sabena, Belgian World Airlines*, 731 F 2d 909, 938 (DC Cir 1984).

On appeal to the Full Court of the Federal Court, as noted above the Court granted an unconditional stay of the proceedings in favour of the arbitration agreement. Thus, there was no longer reason for *Comandate* to seek an anti-suit injunction, and accordingly no need for the anti-anti-suit injunction.[42] However, the Full Court seemed to agree with our caution, noting:

> to order a party not to approach a court of competent jurisdiction is an indirect interference with that court. That is not to say anti-suit injunctions should not be issued. But it is to recognize that in a potentially complex exercise of discretion comity is not an 'incantation' … but a real consideration.[43]

## III. Choice of Law[44]

The primary trend in 2006 was how the lower courts practically applied the rules developed in the High Court's two major choice of law cases of *Pfeiffer*[45] and *Zhang*.[46] Interestingly in 2006 no cases engaged in applying the infinitely messy standard of *renvoi* promoted by the High Court's third major choice of law decision: *Neilson*.[47]

### (a) Characterisation of substance and procedure

One of the oldest issues in private international law is the characterisation question between matters of substance and procedure. *Pfeiffer* seemed to give clear guidance on this,[48] which was partially unwound by obliqueness in *Zhang*.[49] Even before that, however, *O'Driscoll v J Ray McDermott, SA*[50] ran into problems. The case is significant for its interesting fact pattern, as well as for comments made by the Court about the characterisation of laws as substantive or procedural. The plaintiff was injured in an accident while working for the defendant on a barge in Indonesian waters. The plaintiff sued the defendant for breach of an implied term in the employment contract. Under Western Australian choice of law rules, the proper law of the contract was Singaporean law.

At the time that the plaintiff commenced his action, Australian common law was that limitation provisions were procedural,[51] and hence governed by the *lex fori*. The plaintiff commenced his action within the limitation period under Western Australian law, which was six years. However, after the commencement of the

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42 *Comandate (Full Court)* (2006) 157 FCR 45, 110 [251].
43 Ibid 110 [252].
44 For commentary on a choice of law area reviewed in our 2005 survey, see J McCornish, 'Foreign Legal Professional Privilege: A New Problem for Australian Private International Law' (2006) 28 *Sydney Law Review* 297.
45 (2000) 203 CLR 503.
46 (2002) 210 CLR 491.
47 (2005) 223 CLR 331. For commentary on *Neilson*, in addition to sources cited in 2005 review, see E Schoeman, 'Renvoi: Throwing (and Catching) the Boomerang – *Neilson v Overseas Projects Corporation of Victoria Ltd*' (2006) 25 *University of Queensland Law Journal* 203.
48 *Pfeiffer* (2000) 203 CLR 503, 544.
49 *Zhang* (2002) 210 CLR 491, 520.
50 [2006] WASCA 25 (*O'Driscoll*).
51 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

action, the High Court handed down *Pfeiffer*, holding that limitation periods were substantive and thus governed by the *lex causae*.[52] Therefore, Chaney J at first instance applied the Singaporean limitation act, which required a plaintiff to bring an action for damages within three years of the earliest date on which the plaintiff had the knowledge required for bringing the action. As the plaintiff had brought his action more than three years after the accident, the Court dismissed the claim.

Both parties accepted that the Singaporean limitation act applied. In the Western Australian Court of Appeal, the plaintiff creatively argued that the change in Australian conflicts law brought about by *Pfeiffer* was 'knowledge required for bringing an action for damages' and thus the three-year limitation period mandated by the Singapore act did not begin to run until *Pfeiffer* was handed down. The Court unanimously rejected the argument, based on the interpretation of the Singaporean provision.[53]

The plaintiff also appealed on the basis that the defendant had failed to adduce expert evidence of Singapore's choice of law rules. The Court also rejected this argument, noting that there had been some expert evidence, and that the presumption of sameness would operate to fill any gaps in the evidence.[54] In *obiter*, McLure JA further commented that, while Neilson held that the *lex causae* includes the choice of law rules of the forum:

> [w]hat was not addressed in any detail was whether the principle extends to all of the conflict of law rules of the foreign *lex causae* including, *inter alia*, the conflicts classification rules. The question is whether the classification under Australia's conflicts rule of limitation as substantive is determinative or whether we also defer to a contrary (conflicting) classification of the foreign *lex causae*, and with what result?[55]

She noted that Singapore law characterised the limitations act as procedural for conflicts purposes and suggested that, once Australian courts applied foreign choice of law rules, there was no reason not to apply the foreign law in other circumstances. However, as the plaintiff had not argued the point, McLure JA did not offer further comment.

Moving beyond this muddy resolution, the issue of the foreign forum's classification of a provision as substantive or procedural also arose in *Hamilton v Merck & Co Inc*.[56] The plaintiffs sued the defendant in New South Wales under the TPA and in tort for claims made by the defendant in marketing and distributing the drug Vioxx. The defendant's conduct took place in Queensland and hence the defendants sought to rely on the Queensland Personal Injuries Proceedings Act 2002 (PIPA). PIPA imposed a duty on the parties to provide each other with certain documents. It also required plaintiffs to give advance written notice of a claim and for a compulsory conference of the parties to take place before the plaintiff could

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52 *Pfeiffer* (2000) 203 CLR 503, 544.
53 *O'Driscoll* [2006] WASCA 25, [8]-[10] (McLure JA), [46]-[58] (Murray JA).
54 Ibid [14]-[18] (McLure JA); [59]-[60] (Murray JA).
55 Ibid [12].
56 (2006) 230 ALR 156 (*Hamilton*).

start proceedings. The actions were removed to the Court of Appeal to determine whether the Queensland provisions applied.

As Queensland law was the *lex loci delicti* for the tort action, whether PIPA applied depended on whether its provisions were substantive or procedural. The Queensland Parliament had apparently anticipated that problem and expressly provided in section 7 of PIPA that its provisions were substantive. But, Spigelman CJ of the New South Wales Supreme Court rejected the notion that the Queensland politicians' deeming provision could be determinative of how a New South Wales court viewed the matter. As the Court was operating under federal jurisdiction, the Court was obliged to apply the common law of New South Wales.[57] While Queensland politicians' acts could have effect on *Queensland* common law to be applied in Queensland courts, it had no effect in modifying the common law of New South Wales. Whether a statutory provision was part of the substantive law was a matter of substance rather than form that depended on interpretation of the statutory regime. Moreover, Spigelman CJ even rejected the argument that the Queensland Parliament's opinion on the characterisation should be given weight in statutory interpretation.

Instead, Spigelman CJ applied the test established by the Court in *Pfeiffer*: the question was whether the PIPA provisions affected the 'enforceability of rights and duties'.[58] The provisions in relation to the provision of information were plainly procedural. The notice of claim and conference were preconditions to the commencement of proceedings, which suggested that they were substantive. However, other provisions of PIPA allowed further steps to be taken without complying with the legislation. Chief Justice Spigelman was also influenced by Queensland case law on an earlier version of the PIPA provisions and held, 'not without some fluctuation of view' that the notice and conference provisions were also procedural.[59]

Justice Handley in the New South Wales Court of Appeal reached the same conclusion as Spigelman CJ. He found that, as the provisions did not prevent the cause of action from accruing as soon as the damage was suffered, the provisions only regulated the manner in which the rights were enforced and were therefore procedural.[60]

The decision in *Hamilton* demonstrates that, despite the clarification of *Pfeiffer*, the practical operation of the substantive/procedural distinction is still difficult. While Spigelman CJ's reasoning that the distinction depends on substance rather than form appears imminently logical, it will be interesting to see if, as McLure JA in *O'Driscoll* suggested, a foreign forum's characterisation of a law as substantive or procedural will be seen as determinative.

As raised in earlier surveys, the Australian approach to the characterisation of procedure and substance can be contrasted with the English approach. In *Harding v*

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57 Judiciary Act 1903 (Cth) s 80.
58 *Hamilton* (2006) 230 ALR 156, 159 [12].
59 Ibid 172 [104].
60 Ibid 178-79 [143].

*Wealands*,[61] the House of Lords was faced with the same question that the High Court of Australia was faced with in *Pfeiffer* in 2004: whether a cap on damages was part of the substantive law to be applied as part of the *lex loci delicti* or a matter of procedural law to follow *lex fori*. The plaintiff, a British national, and the defendant, an Australian national, lived together in England. While on holiday in New South Wales, the defendant negligently caused a car accident that left the plaintiff tetraplegic. The plaintiff brought an action in England, where the only issue was the quantum of damages. The New South Wales Motor Accidents Compensation Act 1999 limited damages, which would have resulted in the plaintiff receiving about 30 per cent less damages than would have been available under English common law. As discussed in the 2004 review,[62] the English Court of Appeal were persuaded by the High Court of Australia's reasoning in *Pfeiffer* and held that all questions relating to damages were substantive.[63]

The House of Lords unanimously upheld the appeal.[64] However, the issue on which the case in the House of Lords turned was the meaning of 'procedure' not at common law, but in the relevant English statute, the Private International Law (Miscellaneous Provisions) Act 1995. As Lord Hoffman stated, '[e]ven if there appeared to be more logic in [the position under *Pfeiffer*] … the question is not what the law should be but what Parliament thought it was in 1995.'[65] It was clear that the common law position in 1995 was that assessment of damages was a procedural, not substantive, issue. This was further supported by a Report of the Law Reform Commission on which the legislation was based, as well as parliamentary debate at the time the legislation was passed. Thus, while the end result in this specific case is the opposite of Australian law, the reasoning in the case means that it is unlikely to carry any persuasive weight in future Australian decisions.

### (b) Torts

Although the *lex loci delicti* choice of law rule established in *Pfeiffer* and *Zhang* is theoretically easy to apply, two cases this year offer a reminder that the antecedent step – determining the place of the tort – still offers pragmatic difficulties. The case law on determining the place of the tort is well-settled. The authoritative tests propounded include the place where the plaintiff is given cause for complaint,[66] the

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61 [2007] 2 AC 1 (*Harding*).

62 K Anderson with J Davis, 'Annual Survey of Recent Developments in Australia Private International Law 2004' (2005) 25 *Aust YBIL* 697, 704-5.

63 [2005] 1 All ER 415.

64 For comment on the case, see P Rogerson, 'Quantification of Damages – Substance or Procedure?' [2006] *Cambridge Law Journal* 515; A Twine, 'House of Lords Gives Green Light for Forum Shoppers' (2006) 17 *Australian Product Liability Reporter* 107; H Seriki, '*Harding v Wealands*: The Final Word on Assessment of Damages under English Law?' (2007) 26 *Civil Justice Quarterly* 28; A Briggs, 'Decisions of British Courts During 2006: Private International Law' (2007) 77 *British Yearbook of International Law* 554, 565-72.

65 *Harding* [2007] 2 AC 1, 21 [51] (Lord Hoffman). See also 27 [69] (Lord Rodger of Earlsferry).

66 *Jackson v Spittall* (1870) LR 5 CP 542.

place where in substance the cause of action arises,[67] and the place where the act or omission assumes significance.[68] The difficulty, however, lies in applying the test.

While employed in New Zealand, the plaintiff in *Amaca Pty Ltd v Frost*[69] was exposed to dust and fibres from asbestos products manufactured by the defendant in New South Wales. The plaintiff had received compensation under a New Zealand compensation scheme, but brought further negligence proceedings in the New South Wales Dust Diseases Tribunal. The plaintiff argued that the place of the tort was where the asbestos had been manufactured: New South Wales law applied, under which the plaintiff would receive common law damages that are not available under New Zealand law. The defendant argued that the place of the tort was where the plaintiff had been exposed to the asbestos: under New Zealand law, the claim would be barred because the universal accident compensation scheme in that country bars access to the courts. The Tribunal found that the place of the tort was New South Wales; however, the Court of Appeal reversed the decision.

Chief Justice Spigelman, with whom Santow JA and McColl JA agreed, began by setting out the case law. He warned that, '[e]ach case turns on its own facts and it will rarely be appropriate to try to reason on the basis of factual analogies.'[70] Although he noted that the case law usually emphasised the importance of the place where the defendant acted, rather than the place where the plaintiff suffered the harm, which could be 'fortuitous', he distinguished the facts of the present case. The act of manufacture was not the act giving rise to liability: the problem was not one of defective manufacture, but rather that the product itself was inherently dangerous. Further, the fact that the plaintiff had been exposed to the asbestos in New Zealand was not fortuitous: it had always been intended that the asbestos products were to be distributed to New Zealand and the respondent had always been in New Zealand.[71]

The plaintiff further argued that, even if New Zealand law applied, his claim was not barred. He argued that *Pfeiffer* and *Zhang* had not only abolished the double actionability rule, but had also abolished a single actionability requirement. Thus, even though proceedings could not be brought in New Zealand, they could be brought in Australia. Chief Justice Spigelman considered that it was clear from the judgments in *Pfeiffer* and *Zhang* that the purpose of the choice of law rule was to achieve the same result in litigation, wherever the proceedings were commenced.[72] Thus, even if the foreign forum had a statute that allowed proceedings in Australia, 'the Australian choice of law rule should not permit so anomalous a result'.[73] The High Court refused leave to appeal.

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67 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458.
68 *Voth* (1990) 171 CLR 538.
69 (2006) 67 NSWLR 635.
70 Ibid 641 [20].
71 Ibid 645 [43].
72 Ibid 649-52 [77]-[100].
73 Ibid 647 [66].

In *Puttick*,[74] another asbestos case, discussed above in section II (b)(ii), the Court had to determine the place of the tort as part of analysing the connecting factors in a *forum non conveniens* application. The plaintiff argued the place of the tort was where he had been exposed to the risk: either Malaysia or Belgium. Justice Harper rejected this argument, holding that New Zealand was the place where the cause of action arose.

Justice Harper began by setting out the same case law as Spigelman CJ in *Amaca*. If the plaintiffs had sued the owners of the asbestos plants, then the *lex loci delicti* would have been the law of Malaysia or Belgium respectively. However, the breach alleged by the plaintiff in this case was a breach of the employer's obligation to its employees to provide a safe place of work. The defendant was a New Zealand company, the plaintiff was employed in New Zealand and it was there that the instruction was issued and received. Thus, it was in New Zealand that the cause of action arose.[75]

While the primary significance of these cases is to provide concrete examples of the way courts work through the issues of identification of the place of a tort in applying the *lex loci delicti* rule, they also suggest some of the difficulties asbestos cases have caused the conflict of laws. Like the confusing decisions following *Schultz* noted above, the hard cases of asbestos lean towards the bad law of the old adage, particularly when left to a specialist tribunal. It is, therefore, reassuring to see the high standard and understanding of the complex conflict of laws issues shown by the reviewing courts of appeal in rejecting the understandably sympathetic determinations of the lower tribunals.

### (c) Indemnity claims

Indemnity claims usually arise out of insurance contracts and therefore follow choice of contract law rules. *Sweedman v Transport Accident Commission*,[76] however, offers the High Court's guidance on the characterisation of indemnity claims when they arise under *legislation* and what the applicable choice of law rule might be. *Sweedman* concerned an action by the Victorian Transport Accident Commission (TAC) against a New South Wales resident for indemnity for compensation paid by the Commission to Victorian residents. The Victorian residents, the driver and passenger in a Victorian-registered vehicle, were injured in an accident in New South Wales with a New South Wales-registered vehicle driven by a New South Wales resident. The accident was assumed to be caused by the negligence of the New South Wales driver. The injured parties obtained compensation from the TAC under the Transport Accident Act 1986 (Vic). The TAC commenced proceedings against the NSW driver in the Victorian County Court under the Victorian Act for indemnity for the compensation payments.

Both parties accepted that the obligation of the appellant to indemnify was distinct from the underlying claim in tort.[77] The first question for the Court was the

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74 [2006] VSC 370.
75 Ibid [25].
76 (2006) 226 CLR 362.
77 See *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520.

appropriate characterisation of the claim. The majority[78] held that the requirement in the Victorian Act that the TAC seek indemnity only for the proportion of damages attributable to the negligence of the tortfeasor suggested that the indemnity action should be characterised as an action in *indebitatus assumpsit*, that is the old action of debt.[79] Thus, the applicable choice of law rule would be the law of the state with which the obligation to indemnify has the closest connection.

The majority noted that there was no High Court authority as to how to select the forum with the closest connection. Victoria, intervening, had suggested that, rather than the forum with the 'closest connection', the *lex causae* should be the source of the legal compulsion to make the compensation payments. However, there was no need to decide which approach was correct, as the fact that the source of the indemnity was Victorian law pointing to Victorian law as the *lex causae*, while the obligation to indemnify was also regarded as having its closest connection with Victoria.[80]

Justice Callinan, dissenting, decided the case on constitutional grounds. However, in *obiter*, he criticised the 'disturbing trend … towards jurisdictional over-reach'.[81] In Callinan J's opinion, it was strongly arguable that, as the facts giving rise to the indemnity were based in tort, the action was properly characterised as a tort.[82] He further commented that, even if the action was one for indemnity, its nexus with New South Wales was closer than Victoria, as the events giving rise to the indemnity took place in New South Wales, caused by a person resident in New South Wales, and that any indemnity would need to be satisfied in a NSW court.[83]

As the only High Court decision on private international law for the year, this decision is not particularly significant, though it does provide a seemingly workable resolution to this small question.

## IV. Enforcement of Foreign Judgments[84]

### (a) Freezing (Mareva) orders

Mareva orders, also known as freezing orders, allow a plaintiff to prevent a defendant from disposing of its assets, ensuring that there will be enough funds to satisfy the judgment if the plaintiff is successful. While originally intended to avert the need for foreign enforcement proceedings against assets outside the jurisdiction, some courts are now willing to grant Mareva orders over local assets in anticipation of proceedings seeking to enforce a foreign judgment.

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78 Gleeson CJ, Gummow, Kirby and Hayne JJ. Callinan J dissented and Heydon J did not comment on this matter.

79 *Sweedman* (2006) 226 CLR 362, 401 [27]-[29].

80 Ibid 402 [31]-[32].

81 Ibid 421 [102].

82 Ibid 426 [114]-[115].

83 Ibid 428 [120].

84 On enforcement of foreign judgments, see J Hogan-Doran, 'Enforcing Australian Judgments in the United States (and Vice Versa): How the Long Arm of Australian Courts Reaches across the Pacific' (2006) 80 *Australian Law Journal* 361.

This arose in *Celtic Resources Holdings Plc v Arduina BV*.[85] An award made in arbitration between the parties was registered in the United Kingdom. The judgment was not yet enforceable in the United Kingdom due to the Arbitration Act 1996 (UK), and was accordingly not yet enforceable in Australia under the Foreign Judgments Act 1991 (Cth). Nevertheless, the Western Australian Supreme Court was asked to grant a Mareva order over Arduina's Australian assets in anticipation of Australian enforcement proceedings.

Justice Hasluck referred to *Davis v Turning Properties Pty Ltd*,[86] where the New South Wales Supreme Court granted a Mareva order over the defendant's Australian property in support of a worldwide Mareva order issued by a Bahaman court. He accepted he had jurisdiction to grant a Mareva order over Australian assets 'where a foreign judgment has been or is to be obtained'.[87] However, he noted that comity required that he 'endeavour to act consistently with the procedural and substantive requirements in the country of the original Court'.[88] He distinguished the facts from *Davis*; as the judgment was not yet enforceable in the United Kingdom, it would be inconsistent with the procedure in the United Kingdom courts to grant a Mareva order.[89]

Subsequently, the English courts granted a worldwide Mareva order, and the plaintiffs then applied to the Western Australian Supreme Court for a local Mareva order.[90] On this occasion the matter came before Jenkins J, who refused to grant the order. Although Jenkins J agreed that comity no longer precluded the grant of the order,[91] he interpreted Hasluck J as refusing the Mareva order on a second ground that there was no likely abuse of process of the Western Australian Court to justify the order until the foreign judgment was registrable in Australia.[92] The granting of the freezing orders in the English courts did not affect this second ground.

Justice Jenkins' analysis of Hasluck J's judgment is arguably incorrect. Justice Hasluck's statement that there was jurisdiction to grant a Mareva order 'where a foreign judgment has been or is to be obtained'[93] in fact suggests that he would have granted a Mareva order had there been a Mareva order from the United Kingdom courts at the time.[94] In any case, we prefer the more liberal approach of the Court in *Davis* than the narrower approach taken by Jenkins J in the second *Celtic Resources Case*. As international litigation increasingly crosses national borders, so is it more important for courts to cooperate by means such as granting

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85 [2006] WASC 68 (*Celtic 1*).
86 (2005) 222 ALR 767. The decision is discussed in Anderson and Davis, '2005 Annual Survey', above n 4, 442-44.
87 *Celtic 1* (2006) 32 WAR 276, 285 [56].
88 Ibid.
89 Ibid 285 [59]-[60].
90 *Celtic Resources Holdings Plc v Arduina Holding BV* [2006] WASC 103 (*Celtic 2*).
91 Ibid [32]-[34].
92 Ibid [38].
93 *Celtic 1* (2006) 32 WAR 276, 285 [56] [emphasis added].
94 See K Pham, 'Enforcement of Non-Monetary Foreign Judgments in Australia' (2008) *Sydney Law Review* (forthcoming).

Mareva orders to assist in the enforcement of foreign judgments, as well as avoiding unnecessarily prejudicial acts like anti-anti-suit injunctions.

### (b) Consensual orders

In *Funge Systems Inc v Newcom Technologies Pty Ltd*,[95] discussed in the 2005 review,[96] the South Australian Supreme Court refused enforcement of a consensual order made in complex bankruptcy proceedings. In *Newcom Holdings Pty Ltd v Funge Systems Inc*,[97] a Full Court of the Supreme Court unanimously upheld the decision. Justice Gray with whom Nyland J agreed, found several problems with the foreign order, including that one of the parties before the South Australian Court was not a party to the foreign order, and that the foreign order was not final and conclusive or for a fixed sum of money. In any case, there was nothing to enforce in Australia, as the obligation in Australia had already been carried out, and the other orders related to actions to be undertaken in the United States.[98] Justice Vanstone also found that there were no outstanding obligations to be enforced, noting that it was only the orders, rather than the reasons for a foreign judgment, that could be enforced.[99] Despite the complex litigation involved, the Full Court was able to decide the case with a straight-forward application of basic, long-settled conflict rules.

### (c) Trans-Tasman orders

Perhaps the most significant potential development in private international law was the release of the report of the Trans-Tasman Working Group on Trans-Tasman Court Proceedings and Regulatory Enforcement.[100] The proposals, if adopted, will pave the way for significant increased co-operation between Australian and New Zealand courts in a variety of conflict of laws situations.

First, the report recommended the establishment of a scheme – similar to the intra-Australian Service and Execution of Process Act 1992 (Cth) – allowing service in the other country without having to establish a connection between the proceedings and the foreign forum. The report also proposed a common statutory test for *forum non conveniens* based on the 'more appropriate court' standard. It further suggested a number of recommendations supporting trans-Tasman proceedings, relating to subpoenas and court appearances by video-link or telephone.

Second, and of even greater potential impact, are the recommendations in relation to the enforcement of foreign judgments. The report recommended the expansion of enforcement to a wide range of foreign judgments, including non-monetary judgments, tribunal orders, civil pecuniary penalties and fines for

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95 [2005] SASC 498.
96 Anderson and Davis, '2005 Survey', above n 4, 444-45.
97 [2006] SASC 284.
98 Ibid [29]-[39].
99 Ibid [45].
100 Trans-Tasman Working Group, *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Report by the Trans-Tasman Working Group* (2006).

some regulatory offences. The only ground to refuse to enforce foreign judgments would be public policy. Under the proposal, parties could only raise natural justice and fraud defences with the original court, and the common law rule barring the enforcement of judgments based on foreign public law would be abolished.

The Working Group's recommendations have been accepted by both governments and implemented in the Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement. It is anticipated that legislation to implement the Agreement will be introduced in 2009.[101] Given the traditional close links between Australia and New Zealand, we welcome the agreement and its ability to provide 'cheaper, more efficient and less complicated dispute resolution'[102] for individuals and business.

## V. Conclusion

The past half decade has seen the High Court produce at least four major private international law decisions: *Pfeiffer*, *Zhang*, *Neilson*, and *Schultz*. All of these cases purported to bring simplicity to the area with straightforward conflict rules. While 2006 did see one minor High Court decision – *Sweedman* – the more significant trend was how the state Supreme Courts struggled with the practical application of the new rules. These efforts have been mixed. No new guidance was found for *renvoi*; the courts remain mixed on forum transfers under the cross-vesting legislation; characterisation of substance versus procedure remains difficult for Australian (and English) courts; and locating the place of a tort, especially for tort-like statutory claims such as trade practice actions, indemnity claims and dust disease, continues to be conflicted. The 2006 cases add some important gloss to these questions but also portend more litigation to follow. Looking further to the future, what might become the most significant development for the latter half of the decade are the Trans-Tasman proposals for cooperation by Australian and New Zealand courts on a host of transnational procedural issues. If these are adopted, it will do for antipodean conflicts what the cross-vesting legislation and Service and Execution of Process Act 1992 (Cth) have done for intra-Australian conflicts: that is, not do away with the conflicts rules, but make them more predictable and logical to navigate.

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101 Robert McClelland and Lianne Dalziel, 'Treaty to improve trans-Tasman legal cooperation' (Press release, 23 July 2008).

102 Trans-Tasman Working Group, above n 100, 3.