THE AUSTRALIAN 'SINGLE LAW AREA'

JUSTICE BRADLEY SELWAY*

The accepted wisdom in Australia is that Australia comprises a number of separate law areas for the purpose of private international law. On this approach the question whether the court of an Australian State should apply the statute law of another Australian State is to be determined by the common law rules relating to conflict of laws. However, the approach and reasoning of the High Court in a number of recent cases, particularly Pfeiffer and Mobil Oil, at least suggests that Australia should be treated as a single law area and that the rules to resolve conflicts between State statutes are constitutional rules, not common law rules. The nature, detail and effect of such constitutional rules is considered.

I INTRODUCTION

In 1995 Justice Gummow, then of the Federal Court, wrote an important article dealing, in part, with the resolution of conflicts between statutory laws within the Australian federation.[1] His Honour, citing a previous article by Brian Opeskin, posed the question whether Australia comprised a single 'national law area'.[2] It was unnecessary in the context of that paper for his Honour to answer that question.

The question left open by Justice Gummow is an important question not only because of its practical application to issues of private international law, but also because the answer to it will inform our understanding of the nature of the Australian federation.

A 'law area' or 'law district' is a territorial unit with a distinct general body of law.[3] The substantive law applied by the courts within that territorial unit is determined only by the laws (including the conflict of law rules) made or applicable in that area. The question whether a particular law made within a law area is applicable in the courts of that area is ultimately a constitutional question. On the other hand, the question whether a 'foreign' law made outside of that law area should be applied by the courts within that law area is a question of conflict of laws.

The issue of whether there is a single Australian law area comes down to the question of whether conflicts between the laws made by Australian Parliaments are to be resolved by the Commonwealth Constitution or by choice of law rules.

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1 W M C Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979.

2 Ibid 1002 citing Brian Opeskin 'The Price of Forum Shopping' (1994) 16 *Sydney Law Review* 14, 22.

3 M Tilbury, G Davis and Brian Opeskin, *Conflict of Laws in Australia* (2002) 8; P Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) 8.

There have been a number of legal developments since Justice Gummow wrote his article (many of which it predicted). An answer to his Honour's question may now be attempted. In light of those developments it is argued that Australia should now be treated as a single law area.

II SEPARATE LAW AREAS

Historically Australia has been viewed as comprising at least seven 'law areas'.[4] Each State was thought of as being a separate law area. The relationship between these separate law areas was considered to be governed by common law choice of law rules, subject only to whatever valid changes may have been effected by valid Commonwealth laws. Subject to such Commonwealth laws, each separate State was treated as if it were a separate country.

The strongest statement of this position can be found in the majority judgment in *McKain v R. W. Miller & Co (SA) Pty Ltd* :[5]

> To describe the States, as Windeyer J once described them, as 'separate countries in private international law' may sound anachronistic. Yet it is of the nature of the federation created by the Constitution that the States be distinct law areas whose laws may govern any subject matter subject to constitutional restrictions and qualifications. The laws of the States, though recognized through-out Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts unless a valid law of the Commonwealth overrides the relevant State laws and prescribes a uniform legal consequence. That may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union. Far from eliminating the differential operation of State laws, s 118 commands that all the laws of all the States be given full faith and credit: the laws of the forum are to be recognized as fully as the laws of the place where the set of facts occurred. Section 118 would not be obeyed by refusing recognition to the laws of a forum State and by applying only the laws of the part of Australia in which the set of facts occurred. A disparity in legal consequences attached to a set of facts cannot be eliminated by refusing recognition to laws of the forumwhich create the disparity.

This approach was readily understandable. Leaving aside any complications relating to federal jurisdiction, the common view was that within each State there was a separate common law and separate State statutory laws both of which were enforced by the courts of that State.

In a number of recent cases the High Court has moved away from this position. In particular, it identified that there is, in Australia, a single common law and an

4 Tilbury, Davis and Opeskin, above n 3, 9 suggest that there are 17 Australian law areas, comprising the Commonwealth, the States and each of the Territories. Cf Nygh and Davies, above n 5, 9, where it is suggested that there are 9 law areas. For a general discussion of the historical position, see P Nygh, 'Private International Law - Full Faith and Credit: A Constitutional Role for Conflict Resolution' (1991) 13 *Sydney Law Review* 415, 416-21.

5 (1991) 174 CLR 1, 36.

integrated (although not unified) judicial system.[6]

As to the single common law, the previous view had been that the reception of the common law may have differed in the different colonies with the effect that the common law in each State was separate and different.[7] At settlement most of the Australian colonies were convict colonies where certain common law rules could not have been reasonably applied. The common law rule that an attainted felon could not give evidence in court is an obvious example. That rule was not received in New South Wales.[8] However, there is no obvious reason why that rule should not have applied in South Australia and Western Australia where, at least at settlement, the colonies did not have convicts.[9] And it seems to have been assumed that the common law, once received, did not thereafter 'expand' as the conditions in the colony changed so that the previously unreceived common law rule became suitable.[10] However, in *Lipohar v The Queen*[11] the majority of the High Court accepted that the received common law would expand and change as the conditions in the colony changed. The consequence of the new approach was an acceptance that, by federation, the common law in all of the colonies was the same, notwithstanding what it had been at settlement. And, following federation, the appellate role of the High Court ensured that the single Australian common law developed in a uniform and consistent fashion.

This recognition of a single common law administered by an integrated judicial system necessitated at least some qualification to the concept of 'separate law areas'. That qualification was made in *John Pfeiffer Pty Ltd v Rogerson ('John Pfeiffer')*.[12] In this case, the court accepted that the States were separate law areas, but that that description needed to be understood in the context that federal jurisdiction involved a further and separate law area,[13] that the States were components of the federation,[14] and that there was a single common law (which included choice of law rules) applicable in all Australian law areas.[15]

The reason why the court found that there were separate law areas for each of the States was because the court was of the view that State courts apply, and only apply, the statutory law of the relevant jurisdiction. Reference can be made, for

6 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 102, 112-14, 137-9; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562-6; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574; *Lipohar v The Queen* (1999) 200 CLR 485, 504-10.

7 See, eg, John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 785; A Inglis Clark *Studies in Australian Constitutional Law* (1901) 190-195; William Anstey Wynes, *Legislative Executive and Judicial Powers in Australia* (3rd ed, 1962) 76; LJ Priestley, 'A Federal Common Law in Australia?' (1995) 6 *Public Law Review* 221.

8 *R v Farrell* (1831) 1 Legge 5. It is noted that the courts in the Australian colonies were generally reticent in holding that the common law was unsuitable to the condition of the colonies, see Alex Castles, *An Introduction to Australian Legal History* (1971) 139.

9 Western Australia became a convict settlement in 1850 - after initial settlement.

10 For example, this seems to have been assumed by counsel and by the court in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, save only for Murphy J at 610-11.

11 (1999) 200 CLR 485, 508-9, 551-2. See also Gummow, above n 1, 989-90. Callinan J disagreed with the rest of the majority on this point: see at 574-6.

12 (2000) 203 CLR 503.

13 Ibid 518, 529-32.

14 Ibid 514.

15 Ibid.

example, to the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ:[16]

> No question as to the law to be applied arises for State or Territory courts if the events which give rise to the proceeding all occurred within the territory of the court's jurisdiction. It is the body of law comprising the Constitution, applicable Commonwealth legislation, applicable legislation of the State or Territory concerned, and the common law of Australia. But if the parties or the events have some relevant connection with another Australian jurisdiction, there is a question whether any of the legislation of that other jurisdiction should be taken into account in deciding any of the three issues of existence, extent or enforceability of rights and obligations. No question can arise about the other sources of law: effect must always be given by a State or Territory court to the Constitution and to any applicable Commonwealth legislation, and subject to what follows, because there is a single common law of Australia, there will be no difference in the parties' rights or obligations on that account, no matter where in Australia those rights or obligations are litigated.

The consequence of this analysis is that the question whether a State court should apply the statutory law of another jurisdiction was said to be a choice of law question.[17]

This was to be contrasted with the position in relation to federal jurisdiction. In federal jurisdiction there is a single 'Australia wide' jurisdiction. The issue of what substantive law was applicable to a particular act or event was ultimately to be determined by Commonwealth legislation, particularly ss 79 and 80 of the *Judiciary Act 1903* (Cth).[18]

III A SINGLE LAW AREA

In the more recent cases before the High Court, no one has argued that the court should hold that there is only one single law area in Australia. In these circumstances it is not surprising that the court has continued to treat each of the States as separate law areas, at least when exercising 'State jurisdiction'. Nevertheless, the reasoning and approach that the court has adopted would seem to lead inevitably to the conclusion that Australia is a single law area. If so, then the question of what substantive law applies to a particular fact or event to which Australian law purports to apply is a constitutional question - not a question of conflict of laws.

In order to consider this issue it is first necessary to draw a distinction between the jurisdiction of courts and the substantive law applied by the courts in the exercise of that jurisdiction. For this purpose I use the word 'jurisdiction' to refer to the geographical reach of a court's writ and the subject matter of the actions that the court can hear. The word can have other meanings and may be confusing

16 Ibid 517-18.
17 Ibid 528-9.
18 Ibid 529-32.

in this context. This was discussed in *Lipohar v The Queen* in the joint judgment of Gaudron, Gummow & Hayne JJ:[19]

> The term 'jurisdiction' here, as elsewhere, gives rise to difficulty. It is a generic term, a point made by Isaacs J in *Baxter v Commissioners of Taxation (NSW)*[(1907) 4 CLR 1087, 1142]. It is used in a variety of senses, some relating to geography, some to persons and procedures, others to constitutional and judicial structures and powers. Thus, 'federal jurisdiction' is 'the authority to adjudicate derived from the Commonwealth Constitution and laws' whereas the phrase 'inherent jurisdiction', used in relation to such things as the granting of permanent stays for abuse of process, identifies the power of a court to make orders of a particular description.
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> 'Jurisdiction' may be used (i) to describe the amenability of a defendant to the court's writ and the geographical reach of that writ, or (ii) rather differently, to identify the subject-matter of those actions entertained by a particular court, or, finally (iii) to locate a particular territorial or 'law area' or 'law district'. The distinction between (i) and (ii) was drawn by Mason ACJ, Wilson and Dawson JJ in *Flaherty v Girgis* [(1987) 162 CLR 574, 598]. In passages in their joint judgment in *Thompson v The Queen* [(1989) 169 CLR 1, 11-12], Mason CJ and Dawson J used the term 'jurisdiction' in all three of these senses.

Obviously the jurisdiction of a particular court to hear particular issues may be limited. In relation to federal jurisdiction, jurisdiction is necessarily limited by the provisions of Chapter III of the Constitution. In relation to State courts, their 'usual'[20] jurisdiction is limited to the relevant person being present in the area of the State at the time the proceedings are instituted or served.[21] Usually there are also limitations upon the subject matter of the jurisdiction of State courts. The 'usual' jurisdiction of the criminal courts of a State are considered to be limited to hearing offences against the common law where the offence occurs within the relevant State,[22] or to offences against the statutory law of that State.[23] There are also understood limitations upon the 'usual' jurisdiction of the State courts in civil proceedings. For example, the jurisdiction to determine the existence or otherwise of a real property right is limited to real property within the jurisdiction.[24]

19 (1999) 200 CLR 485, 516-7; see also Kirby J, 548; *Regie National Des Usines Renault SA v Zhang* (2002) 187 ALR 1, 3-5; *Dow Jones & Co Inc v Gutnick* (2002) 194 ALR 433, 437; Gummow, above n 1, 984-5.

20 For example, the jurisdiction of the Supreme Court of South Australia. Under section 17(2) of the *Supreme Court Act 1935 (SA)* it possesses the jurisdiction of the English courts of Chancery, Queen's Bench, Common Pleas, Exchequer and Assize. The jurisdiction of those courts was determined largely by the common law. It was a territorial jurisdiction.

21 As to criminal matters, see *Ebatarinja v Deland* (1998) 194 CLR 444, 454. As to civil matters, see *Laurie v Carroll* (1958) 98 CLR 310, 323; *Gosper v Sawyer* (1985) 160 CLR 548 and *Flaherty v Girgis* (1987) 162 CLR 574; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 548-9; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, 166.

22 *R v Munton* (1793) 1 Esp 62 (170 ER 280); *R v Keyn* (1876) 2 Ex D 63, 66-8, 117-8, 145-8, 162-8; *Thompson v The Queen* (1989) 169 CLR 1, 19-22; *Ward v The Queen* (1980) 142 CLR 308; *Lipohar v The Queen* (1999) 200 CLR 485, 532-5.

23 *R v Catanzariti* (1995) 65 SASR 201, 204-5, 215.

24 *Hesperides Hotels Ltd v Muftizade* [1979] AC 508; *Couzens v Negri* [1981] VR 824.

These limitations, properly understood, are simply the consequence of the interpretation of the relevant statutory power conferring jurisdiction, against the background of the English common law relating to venue.[25] There is no constitutional or other reason why the jurisdiction of State courts needs to be so limited. And the States have legislated to extend the jurisdiction of their courts. 'Long arm' jurisdiction is an example.[26] So long as the relevant State law is constitutionally valid, the conferral of 'extra-territorial' jurisdiction is also valid and effective. *Mobil Oil Australia Pty Ltd v Victoria ('Mobil Oil')*[27] concerned the validity of the 'group proceedings' jurisdiction of the Supreme Court of Victoria. That legislation enabled interstate parties to be joined as plaintiffs to an action against a Victorian defendant. The High Court held that there was a sufficient nexus with Victoria to support a law conferring jurisdiction on the Victorian Supreme Court, even though that jurisdiction may have related to plaintiffs residing and to causes of action arising out of the State.[28]

This is not surprising. As was pointed out in the joint judgment in *Mobil Oil*:[29]

> The very existence of that body of choice of law rules, by which state and federal courts in Australia decide what law is to be applied to determine the consequences of acts or omissions which occurred in a state or territory other than that in which proceedings are brought, denies the validity of a proposition that state courts must confine their attention to cases in which the subject matter arises within the geographical area in which the court's writ runs if the states are to be able to coexist in the federation.

The federal structure of the Commonwealth Constitution does mean that the jurisdiction of the courts of a State must be sourced to the legislation of that State. In particular, the Parliament of one State cannot confer jurisdiction upon the courts of another. This point was well made by Gummow and Hayne JJ in *Re Wakim; Ex parte McNally*:[30]

> It may be right to say that there is no reason why the Parliament of a State cannot pass a law that provides (in effect) that the courts of another polity within or outside the federation are to have jurisdiction over certain kinds of matter. But that law will be of no effect unless the courts of that other polity give it effect. And that directs attention to what the law of that other polity provides...
> What gives courts the authority to decide a matter is the law of the polity of

25 *Lipohar v The Queen* (1999) 200 CLR 485, 497-8, 518.
26 *Gosper v Sawyer* (1985) 160 CLR 548; *Flaherty v Girgis* (1987) 162 CLR 574. See Gummow, above n 1, 991.
27 (2002) 189 ALR 161.
28 Ibid 165-8 .
29 Ibid 177.
30 (1999) 198 CLR 511, 573. Of course, that case ultimately determined whether the national cross-vesting scheme was valid. The majority held that the separation of powers principles within the Commonwealth Constitution meant that the Commonwealth Parliament did not have the legislative power to consent to the conferral of State jurisdiction upon federal courts. Nevertheless, the scheme is still effective to cross-vest federal and Territory jurisdiction between State, federal and Territory courts and to cross-vest State jurisdiction between State and Territory courts.

> the courts concerned, not some attempted conferral of jurisdiction on those courts by the legislature of another polity.

Just as the laws of one polity cannot confer jurisdiction upon the courts of another polity, so also, for the same reasons, those laws cannot reconstitute those courts or direct them in relation to their organisation or procedure. The limitation upon Commonwealth legislative power under s 77(iii) of the Constitution that it must take the State courts as it finds them[31] is, necessarily, a federal limitation which applies to all legislative power within the federation.

It will be necessary to return to the question of jurisdiction in due course, but for the moment it suffices to say that only the Victorian Parliament (for example) can confer jurisdiction on Victorian courts. But, so long as there is a relevant nexus to Victoria, that jurisdiction can include the jurisdiction to hear matters that arise in some other State. And indeed, the States have conferred such jurisdiction on their courts. Workers compensation jurisdiction is one example.[32] Probably the most extreme example thus far is the jurisdiction conferred on the New South Wales Dust Diseases Tribunal.[33]

It is one thing to say that only the relevant Parliament can confer jurisdiction (in the sense in which that word is used in this article), it is another to say that that Parliament has an absolute discretion as to what substantive law is to be applied within that jurisdiction.

If we look first at federal jurisdiction, it will be recalled that in *Pfeiffer* the High Court identified ss 79 and 80 of the *Judiciary Act 1903* (Cth) as the source or sources for determining what law is applicable in federal jurisdiction. This may be correct where the federal jurisdiction is based upon a 'matter arising under any laws made by the Parliament' within the meaning of s 77(iii) of the Commonwealth Constitution. It may be that the legislative power that supports the relevant Commonwealth law would also enable the Commonwealth to legislate as to the substantive or procedural law otherwise to apply in any proceedings.

But in other contexts it is not at all obvious what legislative power the Commonwealth Parliament has to determine that applicable substantive law. There is a suggestion by Mason CJ in *Breavington v Godleman*[34] that s 51(xxv) of the Commonwealth Constitution may be the source of Commonwealth legislative power to legislate concerning the applicability of substantive law. That paragraph confers on the Commonwealth Parliament legislative power with respect to 'the recognition throughout the Commonwealth of the laws ... of the States.' However it would not appear that the resolution of conflicts involves 'recognition'. Instead it would appear that 'recognition' relates primarily to issues

31 *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25, 37.

32 See *Commissioner for Railways (Qld) v Peters* (1991) 24 NSWLR 407, 436-8.

33 *Dust Diseases Tribunal Act 1989* (NSW) ss 12A, 12B, 12D.

34 *Breavington v Godleman* (1988) 169 CLR 41, 83; see also Nygh, above n 5, 433-4; Gummow, above n 1, 1010-11.

relating to evidence and (perhaps) enforcement,[35] and does not even extend to questions of the effect of the law in the interstate jurisdiction.[36]

Leaving aside s 51(xxv) of the Commonwealth Constitution, the Commonwealth Parliament does not have any general legislative power to determine what substantive law is applicable in federal jurisdiction. Assume, for example, that a resident of Victoria whilst driving on holiday in South Australia collides in South Australia with a motor vehicle driven by a South Australian resident. The matter is within federal jurisdiction by virtue of the diversity jurisdiction in s 75(iv) of the Commonwealth Constitution. That jurisdiction is conferred by the Constitution itself, not by the *Judiciary Act 1903* (Cth).[37] But there is no Commonwealth legislative power to determine the rights of the two drivers. The Commonwealth Parliament does not have legislative power to determine the rights and liabilities of persons who could be a party to proceedings in federal jurisdiction. The incidental power in s 51(xxxix) of the Commonwealth Constitution is obviously insufficient for this purpose. That power relates to 'something arising in the course of exercising judicial power, something attendant upon, or incidental to, the fulfilment of powers truly belonging to the judicature'.[38] It does not enable the Commonwealth Parliament to create a 'matter'.[39] As is obvious from the Constitution itself, federal jurisdiction arises in circumstances where the Commonwealth has no substantive legislative power.

It is clear that the identification of the law to be applied in the above example must be made by the Constitution itself, and not by the *Judiciary Act 1903* (Cth). Indeed, this would seem to be the conclusion reached in the joint judgment of Gleeson CJ and Gaudron and Gummow JJ in *Australian Securities and Investment Commission v Edensor Nominees Pty Ltd ('Edensor')*,[40] that 'the identification of the substantive law to be applied in federal jurisdiction is achieved by Chapter III of the Constitution'; s 79 of the *Judiciary Act 1903* (Cth) has generally been understood as being consistent with Chapter III and covering clause 5 of the Constitution, but if it is not, then it would need to be read down as being subject to the Constitution.

Section 79 of the *Judiciary Act 1903* (Cth) provides that the substantive laws (including choice of law rules) of the State where the court is sitting apply in the proceedings. Generally the court will be sitting in that State which has the most contact with the case. Even if not, the application of the common law choice of

35 But see section 51(xxiv) which would seem to deal expressly with enforcement.

36 See *Breavington v Goldleman* (1988) 169 CLR 41, 96 (Wilson and Gaudron JJ) on the different operation of s 51(xxv) and s 118. Contrast Australian Law Reform Commission *Judicial Power of the Commonwealth* (2001) 563-7 which takes a remarkably robust view of both paragraph (xxv) and (xxxix) of s 51 of the *Commonwealth Constitution*.

37 *Dalgarno v Hannah* (1903) 1 CLR 1, 10-11.

38 *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 587.

39 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265-6; *Flaherty v Girgis* (1987) 162 CLR 574, 598. This does not mean that there must be pre-existing rights in order to have a 'matter': see A Stone, 'The Common Law and the Constitution: A Reply' (2002) 26 *Melbourne University Law Review* 646, 661-2. Some examples of 'post dated' rights are given later in this paper. For present purposes the distinction being made is between 'matter' and 'jurisdiction'.

40 *Australian Securities and Investment Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 587-8.

law rules will usually ensure that the appropriate laws are applied. But this is not necessarily the case. Referring back to our road accident example, what would be the position if the Victorian Parliament had legislated to the effect that the driver of a Victorian motor vehicle was not liable for personal injury damage caused to any person as a result of the driving of that motor vehicle where the injured person was required by the law of the place where the accident occurred to wear a seat belt, but was not doing so when the accident occurred? This is what Justice Gummow described in his article as 'conflict in the constitutional sense'.[41] At least in the absence of an inconsistent South Australian law, the Victorian legislation would appear to be valid and effective. There is an obvious nexus with Victoria, reinforced by the effect of claims on the Victorian compulsory third party insurance scheme. After *Pfeiffer*, the South Australian courts would apply the common law choice of law rules (assuming there is no contrary statute). In South Australia, South Australian law should apply as the accident occurred in that State. Victorian law would be ignored. Consequently, if the federal proceedings were heard in South Australia then the Victorian statute would be ignored. On the other hand, given the clear terms of the Victorian statute the common law choice of law rules would not apply in that State. If the federal proceedings were heard in Victoria then the Victorian Act would apply and the defendant would have a complete defence if the plaintiff was not wearing his or her seat belt. The difference between the two situations is not a difference as to where the event occurred,[42] but only a difference as to where the proceedings are heard.

This example highlights the fact that s 79 of the *Judiciary Act 1903* (Cth) does not have the result that the same substantive law is applied in federal jurisdiction no matter where the proceedings are taken.[43]

But the question of whether there is a 'matter' and of what rights and liabilities may be applicable to that matter are not incidental to jurisdiction - they are necessarily separate from the question of jurisdiction; albeit that they are obviously related. Chapter III of the Commonwealth Constitution necessarily assumes that the rights and liabilities of the citizen in federal jurisdiction are capable of determination independently of knowing in what State the proceedings are to be heard.

This conclusion was implicit in the Court holding in *Pfeiffer* that there was a single law area in federal jurisdiction. It was made clear in the joint judgment in *Edensor*. The question of what substantive law is to be applied in federal jurisdiction is a constitutional question, not a question capable of being resolved by the common law.

Once this point is reached then it is clear that there must be some constitutional rule implied by the Constitution to identify the applicability of the statutes of two

41 Gummow, above n 1, 1012.

42 Cf s 80 of the *Commonwealth Constitution* which requires that criminal trials on indictment shall be held in the State in which the offence was committed.

43 Australian Law Reform Commission *Judicial Power of the Commonwealth* (2001) at 563.

States where those statutes are in constitutional conflict. This is what Justice Gummow described as 'constitutional conflict rules'.[44] These rules are discussed below.

Although it is less clear, the same result must also apply in State jurisdiction. There are only four possibilities:

(1) Each State is a separate law area, applying its own statutes, notwithstanding the inconsistent statutes of other States. In broad terms, this reflects the approach of the majority in *McKain v R. W. Miller & Co (SA) Pty Ltd.* However, that approach is necessarily inconsistent with the role of the High Court as a single court of appeal. If each State court system applies its own State's statutes and ignores those of other States, then the necessary consequence must be that the High Court could hear two appeals from different States in relation to the same matter and make mutually inconsistent orders in each. It is also inconsistent with the reasoning of the High Court that led to the result that there is a 'single common law'.

(2) Each State is a separate law area, applying its own statutes. However, the legislative power of the States is restricted to the territory of the States, thus reducing any capacity for inconsistency. In broad terms this is the position in Canada[45] and (perhaps) also in the United States.[46] This approach was rejected by the High Court in *Mobil Oil*.[47] The Court followed the previous long line of authority that the Australian States can legislate extra-territorially providing there is a sufficient nexus with the legislating State.[48]

(3) Each State is a separate law area. The question of what State statutes are applicable in any proceedings are to be determined by the common law choice of law rules. This may be the approach taken by Gleeson CJ[49] and

44 See Gummow, above n 1, 1019.

45 *Interprovincial Co-operatives Ltd v The Queen* [1976] 1 SCR 477, 508-13 cf *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78. See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, 193-4.

46 *Brown-Forman Distillers Corp v New York State Liquor Authority* 476 US 573, 580-1 (1986). See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, 192-3. However, the United States position is more complex than this, involving also the constitutionalisation of the common law conflict of law rules: see F Juenger, 'Tort Choice of Law in a Federal System' (1997) 19 *Sydney Law Review* 529, 535-7; Gummow, above n 1, 1022-3.

47 (2002) 189 ALR 161, 165 , 174-5 , 194-5 .

48 See, eg, *Bonser v La Macchia* (1969) 122 CLR 177, 189, 226; *Cox v Tomat* (1972) 126 CLR 105, 109-13, 115-16, 127-9; *Pearce v Florenca* (1976) 135 CLR 507, 514-20, 522; *Robinson v WA Museum* (1977) 138 CLR 283, 331; *The Union Steamship Co of Australia v King* (1988) 166 CLR 1, 12-14; *Port MacDonnell Professional Fisherman's Association Inc v South Australia* (1989) 168 CLR 340, 372; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 529. That position is given statutory force by section 2 of the *Australia Act, 1986* (Cth).

49 (2002) 189 ALR 161, 167 , 'The Constitution gives the federal parliament enumerated powers, some of them exclusive, and s 109 operates in the event of inconsistency between federal and State laws. There is no corresponding provision to deal with the possibility of inconsistency between state laws, but there are choice of law principles which come into play when rights and liabilities are potentially affected by different state laws.' However, the Chief Justice may not have been referring to conflicts involving direct inconsistency: see 168 where the Chief Justice seems to accept that other constitutional rules must apply.

by Callinan J[50] in *Mobil Oil*, and reflects the assumption behind some of the submissions made in that case.[51] There are also a number of cases where it would appear that the High Court has applied common law choice of law rules to determine the application of State statutes which otherwise purported to have application to the case before the court.[52] However, it is sufficient to say that what is absolutely clear is that a valid State law has effect notwithstanding the common law. The common law cannot determine the inapplicability of a State statute to an event or act when that statute, in its terms, purports to apply.[53]

(4) There is a single Australian law area. On this approach the question of what State statutes are applicable in any proceedings is a constitutional question to be determined having regard to the constitutional rule determining the relevant applicability of those statutes. This is the same approach as that suggested above in relation to federal jurisdiction. Ultimately, this approach is also required in relation to State jurisdiction as a necessary consequence of the single appeal structure and the integrated court system.[54]

Consequently in both federal and State jurisdiction the question of what substantive law is to be applied is a constitutional question. It is to be answered by determining the validity of the statutory laws that purport to apply. Consequently, within Australia there is a single body of substantive law. In determining what rights and liabilities parties may have in respect of an act or event which is governed by Australian law one looks to:[55]

The Constitution and, subject to that,
valid and applicable Commonwealth statutes and, subject to that,
valid and applicable State[56] statutes and, subject to that,
the single common law.

50 Ibid 209-214.

51 Ibid 181 (Kirby J).

52 See *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338, 342-3; *Gosper v Sawyer* (1985) 160 CLR 548, 560-1 (Gibbs CJ, Wilson & Dawson JJ). Cf Gummow, aboven 1, 1005.

53 S Gageler, "Private Intra-national law: Choice or Conflict, Common Law or Constitution?" (2003) 23 *Australian Bar Review* 184, 186.

54 See M Leeming, 'Resolving Conflicts between State Criminal Laws' (1994) 12 *Australian Bar Review* 107; G Nicholson, 'The Concept Of "One Australia" In Constitutional Law And The Place Of Territories' (1997) 25 *Federal Law Review* 281; B Selway, 'The Nature of the Commonwealth: A Comment' (1998) 20 *Adelaide Law Review* 95, 96-8.

55 For this purpose I leave aside the role of the common law and of fundamental assumptions in constitutional interpretation: B Selway, 'Horizontal and Vertical Assumptions within the Commonwealth Constitution' (2001) 12 *Public Law Review* 113; but see M Detmold, 'Australian Law Areas: the Status of Laws and Jurisdictions' (2001) 12 *Public Law Review* 185, 201, who argues that these fundamental assumptions form part of the common law.

56 In order to simplify the analysis I do not deal with Territory statutes. They raise the problem whether, and to what extent, they attract s 109 as 'laws of the Commonwealth'; see *Fittock v The Queen* (2003) 197 ALR 1, [7] - [9] contrast [31]. If they do not, does the same implication arise in relation to inconsistent Territory and State laws as between the laws of two States? Some of the issues are discussed by Nicholson, above n 54.

The conclusion that there is a single legal system and that conflicts of laws within that system are to be resolved constitutionally is consistent with the nature of the Australian federation as described in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ('Engineers' Case')*[57] comprising a single sovereignty where legislative, executive and judicial powers are exercised by different governmental authorities in different localities, or in respect of different purposes in the same locality. It is also consistent with the terms of s 74 (now otiose) of the Commonwealth Constitution. That section dealt with Privy Council appeals. It made express provision for appeals as to the 'limits inter se of the Constitutional powers of two or more States'.[58] It is also consistent with the current understanding of Chapter III of the Constitution, particularly in relation to the role of the High Court and the implication of the rule of law within that Chapter.

The conclusion is also consistent with the terms of s 118 of the Commonwealth Constitution. That section provides:

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

That section has generally been understood (consistent with its US counterpart) as being directed to the recognition of the laws of another State for the purpose of the common law conflict of laws rules.[59] Not only does this approach involve giving supremacy to common law rules over statutes, it also is inconsistent with the clear terms of s 118 itself. If a valid interstate statute purports to apply to a particular act or event a local court in ignoring that statute is clearly not giving full faith and credit to it.[60] This does not mean that s 118 is itself the answer to problems of inconsistent State laws. But, as Justice Gummow pointed out, 'Constitution section 118 assumes the existence of constitutional conflict rules without specifying their content'.[61]

This is the same position reached by Gaudron and Deane JJ in their separate judgments in *McKain v R. W. Miller & Co (SA) Pty Ltd* that Australia was a single law area. As Gaudron J put it:

> The constitutional solution operates at two stages. At the first stage, it eliminates "conflict of laws". More precisely, it brings about a situation such that, as between the States, the Territories and the Commonwealth, there is only one body of law which applies to any given set of facts. That is achieved by covering cl. 5 and by ss. 106, 107, 108, 109 and 118 in Ch. V of the Constitution which, when taken together, leave no room for the notion that the one set of facts might, within Australia, simultaneously be subject to different legal regimes.[62]

57 (1920) 28 CLR 129, 152.
58 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 189 ALR 161, [109] - [110]
59 *McKain v R. W. Miller & Co (SA) Pty Ltd* (1992) 174 CLR 1, 36-7. See generally Gummow, above n 1, 1001-7; B O'Brien. 'The Role of Full Faith and Credit in Federal Jurisdiction' (1976) 7 *Federal Law Review* 169.
60 Gageler, above n 53, 186.
61 Gummow, above n 1, 1019; see also Georgina Whitelaw, 'Interstate Conflicts of Laws and Section 118' (1994) 5 *Public Law Review* 238.
62 (1991) 174 CLR 1, 55. See also Deane J 45-6.

IV CONSTITUTIONAL CONFLICT RULES

The necessary consequence of there being a single law area in Australia is that the Commonwealth Constitution must resolve any issues where relevant laws are in conflict. Of course, s 109 of the Constitution does this in relation to conflict between Commonwealth and State laws. And the single common law means that there is no conflict between the disparate common law regimes. However, the Commonwealth Constitution contains no provision dealing with the resolution of conflicts between the statutory laws of the States. Such a resolution must be implied.

One possibility is to 'constitutionalise' the common law choice of law rules,[63] possibly through s 118 of the Commonwealth Constitution.[64] There are a number of problems with this approach. Not least is that it is inconsistent with the principles for making implications from the text or structure of the Constitution. Those principles are discussed further below. But in general terms, the 'constitutionalisation' of the common law rules would suffer from the same error in reasoning as did the attempt to constitutionalise some aspects of the common law of defamation in *Theophanous v The Herald & Weekly Times*[65] - an error that the Court identified and corrected in *Lange v Australian Broadcasting Corporation.*[66] Nor does s 118 provide a sound basis for the implication. That section may presume that there is a constitutional mechanism for resolving the problems of inconsistent State laws, but it does not specify what that mechanism is.[67]

There is another approach which turns upon the nature of the Australian federation, rather than common law rules. In a number of cases, Deane J suggested that in the case of conflict between State laws, the appropriate test was that the statute of the State with the 'greater territorial nexus' to the subject matter of the dispute should be applied.[68]

The question of whether two State laws were relevantly inconsistent was discussed in *Port MacDonnell Professional Fishermen's Association Inc v South Australia* where the Court commented:

> A problem of greater difficulty would have arisen if the fishery defined by the arrangement had a real connexion with two States, each of which enacted a law for the management of the fishery. The Constitution contains no

63 See the discussion by F Juenger, 'Tort Choice of Law in a Federal System' (1997) 19 *Sydney Law Review* 529, 534-8.

64 This was the approach taken by Wilson and Gaudron JJ in *Breavington v Godleman* (1988) 169 CLR 41, 85-99. See H P Glenn, 'Conflicts of Laws - Tort Liability And Choice Of Law - Role of Private International Law And of Constitutional Law: Breavington v Godleman' (1989) 68 *Canadian Bar Review* 586, 589.

65 *Theophanous v The Herald & Weekly Times* (1994) 182 CLR 104, 136, 140.

66 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562-4.

67 *McKain v R. W. Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 37 citing *Breavington v Goldleman* (1988) 169 CLR 41, 150.

68 *Breavington v Godleman* (1988) 169 CLR 41, 129; *Thompson v The Queen* (1989) 169 CLR 1, 34-5.

> express paramountcy provision similar to s.109 by reference to which conflicts between competing laws of different States are to be resolved. If the second arrangement had been construed as extending to waters on the Victorian side of the line of equidistance, there would obviously have been grounds for arguing that the Victorian nexus with activities in these waters was as strong as or stronger than the South Australian nexus. As has been seen, however, the second arrangement does not extend into such waters. Where, as here, there is no suggestion of the direct operation of the law of one State in the territory of another, the problem of conflicting State laws arises only if there be laws of two or more States which, by their terms or in their operation, affect the same persons, transactions or relationships. In the present case, there is no competing law of a State other than South Australia purporting to apply to or in relation to the fishery to which the second arrangement applies. That being so, there is no real question of any relevant inconsistency between the law of South Australia and the law of another State.[69]

It would seem that the issue of inconsistency only arises where the inconsistency is direct; that is where 'there be laws of two or more States which, by their terms or in their operation, affect the same persons, transactions or relationships'.

The comment by the Court that, if there had been inconsistency 'there would obviously have been grounds for arguing that the Victorian nexus with [the relevant activities] was as strong or stronger than the South Australian nexus' would seem to suggest that the whole Court was of the view that a paramount nexus test was at least of some relevance.

In *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*, McHugh and Gummow JJ discussed the issue of inconsistency of State legislation but did not identify what the solution might be:

> The Solicitor-General for New South Wales sought to approach these matters as questions of statutory construction of the laws of New South Wales and Western Australia. He eschewed any submission that, by their terms or in their operation, the laws of the two States affected inconsistently the transactions or relationships of the same juristic entity. There may have been a conflict between laws, in a constitutional sense, if the 1987 Act had stated that the SASB was not subject to taxation under the law of any other State. Accordingly, the Solicitor-General did not take up the point noted in *Port MacDonnell Professional Fishermen's Association Inc v South Australia*, namely that the Constitution contains no express paramountcy provision similar to s 109, by reference to which there are to be resolved conflicts between competing laws of different States.
>
> Speaking extra-judicially in 1943, Sir Owen Dixon said:
>
> "The colonies were and the States are distinct jurisdictions and the enactments of their legislatures are confined in their territorial operation because a State is

[69] (1989) 168 CLR 340, 374.

> a fragment of the whole. In other States the recognition of its statutes depends upon the general common law principles governing the extra-territorial recognition and enforcement of rights, as *affected by the full faith and credit clause*." (Emphasis added)
>
> The subsequent recognition of the full scope for extra-territorial legislation of the States serves only to increase the potential scope of the problem in Australia...
>
> These issues remain for another day.[70]

The issue was referred to by Kirby J in *Lipohar v The Queen*[71] where His Honour noted the need for a simple constitutional rule to deal with inconsistent State statutes without identifying what that rule might be.

The Court returned to the issue in *Mobil Oil*.[72] All Justices, except perhaps Callinan J, acknowledged that the broad extra-territorial legislative powers possessed by the Australian States necessitated some rule for resolving conflicts between the statutes of one or more States. For the remaining five Justices the position would seem to have been that there is a constitutional rule to resolve conflicts between State laws, but that it was unnecessary to attempt to identify that rule with precision. As it was put by Kirby J:

> In the past, this court has approached suggestions about inconsistency between the laws of different States *inter se* by asking whether there is a "real question of any real inconsistency" rather than whether in legal theory it is possible to imagine such an inconsistency presenting in another case at some later stage. There is good sense in maintaining that approach. Whereas inconsistency between federal and state laws, for which express provision is made in the Constitution, is the staple diet of a court such as this, the fact that a century has passed with so few suggestions of inconsistency between the laws of the Australian states *inter se* confirms the wisdom of avoiding precipitate intervention.[73]

In the result there would seem to be a general acceptance that there is implied in the Commonwealth Constitution a mechanism for the resolution of conflicts between State statutes. There is some support for a 'predominancy of nexus' test, but the Court has not spelled out what that means or how it should apply.

Of course, the issue can be approached as one of first principle. This may at least assist in pointing to issues and possible conclusions:

(1) In accordance with ordinary principles, an implication can only be drawn in the Constitution if it is properly derived from the text of the Constitution (in the sense that it follows from the language used in the

70 (1996) 189 CLR 253, 285-7.

71 (1999) 200 CLR 485, 553-4. Kirby J had also dealt with the issue when President of the NSW Court of Appeal in *Thompson v Clark* (1995) 38 NSWLR 714, 717-18 where his Honour had also suggested the need for a constitutional solution based upon s 118.

72 (2002) 189 ALR 161.

73 Ibid 197. See also Gleeson CJ [167]-[168]; Gaudron, Gummow & Hayne JJ [174]-[175].

Constitution or the arrangement of the Constitution) or if it follows logically or as a practical necessity from the structure of the Constitution;[74]

(2) In this case the implication is the consequence of Chapter III of the Constitution combined with the broad extra-territorial power of the States confirmed by s 106 of the Commonwealth Constitution and s 2 of the *Australia Act 1986* (Cth). What is implied is such a rule as is necessary to ensure that the integrated judicial system created by the Constitution can operate notwithstanding the broad powers of the States. The implication is necessarily a narrow one, proven by the fact that there is no example of the need for such a rule in over a century;

(3) The implication only has application where the valid and applicable laws of one or more States are in conflict. This requires first that the relevant laws are applicable. Generally State laws will be interpreted as being limited to the territory of the relevant State.[75] Even where they are not, they may well be construed as incorporating, or having an application consistent with, the common law choice of law rules.[76] It also requires that the State laws are valid. Consequently each law must have a relevant nexus with the enacting State. The relevant laws cannot be in breach of the various limitations upon State legislative power imposed by the Commonwealth Constitution, such as ss 92 and 117.[77] Nor can they be in breach of any other implications in the Commonwealth Constitution such as the federal principle.[78] Where there are two applicable and valid laws the question of whether those laws are in conflict is not to be determined on the basis of 'inconsistency' for the purpose of s 109. The test is more properly seen as one of direct repugnancy in the sense that it is impossible to comply with one law without breaching the other;[79] and

(4) Where there is a conflict between valid and applicable State laws the rule for resolving that conflict must be based upon some determination of the relative territorial nexus of the State laws. This merely reflects the territorial basis of State legislative power. However, the tests to identify 'greatest territorial connection' are still to be identified. The resolution of the conflict may not result in the invalidity of any State law. It may be

74 *McGinty v Western Australia* (1996) 186 CLR 140, 168-71, 184-5, 231, 284-6; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135, 181-2, 227; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 149-50, 193-4 , 194-5; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1, 41; *Stephens v. West Australian Newspapers Ltd* (1994) 182 CLR 211, 232; *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 567; *Kruger v Commonwealth* (1997) 190 CLR 1, 152, 157.

75 See Stuart Dutson, 'The Territorial Application of Statutes' (1996) 22 *Monash University Law Review* 69.

76 If it is accepted that there is a single law area within Australia then this would be the only remaining role for the common law choice of law rules in relation to events governed by Australian law.

77 See, eg, *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463.

78 As would, for example, a law of one State attempting to deal with the jurisdiction or procedure in the courts of other States.

79 Gageler, above n 53, 188.

sufficient merely to determine on a case-by-case basis that one or other laws do not apply.

V JURISDICTION

The result of this analysis is that the single Australian legal system will recognise and determine what substantive laws are valid and applicable to a particular event or circumstance wherever it occurs in Australia. Those laws may include the laws of some State other than the State where the court is sitting. This can occur notwithstanding that the common law choice of law rules would mean that the law of the other State would not apply.

This is not an invariable result. States can pass laws that vary the applicable substantive law depending upon conditions or circumstances occurring after the act or event giving rise to liability has finished. Retrospective laws are one example. Another would be the exercise of a specific jurisdiction (see post). In these cases, assuming the relevant law is valid, it will be valid for the entire legal system. But the substantive law will change depending upon the existence of that condition or circumstance.

However, leaving aside procedural and jurisdictional differences, the recognition of a single law area will usually have the effect that there is uniformity of result throughout Australia. If we refer back to the example given above of a Victorian driver having an accident in South Australia, the Victorian Act, if it is valid and applicable, would have operation to exclude the liability of the Victorian driver subject only to there being an inconsistent Commonwealth or South Australian statute. In this example the legal result would be the same whether the proceedings are taken in South Australia, Victoria or somewhere else. It is the same whether the action is in federal or State jurisdiction. It does not involve Victoria directing what law the courts of some other State should apply. It merely involves giving full faith and credit to a law which the integrated legal system created under the *Commonwealth Constitution* acknowledges as valid and effective.

Of course, if Victoria passed such a law then it would not be surprising if other States legislated to create a direct inconsistency. If they did so, then it would be necessary to determine which law was applicable having regard to the 'greater territorial nexus' test. But again, the result would be the same wherever the proceedings were taken.

This does not mean that all courts must be able to give all possible remedies. It does not even mean that the same result must be obtained no matter where in Australia action is taken. The *Commonwealth Constitution* does not require uniformity of result across the Commonwealth.[80] Nor does it require that each court have jurisdiction over the whole matter.[81] But it does mean that courts

[80] *Leeth v Commonwealth* (1992) 174 CLR 455, 467.
[81] *Abebe v Commonwealth* (1999) 197 CLR 510.

cannot make orders inconsistent with the constitutional implication or the consequences of it.[82] So, for example, whilst the courts of South Australia need not exercise any jurisdiction in relation to the accident involving the Victorian driver, if they do so, then they cannot make an order which would be inconsistent with the applicable substantive law determined in accordance with the constitutional rules.

In practice this approach is unlikely to cause major difficulties. As Kirby J pointed out in *Mobil Oil*:

> Such [constitutional] implications include that the several parts of the federal polity will operate with a high level of cooperation with the other parts that make up the governmental organs of the one nation. This is a basic assumption upon which the Constitution is written. It is implied in the type of federation that the Constitution creates.
>
> Inherent in the foregoing implications is the constitutional assumption that each state parliament, in the exercise of its legislative powers, will avoid what might be described as an impermissible intrusion into the legislative concerns that properly belong to the parliament of another state. Self-evidently, if the parliament of one state were to enact laws that purported to impose obligations upon persons resident in other states, by reference to events occurring in such other states, the result could be legislative chaos. Such chaos is denied not by statute or common law but by the federal Constitution itself.
>
> It is out of recognition of this fact that, with few exceptions, the legislation enacted by the parliaments of the several Australian States has generally avoided unwelcome (and constitutionally invalid) intrusions into the legislative concerns of other states. In the entire history of the Commonwealth, there have been comparatively few instances of alleged legislative 'over-reach' by the laws of one state, asserting purported operation in what is properly the legislative domain of another state. Only occasionally has the legislation of a state been struck down as extending beyond the legislative powers of the parliament of that state. [83]

The most likely place where conflict may arise is where a statutory provision granting jurisdiction performs a 'double function' - it both confers jurisdiction and provides what substantive law is to apply in the exercise of that jurisdiction.[84] There are many examples of this legislative technique. It is endemic in matrimonial jurisdiction. In most cases it causes no problem in that the jurisdiction is limited to the territory of the State and, by implication, so is the purported substantive law. However, in those cases where jurisdiction is extra-territorial then it would seem to have the result that the substantive law to be

82 Ibid 535-6, 572-4, 593-4, 606-7.
83 (2002) 189 ALR 161, 188-9.
84 *Byrnes v The Queen* (1999) 199 CLR 1, 22-3; Lee Aitken, 'Jurisdiction, Liability And "Double Function' Legislation", (1990) 19 *Federal Law Review* 31.

applied is the law of the jurisdiction, but only if proceedings are instituted in that jurisdiction.[85] The *Dust Diseases Tribunal Act 1989* (NSW) is an example.

Such legislation may well be objectionable on policy grounds in that the legal liability of the parties ultimately depends upon what court proceedings are conducted in. But applying the methodology of the single law area, the 'double function' legislative technique would still seem to be valid, assuming a sufficient nexus, and assuming that there is no inconsistent Commonwealth law and no conflicting statute of any other State. The single law system would recognise the validity and applicability of the law of the State as part of the law of the system notwithstanding that it has the effect that the substantive law applicable to an act or event is conditional upon the exercise by a specific court of its jurisdiction. However, as to nexus, the recognition of a single law area does highlight that jurisdiction and substantive law are distinct concepts. This means that the mere fact that there may be a sufficient nexus to support the conferral of jurisdiction does not necessarily mean that there is a sufficient nexus to apply the statute law of the State to an event that has no greater connection with that State than the conferral of jurisdiction on its courts. And there is always the potential for conflicting State laws, as is apparent in the workers compensation field.

VI CONCLUSION

It is suggested that the inevitable consequence of the recognition of a single Australian common law with an integrated judicial system is that Australia is a single law area. Consequently, a valid State law with extra-territorial effect is an Australian law. Section 118 means that such law cannot be ignored by the courts of other States. Effectively it forms part of the law of the place where it validly has application.

Consequently an Australian citizen who is a resident of (say) New South Wales is subject not only to the laws of the Commonwealth and the laws of New South Wales and of the Australian common law, but also to the laws of the other States and Territories, to the extent they are valid and applicable. This is true even if that person does not leave New South Wales.

Obviously this result is an important point of distinction between the Australian constitutional framework and those of some other federations.[86]

[85] Gummow, above n 1, 1006-7.

[86] Of course, the previous decisions of the Court, such as *Pfeiffer* have already gone a considerable way in drawing that distinction: see A Stone, 'Choice of Law Rules, the Constitution and the Common Law' (2001) 12 *Public Law Review* 9, 11-12.