

most powerful newspaper publishers – Edward Hall and Atwell Hayes. The impression left is that Dowling lacked the energy for these encounters. Yet, when it came to winning the prize of the chief justiceship on Forbes's death, Dowling's doggedness in insisting on his seniority of a matter of weeks over William Burton won through and he became chief justice in 1837.

Stabiliser rather than innovator is perhaps the best assessment of Dowling's career. He managed little progress in the development of trial by jury, for example. But Bennett notes that this really took a generation from the commencement of the Supreme Court to attain its most complete form. During Dowling's term an anomalous hangover from the penal days remained. Criminal matters were tried by a 'jury' of seven military men. The tribunal of fact in civil matters comprised two magistrate assessors and the judge. Bennett notes that the soldiers on criminal juries were frequently bored and responded by behaving like schoolboys. In one case they left insulting messages carved into the jury box for the civil assessors they expected to be there the following day.

In that climate, stability cannot have been a bad thing. They were tumultuous times and Bennett's account of Dowling's role in such events as the Myall Creek massacre trials will fascinate many readers. It won't come as a surprise that he singles Dowling out for particular praise for his pioneering work in legal reporting. This work did not make front page news but it was utterly essential to the establishment of a successful and robust Supreme Court.

William a'Beckett, the subject of the third of Bennett's biographies, also played a role in the Myall Creek trials. He was part of a defence team retained by subscriptions from rural landholders who successfully defended the first trial, which was heard before Dowling. The defence – that no victim could be identified (in fact, mutilation of the bodies rendered that impossible) succeeded, and the defendants were acquitted to the wild cheering of many white settlers in court. But a courageous stand by attorney general John Hubert Plunkett saw new proceedings instituted for the murder of one identified child. A plea of *autrefois acquit* failed before Justice Burton and the accused were found guilty and subsequently hanged.

Bennett notes the parallels between later criticisms of Dowling's conduct of the first Myall Creek trial and the historical criticism of a'Beckett's handling of the criminal trials which followed the rebellion at the Eureka Stockade in Ballarat in 1854. As with Dowling, Bennett proposes a revised assessment of a'Beckett's role in one of the most highly charged political events in Australian history. He also presided over the trial of alleged offenders at the Bakery Hill riots at Ballarat. These riots occurred on 29 November 1854, the day before the Eureka rebellion. Bennett seeks to distinguish the silence from the press and later commentators about a'Beckett's very pro-defence charge to the jury in this trial from the attacks he received in relation to his handling of the Eureka trials.

It is difficult not to feel some sympathy for a'Beckett. His father was a dour London solicitor, said to be the model for the cold-hearted Ralph Nickleby in the Charles Dickens novel *Nicholas Nickleby*. True to this characterisation a'Beckett senior refused to brief a'Beckett junior when the latter was called to the Bar in London, so young William eventually made his way to Sydney and developed a thriving practice. The desire for advancement saw him assume the chief justiceship of the new Victorian Supreme Court in 1852. His irritability on the bench may well have been due, Bennett writes, to a life-long spinal illness rather than dissatisfaction with his work. The Melbourne he presided over was convulsing with one of the greatest economic booms in Australian history due to the rivers of gold running through it from the north-west. The resulting social dislocation and excess appears to have distressed a'Becket, not to mention the spirit of republicanism which aggressively rang around his courtroom every time another alleged Eureka rebel was acquitted.

As with Forbes and Dowling, Bennett reassesses a'Beckett as a misunderstood figure whose foundational role in establishing the rule of law has been drowned out by the intense politics of a young nation inventing itself.

**Reviewed by Christopher O'Donnell**

## Conflict of laws in Australia (7th ed)

**P E Nygh and M Davies**  
**Butterworths 2002**



The publication of the 7th edition of this text, in which Peter Nygh is joined as a co-author by Martin Davies (formerly Harrison Moore Professor of Law at the University of Melbourne and now Co-Director of the prestigious Maritime Law Centre at Tulane Law School), is timely for a number of reasons.

First, it is some seven years since the 6th edition was published. In that time, Australian courts and the High Court, in particular, have delivered a series of important decisions in this area: *Henry v Henry* (1996) 185 CLR 571; *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345; *Agar v Hyde* (2000) 201 CLR 552; *Akai Pty Limited v People's Insurance Company* (1997) 188 CLR 418; *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503; *Renault v Zhang* [2002] HCA 10.

Secondly, the other leading Australian text in the area, Sykes & Pyles *Australian Private International Law* (3rd ed) was last published in 1991 and is now extremely out of date.

Thirdly, the leading English texts in the area, *Dicey & Morris and Cheshire & North*, have diminished utility for Australian practitioners by reason of the fact that private international law in the United Kingdom has been radically affected, both in the areas of jurisdiction and choice of law, by the impact of Europe. Choice of law in contract and tort are now governed by statute and questions of jurisdiction and the recognition and enforcement of foreign judgments is predominantly governed by European Council Regulation 44/2001, formerly the Brussels Convention.

This work has always dealt with the subject of conflict of laws in both federal and transnational contexts. In the former context, the decision of the High Court in *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 is dealt with in numerous parts of the text, as is only appropriate given its importance not only on questions of federal choice of law but

also in respect of forum shopping generally and questions of substance and procedure. There is also an excellent, self-contained discussion of the cross-vesting scheme post *Wakim ex parte McNally* (1999) 198 CLR 511.

In the transnational context, it is unfortunate that this edition of the text literally hit the book shops on the same day as the High Court delivered its decision in *Renault v Zhang* [2002] HCA 10. That decision dealt with not only the choice of law rule for torts (and in so doing, sounded the final death knell in this country for *Phillips v Eyre*) but also dealt with the test for a stay of proceedings, arguably (although not in so many words and over the strong dissents of Kirby J and Callinan J) taking the law on that topic in this country back to the position it was in prior to the High Court's decisions in *Oceanic Sun Line Shipping v Fay* (1988) 165 CLR 197 and *Voth v Manildra Flour Mills Pty Limited* (1991) 171 CLR 538.

It is, no doubt, the fate of all writers of legal texts that a significant and, in some respects, unexpected decision is delivered after the proofs have gone to the printers or soon after publication. Fortunately, at least, in the present case, readers of the 7th edition are alerted in the text to the imminence of the decision in *Renault* which had been argued but was still reserved at the time of the text going to press. The chapter on tort justifies its continued discussion of *Phillips v Eyre* as useful and necessary context for a proper understanding of the area. There can be no doubt that, at least in so far as *Renault* dealt with the question of stay of proceedings, that its treatment of that topic was not expected by Professors Nygh and Davies given their observation in the Preface that 'the High Court of Australia is more willing to decline jurisdiction than its English counterpart'. That proposition is not sustainable after *Renault*.

The chapter dealing with 'Jurisdiction in personam' contains a very useful survey of the typical heads or bases of what has traditionally been described as the 'exorbitant' jurisdiction of the supreme courts of the various States and Territories and of the Federal Court, that is to say the bases upon which those courts are authorised to exercise jurisdiction over defendants not present in the forum. This discussion draws attention to and highlights interesting differences as

between the *Federal Court Rules* (Order 8) and amongst the States relating to the available heads or bases for authorising service out of the jurisdiction, differences which may recommend commencement of proceedings in one State (or the Federal Court) rather than another depending upon the particular causes of action sought to be raised.

This edition makes passing reference to the role of the Internet, (see, for example, at p54) and to some of the conflict of laws issues presented by it. These include such topics as the place where a contract is made when an order is placed for the purchase of goods or services over the Internet, and where a person is defamed when a libellous matter appears on an Internet site, more particularly, where such libel is published (as to which, see *Macquarie Bank Ltd v Berg* [1997] NSWSC 526). This issue may be important for both jurisdictional and choice of law reasons. Attention is drawn by authors to the grant of special leave by the High Court in *Dow Jones v Gutnick* [2001] VSC 305 due to be heard during the course of this year and a case which will be of considerable significance throughout at least the Commonwealth and probably beyond in respect of legal issues flowing from the use of the Internet.

One particular strength of the work is its discussion of conflict of laws principles in the context of family law and the Hague Convention on the Civil Aspects of International Child Abduction, no doubt reflecting Professor Nygh's interest in this subject from his time as a member of the Family Court of Australia. The chapter on international arbitration also provides a useful survey and discussion of both jurisdictional and choice of law issues in this area. The important decision of the Full Court of the Federal Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc.* (No. 5) (1998) 90 FCR 1 is discussed in appropriate detail.

The 7th edition adopts the same chapter headings and subject divisions of the previous edition. To some extent this is inevitable. On the other hand, the subject is not static. There is plainly scope for any future edition of this text to deal with the choice of law rule in restitution or unjust enrichment, for example, a subject that is separately treated in Dicey & Morris and which has been the subject of a number of specialist monographs: see F Rose (ed), *Restitution and the conflict of laws*

(Oxford, Mansfield Press, 1995) and G Panagopoulos, *Restitution in private international law* (Hart Publishing, 2000). Similarly, discussion of choice of law principles in relation to equitable claims would be welcomed: see, in this context, the decision of the Full Court of the Federal Court in *Paramasivam v Flynn* (1998) 90 FCR 489, a decision not referred to in the current edition of the text.

Similarly, some issues which are discussed in the present edition merit, in this reviewer's opinion, more extensive treatment in future editions in view of their practical importance; perhaps the most notable example, in this regard, is the two page discussion in relation to injunctions restraining foreign proceedings. In this context, conspicuous by its absence is any reference to Lindgren J's very important decision in *AllState Life Insurance Co v Australia & New Zealand Banking Group Limited* (1996) FCR 1 and 44, a decision in complex multi-party commercial litigation which was instrumental in putting to an end jurisdictional clashes that had bedevilled that litigation and which probably facilitated its ultimate settlement. That this is a very important area in practice is reflected not only by other recent Australian decisions but by the plethora of cases in England in this area in recent years, prominently reported in *Lloyd's Law Reports*.

If one were to make one general observation about this work it is that, in terms of the relative treatment it affords to the subject's broad division between jurisdiction and choice of law, it perhaps fails to reflect the sea change in the subject's focus in the last 20 years (and certainly since the first edition, published as long ago as 1968) from choice of law to jurisdictional issues. As the decisions in both *Renault* and *Akai* illustrate, even when choice of law issues arise, they typically do so in a jurisdictional milieu. More detailed treatment of jurisdictional issues which, for practitioners, tend to be the subject of most immediate and significant concern, would be welcomed in the next edition.

**Reviewed by Andrew S Bell**