2023 SPIGELMAN ORATION

"Extraterritoriality in Australian Law"

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Introduction

1 The Hon. James (Jim) Spigelman AC KC has an extraterritorial streak; he is and, I suspect, has always been an internationalist, and his interest in international affairs, international law and international commerce was a mark of his Chief Justiceship. The interest has continued in his post-judicial life into the world of international arbitration, investor-state arbitration and, for a time, on the Hong Kong Court of Final Appeal.

2 As Chief Justice, he established Memoranda of Understanding between the Supreme Court of New South Wales and courts in Singapore, South Korea and the Southern District of New York,[1] as well as a biennial meeting of New South Wales, Singapore and Hong Kong commercial judges, whilst also maintaining strong connections between senior members of the British judiciary and the Supreme Court of New South Wales. He also wrote a series of important judgments and articles dealing with the extended jurisdiction of the Court over foreign defendants,[2] evidence on commission,[3] proof of foreign law,[4] exclusive

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[1] See *Fleming v Marshall* [2011] NSWCA 86; (2011) 279 ALR 737.

[2] *Hyde v Agar; Worsley v Australian Rugby Football Union Ltd* (1998) 45 NSWLR 487.

[3] *British American Tobacco Australia Services Ltd v Sharon Y Eubanks for the United States of America* (2004) 60 NSWLR 483; [2004] NSWCA 158.

[4] *Murakami v Wiryadi* (2010) 109 NSWLR 39; [2010] NSWCA 7. See also JJ Spigelman, "Proof of Foreign Law by reference to the Foreign Court" (2011) 127 LQR 208.

jurisdiction agreements,[5] *forum non conveniens*,[6] and international commercial arbitration.[7]

3 Thus, in thinking of an appropriate topic for this lecture to honour a great Chief Justice of New South Wales and public intellectual, exterritoriality in Australian law suggested itself to me.

4 It is also a fitting topic for this oration because Jim Spigelman spoke often and both judicially[8] and extra-judicially[9] on questions of statutory interpretation, and,

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[5] *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; 79 ACSR 383; and see more generally JJ Spigelman, 'International commercial litigation: An Asian perspective' (2007) 35(5) *Australian Business Law Review* 318.

[6] *James Hardie Ltd v Grigor* (1998) 45 NSWLR 20; [1998] NSWSC 266; *Fleming v Marshall* [2011] NSWCA 86; (2011) 279 ALR 737.

[7] *Raguz v Sullivan* (2000) 50 NSWLR 236; [2000] NSWCA 240.

[8] See, e.g., *Durham Holdings v New South Wales* (1999) 47 NSWLR 340; [1999] NSWCA 324; *R v Young* (1999) 46 NSWLR 681; [1999] NSWCCA 166; *Hill v Green* (1999) 48 NSWLR 161; [1999] NSWCA 477; *R v Mailes* (2001) 53 NSWLR 251; [2001] NSWCCA 155; *Paliflex Pty Ltd v Chief Commissioner of State Revenue* (2002) 51 ATR 320; [2002] NSWCA 351; *Deputy Federal Commissioner of Taxation v Clark* (2003) 57 NSWLR 113; [2003] NSWCA 91; *Solution 6 Holdings Ltd v Industrial Relations Commission (NSW)* (2004) 60 NSWLR 558; [2004] NSWCA 200; *Bankstown City Council v Alamdo Holdings Pty Ltd* (2004) 135 LGERA 312; [2004] NSWCA 325; *R v Porter* (2004) 61 NSWLR 384; [2004] NSWCCA 353; *Vice-Chancellor, Macquarie University v FM* [2005] NSWCA 192; *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557; [2005] NSWCA 261; *R v Janceski* (2005) 64 NSWLR 10; [2005] NSWCCA 281; *Hamilton v Merck and Co Inc* (2006) 66 NSWLR 48; [2006] NSWCA 55; *Lodhi v The Queen* (2006) 199 FLR 303; [2006] NSWCCA 121; *Director General, Department of Education v MT* (2006) 67 NSWLR 237; [2006] NSWCA 270; *Leichhardt Council v Roads & Traffic Authority (NSW)* (2006) LGERA 439; [2006] NSWCA 353; *Deputy Commissioner of Taxation v Dick* (2007) 226 FLR 388; [2007] NSWCA 190; *R v JS* (2007) 175 A Crim R 108; [2007] NSWCCA 272; *NSW Food Authority v Nutricia Australian Pty Ltd* (2008) 72 NSWLR 456; [2008] NSWCCA 252; *New South Wales v Cadia Holdings Pty Ltd* [2009] NSWCA 174; *Commissioner of Police (NSW) v Industrial Relations Commission (NSW)* [2009] NSWCA 198; *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641; [2010] NSWCA 137; *Cuiying Zhang v Jiang Zemin* (2010) 79 NSWLR 513; [2010] NSWCA 255.

[9] See, e.g., 'Sir Ninian Stephen Lecture: Statutory Interpretation - Identifying the Linguistic Register' (Speech, University of Newcastle, 23 March 1999); 'Speech to the Annual Conference of Judges of the High Court and Court of Appeal of New Zealand' (Speech, Annual Conference of the Judges of the High Court and the Court of Appeal of New Zealand, 2 April 2000); 'The Poet's Rich Resource: Issues in Statutory Interpretation' (Speech, Government Lawyers' Convention, 7 August 2001); 'Blackstone, Burke, Bentham and the Human Rights Act 2004 (ACT)' (Speech, 9th International Criminal Law Congress, 28 October 2004); 'Integrity and Privative Clauses' (Speech, Australian Institute of Administrative Law, 2 September 2004); 'The Principle of Legality and the Clear Statement Principle' (Speech, The New South Wales Bar Association Conference 'Working With Statutes', 18 March 2005); 'Statutory Interpretation and Human Rights. Address to the Pacific Judicial Conference Vanuatu' (Speech, Pacific Judicial Conference, 26 July 2005); 'The Common Law Bill of Rights' (Speech, McPherson Lectures on Statutory Interpretation and Human Rights, 10 March 2008); 'The Application of Quasi-Constitutional Laws' (Speech, McPherson Lectures on Statutory Interpretation and Human Rights, 11 March 2008); 'Legitimate And Spurious Interpretation' (Speech, McPherson Lectures on Statutory Interpretation and Human Rights, 12 March 2008); 'The Intolerable Wrestle: Developments in Statutory Interpretation' (Speech, Australasian Conference of Planning and Environment Courts and Tribunals, 1 September 2010).

as shall be seen, questions of statutory interpretation loom large in any consideration of the extraterritorial operation of Australian laws.

5 Whilst my chosen topic may not fit self-evidently into the public law space into which previous Spigelman Orations have slotted, questions of legislative competence and statutory interpretation are the bread and butter of public lawyers and, as shall be seen, extraterritoriality is also inextricably tied up with notions of sovereignty, statehood and the limitations on the exercise of public authority.

All crime is (not) local

6 My lecture begins in Darling Point, not far, as coincidence would have it, from where Jim Spigelman has lived for more than 30 years. It was at "Winslow", then a stately home at Darling Point[10] that, in 1872, the Rev John McLeod had married Mary Manson, a "widow of means".[11]

7 In 1889, whilst Mary Manson was still alive, the peripatetic Rev and now Dr McLeod (he had acquired a medical degree in Montreal subsequent to his marriage to Mary Manson) married a second Mary, this time Mary Cameron, in St Louis in the State of Missouri, only apparently to abandon her some 6 months later.[12]

8 Now s 54 of the *Criminal Law Amendment Act 1883* (NSW) provided that:

> "Whosoever being married marries another person during the life of the former husband or wife *wheresoever such second marriage takes place* shall be liable to penal servitude for seven years." (emphasis added)

9 The Rev Dr McLeod was charged, tried and convicted in the Supreme Court of New South Wales of the offence of bigamy although apparently not without first

[10] Belonging to Sir Joseph George Long Innes who would become a Supreme Court judge (in 1881).
[11] 'Marriages', *Sydney Morning Herald* (Sydney, 22 July 1872) 1, at https://trove.nla.gov.au/newspaper/article/13260820,
[12] 'McLEOD, Rev Dr. John', *Register of New Zealand Presbyterian Church Ministers, Deaconesses & Missionaries from 1840*, available at https://www.presbyterian.org.nz/archives/Page181.htm. Note that there is some inconsistency in the spelling of his name: he is referred to as both Rev'd McLeod and Macleod.

fleeing to Napier in New Zealand where the arrest warrant was finally executed.[13] Following conviction in New South Wales, he appealed to the Privy Council which held that the expression "wheresoever such second marriage takes place" meant "wheresoever in New South Wales such second marriage takes place",[14] a good example of apparently broad statutory language being read down to avoid legislation being given an extraterritorial operation, even in the face of what might be thought to be the clear legislative policy of the statute.

10 The bigamist Macleod was thus acquitted.

11 This was the decision in which the Lord Chancellor, Lord Halsbury, famously and dogmatically[15] said "all crime is local".[16] In its absolute terms, that epigrammatic statement was historically inaccurate.[17]

12 On 27 June 1817, King George III gave royal assent to the *Murders Abroad Act*, the long title of which was an "Act for the more effectual Punishment of Murders and Manslaughters committed in Places **not** within His Majesty's Dominions" emphasis added). The text of the statute was as follows:

> "All murders and manslaughters committed or that shall be committed on land at the settlement in the bay of Honduras by any person or persons residing or being within the said settlement, and all murders and manslaughters committed or that shall be committed in the islands of New Zealand and Otaheite or [Rep. 36 & 37 Vict. c. 91. (S.L.R.)] within any other islands, countries, or places not within his Majesty's dominions, nor subject to any European state or power, nor within the territory of the United States of America, by the master or crew of any British ship or vessel, or any of them, or by any person sailing in or belonging thereto, or that shall have sailed in or belonged to and have quitted any British ship or vessel to live in any of the said islands, countries, or places, or either of them, or that shall be there living, shall and may be tried, adjudged and punished in any of his Majesty's islands, plantations, colonies, dominions, forts or factories, under or by virtue of the King's commission or commissions which shall have been or which shall hereafter be issued under and by virtue and in pursuance of the powers and authorities of an Act passed in the forty-sixth year of his present Majesty, intituled "An Act for the more speedy trial of

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[13] 'Dr Macleod', *Northern Star* (Lismore, 26 April 1890) 2, at https://trove.nla.gov.au/newspaper/article/71715702.
[14] *Macleod v Attorney-General (NSW)* [1891] AC 455 at 458.
[15] So described by Gleeson CJ in *Lipohar v R* (1999) 200 CLR 485; [1999] HCA 65 at [15].
[16] *Macleod v Attorney-General (NSW)* [1891] AC 455 at 458.
[17] So much was apparent from the following sentence: "The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatsoever": at 458.

> offences committed in distant parts upon the sea," in the same manner as if such offence or offences had been committed on the high seas."

13 Some six years later, the Third Charter of Justice (sometimes referred to as the *New South Wales Act*) which made provision for the establishment of this Court and the Supreme Court of Van Diemen's Land was enacted. It mimicked the *Murders Abroad* Act in providing that the Supreme Courts in New South Wales and Van Diemen's Land:

> "shall and may inquire of hear and determine all treasons piracies felonies robberies murders conspiracies and other offences of what nature or kind soever committed or that shall be committed … in the islands of New Zealand, Otaheite or any other island country or place situate in the Indian or Pacific oceans and not subject to His Majesty or to any European state or power by the master or crew of any British ship or vessel or any of them or by any British subject sailing in or belonging to or that shall have sailed in or belonged to and have quitted any British ship or vessel to live in any part of the said islands countries or places or that shall be there living and that all persons convicted of any of the offences so to be inquired of heard and determined in the said courts respectively shall be subject and liable to and shall suffer all such and the same pains penalties and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to in case the same had been committed and were respectively inquired of tried heard determined and adjudged in England any law statute or usage to the contrary notwithstanding".[18]

14 There are at least three interesting features of this early assertion of extraterritorial jurisdiction: first, that the jurisdiction was in respect of criminal offences rather than civil suits; second it was only extended to geographical places where no other country or state asserted sovereignty (the same qualification that one saw in the *Murders Abroad Act*) and thus could not be said to be an interference with the comity of nations; thirdly, the extension was by reference to the nationality of the putative defendant, namely a nexus based upon British citizenship, or British naval passage.

15 There is a number of early cases in this Court's history where we see the Supreme Court's extraterritorial jurisdiction being asserted and exercised in respect of criminal acts committed in New Zealand.[19] (New Zealand was not to

[18] See also the *Australian Courts Act 1828* 9 George 4 ch 83.

[19] *R v M'Dowell* [1827] NSW SupC 18; *R v Doyle* [1837] NSW SupC 80; *R v Palmer* [1838] NSW SupC 52. I am indebted to Professor Shaunnagh Dorsett for bringing these cases to my attention through a paper entitled "An imperfect jurisdiction: Extraterritoriality and Legal Order in Aotearoa, New Zealand".

become a colony in its own right until 1841, after the Treaty of Waitangi).[20] Those cases merit a separate lecture.

16 Lord Halsbury's observation in *Macleod's Case* that "all crime is local" was explored and critically analysed by Gleeson CJ in *Lipohar v R*[21] including by reference to the High Court's decision in *Meyer Heine Pty Ltd v China Navigation Co Ltd*[22] (**Meyer Heine**), in which Murray Gleeson, then in his third year at the Bar, appeared as junior to JW Smyth QC and Russell Fox QC. That famous decision was concerned with s 4(1) of the *Australian Industries Preservation Act 1906* (Cth) which provided that:

> "Any person who … enters into any contract … or engages in any combination …
>
> (a) in restraint of or with intent to restrain trade or commerce; or
>
> (b) to the destruction or injury of or with intent to destroy or injure by means of unfair competition any Australian industry …
>
> is guilty of an offence."

It was held that s 4(1) did not penalize acts done outside Australia by foreigners, even if, it should be observed, those acts had a deleterious impact on any Australian industry.

17 Before getting ahead of myself, I return to the 19th century and the topic of colonial legislative power.

Colonial legislative power territorially limited

18 In the 19th century, as Sir Harry Gibbs observed in *Pearce v Florenca*[23] in 1976, "the advisers to the Colonial Office formulated a principle that a colonial

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[20] See *Proclamation by His Excellency Captain Hobson, Governor and Commander-in-Chief in and over the Colony of New Zealand and its dependencies, &c., of the appointment of the Governor and Councils* (3 May 1841), available at https://nzetc.victoria.ac.nz/tm/scholarly/tei-Mac01Comp-t1-g1-t5-g1-t2-g1-t24.html.
[21] (1999) 200 CLR 485; [1999] HCA 65 at [15]-[23].
[22] (1966) 115 CLR 10.
[23] (1976) 135 CLR 507 at 514; [1976] HCA 26, citing *Ray v M'Mackin* (1875) 1 VLR (L) 274, 280; *Reg v Barton* (1879) 1 QLJ (Supp) 16.

legislature has no power to enact laws having effect beyond the limits of the colony, and this view came to be accepted by the colonial courts".

19 There was a measure of practicality underpinning this approach. Professor DP O'Connell has suggested that "[r]elationships with foreign nationals outside the colonial boundaries raised questions of international law affecting the Imperial Government, and the latter could not be compromised by possibly irresponsible colonial legislation".[24] The late Justice Graham Hill, writing extrajudicially, suggested it may have been motivated by the practical fear "that, if the various colonial legislatures could all legislate extra-territorially, the laws of one colony could be repugnant to the laws or another, or each could be repugnant to the laws of the Imperial Parliament".[25] The great New Zealand scholar and later judge, Professor John Salmond, writing in the Law Quarterly Review in 1917, surmised that the exclusion of extraterritorial matters "from the competence of colonial legislatures [was] necessitated by the confusion which would result if all the dependencies of the Crown possessed and exercised jurisdiction of this kind concurrently with each other and with the United Kingdom".[26]

20 The limitations on colonial legislatures' ability to enact laws with extraterritorial effect appeared to continue after Federation with the power of the new states to legislate extraterritorially being held to be restricted in the 1915 and 1916 decisions of the High Court in *Commissioner of Stamps (Qld) v Weinholt*[27] and *Delaney v Great Western Milling Co Ltd*.[28] In the former case, the Court held that: [29]

> "the power of the Queensland Parliament is "to make laws for the peace, welfare and good government of the Colony in all cases whatsoever" (sec 2 of the State Constitution). Under that general power taxation is necessarily limited to the territory. Any extra-territorial taxation must depend upon some special

[24] DP O'Connell, 'Problems of Australian Coastal Jurisdiction' [1958] *British Year Book of International Law* 199, 248–249. See also *Union Steamship Co of Australia v King* (1988) 166 CLR 1, 14; [1988] HCA 55.
[25] D G Hill, "Constitutional Power and Extraterritorial Enforcement" (1996) 19(1) *University of New South Wales Law Journal* 45 at 50.
[26] J W Salmond, 'Limitations on Colonial Legislative Power' (1917) 33 *Law Quarterly Review* 117, 125, citing AB Keith, *Responsible Government in the Dominions* (Clarendon Press, 1912) vol 1, 372.
[27] (1915) 20 CLR 531; [1915] HCA 49.
[28] (1916) 22 CLR 150; [1916] HCA 46.
[29] (1915) 20 CLR 531 at 540.

> authority from the Imperial Parliament. The opposite view would result in endless confusion and collision."

In the latter case, Gavan Duffy and Rich JJ stated that:

> "Under legislative provisions identical with those [in s 5 of the *Constitution Act 1902* (NSW)], except that they did not contain the words "subject to the provisions of the *Commonwealth of Australia Constitution Act*," the Privy Council held [in *MacLeod*] that there was no power in the Parliament of New South Wales to enact that a bigamous marriage contracted by any person anywhere in the habitable globe should be a crime, and we think it will be conceded that such an enactment could not in any circumstances be for the "peace, welfare, and good government" of New South Wales; indeed, it is not easy to suggest a case in which these words would justify legislation prescribing conduct outside the State, though we do not desire to say that there could be no such case."[30]

21 No such constraint lay on the Commonwealth Parliament. In *Crowe v The Commonwealth*[31] in 1935, the High Court held that, where a law was made for the "peace, order, and good government" of the Commonwealth, as required by s 51 of the *Constitution*, the extraterritorial application of the law was not in and of itself fatal to its validity.[32] This confirmed what was made explicit by the *Statute of Westminster* in 1931, s 3 of which provided that "it is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial application".

State extra-territorial competence

22 Whatever doubts or limitations as to extraterritorial legislative competence that once existed in relation to *colonial* and then *state legislatures*, they were expressly negatived by s 2(1) of both the Commonwealth and United Kingdom *Australia Acts* of 1986 which provide that:

> "it is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial application."

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[30] (1916) 22 CLR 150 at 173-4.
[31] (1935) 54 CLR 69; [1935] HCA 63.
[32] *Crowe v Commonwealth* (1935) 54 CLR 69 at 83 (Rich J), 85 (Starke J), 90–1 (Dixon J), 93 (Evatt and McTiernan JJ); [1935] HCA 63.

23 This section has been said to do "no more than restate the law as it was immediately before the Australian Acts came into force".[33]

24 The decisions of the High Court in *Union Steamship Company of Australia Pty Ltd v King* (**Union Steamship**),[34] *Port MacDonnell Professional Fishermen's Association Inc v South Australia*,[35] and *Mobil Oil Australia Pty Ltd v Victoria* (**Mobil Oil**)[36] also emphasised the breadth of the power of State legislatures to pass statutes having extraterritorial reach and the need for no more than a slender connection between the subject matter of the Act and the enacting State.

25 The power or legislative competence to enact laws with extraterritorial operation or effect is thus now beyond question. As shall be seen, it is regrettably often not clear whether and to what extent particular legislatures have exercised that power, although some legislatures are better than others in making their extraterritorial intent plain.

The orthodoxy of territoriality

26 Notwithstanding the clarification of the powers of the Commonwealth and State Parliaments to pass legislation with extraterritorial effect, orthodoxy is, and legal history largely illustrates that, at least until relatively recently, our legal system is fundamentally territorial, that is to say, the *norm* is that:

(i) our legislatures generally only enact laws which purport to govern conduct within the territorial reach of the enacting legislature;

(ii) legislation is generally presumed not to have extraterritorial effect (although the strength of this so-called presumption may be on the wane);

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[33] Gilbert, 'Extraterritorial State Laws and the Australia Acts' (1987) 17(1) *Federal Law Review* 25 at 30-1. See also Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 56; *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 14; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [9] (Gleeson CJ).
[34] (1988) 166 CLR 1; [1988] HCA 55.
[35] (1989) 168 CLR 340 at 372; [1989] HCA 49.
[36] (2002) 211 CLR 1; [2002] HCA 27 at [16].

(iii) some polities have provisions in their *Interpretation Acts* designed to give statutes a localising effect;[37]

(iv) In terms of judicial power, courts may only exercise power in the law area of the legislature which has created the court in question: thus, the Supreme Court of New South Wales cannot sit in Tasmania, for example, and evidence for the purposes of a New South Wales Supreme Court matter taken in Tasmania can only be taken on commission.[38] So, too, a subpoena may not be issued to a foreign entity which is not a party that has otherwise submitted to the local jurisdiction because to do so involves the extraterritorial assertion of judicial power;[39]

(v) the jurisdiction of common law courts may only be exercised over persons or companies served with process within the territory of the court,[40] even fleetingly so,[41] unless authorised by rules of Court permitting service abroad. Such rules which we see, for example, in Schedule 6 of the UCPR, were traditionally described as allowing for the

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[37] Thus, s 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) provides that "[i]n any Act, references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth." So, too, s 12(1) of the Interpretation Act 1987 (NSW) provides:

> "In any Act or instrument—
> (a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for New South Wales, and
> (b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales."

[38] See also, for example, *Mutual Assistance in Criminal Matters Act 1987* (Cth); *Trans-Tasman Proceedings Act 2010* (Cth); *Evidence on Commission Act 1995* (NSW).

[39] M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis Butterworths, 2020) at [11.8], [11.37].

[40] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36 at [14]; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [52]–[53], [61], [68].

[41] *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283 at 292. See also *The Schooner Exchange v McFaddon* 11 U.S. 116 (1812) at 144, where Marshall CJ expounded the rationale for temporary local allegiance:

> "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it."

exercise of *exorbitant* jurisdiction, the epithet emphasising the marked deviation from the norm.

27 In many respects, the territoriality principle goes hand in glove with sovereignty. It is by reason of the respect for the sovereignty of other nations that a state will not pass laws which purport to operate in or regulate conduct in other jurisdictions. Chief Justice Kiefel and Justice Gageler recently held as much in *BHP Group Ltd v Impiombato* where their Honours suggested that the common law "presumption against extraterritorial operation" of statutes was better termed a "presumption in favour of international comity."[42]

28 There is also a series of interrelated common law presumptions which have their origin in respect for sovereignty and notions of territoriality. The first, namely the presumption that legislation does not apply to persons and matters outside the territory of the legislature in question, i.e. that it does not have extraterritorial application or operation, has already been mentioned.[43] Then there is the converse presumption, namely that legislation applies both to locals and foreigners, and local and foreign matters, within the territory to which the statutory instrument extends.[44] Thirdly, there is the presumption that legislative provisions do not apply to cases which, according to conflict of laws rules, are governed by foreign law.[45]

29 In this context, the once confounding but now rejected "double actionability" choice of law rule in tort associated with the great case of *Phillips v Eyre*[46] may also be held up as an example of the common law's traditional respect for territoriality. Although that choice of law rule allowed a person to be sued in

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[42] *BHP Group Ltd v Impiombato* (2022) 405 ALR 402; (2022) 96 ALJR 956; [2022] HCA 33 at [23].
[43] *Seaegg v The King* (1932) 48 CLR 251 at 255; [1932] HCA 47; *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10 at 30–31; [1966] HCA 11; *D151 v New South Wales Crime Commission* (2017) 94 NSWLR 738; [2017] NSWCA 143 at [19]–[21]; *Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development* (2018) 336 FLR 37; [2018] NSWCA 174 at [154]–[156].
[44] *Walker v New South Wales* (1994) 182 CLR 45 at 49–50; [1994] HCA 64; *Clark (Inspector of Taxes (UK)) v Oceanic Contractors Inc* [1983] 2 AC 130 at 145.
[45] *Wanganui-Rangitikei Electric Power Board (NZ) v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601; [1934] HCA 3; *Gosper v Sawyer* (1985) 160 CLR 548; [1985] HCA 19; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16 at [30] (**Insight Vacations**). See, generally, P Herzfeld and T Prince, *Interpretation* (2nd ed, 2020, Thomson Reuters) at [9.250].
[46] (1870) LR 6 QB1.

England for the commission of a civil wrong abroad, such a claim was only available in circumstances where the wrongful act was not justifiable in the place where it had taken place.

30 On the other hand and perhaps, as usual, equity lawyers were creative in overcoming some of the limitations or restrictions which the territoriality principle and concomitant respect for foreign sovereignty carried. Thus, in *Penn v Lord Baltimore*, one of the first cases I was taught in equity as exemplifying the proposition or maxim that equity operates "in personam", a suit for specific performance was brought in England for the enforcement of an agreement relating to the border between Pennsylvania and Maryland.[47]

31 Equity's *in personam* operation also underlay the earliest examples of anti-suit injunctions[48] which functionally have been seen to involve the indirect interference with foreign courts and frequently have been criticized for impairing international judicial comity.

32 The close link between respect for sovereignty and territoriality, and the powerful influence of those concepts, also operated within our federation with the traditional view being that "[t]he States are separate countries in private international law, and are to be so regarded in relation to one another".[49]

33 It was not until *John Pfeiffer Pty Ltd v Rogerson*[50] (**John Pfeiffer**), decided in 2000, that this notion was exploded constitutionally. Even so, real issues continue to arise when State legislation arguably operates upon events or actions occurring wholly or in part in other states or territories of the Federation. As was observed in *John Pfeiffer*:

> "The existence of separate law areas implies the possibility (at least so far as statute law is concerned) of apparent incompatibilities or inconsistencies that require resolution. To an extent, the Constitution itself provides explicitly for the resolution of some such inconsistencies. However, apart from this, implicit in federation and in the division of the one nation into separate law areas defined

[47] (1750) 1 Ves. Sen. 444; 27 ER 1132.
[48] *Lord Portarlington v Soulby* (1834) 3 My & K 104; 40 ER 40; *Carron Iron Co v Maclaren* [1855] EngR 700; (1855) 5 HLC 416 [10 ER 961].
[49] *Pedersen v Young* (1964) 110 CLR 162 at 170; [1964] HCA 28 (Windeyer J).
[50] (2000) 203 CLR 503; [2000] HCA 36 at [119]-[121].

> in geographical terms is the fact that each law area will respect the entitlement of the other "to make and apply law within its territorial limit". Unlike the position that may arise with respect to the local enforcement of the law of a foreign nation, there are no reasons, within a federation such as Australia, meriting the public policy that protects the law of the forum and expels the law of the place where the wrong occurred."[51]

34 In *Mobil Oil,* delivered two years after *John Pfeiffer*, Gleeson CJ observed that:

> "There is nothing either uncommon, or antithetical to the federal structure, about legislation of one State that has legal consequences for persons or conduct in another State or Territory. An example is to be found in the provisions of the *Clean Waters Act 1970* (NSW) considered in *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78. That legislation was held to apply to acts or omissions (in that case, trans-border pollution) outside New South Wales which had, or were likely to have, consequences within New South Wales. The idea that all transactions and relationships giving rise to legal consequences can be located "in" one particular State or Territory is unrealistic."[52]

35 What Gleeson CJ described in *Mobil Oil* as "unrealistic" applies equally to the interests of sovereign states. Off-shore actions can have on-shore impacts, commercially, climatically and from the perspective of consumer protection. This was what the argument in *Meyer Heine* concerning the *Australian Industries Preservation Act* (see [16] above) was all about, and it is interesting to ponder whether the same result would be reached today.

36 Acts done abroad by foreign companies or individuals nowadays may give rise to liability in Australia, whether by reason of legislation with an extraterritorial operation or the operation of conflict of laws doctrine.

37 Matching this, there has been a liberalisation of the circumstances in which personal jurisdiction may be asserted over foreign defendants, that is to say, over defendants that do not have a presence in New South Wales or Australia and who can only be served with process overseas.[53] Indeed it was Spigelman

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[51] Ibid at [123] (footnotes omitted).
[52] (2002) 211 CLR 1; [2002] HCA 27 at [16].
[53] One important example of this is seen in UCPR r 11.5 which provides that:

> The court may grant an application for leave if satisfied that—
> (a) the claim has a real and substantial connection with Australia;
> (b) Australia is an appropriate forum for the trial, and
> (c) in all the circumstances the court should assume jurisdiction.

CJ in *Hyde v Agar*[54] who pointed out that the traditional language of "exorbitant jurisdiction" had ceased to be apposite.

38 40 years ago, however, such was the antipathy to extraterritorial legislation of the United States in the form of statutes such as the Sherman Act of 1890 dealing with anti-trust activity, together with 'Westinghouse litigation'[55] and the 'Uranium Antitrust Litigation'[56], that countries such as Australia,[57] Canada,[58] South Africa and the United Kingdom[59] passed laws blocking or designed to negative the operation of such extraterritorial laws.

39 Indeed, this phenomenon was not confined to common law countries. Countries not directly intertwined in the Westinghouse litigation took pre-emptive steps to enact blocking legislation of their own. France, for example, enacted a law making it a criminal offence to send documents relating to commercial or technical matters for use in foreign proceedings except where permitted by

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[54] *Hyde v Agar; Worsley v Australian Rugby Football Union Ltd* (1998) 45 NSWLR 487 at 509B.
[55] *United States v Westinghouse Electric Corp* 648 F 2d 642 (Ninth Circuit, 1981).
[56] *In re Uranium Antitrust Litigation* 480 F Supp 1138 (Northern District of Illinois, 1979).
[57] Australia promptly passed the *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* (Cth). The Bill was subject to significant debate and was hotly contested in federal parliament. By this Act, the federal Attorney-General was permitted to make orders prohibiting the production of documents or the giving of evidence in foreign proceedings where the Attorney-General believed the national interest required the making of such orders, or where the foreign court had failed to comply with international law or the doctrine of comity. The Commonwealth Parliament also enacted the *Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979* (Cth). Under this Act, the Attorney-General was permitted to order that a foreign judgment in respect of antitrust laws was unenforceable in Australia, if satisfied that the foreign court had exercised jurisdiction inconsistent with the principles of international law or comity, that it was against the national interest, or that recognising the judgment may cause detriment to Australian trade or commerce. See also the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth).
[58] Canada passed three laws to limit the effect of the Westinghouse litigation. First, it amended its own antitrust law, the *Combines Investigation Act 1970*, to empower the Canadian Restrictive Trade Practice Commission to bar the implementation of foreign judgments that had adverse effects on competition in Canada. Secondly, the Uranium Information Security Regulations 1976 (Canada) were implemented, which prevented disclosure of documents to participants in the Westinghouse litigation and the US grand jury. Thirdly, the *Foreign Extraterritorial Measures Act 1984* (Canada) was similar to the 1980 *Protection of Trading Interests Act 1980* UK.
[59] In *Rio Tinto Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 616, Lord Wilberforce summarised of the government's complaints:

> "Her Majesty's Government considers that the wide investigatory procedures under the United States anti-trust legislation against persons outside the United States who are not United States citizens constitute an infringement of the proper jurisdiction and sovereignty of the United Kingdom."

some treaty or international agreement.[60] Belgium, Denmark, Finland, Germany, Italy, the Netherlands, the Philippines and Sweden all did the same.[61]

40 So, too, in a famous case in 1984 involving Sir Freddie Laker, the English Court of Appeal restrained Laker Airways from suing Midland Bank in the United States in circumstances where Laker Airways sought to engage the extraterritorial operation of the Sherman and Clayton Acts in proceedings in the United States in respect of conduct of the Bank that had occurred in England.[62] The Plaintiff Banks successfully argued that, as the conduct sought to be impugned occurred in England, it would be unconscionable that they should in such circumstances be exposed to an antitrust suit based on an extra-territorial application of the Sherman and Clayton Acts which an English court should not recognise. Sir Gerard Brennan was attracted to a very similar argument in *CSR Ltd v Cigna Insurance Australia Limited*[63] but for those involved in running that argument, his was sadly a lonely dissent.

41 It is not without irony, as Professor Triggs has observed, that "despite persistent protests by many states against the extraterritorial application of US laws on the ground that they breach international law, there has been a growing recognition that, for laws to be effective, it may be necessary to expand their jurisdictional reach."[64] Modern legislatures are nowadays far less reticent to legislate with extraterritorial effect. This is a trend that we have seen in Australia, as I shall now explore.

The shift away from orthodoxy

42 The globe has shrunk since the heyday of territoriality in terms of physical movement of persons, telecommunications, liberalised trade, the revolutionary role and impact of the internet, electronic funds transfers and related

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[60] Law No. 80–358 of 16 July 1980, J.O. 1799, referred to and translated in B E Herzog, 'The 1980 French Law on Documents and Information' (1981) 75(2) *American Journal of International Law* 382.
[61] W Pengilley, 'United States Trade and Antitrust Laws: A Study of International Legal Imperialism from Sherman to Helms Burton' (1998) 6(3) *Competition and Consumer Law Journal* 187.
[62] *Midland Bank plc v Laker Airways* [1986] QB 689.
[63] (1997) 189 CLR 345
[64] G D Triggs, *International Law: Contemporary Principles and Practices* (2nd ed, LexisNexis Butterworths, 2011) at [8.32].

technological developments. Indeed, there is a new form of territory called cyberspace which is dissociated from notions of sovereignty. Virtual engagement and e-commerce also make it difficult physically to locate particular activities as occurring only in one jurisdiction, and both commercial and personal activity is increasingly international or has a, or indeed multiple, cross border aspects.

43 Hugely powerful global companies such as Facebook (or Meta, as it is now called) are hard to pin down, tax and regulate, and it is therefore unsurprising that legislatures have seen fit to extend their territorial reach – and that courts have been prepared to construe statutory language in a manner that favours the continuing ability of the state to regulate conduct that has *an effect* on that state, even if not strictly occurring within its territory.

44 It has been said that "[t]he challenge for contemporary international law is to balance the practical need to regulate conduct in a global society with the principle of non-intervention in the affairs of the state."[65]

45 An increasing number of Acts of the Commonwealth and some State legislatures, regulating both civil and criminal activity, are expressly stated to operate with a degree of extraterritorial reach.[66]

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[65] Triggs, *International Law: Contemporary Principles and Practices* at [8.32].

[66] Examples of New South Wales legislation where clear guidance is given as to the territorial operation and reach of the statute include:

(1) the *Biodiversity Conservation Act 2016* (NSW), s 12.25 of which provides that:

> "A notice may be given under this part to a person in respect of a matter even though the person is outside the State or the matter occurs or is located outside the State, so long as the matter affects the environment of this State";

(2) the *Fair Trading Act 1987* (NSW), s 5A of which provides that:

> "(1) This Act is intended to have extraterritorial application in so far as the legislative powers of the State permit.
> (2) Without limiting subsection (1), this Act extends to conduct either in or outside the State that:
> (a) is in connection with goods or services supplied in the State; or
> (b) affects a person in the State; or
> (c) results in loss or damage in the State"; and

(3) the *Legal Profession Uniform Law 2014* (NSW), s 4 of which provides that:

46 Within Australia, such legislation may be divided into three broad categories:

(i) legislation which is directed to the conduct of Australian nationals and companies undertaken outside Australia;

(ii) legislation which is directed to conduct of foreign nationals or corporations outside Australia but which nevertheless has an impact within Australia or on Australians;

(iii) legislation which is expressly stated to have an extraterritorial effect, irrespective of any specific connection with Australia.

47 There is a further category of legislation where "a statute employs general or apparently universal language and when the subject matter which the statute addresses may occur or exist outside as well as within the territory in which the relevant legislature is located".[67] Such statutes are silent as to their territorial reach, leaving it to the courts to determine, as a matter of statutory construction, whether they have an extraterritorial operation.

48 Returning to the first category, legislation which is directed to Australian nationals and Australian companies undertaken outside Australia, a clear illustration is supplied by s 5(1) of the *Competition and Consumer Act 2010* (Cth) which extends the application, inter alia, of the *Australian Consumer Law* (except Part 5.3) to conduct outside Australia undertaken by:

> "(g) bodies corporate incorporated or carrying on business within Australia; or

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> "The operation of this Law is, as far as possible, to include operation, according to its terms, in relation to the following—
> (a) things situated within or outside the territorial limits of this jurisdiction;
> (b) acts, transactions and matters done, entered into or occurring within or outside the territorial limits of this jurisdiction;
> (c) things, acts, transactions and matters (wherever situated, done, entered into or occurring) that would, apart from this Law, be governed or otherwise affected by the law of another jurisdiction."

See, also, *Building and Construction Industry Security of Payment Act 1999* (NSW) s 32E; *Mining Act 1992* (NSW) s 387B; *National Energy Retail Law 2012* (NSW) s 17; *Pesticides Act 1999* (NSW) s 33; *Petroleum (Onshore) Act 1991* (NSW) s 129A; *Protection of the Environment Operations Act 1997* (NSW) ss 109 and 212B; *Water Management Act 2000* (NSW) s 340D; and *Work Health and Safety Act 2011* (NSW) s 155A.

[67] *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692; [2020] NSWCA 242 at [4].

(h) Australian citizens; or

(i) persons ordinarily resident within Australia."

49 The concern to impose social norms on Australian citizens, residents and companies acting abroad also extends to the criminal sphere. Thus Division 70 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) extends to bribery of *foreign* public officials which takes place wholly outside Australia by Australian companies, citizens or residents.[68]

50 Perhaps the clearest and in terms of legislative drafting most explicit and best example of the extraterritorial reach of an Australian statute is to be found in the *Criminal Code*. Division 15 of Part 2.7 of the Code is sub-titled "Extended geographical jurisdiction" and was introduced in 2001. The Commonwealth Attorney General's Department commentary on pt 2.7 states:

> "The purpose of Part 2.7 is to clarify, and to provide in an orderly way for, the geographical application of Commonwealth offences. There are several instances where the geographical reach of Commonwealth offences is not clear, or where general application provisions are not adapted to the purpose of particular offence provisions."

The amendments introduced four categories of extended geographical jurisdiction (A, B, C and D) with receding degrees of connexion with Australia being required. To illustrate, s 15.1 of the *Criminal Code* sets out "category A" of its extended territorial jurisdiction as follows:

> "(1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:
>
> (a) the conduct constituting the alleged offence occurs:
>
> (i) wholly or partly in Australia; or
>
> (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
>
> (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
>
> (i) wholly or partly in Australia; or

[68] Section 70.5; see *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377; [2022] NSWCCA 152.

(ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(c) the conduct constituting the alleged offence occurs wholly outside Australia and:

(i) at the time of the alleged offence, the person is an Australian citizen; or

(ii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or

(d) all of the following conditions are satisfied:

(i) the alleged offence is an ancillary offence;

(ii) the conduct constituting the alleged offence occurs wholly outside Australia;

(iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship."

51 Division 15 of Part 2.7 of the Code in part reflects Sir Gerard Brennan's 1989 judgment in *Thompson v The Queen*, [69] in which his Honour distinguished between so-called 'conduct-crimes' and 'result-crimes' (criminal offences designed to suppress harmful results), noting that no principle of comity prohibited the territory where the 'result' crime had its impact from punishing criminal breaches which occurred outside the territory but impacted within it. As Brennan J put it, there must be "some local element" to the offence – whether the result, or a conduct aspect – but that is all.[70]

52 Part of the "rationale behind the extended criminal jurisdiction of the Commonwealth" has been described as ensuring that "the conduct of Australians overseas can be prosecuted – for example, child sex tourism … or in circumstances where the agreement which forms part of a conspiracy occurs

[69] *Thompson v The Queen* (1989) 169 CLR 1 at 24; [1989] HCA 30, itself citing *Treacy* [1971] AC 537 at 560 per Lord Diplock.
[70] Ibid at 25.

overseas. It is also designed to catch money laundering or participation in 'foreign fighting'".[71]

53 The Commonwealth legislature's extraterritorial legislative reach is not confined to the conduct of Australians acting criminally overseas. It is also in furtherance of *protecting* Australians overseas. Thus Division 115 of Part 5.4 of the *Criminal Code*, headed "Harming Australians", establishes a series of offences for murdering or grievously harming Australians citizens or residents outside Australia. This is a long way from *Macleod's* case.

54 The only apparent concession to the explicit extraterritorial reach of these provisions is the requirement of s 115.6 that "[p]roceedings for an offence under this Division must not be commenced without the Attorney-General's written consent."

55 Turning to the second broad category, namely legislation directed to foreign activity having an impact or effect in Australia, one clear example is s 5A of the *Fair Trading Act 1987* (NSW) which provides:

> "(1) This Act is intended to have extraterritorial application in so far as the legislative powers of the State permit.
>
> (2) Without limiting subsection (1), this Act extends to conduct either in or outside the State that—
>
> (a) is in connection with goods or services supplied in the State, or
>
> (b) affects a person in the State, or
>
> (c) results in loss or damage in the State."

56 This Act explicitly rebuts the interpretive common law presumption against extraterritoriality.

57 A more extreme example of this is s 14 of the *Interactive Gambling Act 2001* (Cth) which expressly *reverses* the presumption, providing that "[u]nless the

[71] T Anderson, *Commonwealth Criminal Law* (3rd ed, 2022, Federation Press) at [2.11.1]

contrary intention appears, this Act *extends to* acts, omissions, matters and things outside Australia" (emphasis added).

58 So, too, there are a number of offences under the *Criminal Code* (category D offences: see s 15.4) which need have no territorial connection with Australia. Despite the "exceptional" nature of the extended geographical jurisdiction in category D, it is in fact the category applied to the largest number of offences in the *Criminal Code*. These include terrorist acts, genocide, crimes against humanity and slavery.[72]

Extraterritoriality, universal language and the interpretation of legislation

59 Under this heading I discuss the further category of case identified above, namely that of a statute that offers no express guidance as to its legislative reach and which employs general or apparently universal language and where the subject matter which the statute addresses may occur or exist outside as well as within the territory of the enacting legislature.

60 In many cases, not every act, matter or thing that the statute in question appears to regulate will need to have a connection with the enacting State but the question will be what is the central geographical connection required. This is not a novel or modern conundrum. In *Mynott v Barnard*,[73] it fell to the High

[72] Matters of this nature are indeed reflected in the range of *Criminal Code* offences to which category D is applied, which includes:

(1) sabotage with intent or recklessness as to prejudice against Australia's national security, in div 82B;
(2) acts of espionage, such as dealing with information concerning national security which is or will be communicated or made available to a foreign principal, in div 91A;
(3) terrorism, in s 101.1(1);
(4) membership of, support for, or involvement in the activities of, a terrorist organisation, in div 102;
(5) incursions into foreign countries with the intention of engaging in hostile activities or recruiting persons to join organisations engaged in hostile activities against foreign governments, in div 119;
(6) dealing with officially secret information, including the communication of inherently harmful information by current and former Commonwealth officers, in part 5.6;
(7) theft of property belonging to a Commonwealth entity, in s 131.1(1);
(8) fraudulent conduct involving a Commonwealth entity, in div 135;
(9) bribery of a Commonwealth public official, in s 141.1;
(10) genocide, crimes against humanity and war crimes, in div 268;
(11) slavery, in s 270.3; and
(12) the use of false identification information to obtain an air passenger ticket, in ss 376.3 and 376.4.

[73] (1939) 62 CLR 68; [1939] HCA 13.

Court to construe s 5(1) of the *Workers Compensation Act 1928* (Vic). Latham CJ observed that:

> "Some territorial limitation must be introduced in the construction of the section. The court has been offered an embarrassing choice of possible limitations."[74]

61 Once the relevant connection, described in contemporary legalese as "the hinge" [75] , has been identified, it is not necessary for every possible aspect or element of a piece of legislation to be read as territorially delimited.

62 It is essential for lawyers and those who seek legal advice about their legal rights and obligations to know whether and to what extent a statute applies to particular conduct or occurrences which have a connection with a particular territory but which may not occur wholly within that territory. Identifying the legislative "hinge" of any given Act and the extent of its territorial reach must be determined on the relevant Act's "proper construction", taking into account its context, subject matter and purpose.[76]

"In and of New South Wales" and the common law presumption

63 Now you may immediately think that, where a statute is silent as to its territorial operation, provisions such as s 12 of the *Interpretation Act 1987* (NSW) or s 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) together with the presumption against extraterritoriality "kick in" to provide a quick and short answer to the legislative conundrum.

64 If you did so, you would be wrong. This is for at least three reasons.

65 First, the statutory interpretation provisions referred to are subject to contrary legislative intention and the common law presumptions may be rebutted. Such

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[74] Ibid at 73.

[75] See, for example, *Old UGC Inc v Industrial Relations Commission of New South Wales* (2006) 225 CLR 274; [2006] HCA 24 at [22]; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16; *Law Society of New South Wales v Glenorcy Pty Ltd* (2006) 67 NSWLR 169; [2006] NSWCA 250 (**Glenorcy**); *Chubb Insurance Company of Australia Ltd v Moore* (2013) 302 ALR 101; [2013] NSWCA 212 at [144]-[147].

[76] *Insight Vacations* at [30].

contrary intention or rebuttal need not be by express words. It may be by reason of:

(i) necessary implication;[77]

(ii) reading the Act as a whole[78] and in light of its "object, subject matter or history of the enactment";[79]

(iii) avoiding the frustration of legislative purpose.[80]

66 Second, statutory interpretation provisions such as s 12 of the *Interpretation Act*, where not otherwise contra-indicated, have not been construed so as to qualify every "locality, jurisdiction or other matter or thing" referred to in a statute by the words "in and of New South Wales". It was so held by Jacobs JA in *O'Connor v Healey*[81]who stated that:

> "When there are a number of circumstances which have a local content, such as, in the present case, injury, journey, place of abode and place of work, I do not think that ordinarily it is possible to apply the terms of the *Interpretation Act* to each and every one of them as a matter of course. It seems to me that the intention of [s 12] is to provide the natural limit of legislation, so that it applies in its subject matter to those situations which have a nexus with New South Wales. However, it is not every aspect of every sentence or clause of legislation which can be given the local New South Wales connotation." [82]

67 So, while there must be some nexus with New South Wales for a piece of State legislation to be constitutionally valid (and *Mobil* tells us that the connection need only be slight), such an Act may still be capable of operating extraterritorially insofar as its general language may appear to have universal operation. Whether it does so or not involves an exercise of statutory construction in the absence of express legislative guidance within the Act.

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[77] See, for example, *Macleod v Attorney-General (NSW)* [1891] AC 455 at 457–458.
[78] See, for example, *University of Birmingham and Epsom College v Commissioner of Taxation (Cth)* (1938) 60 CLR 572 at 579–80; [1938] HCA 57.
[79] See, for example, *Schmidt v Government Insurance Office (NSW)* [1973] 1 NSWLR 59 at 67–68. See generally P Herzfeld and T Prince, *Interpretation* (2nd ed, 2020, Thomson Reuters) at [9.280] (**Herzfeld and Prince**).
[80] See, for example, *Australian Securities Commission v Bank Leumi Le-Israel* (1995) 134 ALR 101; [1995] FCA 1012.
[81] (1967) 69 SR (NSW) 111.
[82] Ibid at 114.

68 In relation to s 12 of the *Interpretation Act*, as Leeming JA pointed out in his wonderful judgment in *DRJ v Commissioner of Victims Rights (No 2)* (**DRJ**),[83] that interpretative provision is "home grown" and has its origin in the colonial *Acts Shortening Act* of 1852. In terms of cross-border activity, the world was radically different in 1852 than it is today and, as I pointed out in the same case, it is notable that, in s 12 of the *Interpretation Act* and its Commonwealth cognate, we are still using a virtually unchanged legislative tool that was created almost 170 years ago as a default guide to the territorial reach and operation of legislation.

69 The third point to be made in this context is that the common law presumption against extraterritoriality (and the associated common law presumptions) may not be quite as potent as they once were. There is a hint of this in the joint judgment of Kiefel CJ and Gageler J in *BHP v Impiombato*. Their Honours pointed out correctly that the common law presumption was strongly influenced by 19th and early 20th century notions of territorial sovereignty. The world has changed and global activity transcends national borders in a way that invites far more frequent legislative and regulatory response. To the extent that there has been a "shift in orthodoxy" in terms of attitudes to extraterritoriality, as I have suggested, the strength of the common law presumption against extraterritoriality may have correspondingly diminished.

BHP and NAB invoke the presumption with different results

70 The presumption certainly did not do the work that BHP sought it to do in *Impiombato* which was a shareholder class action in the Federal Court against BHP, arising out of BHP's alleged failure to inform the market of a risk that the Fundao tailings dam, at a Brazilian mine in which BHP was a non-operating joint venturer, might collapse. Certain plaintiffs in the class action were foreign

[83] (2020) 103 NSWLR 692; [2020] NSWCA 242. Another relatively recent case arising in relation to the scope of important legislation, was that of the New South Wales Court of Appeal in *Chubb Insurance Company of Australia Ltd v Moore* (2013) 302 ALR 101; [2013] NSWCA 212 in relation to the notorious s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

residents, including some who bought shares on foreign exchanges on which BHP shares were traded.

71 The question which the High Court confronted on an interlocutory appeal was whether Pt IVA of the *Federal Court of Australia Act 1976* (Cth) permitted representative proceedings to be brought on behalf of group members who were not resident in Australia? The precise nature of BHP's argument was that use of the word "person" in the statutory definition of "group member" engaged the presumption against extraterritorial effect, such that it should have been read down so as not to include group members who were not resident in Australia.

72 For the Chief Justice and Gageler J, the answer lay in what their Honours identified as the underlying rationale of the presumption, namely international comity. They said that:

> "to bind a nonconsenting group member who is not resident in Australia to a judgment of the Federal Court determining a matter in which the Federal Court has jurisdiction in a representative proceeding would be to infringe no principle of international law or international comity".[84]

As such, there was no basis on which to engage the 'presumption' – the comity of nations would be left undisturbed by any judgment of the Federal Court.

73 Justice Gordon, Edelman and Steward took a slightly different approach. Their Honours noted that the presumption was a constructional rule only, and that "it may have little or no place where some other [territorial] restriction is supplied by context or subject matter [of the statute in issue]".[85] Having identified the "hinge" or "central focus" of Part IVA as "the powers and procedures for determining proceedings within the Court's jurisdiction", their Honours observed that there was no extraterritorial operation of the Act in the relevant sense.[86] Rather, it was simply a case of the determination of group members'

[84] Ibid at [32].
[85] Ibid at [61], citing *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601; [1934] HCA 3.
[86] Ibid at [66].

claims as a matter of Australian law, clearly territorially connected to the Court's jurisdiction. Their Honours were emphatic:

> In such a context – interpreting a provision that governs how the jurisdiction of an Australian court is to be exercised; a matter so directly territorially connected to Australia – the presumption against the extraterritorial operation of legislation does not have any role to play. There is no basis to apply the presumption to exclude group members who may reside outside of the physical territory of the jurisdiction. Who makes the claim and where they live does not determine the jurisdiction of the Federal Court or the claims that may be brought in accordance with the procedures in Pt IVA.[87]

74 Although the common law presumption may be of diminishing potency or may be readily rebutted or disengaged, it came to the rescue of the National Australia Bank in the United States Supreme Court in its 2010 decision in *Morrison v National Australia Bank*.[88]

75 In 1998, NAB had purchased a Floridian mortgage servicing company, HomeSide Lending. Several writedowns – totalling some $2.2 billion US dollars – followed, largely due to overly optimistic assumptions of future mortgage fee revenue. The plaintiffs – Australian shareholders of NAB – had contended that these assumptions were in fact the basis of a scheme to defraud NAB on the part of HomeSide's management, and that NAB and its officers were aware of this. The fraud was alleged to have occurred in Florida, providing *some* territorial connection to the US.

76 The essence of the case before the United States Supreme Court concerned the meaning of s 10(b) of the *Securities Exchange Act 1934*, which provided that it was unlawful:

> "To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device…"

Did that provision extend to a so-called "foreign-cubed" case such as this: where foreign plaintiffs had suffered loss on foreign exchanges in respect of foreign issuers of securities? If not, could it extend to so-called "foreign-

[87] Ibid at [69].
[88] 561 U.S. 247 (2010).

squared" claims, involving domestic – that is, US – plaintiffs suing foreign issuers of securities for losses on foreign exchanges?

77 The Court, in a judgment given by Scalia J, held that neither species of class action could be brought under s 10(b), because s 10(b) was subject to a presumption against extraterritorial effect. This meant that the section had no application in respect of securities traded on foreign exchanges – in this case, NAB shares. The basis for this judgment was what Scalia J identified as a 'longstanding principle of American law': 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States', citing *EEOC v Arabian American Oil Co*.[89]

78 As the words of s 10(b) were silent as to any intended extraterritorial effect, it was to be assumed that none was intended. It was not relevant that the alleged fraud occurred in Florida, as the *Securities and Exchange Act* was concerned with the sale and purchase of securities, and not the fraudulent conduct itself. Accordingly, s 10(b) did not provide the plaintiffs a cause of action in respect of their losses.

Extraterritoriality in the United Kingdom – a recent decision

79 Difficult questions of statutory construction have also recently presented themselves to the United Kingdom Supreme Court which has explored the issue of the scope of statutory document compulsion powers granted to the Serious Fraud Office, specifically whether language empowering the Director to "require…any other person to produce…any specified documents" extended to the ability to compel production from a foreign parent of a UK company of documents held overseas.[90] In that case, the Court held that the presumption against the extraterritorial operation of the statute was not rebutted, on a proper interpretation of the legislation in question.[91] Of particular and it might be

[89] (499) U.S. 244. The US Supreme Court returned to the question of extraterritoriality in relation to the *Alien Torts Statute* in *Nestle USA, Inc. v Doe et al* 593 U.S. __ (2021); 141 S. Ct. 1931.
[90] *R (on the application of KBR, Inc.) v Director of the Serious Fraud Office* [2022] AC 519; [2021] UKSC 2 at [2]-[4], [14].
[91] Ibid at [65].

thought obvious significance was that the Act allowed for a separate mechanism to obtain documents from overseas.[92]

80 In an interesting aside, the Court deprecated the lower Court's attempt to 'read in' a "sufficient connection" test to the statute. While it may have been necessary for other statutes conferring wide powers, nothing in the language, purpose or context of this statute was held to require a broad reading of the statute that would make such a limiting factor necessary. Rather, the correct construction of the Act required a limited reading of the statute *in the first place*.[93] This decision has had far-reaching effects; it has, for instance, limited the power of the UK Competition and Markets Authority to require foreign companies, which are related entities of UK companies, to disclose documents in competition investigations.[94]

DRJ v Commissioner of Victims Rights (No 2)

81 The challenges (or joys, depending on one's perspective) of the process of determining the territorial scope of particular legislation by the process of statutory construction are well illustrated by the relatively recent decision of the New South Wales Court of Appeal in *DRJ*.[95]

82 In *DRJ*, the Court was required to consider the territorial scope of the *Victims Rights and Support Act 2013* (NSW) (**the Act**) which, by s 23(1), provides that a "primary victim of an act of violence or modern slavery is eligible for the support under the Scheme described in section 26". Section 26 of the Act provides that a "primary victim" is entitled to support from the Commissioner of Victims Rights, relevantly comprising counselling, financial assistance and, in some cases, a recognition payment. These sections were contained in Part 4 of the Act, which specifically governed the "Victims Support Scheme".

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[92] Ibid at [45].
[93] Ibid at [64]-[66].
[94] See *BMW AG and Volkswagen AG v Competition and Markets Authority* [2023] CMA 7.
[95] (2020) 103 NSWLR 692; [2020] NSWCA 242. Another relatively recent case arising in relation to the scope of important legislation, was that of the New South Wales Court of Appeal in *Chubb Insurance Company of Australia Ltd v Moore* (2013) 302 ALR 101; [2013] NSWCA 212 (**Chubb**) in relation to the notorious s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

83 The Applicants in *DRJ* were five women of Yazidi ethnicity who claimed that in 2014 they were subjected to a series of acts of violence at the hands of an Australian man. Those acts of violence were said to have occurred in Syria and Northern Iraq. In July 2018, the Applicants sought to obtain recognition payments and counselling pursuant to the Act, on the basis that each of them was a "primary victim"[96] of an "act of violence". The only discernible connection between the acts of violence and the jurisdiction of New South Wales was that their Australian perpetrator was a resident of New South Wales until 2013. It was not in contention that none of the Applicants had ever visited Australia.

84 As I said in *DRJ*:

> "State legislatures … may pass laws which operate or purport to regulate conduct or actions which occur either wholly outside the state (at least so long as there is a sufficient nexus with the state) or to conduct or actions that occur partly within and partly outside the territory. The extent to which a legislature has intended to use its legislative competence to pass laws with extraterritorial effect, and the connecting factor or factors by reference to which it has chosen to exercise such power, are regrettably not always and indeed are frequently not made apparent on the face of any given enactment."[97]

85 Nothing in the *Victims Rights and Support Act* provided that the relevant "act of violence" must occur in New South Wales, or that the offence which is apparently committed must be against the law of New South Wales specifically.

86 Support was refused by the Commission and challenges in NCAT were rejected. The case came to the Court of Appeal.

87 The following questions arose for the consideration and determination of the Court of Appeal in construing the *Victims Rights and Support Act* having regard to s 12(1) of the *Interpretation Act*:

(1) What connection, if any, must a "primary victim" have with New South Wales to be eligible for support?

(2) Does the act of violence have to occur in New South Wales?

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[96] See s 20 of the Act.
[97] (2020) 103 NSWLR 692; [2020] NSWCA 242 at [23].

(3) Does the violence have to be perpetrated by a person ordinarily resident in New South Wales?

(4) Would that connecting factor be sufficient to engage the Act if there were no other connection with New South Wales?

(5) Would the Act apply if, for example, the victim and the perpetrator of the violence both resided outside of New South Wales but were temporarily present in New South Wales when the relevant act of violence occurred?

88 These questions did not admit of a simple answer to be reached by a straightforward process of reasoning.

89 In *DRJ*, Leeming JA was guided by authorities including *Insight Vacations* and *Chubb* when formulating the principled approach to the construction of a particular statute's territorial scope, by reference to the statutory "hinge" or "central concern", as follows:[98]

> "A variety of language has been used, including 'central conception', 'central focus', 'statutory springboard' and 'hinge', to which may be added the 'central concern' mentioned by Mitchell and Beech JJA in *Huntingdale Village Pty Ltd (recs and mgrs apptd) v Corrs Chambers Westgarth* (2018) 128 ACSR 168; [2018] WASCA 90 at [167]. The different language describes the same approach. Putting to one side the different considerations applicable to legislation creating an offence, in cases where no express provision has been made connecting the statute to New South Wales, the task is *to identify the central focus or central conception of the legislation*, and *require that to bear a connection with New South Wales*. One does so *as a matter of construction, based on subject matter and scope, and with a regard to internal indications and to avoiding improbable and absurd outcomes*. It will be relevant to have regard to *the purpose of the statute, the likelihood that the statutory purpose will be evaded if made to depend upon something readily altered at the instance of the parties*, and the *need to avoid an unduly restrictive approach* whereby more than one factum is required to bear a connection." (emphasis added)

90 His Honour drew upon the relevant authorities to provide examples of statutory "hinges" or "central concerns" ascertained as a result of the process of statutory construction, as follows:[99]

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[98] Ibid at [157].
[99] Ibid at [180]. See also *Wipro Ltd v New South Wales* [2022] NSWCA 265; (2022) 321 IR 108.

> "(1) the suffering of an injury in New South Wales by a worker in *O'Connor v Healey*, even while on a work-related journey with a Victorian destination;
>
> (2) the regulation of solicitors in New South Wales (including payment of levies) in *Glenorcy*, rather than the location where there was a failure to account;
>
> (3) the performance of work in an industry (as opposed to the proper law of the contract) in *Old UGC*; and
>
> (4) the place of performance of recreational services in *Insight Vacations*, rather than the proper law of the contract."

91 The formulation of this principle of construction was not in contention before the Court of Appeal in *DRJ*, such that "[i]n order to determine whether the [*Victims Rights and Support Act*] was limited by reference to 'acts of violence' which have a connection with New South Wales, as the Commissioner contended, or perpetrators of acts of violence who were residents of New South Wales or who had committed an offence contrary to the laws of New South Wales, as the [Applicants] contended, it was *necessary to identify the central focus or central conception of the statute*".[100]

92 Importantly, the question of the "hinge" or "central concern" of the *Victims Rights and Support Act* was held not to be capable of resolution solely through recourse to s 12(1)(b) of the *Interpretation Act*, by reading every reference to a locality, jurisdiction, matter and thing in the *Victims Rights and Support Act* as a reference to that locality, jurisdiction matter and thing "in and of New South Wales".[101] To do so would be, his Honour pointed out, to proceed upon two fallacies. First, that s 12 of the *Interpretation Act* is to be applied literally;[102] and, secondly, that every subject matter addressed by a statute must bear a nexus to the jurisdictional territory.[103]

93 In respect of the second of those fallacies, Leeming JA referred to observations of Sir Owen Dixon who, in *Barcelo v Electrolytic Zinc Company of Australasia*

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[100] Ibid at [158].
[101] Ibid at [116].
[102] See, for example, *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1; [2021] NSWCA 204.
[103] See *O'Connor v Healey* 69 SR (NSW) 111 at 114 per Jacobs JA and *Law Society (NSW) v Glenorcy Pty Ltd* (2016) 67 NSWLR 169; [2006] NSWCA 250 at [37] per Mason P; cited in *DRJ* at [116].

Ltd,[104] said that, if there are two expressions in a statute to which a section akin to s 12 is capable of applying, then "as soon as this restriction is applied to one of these expressions, the prima facie need for a territorial limitation is met and to that extent there is less reason for the other".

94 Thus, to apply s 12 of the *Interpretation* simply and mechanically to the *Victims Rights and Support Act* would be erroneous, and it was not the solvent to answering the key question, namely, how does one decide which statutory expression or subject matter is properly characterised as the "hinge" or "central concern" of the legislation?[105] The same point had been made by the High Court in *Insight Vacations*[106] where it was stated that, as explained by Kitto J in *Kay's Leasing Corporation Pty Ltd v Fletcher*, "the question of geographical limitation arises regardless of the engagement of a provision such as s 12(1)(b) of the *Interpretation Act*".[107]

95 In the event in *DRJ*, the Court of Appeal confirmed the decision of NCAT and the *Victims Rights and Support Act* was construed as not extending to the plaintiffs' claims for victims' compensation. An application for special leave to appeal was refused and Leeming JA's decision was extensively cited by the High Court in *BHP v Impiombato.*

96 The High Court will revisit the question of extraterritoriality shortly, having recently granted special leave to appeal from the decision of the Full Court of the Federal Court in the *Ruby Princess* case.[108] The Court will explore whether the unfair contract terms provisions of the *Australian Consumer Law* – in particular, section 23 – apply to the passage contracts of 696 of the passengers on that ship's ill-fated voyage which are not governed by Australian law and which contain both an exclusive jurisdiction clause in favour of the US District

[104] (1932) 48 CLR 391 at 422; [1932] HCA 52.
[105] *DRJ* at [116]-[117].
[106] *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16 at [28].
[107] (1964) 116 CLR 124 at 142; [1964] HCA 79.
[108] *Carnival plc v Karpik (The Ruby Princess)* (2022) 404 ALR 386; [2022] FCAFC 149; *Karpik v Carnival plc* [2023] HCATrans 33.

Court in California and, importantly, waive any entitlement to participate in a class action.[109]

Conclusion

97 That "superficially simple question[s] of construction"[110] such as that presented in *DRJ* and other cases[111] gave rise to such a complex and lengthy process of reasoning to a principled answer makes all the more acute the "importance and desirability of clear and explicit legislative drafting as to the territorial reach and operation of legislation".[112] This is particularly so where modern legislatures are more prepared and motivated to legislate with extraterritorial effect, precipitated by a significant change in attitudes to territoriality as a result of globalisation affecting almost all facets of day-to-day life.

98 Another consequence of a growth in legislation with extraterritorial operation (both within the federal sphere and transnationally), and one for another day, is to grapple with the situation where two (or more) statutory schemes (at least one of which is extraterritorial in its operation) both purport to deal with the same subject matter. This is a true conflict of laws. To be dealt with fully would require not just another lecture but probably at least an entire conference.

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[109] *Carnival plc v Karpik (The Ruby Princess)* (2022) 404 ALR 386; [2022] FCAFC 149 at [97].
[110] *DRJ* at [43].
[111] For example, *Chubb* which concerned the reach and operation of s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).
[112] *DRJ* at [1].