



## Articles

### Foreign law in Australian courts: *Neilson v Overseas Projects Corporation of Victoria Ltd*

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*In **Neilson v Overseas Projects Corporation of Victoria Ltd**, the High Court determined for the first time whether a reference by the Australian tort choice of law rule to foreign law as the law of the place of the tort includes the foreign law's private international law rules. This article explains the High Court's decision about what is meant by the foreign law in an international tort dispute and its decision about how the foreign law should be applied if this is not fully proven by the parties. It critically considers the High Court's contradictory responses to certain choices as to the conduct of litigation made by the plaintiff in **Neilson**. It argues that a flexible exception to the general tort choice of law rule could and should have been adopted and applied in **Neilson**. Finally, the implications of this decision for international contract disputes are briefly outlined.*

#### Introduction

The decision of the High Court in *Neilson v Overseas Projects Corporation of Victoria Ltd*<sup>1</sup> was much anticipated, principally because it was expected to resolve the problem of what was meant by the 'foreign law', when foreign law was to be applied by Australian courts as the governing law in international torts. The issue on which the case was decided by the Full Court of the Supreme Court of Western Australia was whether the foreign law means the choice of law rules of the foreign legal system or whether it means only the internal, substantive legal principles of the foreign legal system, excluding its rules of private international law.<sup>2</sup> *Neilson* is the first time that the High Court has directly resolved this question, which in private international law is addressed by the doctrine of renvoi. A second issue which arose in the determination of this case in the High Court, which assumed greater prominence on the final appeal than in the preceding determinations, was how the court should deal with a deficiency in the proof of the applicable foreign law. The decision on both issues has significant implications for private international law, not only in the area of international torts.

This article is in six parts. Part I explains the High Court's decision in *Neilson* on the meaning of the 'foreign law' when an Australian court must apply foreign law as the governing law in international torts cases and relates

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1 (2005) 223 CLR 331; 221 ALR 213 (*Neilson*).

2 *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 (*MMI v Neilson*). The Full Court held that the reference to foreign law meant only the internal law of the foreign legal system (at [48]).

that decision to the private international law literature on renvoi. Part II explains the High Court's decision in *Neilson* on how a case should be decided when the applicable foreign law was not fully proven by the party who relied on it to establish his or her case. The remainder of the article is a commentary on this case. Part III explores the role of party autonomy in international litigation and the inconsistent manner in which certain choices by the plaintiff in *Neilson* were treated by the High Court. In Part IV I discuss the flexible exception to the normal tort choice of law rule, which forms an integral part of tort choice of law in other Commonwealth countries. I suggest that several members of the High Court essentially applied the methodology of a flexible exception to justify application of the law of the forum in *Neilson*. Part V briefly considers the implications of *Neilson* for other areas of law, particularly international contracts. Part VI is a conclusion.

## I The meaning of foreign law

In disputes concerning a foreign tort, the High Court determined in 2002 that the governing law is the law of the place of the tort.<sup>3</sup> The first issue which arose in *Neilson*, which had not been addressed in earlier cases, was whether, in cases in which the tort occurred in a foreign country, the law of the place of the tort meant all of that foreign legal system's relevant rules, including its rules applicable in private international disputes, or whether it referred only to its internal rules for tort. This question is resolved in private international law, when it is recognised at all, by the doctrine of renvoi.

### The facts of *Neilson*

The appellant, Barbara Neilson, and her husband, George Neilson, were at all material times ordinarily resident and domiciled in Western Australia. The first respondent to the appeal, the Overseas Projects Corporation of Victoria Ltd (OPC), a company incorporated in Victoria,<sup>4</sup> employed Mr Neilson to work in Wuhan, China. After Mr Neilson had been employed by OPC, OPC also employed Mrs Neilson to work in Wuhan on a part-time basis. The Neilson family moved to Wuhan and lived in an apartment there which was provided to Mr Neilson by OPC under the terms of his employment. Mrs Neilson sued the first respondent in the Supreme Court of Western Australia in tort and contract for personal injuries she suffered when she fell down the stairs in the apartment in Wuhan in October 1991. Those proceedings were commenced in June 1997, almost six years after her injuries were first sustained. The first respondent joined its public liability insurer, Mercantile Mutual Insurance Ltd (MMI, the second respondent to the High Court appeal),<sup>5</sup> as a third party, claiming that MMI was bound to indemnify OPC if OPC was found to be liable to the appellant.

The appellant did not plead her case by reference to the potentially applicable Chinese law, nor did she lead evidence of Chinese law. Kirby J

3 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [75] (*Renault v Zhang*).

4 The registered office and principal place of business of OPC was in Victoria. OPC was also owned by the state of Victoria, but nothing turned on that fact.

5 MMI was an Australian corporation, incorporated in New South Wales.

suggested that this was perhaps explained by the fact that until 2002 the choice of law rule for international torts in Australia was uncertain, and the law of the forum had a 'predominant role'.<sup>6</sup> Even so, it was an essential precondition to establishing liability in non-local torts that the plaintiff establish that there was some liability according to the law of the place of the tort.<sup>7</sup> It was a risky strategy for the appellant neither to plead nor to lead evidence of the Chinese law.<sup>8</sup> The first respondent argued that Chinese law was the governing law, according to which it was not liable to the appellant. In particular, the first respondent argued that the Chinese limitation period of one year applied,<sup>9</sup> and that the claim was therefore time-barred.<sup>10</sup> The first respondent called an expert in Chinese law and tendered evidence of a translation of the Chinese law, including the Chinese choice of law rule. Ultimately, the success of the appellant's case depended on the Australian court applying the Chinese choice of law rule. In private international law, whether the foreign choice of law rule is applicable by the courts of the forum as part of the foreign law is determined according to the doctrine of *renvoi*, which is explained in the following section.

### Renvoi

Conventionally, three solutions to the problem of *renvoi*<sup>11</sup> have been identified: ignoring or rejecting the *renvoi*; the single *renvoi* solution; and the double or total *renvoi* solution.<sup>12</sup> Ignoring the *renvoi* assumes, without deciding, that a reference to foreign law means the foreign internal law. This result is consistent with rejecting the *renvoi*, which entails a conscious consideration, and rejection, of the relevance of the foreign choice of law rule and application of only the internal substantive rules of the foreign legal system. Applying this solution, if the Australian choice of law rule requires the application of foreign law, the Australian court applies only the internal rules of the foreign legal system. Before *Neilson*, in almost all Australian private international law cases, including foreign tort cases, the *renvoi* was ignored.

The single *renvoi* solution requires the forum first to apply the choice of law rule of the foreign legal system which supplies the governing law, and then to

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6 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [146].

7 *Breavington v Godleman* (1988) 169 CLR 41 at 110–11; 80 ALR 362; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 39; 104 ALR 257; *Stevens v Head* (1993) 176 CLR 433 at 441, 453; 112 ALR 7. For comment, see M Davies, 'Exactly what is the Australian choice of law rule in torts cases?' (1996) 70 *ALJ* 711.

8 According to Kirby J, it was 'a perilous approach': *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [167].

9 The Chinese limitation period for personal injuries was one year: General Principles of Civil Law of the People's Republic of China Art 136(i). The expert witness called by the first respondent testified that this provision would be regarded as substantive in China. Article 137 allowed a Chinese court to extend the limitation period in 'special circumstances'.

10 OPC pleaded that it was not liable to the defendant under substantive Chinese law and that it was not liable because the Chinese limitation period had run. It also pleaded that the Chinese rules on assessment of damages applied. In the appeal to the High Court, the focus of argument was on the application of the Chinese limitation period.

11 *Renvoi* is from the French verb *renvoyer*, meaning to refer back or to return.

12 P E Nygh and M Davies, *Conflict of Laws in Australia*, 7th ed, Butterworths, Sydney, 2002, pp 290–2.

apply only the internal legal rules of the legal system identified by the foreign choice of law rule. For example, if French law was the governing law according to the Australian choice of law rule and, according to the French choice of law rule law, Australian law should be applied, Australian courts would apply only the internal Australian legal rules. This solution has found little support in the Anglo-Australian cases and commentary. It is applied in some continental European countries.<sup>13</sup>

The double or total renvoi solution requires the court to apply the solution that would have been applied by the court of the legal system which supplies the governing law, if the dispute had been litigated in that court. This solution is also known as the 'foreign court theory'. Before *Neilson*, double renvoi was the solution which had been applied in the rare English and Australian cases which explicitly recognised the problem of renvoi.<sup>14</sup> Its principal virtue is that it ensures uniformity of outcome, irrespective of the forum chosen by the plaintiff.<sup>15</sup> Double renvoi has been subjected to sustained criticism in England and Australia. These criticisms focus on three practical difficulties to which double renvoi gives rise. First, the proof of foreign choice of law rules and attitudes to renvoi is said to be exceedingly difficult.<sup>16</sup> Secondly, foreign choice of law rules sometimes apply connecting factors (such as nationality) or law areas (such as the national law of a country) which are meaningless from the perspective of English or Australian law.<sup>17</sup> Thirdly, double renvoi may lead to no solution at all, if the foreign court's solution would be to apply the choice of law rules of the forum or of a third legal system.<sup>18</sup> In that case, double renvoi gives rise to an 'infinite regression'; a never-ending circle of references. All three of these practical difficulties arose in *Neilson*; the way in which each was addressed by the High Court is discussed in detail below.

Until *Neilson*, it was widely assumed that renvoi only had a very narrow potential application;<sup>19</sup> and even in the small category of cases to which renvoi was thought to apply, it was rarely identified either by the parties or the courts as being relevant. Most Australian and English commentators were hostile to renvoi, regarding it as 'an abstract irritant, obscuring the clarity of choice of law'.<sup>20</sup> Prior to *Neilson*, there was no Australian torts case in which the court had explicitly applied any of these solutions to renvoi. Although

13 D McClean and K Beevers, *Morris: The Conflict of Laws*, 6th ed, Sweet & Maxwell, London, 2005, p 500.

14 These are listed in Nygh and Davies, above n 12, p 292 and L Collins (Gen Ed), *Dicey & Morris on the Conflict of Laws*, 13th ed, Sweet & Maxwell, London, 2000, p 72.

15 A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 *ICLQ* 877 (Briggs, 'In Praise'); Nygh and Davies, above n 12, p 300.

16 Collins, above n 14, p 76; McClean and Beevers, above n 13, pp 508–9.

17 Collins, above n 14, pp 77–8; R Mortensen, *Private International Law in Australia*, LexisNexis Butterworths, Sydney, 2006, pp 206–8.

18 Collins, above n 14, p 78; McClean and Beevers, above n 13, pp 510–11.

19 It was widely thought that renvoi was potentially applicable only in cases of succession and legitimation by subsequent marriage: *Macmillan Inc v Bishopsgate Investment Trust (Plc)* (No 3) [1995] 3 All ER 747; [1995] 1 WLR 978 at 1008; Nygh and Davies, above n 12, p 296; Collins, above n 14, p 72. McClean and Beevers also note that it has been applied to international child abduction: McClean and Beevers, above n 13, p 505 (citing *Re JB (Child Abduction) (Rights of Custody: Spain)* [2003] 1 FLR 976).

20 A Briggs, 'The Meaning and Proof of Foreign Law' [2006] *LMCLQ* 1 at 3 (Briggs, 'The Meaning and Proof').

there was no Australian or English authority, most commentators assumed that renvoi did not apply in foreign torts cases and that a reference to foreign law in international torts meant the internal law of that legal system.<sup>21</sup>

### The decision at first instance

McKechnie J, the trial judge, held that the first respondent was not liable to the appellant in contract,<sup>22</sup> but that it was liable to her in tort,<sup>23</sup> and that MMI was bound to indemnify the first respondent.<sup>24</sup> In reaching his conclusion that OPC was liable to the appellant in tort, his Honour relied on Art 146 of the General Principles of Civil Law of the People's Republic of China (the General Principles). The translation of that provision which was put into evidence by the first respondent relevantly states:

With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.<sup>25</sup>

McKechnie J held that Art 146 gave him 'the right to choose to apply the law of Australia',<sup>26</sup> and he evidently took this to mean the internal tort law of the forum.<sup>27</sup> In reaching this conclusion, his Honour did not refer to the doctrine of renvoi, but his conclusion is consistent with the single renvoi solution.

Earlier in his judgment, McKechnie J applied the Chinese rule relating to limitation periods, according to which it was possible to extend the period of limitation.<sup>28</sup> He decided, contrary to the evidence of the expert called by OPC, that in the circumstances it was appropriate to extend the limitation period; consequently OPC's defence that the proceedings were time-barred failed.<sup>29</sup> This aspect of his decision is inconsistent with his later conclusion that

21 M Tilbury, G Davis and B Opeskin, *Conflict of Laws in Australia*, OUP, Melbourne, 2002, p 1012. Most of the Australian texts published before *Neilson* was decided do not state whether renvoi applies in international torts: eg, Nygh and Davies, above n 12; E I Sykes and M C Pryles, *Australian Private International Law*, 3rd ed, Law Book, Sydney, 1991. English works assume that it does not; an assumption strengthened by the explicit rejection of renvoi in the Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 9(5): Collins, above n 14, p 73; P M North and J J Fawcett, *Cheshire and North's Private International Law*, 13th ed, Butterworths, London, 1999, p 64.

22 *Neilson v Overseas Projects Corp of Victoria Ltd* [2002] WASC 231 (unreported, McKechnie J, 2 October 2002, BC200205850) at [74], [84], [90].

23 *Ibid*, at [219]–[221].

24 *Ibid*, at [274].

25 *Ibid*, at [200]. Other translations of this provision do not include the word 'also': Briggs, 'The Meaning and Proof', above n 20, at 1 n 2; M Davies 'Neilson v Overseas Projects Corporation of Victoria Ltd: Renvoi and Presumptions about Foreign Law' (2006) 30 *MULR* 244 at 248 n 14.

26 *Neilson v Overseas Projects Corp of Victoria Ltd* [2002] WASC 231 (unreported, McKechnie J, 2 October 2002, BC200205850) at [204].

27 *Ibid*, at [213]–[218].

28 The primary rule was that the limitation period for personal injuries was one year: General Principles Art 136(i), cited by McKechnie J in *Neilson v OPCV* [2002] WASC 231 (unreported, McKechnie J, 2 October 2002, BC200205850) at [185]. According to Art 137, it was possible for the Chinese court to extend the limitation period 'under special circumstances': cited by McKechnie J, *ibid* at [186].

29 *Neilson v OPCV* [2002] WASC 231 (unreported, McKechnie J, 2 October 2002, BC200205850) at [191], [198].

Australian internal law was applicable. If Australian internal law was applicable as the governing law, there was no basis on which the Chinese limitation period could have been relevant.

### The appeal to the Full Court of the Supreme Court of Western Australia

On appeal, the Full Court of the Supreme Court of Western Australia held that McKechnie J had erred in applying Western Australian law.<sup>30</sup> McLure J, with whom Johnson J and Wallwork AJ agreed, considered fully the doctrine of renvoi and held that it should not be applied to international torts, on the basis that 'it would be inconsistent with the reasoning and result in *Zhang* to superimpose a renvoi doctrine the purpose and effect of which is to soften or avoid the rigidity of choice of law rules'.<sup>31</sup> The court concluded that the renvoi should be rejected and that the law of the place of the tort meant only the internal law of that place.<sup>32</sup> Applying the Chinese limitation period, the Full Court held that the claim was brought out of time.<sup>33</sup> McLure J held that McKechnie J should have accepted the evidence of the expert witness called by OPC as to the interpretation of the Chinese limitation period, which was that there were no circumstances in this case that would have warranted granting an extension of time in which to commence proceedings.<sup>34</sup>

### The appeal to the High Court

The question on the appeal to the High Court was whether the Western Australian limitation period applied, in which case the litigation was commenced in time, or whether the Chinese limitation period applied, in which case the litigation was time-barred. The two issues which the High Court addressed to resolve this question were first, whether a reference to 'foreign law' by the Australian choice of law rule meant only the internal law of the foreign legal system or whether it meant the foreign choice of law rule; and second, how a deficiency in the proof of the relevant Chinese law should be addressed. The first of these issues is discussed in this section; the second issue is discussed in the next part.

The High Court in *Neilson* confirmed that in the case of foreign torts, the governing law is the law of the place of the tort. By a majority of six to one,<sup>35</sup> the High Court held that the reference by the Australian torts choice of law rule to Chinese law, as the law of the place of the tort, meant all of the relevant

30 *MMI v Neilson* (2004) 28 WAR 206. For discussions of the decision of the Full Court of the Supreme Court of Western Australia, see R Yezerski, 'Renvoi Rejected? The meaning of the "lex loci delicti" after *Zhang*' (2004) 26 *Syd L Rev* 273; M Keyes, 'The doctrine of renvoi in international torts: *Mercantile Mutual Insurance v Neilson*' (2005) 13 *TLJ* 1 (Keyes, 'The doctrine of renvoi').

31 *MMI v Neilson* (2004) 28 WAR 206 at [48].

32 *Ibid.*

33 *Ibid.*, at [64]–[65].

34 *Ibid.*, at [64].

35 The majority comprised Gleeson CJ, Gummow, Hayne, Kirby, Callinan and Heydon JJ. McHugh J dissented.

Chinese law, including the Chinese choice of law rule.<sup>36</sup> Gummow, Hayne, Kirby and Callinan JJ expressed this conclusion in general terms. They held that in international torts, the law of the place of the tort meant all of the law of that place.<sup>37</sup> Gleeson CJ and Heydon J's conclusion was limited to the facts of this case, holding that a reference to Chinese law in this case meant all the Chinese law.<sup>38</sup> All six members of the majority concluded that when the Australian choice of law rule indicates that foreign law is the governing law, Australian courts must apply that foreign law in the same way that the courts of the place of the tort would have applied their own law.<sup>39</sup> If the Chinese court would apply the law of another legal system, then the forum should apply the law of that other legal system. While the members of the majority preferred not to use the terminology of *renvoi*,<sup>40</sup> the solution applied by all members of the majority except Callinan J is expressed in terms which resemble double *renvoi*. Callinan J endorsed what is effectively a single *renvoi* solution.<sup>41</sup> He was influenced in adopting that solution by his very clear preference for applying the law of the forum, given the strong connections between the parties and Australia, and the relatively weaker connections to China.<sup>42</sup>

McHugh J, in dissent, was the only member of the court who directly determined whether foreign law meant the foreign choice of law rule by reference to the doctrine of *renvoi*. His Honour's view was that the relevant inquiry was not 'whether choice of law rules form part of the *lex loci delicti*', but 'whether choice of law rules form part of the category of the *lex loci delicti*'s laws that the forum court makes applicable to the characterised issue of law'.<sup>43</sup> He held that they did not.<sup>44</sup> Consequently the applicable law in international torts should be the internal law of the place of the tort.<sup>45</sup> His Honour considered and rejected both single and double *renvoi*. He rejected double *renvoi* because he asserted that to permit consideration of the choice of law rules of the place of the tort would inevitably produce an infinite regression.<sup>46</sup> Infinite regression, including McHugh J's analysis of the problem, is discussed in detail below; for present purposes, it should be noted that double *renvoi* does not inevitably lead to an infinite regression.

McHugh J also rejected the single *renvoi* doctrine,<sup>47</sup> because it would lead to Australian courts applying 'a set of laws that is entirely different from the set of laws that (an Australian court presumes) would be applied if the action

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36 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [11] per Gleeson CJ, [102] per Gummow and Hayne JJ, [171], [174] per Kirby J, [261] per Callinan J, [271] per Heydon J.

37 *Ibid*, at [102] per Gummow and Hayne JJ, [174] per Kirby J, [261] per Callinan J.

38 *Ibid*, at [11] per Gleeson CJ, [271] per Heydon J.

39 *Ibid*, at [13] per Gleeson CJ, [90], [107], [113] per Gummow and Hayne JJ, [174], [176], [191] per Kirby J, [275] per Heydon J.

40 See further below at Part V.

41 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [261].

42 *Ibid*, at [257]–[258].

43 *Ibid*, at [39].

44 *Ibid*, at [39], [59].

45 *Ibid*, at [59].

46 *Ibid*, at [39]. An infinite regression occurs when the forum would apply the foreign court's choice of law rules, but the foreign court would defer to the forum's choice of law rules.

47 *Ibid*, at [39], [57]–[58].

were heard in China'.<sup>48</sup> This would undermine the essential objective of choice of law, which he described as being 'to take account of what the foreign jurisdiction would do'.<sup>49</sup> The preferable approach was to reject the renvoi.<sup>50</sup> While his Honour allowed that this was artificial in the sense of doing something other than precisely what the foreign court would do, in his view this was superior to the other possible resolutions and was consistent with the reasoning in *Pfeiffer v Rogerson*<sup>51</sup> and *Renault v Zhang*.<sup>52</sup>

### Infinite regression

The most compelling of the criticisms of double renvoi is that it may lead to an infinite regression.<sup>53</sup> This occurs when the local law selects foreign law, including its choice of law rule, as the governing law, but the foreign law selects the law of another legal system (the forum or a third legal system), including its choice of law rule, as the governing law. An infinite regression only arises if the foreign choice of law rule is different from the forum's choice of law rule, either in content or in the manner of its application;<sup>54</sup> or if the foreign choice of law rule also applies double renvoi. Critics of double renvoi argue that an infinite regression is incapable of logical solution,<sup>55</sup> and assert that the possibility of infinite regression should prevent the adoption of double renvoi.<sup>56</sup> The majority in *Neilson* did not accept as a matter of principle that the possibility of an infinite regression was an impediment to an Australian court applying the solution that would be applied by the foreign court.

Five members of the majority in *Neilson* found that an infinite regression did not occur on the facts of this case, because they held that the Chinese choice of law rule required the application of internal Australian tort law. Callinan J endorsed a solution which is consistent with single renvoi; infinite regression does not arise if this solution is applied. Four members of the majority addressed the potential problem of an infinite regression by construing Art 146. Gleeson CJ stated that there was no evidence that an infinite regression would occur in this case and concluded that the Chinese law 'appears to refer' to the internal Australian law.<sup>57</sup> Gummow and Hayne JJ interpreted Art 146 as 'a once for all reference of the problem *out of* Chinese law and into the law of the country of nationality or domicile'.<sup>58</sup> Heydon J held that Art 146 intended that the issue should not be remitted to Chinese law

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<sup>48</sup> Ibid, at [58].

<sup>49</sup> Ibid.

<sup>50</sup> Ibid, at [59].

<sup>51</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625.

<sup>52</sup> *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; 187 ALR 1.

<sup>53</sup> Nygh and Davies, above n 12, pp 297–8; Collins, above n 14, p 78.

<sup>54</sup> That is, if foreign law uses a different connecting factor from that used by forum law or defines the connecting factor differently. In the context of international tort, this would occur if the foreign choice of law rule selected a governing law other than the law of the place of the tort or if it applied a different method of identifying the place of the tort.

<sup>55</sup> Collins, above n 14, p 78; North and Fawcett, above n 21, p 56.

<sup>56</sup> Collins, above n 14, p 78.

<sup>57</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [12].

<sup>58</sup> Ibid, at [131] (emphasis in original).



and therefore Australian domestic law should be applied.<sup>59</sup> Their Honours' conclusion that Art 146 required the application only of the internal Australian law is unconvincing. There was no more evidence to support it than there was to support the argument that the reference by Australian law to the law of the place of the tort required application of only the internal Chinese law.

McHugh J disagreed with the majority in relation to the possibility of an infinite regression. He stated that reference to the foreign choice of law rule would necessarily result in an infinite regression,<sup>60</sup> and held that double renvoi should be rejected as a matter of principle because there was no logical way of resolving an infinite regression.<sup>61</sup> His Honour observed that a serious problem with adopting double renvoi was that in the absence of evidence about how the foreign legal system dealt with renvoi, the presumption of similarity between foreign and local law<sup>62</sup> should require the forum court to assume that the foreign legal system also applied the doctrine of double renvoi, and that this would lead to an infinite regression.<sup>63</sup> McHugh J also held that the burden of proving that the exception in Art 146 required the application of internal Australian law had not been discharged.<sup>64</sup>

Kirby J did not consider how a potential infinite regression should be resolved. Although his Honour endorsed a double renvoi solution, he held that the appellant had not proven how the Chinese court would have applied the Chinese choice of law rule.<sup>65</sup> He did not accept that the Chinese court would have applied Australian law.<sup>66</sup>

The decision in *Neilson* provides little guidance on how an infinite regression should be resolved in future, because of the majority's close focus on the terms of the Chinese law. It is possible that the solution suggested by Scrutton LJ in *Casdagli v Casdagli*,<sup>67</sup> which was that if the foreign court would apply the law of the forum, the forum should apply its own internal law,<sup>68</sup> may be adopted in future, given that three members of the court referred to it without disapproval.<sup>69</sup> It is likely that unless there is direct evidence that an infinite regression actually arises, Australian courts will, like the majority in *Neilson*, be inclined to find that a reference by foreign law to the law of another country is a reference to the internal law of that other country.

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59 Ibid, at [277]. Heydon J stated it was unnecessary to decide what the result would have been if the foreign law referred the issue to the law of a third legal system: *ibid*.

60 Ibid, at [39].

61 Ibid, at [39], [46].

62 This presumption is discussed further below in Part II.

63 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [43], [45]–[46].

64 Ibid, at [44].

65 Ibid, at [213].

66 Ibid, at [214].

67 [1918] P 89 at 111.

68 Cited in *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [133] per Gummow and Hayne JJ, [260] per Callinan J.

69 McHugh J considered that this dictum of Scrutton LJ did not provide a solution which was consistent with double renvoi: *ibid*, at [50].

## Foreign choice of law rules — connecting factors and law areas

Critics of double renvoi have doubted the practical utility of this solution because foreign choice of law rules sometimes apply connecting factors or refer to law areas which are meaningless from the perspective of forum law.<sup>70</sup> This issue arose in *Neilson*. If the second sentence of Art 146 was applicable, it permitted reference to the law of the *country* in which the parties were both nationals or domiciled. Several members of the court noted that there is no national Australian law applicable to tortious liability,<sup>71</sup> but this did not deter them from applying the Western Australian limitation period or from adopting what is effectively a double renvoi solution. For some members of the court, this was because the parties had not taken issue with this point.<sup>72</sup> This pragmatic attitude to the detail of the foreign law, and its application to the facts, reflects the manner in which earlier cases have dismissed this perceived difficulty associated with double renvoi.<sup>73</sup>

### Summary

At least in foreign tort cases, a reference to foreign law as the governing law requires an Australian court to apply the foreign choice of law rule and to apply it in the same way that the foreign court would have applied it. The High Court was not deterred from adopting this solution either by the possibility of infinite regression or by the fact that Chinese law would have applied the parties' national law. The implications of this decision for other areas of law, particularly international contract disputes, are briefly canvassed in Part V below.

## II The proof of foreign law

The second issue which arose in *Neilson* concerns the proof of foreign law. As explained in Part I, a majority of the High Court held that where the law of the place of the tort was foreign law, the forum court must apply that foreign law in the same way that the foreign court would have applied it. In *Neilson*, the appellant did not plead that Chinese law was applicable and at trial led no evidence of Chinese law.<sup>74</sup> The first respondent pleaded the application of Chinese law in its defence and led evidence of the content of that law.<sup>75</sup>

<sup>70</sup> Collins, above n 14, pp 77-8.

<sup>71</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [6] per Gleeson CJ, [82], [129] per Gummow and Hayne JJ, [135] per Kirby J.

<sup>72</sup> *Ibid*, at [6] per Gleeson CJ, [135] per Gummow and Hayne JJ. There was at the time no material difference between the law of Victoria, where OPC had its registered office and principal place of business, and the law of Western Australia, where the appellant was resident and domiciled: *ibid*, at [8] per Gleeson CJ.

<sup>73</sup> Eg, *Re Askew* [1930] 2 Ch 259 at 276-7; *Simmons v Simmons* (1917) 17 SR (NSW) 419 at 423.

<sup>74</sup> Following cross-examination of the expert witness called by the first respondent, counsel for the appellant tendered a journal article which described Chinese personal injuries law.

<sup>75</sup> The first respondent tendered an English translation of the text of the General Principles of Civil Law of the People's Republic of China and called an expert witness to give evidence as to the meaning and application of that law.

In the High Court appeal, the appellant's success depended on the second sentence of Art 146, the Chinese choice of law rule, being applied in her favour, to select the Western Australian limitation period. The second sentence of Art 146 stated, according to the translation put into evidence by OPC: 'If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.' The majority held that an Australian court must apply that rule in the same way that a Chinese court would apply it. Although the content of the Chinese rule was adequately proven, there was very limited evidence as to how a Chinese court would interpret and apply the rule. In cross-examination, the expert witness on Chinese law called by the defendant 'assented rather hesitantly to the proposition that, if it appeared just and reasonable, a court in Wuhan might treat Australian . . . law as applicable'.<sup>76</sup> A different majority of the High Court held that there was effectively no evidence as to how the second sentence of Art 146 would be applied by the Chinese court.<sup>77</sup>

The judgments as to how the Australian court should deal with Art 146 divide into three categories. The divisions between the categories are blurred; two of the six judgments<sup>78</sup> span two different categories. The judges in the first category held that the evidence as to the interpretation of Art 146 either was or may have been sufficient to enable the court to conclude that the Chinese court would have applied Australian law. The other judges, who held that there was no evidence of how the foreign court would apply the discretion in Art 146,<sup>79</sup> disagreed as to how that deficiency in the evidence should be addressed. The judges in the second category applied the presumption that foreign and forum law are similar. By applying Australian principles of statutory interpretation to Art 146, their Honours concluded that a Chinese court would apply Australian law. The second category forms the majority on the issue of proof of foreign law. The judges in the third category held that the presumption of similarity should not be applied in this case. Two of the three judges in this category held that the onus of proving foreign law lay on the appellant and that she had not discharged that onus. Consequently, her claim should be dismissed. These three categories are discussed in more detail below.

### The expert evidence was sufficient

Gleeson CJ stated that the expert evidence on the manner in which a Chinese court would apply the second sentence of Art 146, while 'barely sufficient',

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<sup>76</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [10] per Gleeson CJ. See similarly at [201] per Kirby J.

<sup>77</sup> McHugh, Kirby, Callinan and Heydon JJ held that the evidence as to the meaning of Art 146 was insufficient. Gleeson CJ held that the evidence was sufficient; Gummow and Hayne JJ hypothesised without positively deciding that the evidence may have been exhaustive.

<sup>78</sup> Gleeson CJ held both that the evidence of foreign law was sufficient and that the presumption of similarity should not be applied on the facts of this case. Gummow and Hayne JJ assumed, without deciding, that the evidence as to the manner in which Art 146 would be applied by a Chinese court was exhaustive. If that evidence was not satisfactory, they applied the presumption of similarity between forum and foreign law to interpret Art 146.

<sup>79</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [35] per McHugh J, [213] per Kirby J, [248] per Callinan J, [267] per Heydon.

was 'just enough to support' the conclusion of the trial judge that the law of Western Australia applied.<sup>80</sup> His Honour held that it was 'not inherently implausible that Art 146 calls for a consideration of what is just and reasonable in the circumstances of the case'.<sup>81</sup> Gleeson CJ identified factors relevant to deciding whether it was just and reasonable to apply the law of the parties' joint nationality: these were that the relationship between the parties was formed in Australia; that there were no Chinese interests in the outcome of the litigation; and that there was no reason in policy why the Chinese courts should object to Western Australian law being applied to resolve the dispute.<sup>82</sup> Mortensen observed that by identifying these factors, Gleeson CJ did not rely solely on the expert evidence, but added 'a partial Australian gloss' to the applicable Chinese law.<sup>83</sup>

Gummow and Hayne JJ placed some reliance on the expert evidence as to the interpretation of Art 146. Their Honours suggested that it was possible that 'all that could be said about the content and application of Art 146 had been said in evidence',<sup>84</sup> but stated that it was unnecessary to decide whether that hypothesis was correct.<sup>85</sup> Assuming that it was correct, Gummow and Hayne JJ held that a consideration of fairness and justice would direct the Chinese court to apply the law of the parties' joint nationality or domicile.<sup>86</sup> This was because the parties were all Australian and the only connection to China was that it was the place where the tort occurred.<sup>87</sup>

### The presumption of similarity

The other members of the court had to determine how the court should address the lack of evidence as to how a Chinese court would apply the discretion conferred by Art 146. Callinan and Heydon JJ relied on the principle that in the absence of evidence to the contrary, foreign law is presumed to be the same as forum law (the 'presumption of similarity').<sup>88</sup> Gummow and Hayne JJ agreed that this presumption should be applied, if the expert evidence as to the meaning of Art 146 was insufficient.<sup>89</sup> This meant that the Australian court had to interpret the Chinese provision 'as it would approach the construction of an Australian statute'.<sup>90</sup> According to Gummow, Hayne, Callinan and Heydon JJ the result would be that Australian law should be applied. Gummow and Hayne JJ justified this conclusion by a process of elimination. Article 146 refers only to the place of commission of the tort and the place of the parties' domicile or nationality. Their Honours concluded that inevitably the law of the

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<sup>80</sup> Ibid, at [17].

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> R Mortensen, "'Troublesome and Obscure': The Renewal of *Renvoi* in Australia' (2006) 2 *JPIL* 1 at 6 (Mortensen, 'Troublesome and Obscure').

<sup>84</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [124].

<sup>85</sup> Ibid, at [126].

<sup>86</sup> Ibid.

<sup>87</sup> Ibid, at [127].

<sup>88</sup> Ibid, at [249] per Callinan J, [267] per Heydon J.

<sup>89</sup> Ibid, at [125].

<sup>90</sup> Ibid, at [125] per Gummow and Hayne JJ. See also *ibid*, at [249] per Callinan J, [275] per Heydon J.

place of nationality or domicile *must* be applied.<sup>91</sup> With respect, this does not seem an inevitable conclusion.<sup>92</sup> Callinan J, with whom Heydon J agreed, assuming that the discretion was ‘exercisable according to Australian legal principles’, identified himself the factors which a Chinese court would take into account in deciding whether to apply the law of the parties’ common nationality or domicile.<sup>93</sup> Taking into consideration the connections between the parties, the dispute and Australia on the one hand,<sup>94</sup> and the more limited connections between the dispute and China on the other hand,<sup>95</sup> Callinan J concluded that Australian law should be applied.<sup>96</sup>

### No presumption of similarity — foreign law must be proven

Gleeson CJ, McHugh and Kirby JJ doubted the relevance of the presumption of similarity in this case.<sup>97</sup> Gleeson CJ and McHugh J noted that the applicable Chinese rule was in effect a flexible exception to the general rule that the law of the place of the tort applied. As there is no corresponding Australian principle, it made no sense to presume similarity between local and foreign law in this case.<sup>98</sup> Kirby J thought it an ‘incredible fiction’ to presume that Chinese and Australian law were similar.<sup>99</sup> While the presumption of similarity might be justified if the foreign legal system was a common law jurisdiction, it should not be applied in this case, given the significant differences between the Chinese and Australian legal systems.<sup>100</sup>

As explained above, Gleeson CJ held that the expert evidence as to the meaning of Art 146 was sufficient. McHugh and Kirby JJ disagreed. They held that the appellant bore the onus of proving the foreign law necessary to establish her claim, including how the foreign court would apply that law.<sup>101</sup> Kirby J held that if this burden is not discharged, the solution in Australian law

<sup>91</sup> Ibid, at [238].

<sup>92</sup> Briggs, ‘The Meaning and Proof’, above n 20, at 5.

<sup>93</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [251] per Callinan J, [275] per Heydon J.

<sup>94</sup> In particular, Callinan J identified that the defendants were Australian; that the parties’ relationship came into existence in Australia; that the litigation required construction of the contract between the parties which was made in Australia; that the appellant’s expenses and standards of treatment were Australian: *ibid*, at [251].

<sup>95</sup> His Honour identified that no Chinese individual was a party to the litigation; that no Chinese person would be required to give evidence (except expert evidence as to Chinese law); that the appellant did not allege breach of Chinese laws; and that the outcome of the case would be of limited relevance or interest to Chinese law makers: *ibid*, at [251].

<sup>96</sup> *Ibid*, at [251], [254].

<sup>97</sup> *Ibid*, at [16] per Gleeson CJ, [36] per McHugh J, [203] per Kirby J.

<sup>98</sup> *Ibid*, at [16] per Gleeson CJ, [36] per McHugh J. McHugh J pointed out that the presumption of similarity was rebutted by the evidence which established a dissimilarity between the foreign and local law.

<sup>99</sup> *Ibid*, at [206] and [208]; also [203] (the presumption is ‘an unrealistic fiction’ and ‘completely unconvincing’ in this case), [204] (the presumption, when applied to Chinese law strains credulity), [219] (the presumption is ‘an unconvincing fiction’).

<sup>100</sup> *Ibid*, at [203]. The NSW Court of Appeal in *Damberg v Damberg* (2001) 52 NSWLR 492 similarly held that the court may not presume similarity, even if both parties admit or agree that the foreign law is the same as forum law, if according to the evidence the foreign law is substantially dissimilar to forum law.

<sup>101</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [33], [35] per McHugh J, [206] per Kirby J.

is that the appellant has ‘failed to prove its case’.<sup>102</sup> His Honour stated that if the appellant was not required to prove the applicable foreign law, the ‘purpose of *Zhang*’ would be undermined and forum shopping would not be prevented.<sup>103</sup> McHugh J stated that the presumption of similarity should be applied against the party who is obliged to prove foreign law.<sup>104</sup> McHugh and Kirby JJ concluded that the evidence did not establish that a Chinese court would apply Australian law.<sup>105</sup>

### Practical difficulties in obtaining evidence about foreign law

The difficulties in obtaining reliable expert evidence, widely cited as an inherent flaw of double renvoi,<sup>106</sup> were effectively, if unconvincingly, dismissed by the bare majority in *Neilson*. In *Neilson*, the court had to decide the case on the basis of extremely inadequate evidence as to the meaning of Art 146. The fact that the evidence was so deficient was not regarded as a reason in principle for not applying the foreign court’s solution.

The pragmatic response taken by the majority to the defects in the proof of foreign law has attracted the approval of some writers.<sup>107</sup> There is significant support for this approach in the commentary.<sup>108</sup> *Dicey & Morris* notes that while the ‘burden of proving foreign law lies on the party who bases his claim or defence on it’, if the foreign law is not proved, an English court will apply forum law.<sup>109</sup> Nussbaum argued that if the foreign law was not proven, the court should apply forum law rather than dismissing the claim,<sup>110</sup> because ‘in the vast majority of situations the law of the forum will permit a perfectly reasonable disposition of the litigation’.<sup>111</sup> Some writers have criticised the terminology of presumption and suggested that it is more accurate to state that in default of proof of the foreign law, forum law applies.<sup>112</sup>

Only two members of the High Court in *Neilson* took a strict view about how the court should respond to the lack of evidence about the Chinese court’s interpretation of Art 146. McHugh and Kirby JJ’s conclusion — that because the appellant had failed to prove the foreign law necessary to make good her claim, her claim should fail — reflects Fentiman’s view. He stated that it is the responsibility of the party ‘whose case depends on it, to establish foreign law. Rather than cure a defective claim or defence, therefore, a court has but one

102 Ibid, at [206].

103 Ibid, at [197]; see also at [199], [206], [215] per Kirby J.

104 Ibid, at [37].

105 Ibid, at [36] per McHugh J, [214]–[215] per Kirby J.

106 *Re Askew* [1930] 2 Ch 259 at 278; Collins, above n 14, p 76; North and Fawcett, above n 21, p 58.

107 Briggs, ‘The Meaning and Proof’, above n 20; A Dickinson, ‘Renvoi: The Comeback Kid?’ (2006) 122 *LQR* 183.

108 North and Fawcett, above n 21, pp 99–100.

109 Collins, above n 14, p 232.

110 A Nussbaum, ‘The Problem of Proving Foreign Law’ (1941) 50 *Yale LJ* 1018 at 1044.

111 Ibid, at 1039.

112 Collins, above n 14, p 232; Sykes and Pryles, above n 21, p 276; Briggs, ‘The Meaning and Proof’, above n 20, at 4–5.

option — to dismiss it.’<sup>113</sup> Similarly, in *BP Exploration Co (Libya) Ltd v Hunt*, Hunt J held:

The application of the presumption is intended to operate against, not in favour of, the party whose obligation it is to prove the foreign law, so that he is deprived of the benefit of a right or exemption given by that foreign law, but not by [the law of the forum,] if he does not establish that foreign law in the proper way.<sup>114</sup>

The bare majority’s invocation of the presumption of similarity in favour of the appellant, who was obliged to prove the foreign law, is inconsistent with the High Court’s insistence in recent multistate torts cases that a plaintiff should not be permitted to manipulate the outcome of litigation by selection of forum. For a court ostensibly committed to the prevention of forum shopping, it is an odd outcome that the plaintiff, by choosing not to plead or prove the applicable law, can invoke the *prima facie* application of forum law and cast the burden of disproving a similarity on to the defendant. In the following part, the High Court’s responses to party choices in *Neilson* are critically examined.

### Summary

A bare majority in *Neilson* held that an Australian court could remedy the lack of evidence as to the interpretation of Art 146 by resort to a presumption of similarity. It would have been more apt to say that the court applied forum law in default of proof of the foreign law, given the evidence of dissimilarity.

## III Party choice in adversarial litigation

*Neilson* raises several issues about the efficacy of the parties’ choices in private international litigation. Private international law is, broadly speaking, a permissive field of law. As in domestic litigation, the parties are generally at liberty to choose whether to litigate; where to litigate; against whom to claim; what claims and defences to raise; what relief to claim; and what evidence to lead in support of their claims and defences.<sup>115</sup> *Neilson* raised issues about the effectiveness of the plaintiff’s choice of forum, the plaintiff’s choices in pleading and proving the applicable law, and whether the parties should be distinguished when deciding whether to uphold their choices. These issues are addressed in turn.

### The plaintiff’s choice of forum: Forum shopping, jurisdiction and choice of law

In Australia, the courts have been harshly critical of forum shopping in the context of non-local torts. Recent reforms to the tort choice of law rule have been influenced by the High Court’s stated objective to prevent forum

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<sup>113</sup> R Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law*, OUP, Oxford, 1998, p 68, footnotes omitted.

<sup>114</sup> [1980] 1 NSWLR 496 at 503.

<sup>115</sup> Fentiman, above n 113, pp 60–1; M Keyes, *Jurisdiction in International Litigation*, Federation Press, Sydney, 2005, pp 18–19 (Keyes, *Jurisdiction in International Litigation*).

shopping.<sup>116</sup> In *Neilson*, the dominant justification given by members of the majority for requiring the application of the whole of the foreign law was to ensure uniformity of outcome irrespective of the forum selected.<sup>117</sup> Gummow and Hayne JJ stated that:

the rules adopted [to resolve the issues raised on this appeal] should, as far as possible, avoid parties being able to obtain advantages by litigating in an Australian forum which could not be obtained if the issue were to be litigated in the courts of the jurisdiction whose law is chosen as the governing law.<sup>118</sup>

Five members of the court, by emphasising the importance of uniformity of outcome, implicitly held that the plaintiff's freedom to select the forum should not be unconstrained. In this respect, the tort choice of law rule is inconsistent with the principles of jurisdiction applicable in international torts cases, which permit forum shopping. The principles of jurisdiction in Australia, as in other common law countries, divide into two categories — those which establish the courts' competence, which in the Australian courts are drawn widely; and those which permit the courts to decline to exercise jurisdiction, which in Australia are drawn narrowly. The rules in each category are briefly discussed below, as they apply to international torts and to the facts of *Neilson* particularly.

The principles of establishing jurisdiction in international tort cases are extraordinarily broad. The court's competence depends on whether the defendant can be validly served with originating process. In international torts, service of process is permitted outside Australia in most jurisdictions<sup>119</sup> where the plaintiff alleges that they have suffered some loss or damage within the forum in consequence of a tort occurring outside the forum.<sup>120</sup> This ground of jurisdiction requires the plaintiff to show that they have suffered or continue to suffer within the jurisdiction any consequences of a foreign tort; this criterion is easily established.<sup>121</sup> In *Neilson*, service out of the jurisdiction was not necessary because both respondents were Australian corporations.

116 *Blunden v Commonwealth* (2003) 218 CLR 330; 203 ALR 189 at [108]; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [196]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [17], [44], [64] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, [123], [128]–[129] per Kirby J, [184] per Callinan J.

117 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [13] per Gleeson CJ, [89]–[91] per Gummow and Hayne JJ, [172], [173], [197], [199] per Kirby J, [271] per Heydon J.

118 *Ibid*, at [89]. See also at [90].

119 This ground of jurisdiction is available in all jurisdictions except Western Australia and the Australian Capital Territory.

120 *Eg*, Federal Court Rules 1979 (Cth) O 8 r 2 item 5 (this ground of jurisdiction also applies to proceedings commenced in the High Court of Australia: High Court Rules 2004 (Cth) r 9.07.1); Uniform Civil Procedure Rules 2005 (NSW) Sch 6(e); Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 7.01(1)(j). All Australian jurisdictions also permit service out of the jurisdiction in tort cases on the less objectionable basis that the dispute concerns a tort which occurred within the forum: see, *eg*, Federal Court Rules 1979 (Cth) O 8 r 2 item 4 (this ground of jurisdiction also applies to proceedings commenced in the High Court of Australia: High Court Rules 2004 (Cth) r 9.07.1); Uniform Civil Procedure Rules 2005 (NSW) Sch 6(d); Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 7.01(1)(i).

121 *Eg*, *Brix-Neilsen v Oceaneering Australia Pty Ltd* [1982] 2 NSWLR 173; *Colosseum Investment Holdings Pty Ltd v Vanguard Logistics Service Pty Ltd* [2005] NSWSC 803 (unreported, Palmer J, 10 August 2005, BC200505735).



Legislation permitting service of the process of Australian courts in civil disputes within Australia<sup>122</sup> would have facilitated service on the respondents in *Neilson*.

The principles of jurisdiction, therefore, make it easy for a plaintiff to establish the Australian courts' competence in tort disputes and place few obstacles in the way of would-be forum shoppers. A crude measure of forum shopping is whether the plaintiff is local to the forum or not.<sup>123</sup> In international personal injuries disputes determined by Australian superior courts between 1991 and 2001, the plaintiff was local in 10 out of 15 cases (66.67%); in non-personal injuries disputes, the plaintiff was local in 67 out of 83 cases (79.76%).<sup>124</sup> Using this criterion, forum shopping appears to be more frequent in personal injuries than other types of disputes. Applying local residence as a test, Mrs Neilson was not a forum shopper.

Australian courts, like the courts of other common law systems, have a discretion to decline to exercise jurisdiction in cases in which they are jurisdictionally competent. In international torts cases, whether a court will decline jurisdiction is normally determined by reference to the principle of *forum non conveniens*. The Australian version of this principle requires the court to decline to exercise jurisdiction only if the defendant establishes that the court is a clearly inappropriate forum.<sup>125</sup> Factors relevant to that determination include the parties' places of residence or business; factors of convenience and expense, including the location of evidence; the governing law; and the existence of 'legitimate' personal and juridical advantages.<sup>126</sup> Giving weight to 'legitimate' advantages, particularly when as in Australia the

122 Service and Execution of Process Act 1992 (Cth) s 15(1). It is not necessary to show any nexus between the forum and either the parties or the subject matter of the dispute. However, a court may transfer proceedings to another Australian court, if the proceedings are commenced in a superior court: Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) s 5 and identical provisions in the legislation of the same name enacted by all the states and territories. In proceedings in intermediate or inferior courts, the court may order a stay of proceedings: Service and Execution of Process Act 1992 (Cth) s 20.

123 M E Solimine, 'The Quiet Revolution in Personal Jurisdiction' (1998) 73 *Tulane L Rev* 1 at 36. While Australian judges are harshly critical of forum shopping, there is no clear description of the criteria of forum shopping. In *Pfeiffer v Rogerson*, both parties were resident in the ACT and the plaintiff was employed by the defendant in the ACT under a contract which would have been governed by ACT law. Notwithstanding the strong connections to the ACT, Callinan J characterised the plaintiff's behaviour in commencing proceedings in the ACT Supreme Court as 'a clear example of forum shopping': (2000) 203 CLR 503; 172 ALR 625 at [184].

124 Keyes, *Jurisdiction in International Litigation*, above n 115, p 157.

125 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; 97 ALR 124; *Henry v Henry* (1996) 185 CLR 571; 135 ALR 564; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1.

126 These are the factors identified as relevant to the English principle of *forum non conveniens*, which unlike the Australian principle, requires the forum to stay proceedings where the defendant identifies another forum which is more appropriate: *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 478; [1986] 3 All ER 843. These factors were stated by Deane J to be helpful in determining whether the local court was clearly inappropriate in his influential judgment in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 251; 79 ALR 9. Majorities in later High Court cases confirmed that these factors should be applied in determining whether the local court is clearly inappropriate: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564–5; 97 ALR 124; *Henry v Henry* (1996) 185 CLR 571 at 587; 135 ALR 564.

criteria of legitimacy are not articulated, appears calculated to reward, if not stimulate, forum shopping.

It is very difficult for the defendant to persuade the court that it is clearly inappropriate. In international personal injuries disputes, it may be impossible. The Australian superior courts did not decline jurisdiction in *any* international personal injuries case between 1991 and 2001.<sup>127</sup> Defendants enjoy more success in non-personal injuries cases, but the courts declined jurisdiction in only 28.6% of those cases.<sup>128</sup> There may well be sound reasons for a strong bias in favour of plaintiffs in personal injuries cases, including the financial and physical impediments that such plaintiffs would face in participating in litigation abroad.<sup>129</sup> It would improve the law if those justifications were clearly expressed in the applicable principles of establishing and declining jurisdiction.<sup>130</sup> In *Neilson*, neither respondent challenged the jurisdiction of the Supreme Court of Western Australia. If they had sought a stay of proceedings on the grounds of *forum non conveniens*, it is almost certain that they would have failed.<sup>131</sup> The Australian principle of *forum non conveniens* is an ineffective control of potential forum shopping; if uniformity of outcome is a desirable outcome in private international litigation, this principle should more closely reflect that objective.

In litigation within Australia, legislation requires proceedings to be transferred between state, territory and federal superior courts if another superior court in Australia is more appropriate or if it would be in the interests of justice to transfer proceedings to that other court.<sup>132</sup> This test is more favourable to defendants than the principle of *forum non conveniens*.<sup>133</sup> In *Neilson* it is possible but unlikely that proceedings would have been transferred from Western Australia to Victoria, where the first respondent had its registered office and principal place of business.

The principles of jurisdiction therefore, so far from dissuading forum shopping, seem positively to encourage it.<sup>134</sup> The High Court has, ostensibly at least, taken the opposite attitude to forum shopping in the context of choice

127 Keyes, *Jurisdiction in International Litigation*, above n 115, p 173.

128 Ibid.

129 Kirby J stated that 'natural sympathy' for the predicament of the plaintiff, who had become a paraplegic, was 'legally illegitimate' in *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [170]. The majority did not explicitly identify any sympathy for the plaintiff, but the plaintiff succeeded in resisting the application for a stay of proceedings. Other cases in which courts have explicitly considered plaintiffs' physical inability to participate in litigation abroad include *Fullford v Pearson* [2004] NSWSC 150 (unreported, Hidden J, 13 April 2004, BC200401828); *Teare v British Nuclear Fuels plc* (unreported, Vic SC, Harper J, 20 October 1993, BC9304155). The plaintiff's financial disadvantage in participating in foreign litigation, relative to the defendant, was expressly recognised in *Placer (PNG) Pty Ltd v Anderson* [1997] QCA 74 (unreported, 18 April 1997, BC9701524).

130 Keyes, *Jurisdiction in International Litigation*, above n 115, p 264 (proposing a specific rule for establishing jurisdiction in international personal injuries cases); pp 269–70 (proposing specific factors which should be considered in determining whether to decline jurisdiction in personal injuries cases).

131 Although Kirby J stated that China was 'ostensibly a "clearly more appropriate forum" for the litigation': *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [138].

132 Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) s 5 (and coordinate legislation of the states and territories).

133 *BHP Billiton v Schultz* (2004) 221 CLR 400; 211 ALR 523.

134 Keyes, *Jurisdiction in International Litigation*, above n 115, p 212.

of law in international torts. It is obviously undesirable that the jurisdictional principles and the choice of law rules are inconsistent in this regard. The jurisdictional principles should be reformed. In *Neilson*, Callinan J drew a direct connection between choice of law and jurisdiction. His Honour stated that the question of jurisdiction and applicable law 'are closely related, and will often admit, indeed demand, the same answer'.<sup>135</sup> Whether this is desirable is one matter; it does not accurately represent Australian law. Therefore, the proposition that the same answer as to jurisdiction and governing law will be *often* admitted, much less demanded, cannot be accepted.<sup>136</sup> If the principles of jurisdiction ensured that the local court was the most appropriate forum, then it might be argued that in some cases this would indicate that local law should be applied.<sup>137</sup> In the next part, I argue that a flexible exception is the best mechanism for determining whether forum law should displace the general choice of law rule.

Despite Callinan J's assertion in *Neilson* that choice of law and jurisdiction are closely connected,<sup>138</sup> in Australian law there is a strange reluctance to identify and act upon this relationship. In *Pfeiffer v Rogerson*, the joint judgment stated that '[q]uestions of jurisdiction . . . are better kept separate from questions of the applicable law'.<sup>139</sup> The disconnection between choice of law and jurisdiction is manifest in the lack of congruity between the jurisdictional principles and the choice of law rules, discussed above. It is further demonstrated in the insistence of the majority in *Neilson* that the Australian court must apply the solution which the Chinese court would have applied, without satisfying itself that the Chinese court would have exercised jurisdiction.<sup>140</sup> Six members of the court in *Neilson* held that the relevant issue was whether the Chinese court would have exercised the discretion in the second sentence of Art 146; none inquired whether the Chinese courts would have taken jurisdiction. In the absence of an affirmative response, to insist that the forum court must do as the Chinese court would have done is nonsensical.<sup>141</sup>

### The plaintiff's choice in pleading and proof

In *Neilson*, initially the appellant chose not to plead or prove her claims by reference to the international nature of the dispute.<sup>142</sup> All members of the High Court refused to accept one consequence of this choice; they all decided the

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<sup>135</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [257].

<sup>136</sup> *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [81].

<sup>137</sup> See similarly Davies, above n 25, at 256.

<sup>138</sup> *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [257].

<sup>139</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [25]. See also *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [7] and [10].

<sup>140</sup> Keyes, 'The doctrine of renvoi', above n 30, at 4 n 22; Davies, above n 25, at 254.

<sup>141</sup> For a full discussion of this issue see Davies, above n 25, at 254.

<sup>142</sup> In Australian law, it is for the defendant to raise any issue about whether the plaintiff's claim was brought within time. As this is a matter of procedure according to the meaning of that term adopted in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [99], it is governed by the law of the forum. In international litigation in Australian courts, therefore, the plaintiff is not required to plead that proceedings were brought within time. In a case such as *Neilson*, where the defendant raises the issue of limitation in its defence, the plaintiff would normally address in reply why that defence should not succeed.

appeal by reference to the law of the place of the tort.<sup>143</sup> *Neilson* therefore establishes that the tort choice of law rule is mandatory; Australian courts are required, whether the plaintiff wishes it or not, to apply the law of the place of the tort. In direct contrast to this holding, a bare majority effectively upheld the appellant's choice not to lead evidence of the foreign law on which her claim ultimately relied. Upholding that choice led to the application of the law of the forum, given the lack of evidence as to the foreign law. As Fentiman predicted, this undermines the mandatory nature of the tort choice of law rule. He stated:

One danger in applying the presumption [of similarity] . . . is that the mandatory introduction of foreign law might thus be subverted. A party who is required to introduce foreign law by a mandatory choice of law rule may attempt to employ the presumption to defeat that rule's obligatory character.<sup>144</sup>

North suggested that choosing the law of the forum by failing to plead the applicability of foreign law may be 'a valid example of freedom of choice, albeit one which is more often implicit than explicit'.<sup>145</sup> In *Neilson*, Gleeson CJ, Gummow and Hayne JJ expressly affirmed the freedom of parties in adversarial litigation to define the issues in dispute and to determine what evidence to lead accordingly.<sup>146</sup> Callinan and Heydon JJ, who applied the presumption of similarity, thereby implicitly affirmed the plaintiff's choice not to plead and prove foreign law.

### Fairness between the parties

Gleeson CJ, Gummow and Hayne JJ did not differentiate between the plaintiff and the defendant in their references to the parties' freedom to define the issues and select the evidence to lead in support of their case.<sup>147</sup> This fails to appreciate that, as is very common in litigation, the parties' interests and the choices they would make to further those interests were not synonymous. Unilateral choices of the plaintiff may have severe repercussions for the defendant, as the choice not to plead or prove foreign law did in *Neilson*. The rationale for upholding party choice does not always justify enforcing unilateral choices; criticisms of forum shopping are based on an appreciation of the harm done to the defendant by the plaintiff's unilateral choice of venue. Reforms to the tort choice of law rule based on an attempt to achieve decisional harmony recognise and attempt to prevent this unfairness.<sup>148</sup>

One of the stated overriding objectives of the UK Civil Procedure Rules is to ensure that the parties are on an equal footing.<sup>149</sup> The Australian rules of court do not express a similar sentiment. Zander suggested that the

143 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [15] per Gleeson CJ, [59] per McHugh J, [64] per Gummow and Hayne JJ, [149], [166] per Kirby J, [264] per Heydon J.

144 Fentiman, above n 113, pp 146–8 (this passage was cited by Kirby J in *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [203]).

145 P North, 'Choice in Choice of Law' in P M North, *Essays in Private International Law*, Clarendon Press, Oxford, 1993, p 181.

146 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [1] per Gleeson CJ, [118] per Gummow and Hayne JJ.

147 *Ibid*, at [1] per Gleeson CJ, [118], [125] per Gummow and Hayne JJ.

148 *Ibid*, at [173] per Kirby J.

149 Civil Procedure Rules 1998 (UK) (Statutory Instrument 1998 No 3231 L 17) r 1(2)(a).

fundamental question in litigation should be ‘whether the system holds the balance fairly between the parties’.<sup>150</sup> It is regrettable that while the judges in *Neilson* appreciated the importance of this issue in the context of tort choice of law, they ignored it in the context of the proof of foreign law. A more nuanced approach to proof of foreign law, similar to that required by the majority in *Renault v Zhang*,<sup>151</sup> is appropriate in international litigation and is required if the parties’ interests are to be given equal consideration.

#### IV The flexible exception

Most common law systems which apply the law of the place of the tort as the governing law allow an exception to that general rule.<sup>152</sup> This is known as the ‘flexible exception’, which allows the court in exceptional circumstances to apply the law of a system other than that of the place of the tort where that other legal system has ‘the most significant relationship with the occurrence and with the parties’.<sup>153</sup> The factors which are relevant in determining whether the law of the place of the tort should be displaced include the duration and intensity of the parties’ individual and mutual connections to the relevant legal systems;<sup>154</sup> whether the parties were in a relationship<sup>155</sup> prior to the tort and, if so, where that relationship was based;<sup>156</sup> where the plaintiff’s damages or losses were sustained;<sup>157</sup> in cases of concurrence of liability, the governing law of the contract;<sup>158</sup> and whether the state in which the tort occurred has an interest in ensuring the application of its law.<sup>159</sup>

In *Neilson*, several members of the court reaffirmed that there is in Australian law no flexible exception to the general rule that the law of the place of the tort applies.<sup>160</sup> Several of the judgments nonetheless point to the relevance of this solution. Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ justified their conclusion that Australian law should be applied pursuant to Art 146 by identifying factors which are pertinent to the flexible exception. In particular, they noted that all parties were Australian;<sup>161</sup> that their presence in China was temporary;<sup>162</sup> that the parties were in a

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150 M Zander, *The State of Justice*, Sweet & Maxwell, London, 2000, p 5.

151 (2002) 210 CLR 491; 187 ALR 1 at [72].

152 Eg, Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 12; *Baxter v RMC Group plc* [2003] 1 NZLR 304; *Tolofson v Jensen* [1994] 3 SCR 1022.

153 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 at 206; [1994] 3 All ER 749.

154 *Boys v Chaplin* [1971] AC 356; [1969] 2 All ER 1085; *Edmunds v Simmonds* [2001] 1 WLR 1003; *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961; [2002] 1 WLR 2304.

155 Including a contractual relationship: *Coupland v Arabian Gulf Petroleum Co* [1983] 3 All ER 226; [1983] 1 WLR 1136.

156 *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14; *Edmunds v Simmonds* [2001] 1 WLR 1003.

157 *Edmunds v Simmonds* [2001] 1 WLR 1003.

158 *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14.

159 *Boys v Chaplin* [1971] AC 356; [1969] 2 All ER 1085.

160 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [34] per McHugh J, [64], [91], [93] per Gummow and Hayne JJ, [283] per Heydon J. Kirby J referred (at [148]) to his statements in *Renault v Zhang* that he was inclined to reserve for later decision whether a flexible exception should be permitted, but did not press that inclination to a dissent.

161 *Ibid*, at [127] per Gummow and Hayne JJ, [251] per Callinan J (with whom Heydon J agreed at [275]).

162 *Ibid*, at [257] per Callinan J.

pre-existing contractual relationship which came into existence in Australia;<sup>163</sup> that the appellant sustained losses and damage in Australia;<sup>164</sup> and that there were no Chinese interests in the outcome of the litigation.<sup>165</sup> The factors which are relevant to the flexible exception clearly influenced the majority's conclusion that Australian law should be applied.

The High Court's refusal to consider a flexible exception in *Renault v Zhang* was widely criticised.<sup>166</sup> A flexible exception, whatever its flaws, is a simpler, more intellectually satisfactory solution than renvoi.<sup>167</sup> It is regarded as an essential component of the choice of law rules of other common law jurisdictions. The flexible exception would have provided the same resolution on the facts of *Neilson* as the solution reached by the majority, but would have been less problematic.<sup>168</sup> The flexible exception would have avoided the difficulties which can be foreseen to arise in future cases, including proving complex aspects of foreign law, resolving an infinite regression, and determining the implications of *Neilson* in other areas of law.

## V Implications for choice of law in contract

In *Neilson*, only one member of the court resolved the case directly by reference to renvoi. Four members of the court expressly declined to state a general solution to the problem of renvoi.<sup>169</sup> There are two apparent reasons for their reluctance. First, Gummow and Hayne JJ doubted the relevance of abstract theories of renvoi, emphasising 'the principal and essentially practical concern of the courts, which is to decide the controversies which are tendered by the parties for decision'.<sup>170</sup> Consistently with this emphasis, other members of the majority focused on construing Art 146, rather than articulating a general principle of renvoi.<sup>171</sup> Secondly, Gummow and Hayne JJ stated that the appropriate response to renvoi depended on the rationale for the choice of law rules in the particular area of law and, on this basis, refused to articulate a single principle applicable to every area of law.<sup>172</sup> They noted, for example,

163 Ibid, at [17] per Gleeson CJ, [251] per Callinan J (with whom Heydon J agreed at [275]).

164 Ibid, at [251] per Callinan J (with whom Heydon J agreed at [275]).

165 Ibid, at [17] per Gleeson CJ, [251] per Callinan J (with whom Heydon J agreed at [275]).

166 R Anderson, 'International torts in the High Court of Australia' (2002) 10 *TLJ* 1 at 9; R Garnett, '*Renault v Zhang*: A Job Half Done?' (2002) 10 *Tort L Rev* 145 at 150-1; G Lindell, '*Regie Nationale des Usines Renault SA v Zhang*: Choice of Law in Torts and another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum non conveniens* in Australia' (2002) 3 *Melb J of Int L* 364 at 373.

167 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [256] per Callinan J; Mortensen, 'Troublesome and Obscure', above n 83, at 24.

168 Briggs, 'The Meaning and Proof', above n 20, at 2; A Mills, 'Renvoi and the Proof of Foreign Law in Australia' [2006] *Camb LJ* 37 at 40. Cf Mortensen, 'Troublesome and Obscure', above n 83, at 21 (arguing that *Neilson* was not a case in which the flexible exception could have been applied under the UK or Canadian principles).

169 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [99] per Gummow and Hayne JJ, [175] per Kirby J (it was 'unnecessary to postulate a single theory of renvoi'; it was necessary to determine the meaning of Art 146, 'not . . . a comprehensive dissertation on a principle of renvoi, of universal or general application'), [277] per Heydon J. Similarly, Callinan J stated that each case depends on the evidence as to what the foreign court would do: *ibid*, at [261].

170 Ibid, at [87].

171 Ibid, at [11] per Gleeson CJ, [175] per Kirby J, [277], [282] per Heydon J.

172 Ibid, at [111].

that '[c]hoice of governing law may be important in creating private obligations by contract but less important when the question is one of legal status'.<sup>173</sup> While they asserted that different responses would be required in different areas of law, they did not state what those responses should be.

The majority's close focus on the facts in *Neilson* and their reluctance to articulate a general renvoi principle make the implications of this case for international litigation obscure. At least in international torts cases, a reference to foreign law probably means the choice of law rules of that foreign legal system. *Neilson* raises the question of whether a reference to foreign law in areas of law other than tort might require the application of foreign choice of law rules. The justifications for applying all of the law of the cause given by members of the majority in *Neilson* were to ensure decisional uniformity;<sup>174</sup> to promote certainty;<sup>175</sup> to avoid the artificial and arbitrary exclusion of an integral component of the foreign law (the foreign choice of law rule);<sup>176</sup> to give effect to the parties' reasonable expectations;<sup>177</sup> to respect the territorial sovereignty of other countries;<sup>178</sup> and to treat plaintiffs and defendants fairly.<sup>179</sup> At least the first three justifications are not peculiar to international torts.<sup>180</sup> It can certainly be anticipated that litigants may, relying on these justifications, argue that a reference to foreign law in other areas of law requires a reference to the foreign choice of law rule. Whether such an argument would succeed is difficult to predict.<sup>181</sup> It is beyond the scope of this article to consider this issue in detail, but there are a significant number of cases in which Australians who have been injured in the course of employment abroad seek compensation in Australian courts.<sup>182</sup> Following *Neilson*, if the plaintiff in such a case claimed in tort, the Australian court would be required to resolve the case by applying the foreign law, as the foreign court would have applied it. But what should an Australian court do, if the plaintiff claims in contract rather than in tort?

173 Ibid, at [99].

174 Ibid, at [13] per Gleeson CJ, [89]–[91] per Gummow and Hayne JJ, [172], [173], [197], [199] per Kirby J, [271] per Heydon J.

175 Ibid, at [100] per Gummow and Hayne JJ, [172] per Kirby J. See similarly *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [66].

176 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [98], [111] per Gummow and Hayne JJ, [171], [174] per Kirby J. See similarly at [271] per Heydon J.

177 Ibid, at [172], [199] per Kirby J.

178 Ibid, at [172] per Kirby J. See similarly *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [64].

179 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [173] per Kirby J. See similarly *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [63].

180 References to reasonable expectations and to respect for territorial sovereignty are more commonly encountered in the context of international tort than in other areas of law. Reasonable expectations are sometimes also offered as a justification for enforcing contractual choices of law.

181 Mortensen suggests that, following *Neilson*, renvoi is potentially applicable in any private international dispute unless legislation specifically excludes it: Mortensen, 'Troublesome and Obscure', above n 83, at 23.

182 Eg, *O'Driscoll v J Ray McDermott, SA* [2006] WASCA 25 (unreported, 22 February 2006, BC200600796); *Fullford v Pearson* [2004] NSWSC 150 (unreported, Hidden J, 13 April 2004, BC200401828); *McGregor v Three Counties Equine Hospital* [2004] NSWSC 1203 (unreported, Malpass M, 17 December 2004, BC200408752); *Dyno Wesfarmers Ltd v Knuckey* [2003] NSWCA 375 (unreported, 17 December 2003, BC200307990).

Prior to *Neilson*, it was universally accepted that renvoi does not apply in international contract cases.<sup>183</sup> This was generally justified by reference to the presumed intentions of the parties. North and Fawcett state that 'one of the clearest rejections of any renvoi doctrine is to be found in the field of contract, it being thought that no sane businessman or his lawyers would choose the application of renvoi'.<sup>184</sup> In *Neilson*, Gummow and Hayne JJ noted that in contractual cases the parties' choice of law may be a relevant factor,<sup>185</sup> although they did not identify the implications of that choice for determining whether a reference to foreign law included its choice of law rules. In justifying their refusal to state a renvoi rule of general application, Gummow and Hayne JJ stated that 'questions of delictual responsibility and questions of contractual obligations differ in important respects'.<sup>186</sup> Presumably they meant that renvoi should not apply in international contractual disputes. It comes as a surprise, then, to find that the parties to a recent appeal in the Court of Appeal of the Supreme Court of Western Australia accepted for the purposes of the appeal that the High Court's decision in *Neilson* applied to contractual choice of law.<sup>187</sup>

In *O'Driscoll v J Ray McDermott, SA* the plaintiff originally claimed in negligence, but amended his claim to one for breach of contract.<sup>188</sup> McLure JA held that because the choice of law rules of the proper law of the contract and of forum law were the same, there was 'no need to consider the [foreign law's] attitude to renvoi'.<sup>189</sup> Murray AJA, with whom Malcolm CJ agreed, also noted the similarity between the choice of law rules of the foreign law and forum law, and concluded that consequently it was not necessary to consider what attitude the foreign legal system took to renvoi.<sup>190</sup> Both judgments seem to accept that renvoi applies in contract, at least if the parties accept that it does. This case should give cause for concern. If renvoi is applicable in international contract, it should probably be applied in every other area of private international law.

## VI Conclusion

The High Court's decision in *Neilson* has attracted both praise and criticism. Briggs described the approach of the majority as 'a brilliant illumination of renvoi as a vital element in the overall search for the most appropriate outcome'.<sup>191</sup> His enthusiasm must be seen in the context of his criticism of the defects in the current Australian law, which mean that Australian choice of law rules are required to fulfil functions that in other legal systems are addressed

183 *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 437–8 per Evatt J; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747; [1995] 1 WLR 978 at 1008; Nygh and Davies, above n 12, pp 296–7; Tilbury et al, above n 21, p 1012; Collins, above n 14, pp 72–3.

184 North and Fawcett, above n 21, pp 64–5.

185 *Neilson* (2005) 223 CLR 331; 221 ALR 213 at [99].

186 *Ibid.*

187 *O'Driscoll v J Ray McDermott, SA* [2006] WASCA 25 (unreported, 22 February 2006, BC200600796) at [12].

188 *Ibid.*, at [22].

189 *Ibid.*, at [18].

190 *Ibid.*, at [43], [60].

191 Briggs, 'The Meaning and Proof', above n 20, at 3.



by jurisdictional principles and the flexible exception.<sup>192</sup> Dickinson congratulated the majority on its pragmatic response to the gaps in the proof of foreign law.<sup>193</sup> Davies criticised the court for failing to provide practical guidance to litigants and their advisers; he expected that *Neilson* would lead to further litigation.<sup>194</sup> Mortensen argued that *Neilson* ‘merely reinforces our understanding of the shortcomings of the doctrine of renvoi, and especially of double renvoi’.<sup>195</sup>

A six to one majority of the High Court in *Neilson* surprised almost all interested observers by holding that in this case at least, a reference to foreign law meant all the relevant foreign law, including its choice of law rules. A bare majority held that where the foreign law was incompletely proven, principles of forum law should be applied to fill the gaps on the basis that Australian law should be presumed to be similar to Chinese law. Both decisions are characterised by their pragmatism and by the judges’ close focus on the facts of the case. The result in practical terms is hardly offensive. At the time the appellant commenced proceedings, the law in Australia was that most limitation periods were governed by the law of the forum.<sup>196</sup> The parties were all Australian and there was a stronger connection between the parties and the dispute to Australia than to China. The complex route which the majority took to get to that result is, with respect, hardly satisfying. This decision adds unnecessarily to the costs and uncertainties of international litigation and provides little clear guidance for litigants and their advisers.

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<sup>192</sup> Ibid, at 2.

<sup>193</sup> Dickinson, above n 107, at 188.

<sup>194</sup> Davies, above n 25.

<sup>195</sup> Mortensen, ‘Troublesome and Obscure’, above n 83, at 12.

<sup>196</sup> *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 44; 104 ALR 257.