



## Case Note

### The doctrine of renvoi in international torts: *Mercantile Mutual Insurance v Neilson*

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*The High Court recently clarified the choice of law rule which applies to international torts, which are now governed by the law of the place of the tort. Where the tort occurred abroad, the choice of law rule will require Australian courts to apply foreign law. The High Court did not specifically address whether a reference to foreign law means a reference to its internal law or to its choice of law rules — a problem which is addressed in private international law by the doctrine of renvoi. This problem arose directly in **Mercantile Mutual Insurance (Australia) v Neilson**. This note explains and critically evaluates the decision of the Full Court of Western Australia in this case. It argues for a closer consideration of whether renvoi should be available in international torts and for refinement of the choice of law rule in international torts.*

#### I Introduction

In 2002, in *Regie Nationale des Usines Renault SA v Zhang*,<sup>1</sup> the High Court clarified and simplified the choice of law rule for international torts. With only very limited possible exceptions,<sup>2</sup> the law of the place of the tort is the governing law for international torts.<sup>3</sup> In cases where the tort occurred in a foreign country, the High Court did not expressly state whether the ‘law’ of the place of the tort referred to the internal law of the place of the tort or the choice of law rules of that legal system. In the language of private international law, the High Court did not decide whether the doctrine of renvoi applied to international torts or not. The reasons for the court’s decision in *Renault v Zhang* do not clearly indicate which of these two options the court

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1 (2002) 210 CLR 491; 187 ALR 1 (*Renault v Zhang*).

2 The main judgment emphatically denied the availability of a ‘flexible exception’ to the general principle: *ibid*, at [75]. This is discussed further below in part IIB. The joint judgment reserved for future consideration whether issues relating to types of damages and quantum of damages (treated as matters of substance and not procedure in intranational torts: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [99]) should be governed by the law of the place of the tort in international tort: *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [76]. They also reserved their opinion as to the consequence for their decision on the *Moçambique* rule, which denies the court’s jurisdiction over claims concerning title to and possession of foreign immovable property, which in Australia includes some intellectual property rights: *British South Africa Company v Companhia de Moçambique* [1893] AC 602; *Potter v BHP Co Ltd* (1906) 3 CLR 479 (applying the *Moçambique* rule to disputes over patents). They also noted the particular nature of maritime and aerial torts: *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [76]. None of these possible exceptions is relevant to the discussion in this case note.

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

intended. The High Court will soon clarify its opinion on this question, having granted special leave to appeal to the unsuccessful plaintiff in *Mercantile Mutual Insurance (Australia) Ltd v Neilson*,<sup>4</sup> a decision of the Full Court of the Supreme Court of Western Australia, which decided that the law of the place of the tort meant the internal law of that legal system.<sup>5</sup>

In this case note, I outline the Australian choice of law rule in tort and the Australian doctrine of renvoi. I then summarise and critically analyse the decision in *MMI v Neilson*, before making some suggestions for future refinement of the rules relating to choice of law in international torts.

## II Choice of law in international tort

The Australian choice of law rules for tort have not had a neat history. Until *John Pfeiffer Pty Ltd v Rogerson* was decided in 2000,<sup>6</sup> there was a great deal of uncertainty about what the choice of law rule was.<sup>7</sup> In *Pfeiffer v Rogerson* the High Court dispelled the confusion, at least in the case of intra-Australian torts, by holding that in such cases the law of the place of the tort was to be applied.<sup>8</sup> In reaching that decision, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ were heavily influenced by provisions of the Constitution, the implications of the Constitution for the development of common law rules, the nature of federal jurisdiction, and the nature of federation itself.<sup>9</sup> Less than two years later, in *Renault v Zhang* the High Court ruled that the same choice of law rule was applicable in international torts even though 'the factor of federal considerations' was absent from such cases.<sup>10</sup> The rule is superficially simple, but it leaves many questions unanswered, including whether the doctrine of renvoi does or should apply in international torts.

### A Choice of law and renvoi

The purpose of the choice of law analysis in private international law is to identify the legal system whose rules are applied to resolve the substantive issues in dispute. For example, in international tort cases, the 'law of the place of the tort' applies to determine liability. When the forum's choice of law rule indicates that foreign law should be applied, an issue which may arise<sup>11</sup> is

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4 (2004) 28 WAR 206 (*MMI v Neilson*).

5 *Neilson v Overseas Project Corporation of Victoria Ltd* [2004] HCATrans 528 (3 December 2004).

6 (2000) 203 CLR 503; 172 ALR 625 (*Pfeiffer v Rogerson*).

7 In a splendid understatement, the joint judgment in *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [61] observed that 'the course of authority in this court has not been free from doubt or difficulty' (see also *ibid.*, at [136] per Kirby J). For a comprehensive explanation of these doubts and difficulties, see M Davies, 'Exactly what is the Australian choice of law rule in torts cases?' (1996) 70 *ALJ* 711.

8 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [102], [157].

9 *Ibid.*, at [59]–[70] and [85]–[86]. These factors also influenced Kirby J (at [108], [119]–[124], [142]–[143]).

10 *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [75].

11 The issue does not arise if both legal systems use the same choice of law rule and the same connecting factors.

whether the reference to the foreign law is a reference to the internal rules of that system or to the choice of law rules of that system. The doctrine of renvoi<sup>12</sup> resolves this issue.

Conventionally, three solutions to the problem of renvoi are identified.<sup>13</sup> The first is to reject or ignore the renvoi.<sup>14</sup> Under this solution the forum court applies only the internal rules of the foreign legal system and resolves the problem as if it were purely domestic to the foreign system, ignoring the international aspects of the facts. In practice, this is what is most often done, but not because the renvoi is consciously ignored or rejected.<sup>15</sup> The question of renvoi is scarcely ever raised,<sup>16</sup> no doubt due to its complexity, a general perception that renvoi is only applicable in certain areas of law,<sup>17</sup> practitioners' lack of familiarity with conflicts issues, and a lack of appropriate foreign evidence.<sup>18</sup> Thus, in the vast majority of cases the reference to foreign law is treated as a reference solely to its internal rules. The fact that this *is* done in the absence of any consideration of whether it *ought* to be done should not be taken as an endorsement by courts that this is the correct solution. Rejecting or ignoring the renvoi may sometimes be the 'simple and rational solution'<sup>19</sup> to the problem, but simplicity is not necessarily a rational justification in some cases, because it would lead to the local court applying a foreign law which was in its own terms inapplicable.<sup>20</sup>

The second solution is to treat the reference to the foreign law as a reference to the choice of law rules of that system and then to treat the further reference by those choice of law rules as a reference to the internal principles of the legal system indicated (this might be the forum, or a third legal system), ignoring that system's attitude to renvoi. For example, if the Australian choice of law rule selected French law and the French choice of law rule selected Australian law, the reference to Australian law would be treated as a reference to domestic Australian law. This is the 'single renvoi' solution; the result may be a 'remission' to the internal principles applicable in the forum or

12 Renvoi is taken from the French verb *renvoyer* which means to refer back or to refer further.

13 L Collins (Gen Ed), *Dicey & Morris on The Conflict of Laws*, 13th ed, Sweet & Maxwell, London, 2000, pp 66–7; P M North and J J Fawcett, *Cheshire and North's Private International Law*, 13th ed, Butterworths, London, 1999, p 53; P E Nygh and M Davies, *Conflict of Laws in Australia*, 7th ed, Butterworths, Sydney, 2002, pp 290–1.

14 This is sometimes treated as two separate solutions — in theory, rejecting and ignoring the renvoi have different justifications: see M Davies, S Ricketson and G Lindell, *Conflict of Laws: Commentary and Materials*, Butterworths, Sydney, 1997, pp 380–1; E I Sykes and M C Pryles, *Australian Private International Law*, 3rd ed, Law Book, Sydney, 1991, p 218.

15 North and Fawcett state that this solution 'is, and always has been, *unconsciously* adopted in a multitude of decisions': North and Fawcett, above n 13, p 53 (emphasis added).

16 In Australia, there seem to be only two reported cases in which the court has determined the issue of renvoi: *Simmons v Simmons* (1917) 17 SR (NSW) 419 and *MMI v Neilson* (2004) 28 WAR 206.

17 These are validity of bequests, claims to foreign immovable property, some claims to movable property, and some family law issues: North and Fawcett, above n 13, pp 65–6. Some writers think there is no reason why renvoi should be confined to these areas: B D Inglis, 'The Judicial Process in the Conflict of Laws' (1958) 74 *LQR* 493 at 499–502. Many of the areas in which renvoi was applied in older cases have been substantially reformed by legislation which has diminished the practical importance of renvoi.

18 Sykes and Pryles, above n 14, p 217.

19 *Re Annesley* [1926] Ch 692 at 709.

20 Sykes and Pryles, above n 14, p 218; Inglis, above n 17, at 495–6.

'transmission' to the internal principles of a third legal system. There are very few English and Australian cases which have been decided consistently with this solution.<sup>21</sup>

The third solution is to consider the issue from the perspective of the foreign court and to solve the problem exactly as the foreign court would have resolved it, including by reference to the foreign system's solution to renvoi.<sup>22</sup> This is the 'total' or 'double' renvoi solution, also referred to as 'the foreign court theory'. The third solution has drawn the greatest level of support in the English cases which have explicitly addressed the issue of renvoi. It is regarded as representing the law in Australia in cases of succession to movable property, although there is only one case in point.<sup>23</sup> English commentators who advocate the use of renvoi support the double renvoi solution.<sup>24</sup> Because of the lack of case law and commentary on the single renvoi solution in Anglo-Australian law, for the remainder of this note, the discussion of renvoi will focus on the double renvoi solution.

Very few Australian cases even recognise the possibility of renvoi.<sup>25</sup> There is a body of English cases in which the double renvoi solution has been applied.<sup>26</sup> Most of these occur in the context of succession and some of these decisions have been justified as necessary in order to address perceived problems with the applicable choice of law rules. Recently, English judges have expressed the view that it is undesirable to extend the application of double renvoi beyond the areas of succession and legitimation by subsequent marriage.<sup>27</sup>

The chief justification for double renvoi is that it promotes uniformity in outcomes by preventing the manipulation of outcomes by selection of forum.<sup>28</sup> Double renvoi can also be used to prevent absurd or undesirable

21 This solution is consistent with the result at first instance in *MMI v Neilson* (2004) 28 WAR 206: see *Neilson v Overseas Projects Corporation of Victoria* [2002] WASC 231 (unreported, McKechnie J, 2 October 2002, BC200205850) (*Neilson v OPCV*), although McKechnie J did not refer to the doctrine of renvoi. See further below at part III.

22 This solution assumes that the foreign court would have regarded itself as jurisdictionally competent, which may be a problematic assumption. The inter-relationships between jurisdiction and choice of law in the context of renvoi have attracted surprisingly little comment, but see A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 *ICLQ* 877; and Nygh and Davies, above n 13, pp 299–300.

23 *Simmons v Simmons* (1917) 17 SR (NSW) 419 at 422–3; M Tilbury, G Davis and B Opekin, *Conflict of Laws in Australia*, Oxford UP, Melbourne, 2002, p 1007.

24 Briggs, above n 22; Inglis, above n 17.

25 It is referred to in passing in a small number of first instance decisions, eg, *Damberg v Damberg* (2001) 52 NSWLR 492 at 512; *Bluebird Investments Pty Ltd v Graf* (1994) 13 ACSR 271 at 302; *Zappacosta v Queanbeyan Bowling Club Ltd* [1991] ACTSC 117 (unreported, Higgins J, 20 December 1991) at [50]; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 748. It is not applied in these cases. The only High Court case in which it is directly mentioned is *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 437 per Evatt J.

26 These are comprehensively listed in Collins, above n 13, p 72 nn 37–45.

27 *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 at 1008; [1995] 3 All ER 747; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 at 61–2; [1983] 2 All ER 884.

28 *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 at 1008; [1995] 3 All ER 747; J G Collier, *Conflict of Laws*, 3rd ed, Cambridge UP, Cambridge, 2001, p 25; A Briggs, *The Conflict of Laws*, Clarendon, Oxford, 2002, pp 16–17.

results.<sup>29</sup> This pragmatic justification is characteristic of the English approach to the conflict of laws. According to *Dicey & Morris*:

in some situations the doctrine is convenient and promotes justice, and . . . in other situations the doctrine is inconvenient and ought to be rejected. In some cases the doctrine may be a useful means of arriving at a result which is desired for its own sake.<sup>30</sup>

It has been suggested that double renvoi is sometimes used to uphold the legitimate expectations of relevant parties where those expectations would otherwise be undermined.<sup>31</sup>

Some writers on the conflict of laws are severely critical of double renvoi,<sup>32</sup> although this is by no means unanimous,<sup>33</sup> and a majority of writers outline both the advantages and disadvantages of renvoi.<sup>34</sup> Criticisms of renvoi are based largely on the three practical problems to which the double renvoi theory is claimed to give rise.<sup>35</sup> The first of these problems is that determining how the foreign court would resolve the dispute requires reliance on 'the doubtful and conflicting evidence of foreign experts'.<sup>36</sup> The difficulties associated with expert evidence on foreign law are notorious, even where all that is required is evidence of the internal foreign law.<sup>37</sup> *Dicey & Morris* observes that 'there are few matters [of foreign law] about which it is more difficult to obtain reliable information'.<sup>38</sup> However, as Griswold noted, 'mere difficulty of deciding a question has not ordinarily been regarded by common-law courts as a reason for refusing to undertake a decision'<sup>39</sup> and Collier thought that this objection to renvoi 'seems either misguided or exaggerated'.<sup>40</sup> Reliance on expert evidence is not unique to renvoi, but is inherent in allowing the forum courts to apply foreign law where that is indicated under choice of law rules. In *Renault v Zhang*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated that proof of foreign law, while onerous, 'is concomitant of reliance upon any choice of law rule which selects a non-Australian *lex causae*'.<sup>41</sup> Reliance on expert evidence therefore cannot be regarded as a serious obstacle to the acceptance of double renvoi.

The second practical problem which may arise if the court is required to

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<sup>29</sup> For example, upholding the validity of a testamentary disposition.

<sup>30</sup> Collins, above n 13, p 73. See similarly S C Symeonides, W C Perdue and A T von Mehren, *Conflict of Laws: American, Comparative, International*, 2nd ed, Thomson West, St Paul, 2003, p 69.

<sup>31</sup> Collier, above n 28, p 25.

<sup>32</sup> North and Fawcett, above n 13, pp 56–60; Sykes and Pryles, above n 14, pp 223–7.

<sup>33</sup> Some writers argue its virtues: Inglis, above n 17; Briggs, above n 22.

<sup>34</sup> Collins, above n 13, pp 73–4 (although ultimately concluding that 'in most situations, the balance of convenience surely lies in interpreting the reference to foreign law to mean its domestic rules': pp 78–9); Collier, above n 28, pp 20 and 25; and Tilbury, Davis and Opeskin, above n 23, pp 1002–6.

<sup>35</sup> Collins, above n 13, pp 76–8; Sykes and Pryles, above n 14, pp 224–7; Inglis, above n 17, at 496–9.

<sup>36</sup> *Re Askew* [1930] 2 Ch 259 at 278.

<sup>37</sup> R Fentiman, 'Foreign Law in English Courts' (1992) 108 *LQR* 142 at 150–1.

<sup>38</sup> Collins, above n 13, p 76; *Re Duke of Wellington* [1947] Ch 506 at 515; North and Fawcett, above n 13, p 58.

<sup>39</sup> E N Griswold, 'Renvoi Revisited' (1938) 51 *Harv L Rev* 1165 at 1179.

<sup>40</sup> Collier, above n 28, p 23.

<sup>41</sup> *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [66].

apply a foreign choice of law rule as a foreign court would is that the connecting factor or law area which the foreign law uses might be meaningless in the context of the case, from the perspective of the forum.<sup>42</sup> For example, civil law legal systems often use the law of the nationality as a connecting factor while in many common law countries, including Australia, there is no relevant national law for many areas of private law.<sup>43</sup> Like the first problem, the magnitude of this difficulty is overstated. The cases demonstrate that judges are able to resolve this problem sensibly.<sup>44</sup>

The third practical problem associated with double renvoi, which is commonly cited, is that it may not lead to any solution at all. If the foreign court also applies double renvoi, this may lead to a never-ending circle of references.<sup>45</sup> However, there is no reported case where this has occurred<sup>46</sup> and it is unlikely to occur, because double renvoi has been applied mainly in common law countries, which use similar or identical choice of law rules and connecting factors. Most civilian law countries, which sometimes use different choice of law rules or connecting factors, in which case the issue of renvoi can arise, apply the single renvoi solution.<sup>47</sup>

In addition to these practical problems, it has been suggested that by applying a foreign choice of law rule, the forum court abdicates its responsibility and undermines the validity of its own conflicts rules, which leads to a diminution of sovereignty or, at least, 'a loss of control' by the forum court.<sup>48</sup> The same argument may also be made in relation to applying substantive foreign law, as it is inherent in any choice of law system under which foreign law may be selected as the governing law. It should not be regarded as a serious impediment to the application of renvoi.

None of the problems identified with double renvoi is a compelling reason for refusing to apply this solution.

## B Flexibility in choice of law

While the general rule for tort choice of law established in *Renault v Zhang* has been welcomed, the decision has been widely criticised as overly narrow in its complete rejection of any flexible exception to the general rule.<sup>49</sup> The flexible exception recognises that in exceptional circumstances, the legal system which has 'the most significant relationship with the occurrence and with the parties' is not the place of the tort, but another legal system, which

42 Collins, above n 13, pp 77–8.

43 *Simmons v Simmons* (1917) 17 SR (NSW) 419; *Re O'Keefe* [1940] Ch 124.

44 *Re Askew* [1930] 2 Ch 259 at 276–7; *Simmons v Simmons* (1917) 17 SR (NSW) 419 at 423.

45 Collins, above n 13, p 78.

46 Ibid.

47 Nygh and Davies, above n 13, p 291.

48 Briggs, above n 22, at 882; North and Fawcett, above n 13, p 57.

49 R Anderson, 'International torts in the High Court of Australia' (2002) 10 *TLJ* 1 at 9; A Briggs, 'The Legal Significance of the Place of a Tort (*Regie Nationale des Usines Renault SA v Zhang*)' (2002) 2 *OUCLJ* 133 at 136–7; R Garnett, '*Renault v Zhang*: A Job Half Done?' (2002) 10 *Tort L Rev* 145 at 150–1, 156; 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.

should provide the governing law.<sup>50</sup> The joint judgment in *Pfeiffer v Rogerson* left the way open for the application of a flexible exception in international torts, anticipating that there might be ‘advantages of a flexible rule or of a flexible exception to a universal rule in the case of international torts’.<sup>51</sup> The joint judgment in *Renault v Zhang* flatly refused to countenance a flexible exception, although it stated that the kind of factors relevant to a flexible exception ‘may often be subsumed in the issues presented on a stay application, including one based on public policy grounds’.<sup>52</sup>

In *Pfeiffer v Rogerson*, the joint judgment thought that in intra-Australian cases, a flexible exception would lead to ‘difficulties in practice’, in particular, that its application is too unpredictable and uncertain for courts, parties and insurers.<sup>53</sup> The position of insurers is pertinent in *MMI v Neilson*. The English and Scottish Law Commissions investigated the claim that ‘it is necessary for insurers to be able to predict the law by which their insured might be held liable in respect of his activities’ and found it to be ‘misconceived’. Their investigation showed that ‘premiums are based more on an analysis of past liability than on an analysis of present risk . . . we understand that the level of premiums is not in practice affected by our own rules of private international law’.<sup>54</sup> There is no suggestion in either *Pfeiffer v Rogerson* or *Renault v Zhang* that the High Court had access to information which contradicted the findings of the Law Commissions.

### III *Mercantile Mutual Insurance Ltd v Neilson*

Given the lack of case law on renvoi in Australia, and the disquiet caused by the High Court’s rejection of a flexible exception in *Renault v Zhang*, it is not surprising that this case has generated interest. Although the facts are ‘apparently simple’,<sup>55</sup> they raise interesting legal issues. Barbara Neilson, the first plaintiff, and George Neilson, the second plaintiff, were at all times ordinarily resident in Western Australia. The first defendant, Overseas Projects Corporation of Victoria Ltd (OPCV), a corporation incorporated in Victoria,<sup>56</sup> employed George Neilson to provide training at a facility associated with the

50 Two members of the House of Lords applied a flexible exception in *Chaplin v Boys* [1971] AC 356 at 379–80 (Lord Hodson) and 392 (Lord Wilberforce); [1969] 2 All ER 1085; the flexible exception was recognised and applied by the Privy Council in *Red Sea Insurance Co Ltd v Bouygues* [1995] 1 AC 190 at 206; [1994] 3 All ER 749. The flexible exception is incorporated in legislation in the United Kingdom: Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 12.

51 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [80].

52 *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [73]. Analysing this suggestion is beyond the scope of this note. The Australian rules on establishing and declining jurisdiction are already very generous to plaintiffs, who succeed in the vast majority of cases. Plaintiffs do not require further assistance in resisting applications to stay proceedings. If there is a public policy concern with the content of foreign law, one would have thought that this must be taken into account in determining the governing law.

53 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [79].

54 The English Law Commission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict*, Working Paper No 87, 1985, pp 313–14 [4.12], footnotes omitted, emphasis added (Law Commissions, Working Paper).

55 *Neilson v OPCV* [2002] WASC 231 (unreported, McKechnie J, 2 October 2002, BC200205850) at [4].

56 OPCV is owned by the State of Victoria (*ibid.* at [1]), although nothing turns on this.

Chinese University of Iron and Steel, located in the city of Wuhan, in Hubei province in the People's Republic of China. The plaintiffs intended that Mrs Neilson should accompany her husband. Before the plaintiffs left Western Australia for China, Mrs Neilson was also employed by OPCV. The first third party, Mercantile Mutual Insurance (MMI), was the first defendant's third party liability insurer.

Under the terms of the contract between OPCV and Mr Neilson, OPCV was contractually obliged to provide housing for Mr Neilson and his family. OPCV provided a two-storey unit for the Neilsons' use. In 1991, Mrs Neilson suffered personal injuries when she fell down the stairs in the unit. Part of the landing, from which Mrs Neilson fell, was not protected by a balustrade. She claimed against OPCV in the Supreme Court of Western Australia seeking damages for negligence and for breach of contract.<sup>57</sup> OPCV joined MMI as its insurer.

At first instance, McKechnie J found that there was no contractual obligation on the part of OPCV to provide housing for Mrs Neilson<sup>58</sup> and that she could not enforce any contractual obligation that OPCV had under the express terms of its contract with Mr Neilson in relation to the quality of housing provided.<sup>59</sup> Applying *Renault v Zhang*, McKechnie J held that the governing law for Mrs Neilson's claim in negligence was the law of the place of the tort, which he held to be Chinese law.<sup>60</sup> His Honour referred to specific provisions of domestic Chinese law relating to liability for wrongs, and then to a provision of Chinese law which 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>61</sup>

McKechnie J stated that this provision 'gives me a right to apply the law of Australia'.<sup>62</sup> His Honour did not refer to the concept of *renvoi*, nor justify why he applied the Chinese choice of law rule, rather than confining his discussion to the internal Chinese law concerning liability. McKechnie J then applied Australian substantive law relating to liability, quantum, and limitation period. MMI was held liable to indemnify OPCV.<sup>63</sup>

MMI appealed to the Western Australian Full Court on three grounds. These raised the issues of whether the doctrine of *renvoi* applied in international torts cases; whether Mrs Neilson's claim was barred by the applicable Chinese

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<sup>57</sup> Mr Neilson also claimed against OPCV for negligence and breach of contract and succeeded on both claims: *ibid*, at [275] and [277].

<sup>58</sup> *Ibid*, at [74], [80].

<sup>59</sup> *Ibid*, at [94].

<sup>60</sup> *Ibid*, at [123].

<sup>61</sup> Article 146, General Principles of Civil Law of the People's Republic of China adopted at the Fourth Conference of the Third National People's Congress on 12 April 1986 with effect from 1 January 1997, cited *ibid*, at [200].

<sup>62</sup> *Ibid*, at [204]. The provision is somewhat problematic, as there is no national law of negligence in Australia, it being within the jurisdiction of the States. This problem can occur between legal systems which use different connecting factors, but it should not be thought to be insuperable. See the discussion above in part IIA.

<sup>63</sup> *Neilson v OPCV* [2002] WASC 231 (unreported, McKechnie J, 2 October 2002, BC200205850) at [274].



limitation period; and whether Mrs Neilson's injuries arose out of or in the course of her employment with the first defendant Overseas Projects Corporation of Victoria.<sup>64</sup> The Full Court unanimously upheld the appeal by MMI on the first and second grounds; I will address only the first ground, which was identified as the 'central issue' in the appeal.<sup>65</sup> McLure J's judgment, with which Johnson J and Wallwork AJ agreed, focused on the availability of renvoi in international tort claims. After outlining the possible solutions to renvoi, academic criticisms of double renvoi, and briefly referring to some foreign authorities, her Honour concluded:

there is no binding (or any other) authority that renvoi is applicable in tort cases; there is non-binding authority to the contrary; there is widespread academic opinion that renvoi is not applicable to tort; finally there is much academic criticism of the renvoi doctrine in general.<sup>66</sup>

McLure J then summarised the justifications given by the High Court in *Renault v Zhang* and *Pfeiffer v Rogerson* in support of the choice of law rule selecting the law of the place of the tort and stated: '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>67</sup> Her Honour therefore concluded that what she referred to as the 'no renvoi solution' (generally referred to as rejecting or ignoring the renvoi) applied in international tort cases and that a reference to foreign law should be interpreted as a reference to its internal law.<sup>68</sup>

#### IV Renvoi in Australian tort choice of law?

In this section, I consider the objections raised by the Western Australian Full Court to the application of renvoi in torts. First, I discuss the relevant authorities and the academic discussion of renvoi and then I consider the implications of *Renault v Zhang* for the doctrine of renvoi.

##### A Cases and commentary on renvoi in international torts

McLure J stated that there is little authority on renvoi in international torts. Earlier in her judgment, she observed that a possible reason is the prominence of the law of the forum in Australian choice of law in torts until very recently.<sup>69</sup> Before *Breavington v Godleman*<sup>70</sup> was decided in 1988, the High Court had held on two occasions that the governing law for torts was the law of the forum.<sup>71</sup> This reflected the English common law until 1970.<sup>72</sup> A majority of the High Court in *Breavington v Godleman* held that the governing law for intranational torts was the law of the place of the tort, but

64 *MMI v Neilson* (2004) 28 WAR 206 at [4]. The appellant was successful on the first and second grounds of appeal (at [48] and [65]), but unsuccessful on the third ground of appeal (at [72]). The discussion in this note focuses on the first ground of appeal.

65 *Ibid.*, at [1].

66 *Ibid.*, at [39].

67 *Ibid.*, at [48].

68 *Ibid.*

69 *Ibid.*, at [34].

70 (1988) 169 CLR 41; 80 ALR 362.

71 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 23–4, 31, 42, 44; *Koop*

this was overruled only three years later. Majorities in *McKain v R W Miller & Co (SA) Pty Ltd*<sup>73</sup> and *Stevens v Head*<sup>74</sup> adopted the double actionability rule formulated by Brennan J in *Breavington v Godleman*. There was a great deal of uncertainty about the nature of the double actionability rule;<sup>75</sup> a popular interpretation was that the law of the forum was the applicable law in non-domestic torts.<sup>76</sup> Consequently, in Australia until 2002 (with the possible exception of the three years between 1988 and 1991) foreign law could never be the governing law and the issue of renvoi therefore could not arise in tort cases. This is the reason that there is no binding authority on the point; the lack of authority is not based on a principled rejection of the doctrine.

A small number of foreign cases have considered whether the doctrine of renvoi applies in tort cases. According to the Scottish and US cases cited by McLure J, it does not,<sup>77</sup> but there is other, more compelling, US authority that it is applicable.<sup>78</sup> Although *M'Elroy v M'Allister* is treated as a dispositive authority by some authors,<sup>79</sup> only one of the seven judges referred to the issue. Lord Russell stated that:

in referring to the *lex loci delicti* to ascertain by what rules the rights and responsibilities of the parties to this action are there regulated this court [the Scottish Court of Session] refers to the internal domestic law of that locus and not to *its* private international law.<sup>80</sup>

He made this point to emphasise that English decisions on the characterisation of limitation periods were not binding on a Scottish court. The report gives no indication that the parties raised the issue of renvoi; as it is not referred to in the other judgments, it seems improbable. Prior to *MMI v Neilson*, the only Australian tort case in which renvoi was referred to is *Zappacosta v Queanbeyan Bowling Club Ltd*, in which Higgins J stated that

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*v Bebb* (1951) 84 CLR 629 at 644. This was subject to the plaintiff showing that the defendant's behaviour was not justifiable according to the law of the place of the tort as a threshold requirement.

72 Until 1970, the law of the forum was the governing law in England: *The Halley* (1868) LR 2 PC 193; *Machado v Fontes* [1897] 2 QB 231; *Chaplin v Boys* [1971] AC 356; [1969] 2 All ER 1085.

73 (1991) 174 CLR 1; 104 ALR 257.

74 (1993) 176 CLR 433; 112 ALR 7.

75 Davies, above n 7.

76 This view was taken by Dawson J in *Gardner v Wallace* (1995) 184 CLR 95; 132 ALR 323 and was applied in other cases including *Thompson v Hill* (1995) 38 NSWLR 714; 22 MVR 289 and *Zhang v Renault Nationale des Usines Renault SA* [2000] NSWCA 188 (unreported, 27 July 2000, BC200004224).

77 *M'Elroy v M'Allister* 1949 SC 110 at 126; *Haumschild v Continental Casualty Co* 7 Wis 2d 130 at 141–2; 95 NW 2d 814 at 820 (1959); *Pfau v Trent Aluminium Co* 55 NJ 2d 511; 263 A 2d 129 at 136–7 (1970). These are the cases cited by Collins, above n 13, p 73. For critical analysis of these cases, see R Yezerski, 'Renvoi Rejected? The meaning of the "lex loci delicti" after *Zhang*' (2004) 26 *Syd L Rev* 273 at 283–4.

78 The most significant of which is *Richards v United States* 369 US 1 at 11 (1962), a decision of the US Supreme Court, which has been followed in numerous lower court decisions (see the cases cited in J A Shapiro, 'Choice of Law Under the Federal Tort Claims Act: *Richards* and Renvoi Revisited' (1992) 70 *North Carolina L Rev* 641). See also *Braxton v Anco Electric, Inc* 330 NC 124; 409 SE 2d 914 (1991) (cited by Symeonides, Perdue and von Mehren, above n 30, pp 76–8).

79 Collins, above n 13, p 73 n 48; North and Fawcett, above n 13, p 64 n 13.

80 1949 SC 110 at 126.

it was not necessary to consider renvoi in intra-Australian cases.<sup>81</sup> In *MMI v Neilson* McLure J observed that this was because ‘the choice of law rules are the same throughout the Federation’.<sup>82</sup>

There is very little academic discussion about the applicability of renvoi in torts specifically. A few texts briefly state that it is regarded as unavailable;<sup>83</sup> where authority is cited it is invariably *M’Elroy v M’Allister*.<sup>84</sup> There is academic commentary which argues that renvoi should be applied to torts. Inglis’s view was that double renvoi should be generally applicable.<sup>85</sup> The only detailed discussion of renvoi in tort specifically is by Briggs, who argues enthusiastically for the application of double renvoi.<sup>86</sup>

## B Implications for renvoi from *Renault v Zhang*

McLure J stated in *MMI v Neilson* that the clear implication from *Renault v Zhang* was that renvoi should not apply in international tort.<sup>87</sup> With respect, the implication is not necessarily so clear. The stated justifications for the decision in *Renault v Zhang* that the law of the place of the tort was to be applied in international torts do not make it clear whether the High Court meant a reference to foreign law to include its choice of law rules or not. The justifications for the application of the law of the place of the tort to which the members of the joint judgment specifically referred in *Renault v Zhang* were that it avoids ‘parochialism and systematic unfairness to defendants’;<sup>88</sup> that it respects the territorial sovereignty of other states;<sup>89</sup> and that it promotes certainty.<sup>90</sup> On the question of the governing law, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ concluded that:

the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the *lex loci delicti* should be extended to foreign torts, despite the absence of the significant factor of federal considerations.<sup>91</sup>

Other relevant justifications for applying the law of the place of the tort which are identified in *Pfeiffer v Rogerson*, and incorporated by reference in *Renault v Zhang*,<sup>92</sup> are giving effect to the reasonable expectations of the

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81 [1991] ACTSC 117 (unreported, Higgins J, 20 December 1991) at [50].

82 *MMI v Neilson* (2004) 28 WAR 206 at [27].

83 Tilbury, Davis and Opeskin, above n 23, p 1012 (citing no authority). Most of the Australian texts do not discuss whether renvoi does or should apply to torts specifically: Nygh and Davies, above n 13; Sykes and Pryles, above n 14; Davies, Ricketson and Lindell, above n 14. Academic discussion of the issue in England has been effectively superseded by s 9(5) of the Private International Law (Miscellaneous Provisions) Act 1995 (UK), which makes it clear that a reference to foreign law is a reference to the internal law.

84 Law Commissions, Working Paper, above n 54, p 244 [2.18].

85 Inglis, above n 17, at 502.

86 Briggs, above n 22.

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

88 *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [63].

89 *Ibid.*, at [64].

90 *Ibid.*, at [66].

91 *Ibid.*, at [75].

92 In *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 there is an extended discussion of the effect of the Constitution, the nature of federal jurisdiction and the fact of federation

parties;<sup>93</sup> predictability;<sup>94</sup> and uniformity of outcome.<sup>95</sup> The justifications identified in *Renault v Zhang* and *Pfeiffer v Rogerson* do not clearly indicate whether the choice of law rules of the foreign legal system should be considered. It is at least arguable that they support the application of double renvoi.<sup>96</sup>

The justifications given in *Renault v Zhang* do not clearly indicate that the law of the place of the tort should mean only its internal law. Parochialism is not avoided by taking an unrealistic approach to what is meant by foreign 'law'. If the forum resolves an international dispute using rules which recognise the international nature of the dispute, it shows a lack of respect for foreign legal systems to refer only to their rules which would apply if the dispute were domestic. Respect for territorial sovereignty surely requires that the whole of the law of the place of the tort must be consulted. It would be absurd to pretend to defer to the territorial sovereignty of China, but to refuse to implement the legal solution which is required under Chinese law. It is hard to see how territorial sovereignty can realistically be observed other than by giving effect to the foreign law's total solution to the problem.

In *MMI v Neilson*, McLure J's opinion was that potential difficulties in ascertaining the foreign court's choice of law rules established that double renvoi was an impediment to achieving certainty.<sup>97</sup> As discussed above, the joint judgment in *Renault v Zhang* accepts that such difficulties are inherent in a rule which holds foreign law applicable. Requiring the parties to prove foreign choice of law rules is not qualitatively different from requiring proof of foreign dispositive rules and this should not be seen to add an unacceptable level of uncertainty.

The relevant justifications given in *Pfeiffer v Rogerson* similarly do not clearly indicate that a reference to foreign law must mean its internal rules. In *Pfeiffer v Rogerson* the High Court referred to the reasonable expectations of the parties as a justification for the application of the law of the place of the tort.<sup>98</sup> This is a problematic justification, not only because 'reasonableness' is such a meaningless standard, but also because there is no empirical evidence of whether any expectations are held by tortfeasors or their insurers and victims,<sup>99</sup> and if so what these expectations are. Consideration of reasonable expectations is unlikely to be particularly instructive in the area of renvoi, as very few laypeople would have any conception of the more esoteric principles of private international law. If, as the joint judgment in *Pfeiffer v Rogerson* asserts, it is reasonable to expect that the law of the place of the tort should govern local conduct, it is hard to see why the choice of law rules should be excluded.

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on the choice of law rule for intranational torts. These issues could not be relevant in international cases and are excluded from the following discussion.

<sup>93</sup> *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [75], [87].

<sup>94</sup> *Ibid.*, at [79], [83]–[84], [123], [136].

<sup>95</sup> *Ibid.*, at [83]–[86], [123].

<sup>96</sup> The argument is made by Yezereski, above n 77, at 285–90.

<sup>97</sup> *MMI v Neilson* (2004) 28 WAR 206 at [47].

<sup>98</sup> *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [75] (referring to 'reliance on the legal order in force in the law area in which people act or are exposed to risk of injury gives rise to expectations that should be protected') and [87].

<sup>99</sup> Law Commissions, Working Paper, above n 54, p 313 [4.11].

A commitment to achieving uniformity in outcomes strongly indicates that foreign choice of law rules must be considered. If the foreign choice of law rule were not applied, this would lead to a lack of uniformity which could be manipulated by the parties' choice of forum,<sup>100</sup> and this would systematically disadvantage defendants. The High Court has repeatedly declared its opposition to forum shopping by plaintiffs seeking to manipulate the outcome of litigation by forum selection.<sup>101</sup> It would seem odd if the court were to permit a similar outcome by refusing to recognise double renvoi in appropriate circumstances.<sup>102</sup>

In short, neither authority nor academic commentary on renvoi in torts is as conclusive as McLure J thought in *MMI v Neilson*. The issue simply has not been considered in sufficient detail.

## V Refining choice of law in tort

The choice of law rule enunciated in *Renault v Zhang* is superficially simpler and more certain than the rule it replaced. It is also unnecessarily blunt. Its bluntness and simplicity scarcely conceal problems which will have to be addressed in the future.<sup>103</sup> In this section, I discuss two particular refinements which will need to be considered in deciding *MMI v Neilson*. In *Collier v Rivaz*,<sup>104</sup> the case which established double renvoi, 'the doctrine of renvoi was invoked, obviously as an escape device, in order to get round the rigidity of the English conflict rule'.<sup>105</sup> McClean states that renvoi is often invoked where the choice of law rule is defective.<sup>106</sup> Nygh and Davies suggest that rather than relying on renvoi to compensate for defective choice of law rules it is preferable to reform the choice of law rules.<sup>107</sup> Although the High Court has just reformed the choice of law rules in tort, one hopes that the court will appreciate the need for further refinement to take into account the complexities of international torts.

The first desirable refinement arises because the Australian choice of law rule in tort is incomplete and lacks balance. Recent reforms to the tort choice of law rule in Canada and in the United Kingdom<sup>108</sup> influenced developments in the Australian rule.<sup>109</sup> While the High Court took into account the general

<sup>100</sup> McLure J acknowledged this in *MMI v Neilson* (2004) 28 WAR 206 at [35].

<sup>101</sup> *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [58]–[59], [83]–[84], [128]–[129], [184].

<sup>102</sup> Nygh and Davies, above n 13, p 291.

<sup>103</sup> Even the High Court acknowledged this in *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [76] and in *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [81]–[82].

<sup>104</sup> (1841) 2 Curt 855; 163 ER 608.

<sup>105</sup> D McClean, *Morris: The Conflict of Laws*, 5th ed, Sweet & Maxwell, London, 2000, p 504.

<sup>106</sup> *Ibid*, p 509.

<sup>107</sup> Nygh and Davies, above n 13, p 300. These solutions need not be mutually exclusive. The Australian Law Reform Commission recommended that renvoi be retained in international succession cases even though many of the relevant choice of law rules have been reformed: Australian Law Reform Commission, *Choice of Law*, Report No 58, 1992, p 112 [9.15].

<sup>108</sup> In Canada, by the Supreme Court's decision in *Tolofson v Jensen* [1994] 3 SCR 1022; (1994) 120 DLR (4th) 289; in the United Kingdom, by the Private International Law (Miscellaneous Provisions) Act 1995 (UK).

<sup>109</sup> *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [87], [111]–[113], [144]; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [35], [63], [116], [128].

rule in other common law countries (that the law of the place of the tort should apply), it rejected the flexible exception which is an integral part of the reforms in the United Kingdom.<sup>110</sup> The flexible exception was introduced in the United Kingdom with the intention of refining 'the basic *lex loci delicti* rule to the extent that appropriate results were achieved in an acceptably high proportion of cases'.<sup>111</sup> The Supreme Court of Canada did not reject the availability of a flexible exception in international cases.<sup>112</sup> La Forest J stated that 'because a rigid rule on the international level could give rise to injustice, in certain circumstances I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances'.<sup>113</sup> *MMI v Neilson* is arguably the kind of case in which it would be appropriate to apply a flexible exception. If it were available, the parties would not have to resort to the device of *renvoi*.

In particular, in deciding whether *renvoi* should be applied in international torts it is necessary to consider the availability of other refining devices which ensure that the choice of law rules are sufficiently flexible to do justice in the wide and diverse range of circumstances in which international torts occur. McLure J noted in *MMI v Neilson* that the English and Scottish Law Commissions recommended that *renvoi* should not apply in tort<sup>114</sup> and that the Australian Law Reform Commission made a similar recommendation.<sup>115</sup> What her Honour did not consider was that the Law Commissions also recommended that a flexible exception to the general choice of law rule should be available.<sup>116</sup> The Commissions' recommendations that *renvoi* should not apply in tort should be seen in this context; it is artificial and misleading to consider them in isolation from the second recommendation. In deciding whether *renvoi* should be applied in tort the High Court should reconsider the need for flexibility in international torts.

The second refinement is that choice of law rules should be considered in the context of their relationship to jurisdictional principles. The principles of choice of law and jurisdiction should operate sympathetically, not in opposition. It is ironic that in *Renault v Zhang* the High Court endorsed an approach to declining jurisdiction which favours forum shoppers, while claiming as one justification for the new choice of law rule that it prevents forum shopping.<sup>117</sup> There is a clear tendency in Australian law — particularly in the context of multistate torts — to treat choice of law and jurisdiction separately and to give insufficient consideration to how the principles in these

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110 Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 12.

111 Law Commissions, Working Paper, above n 54, p 138 [4.95].

112 *Tolofson v Jensen* [1994] 3 SCR 1022; (1994) 120 DLR (4th) 289 at 310, 312, 314.

113 *Ibid.*, at DLR 307–8.

114 *MMI v Neilson* (2004) 28 WAR 206 at [36]. This recommendation was implemented in Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 9(5).

115 *MMI v Neilson* (2004) 28 WAR 206 at [37]. The Australian Law Reform Commission's recommendation in relation to *renvoi* is general: ALRC, above n 107, p 30 [4.12]. The Report made no specific recommendation relating to *renvoi* in tort cases.

116 English Law Commission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict*, Report No 193, 1990, pp 333–4 [3.13] (Law Commissions, Report); Australian Law Reform Commission, above n 107, pp 50 [6.27] and 60–1 [6.62].

117 Garnett, above n 49, at 145, 156.

areas interact.<sup>118</sup> Briggs has pointed out that double renvoi can serve a very important function in controlling forum shopping if jurisdictional rules are inadequate.<sup>119</sup> The Australian principle of *forum non conveniens* is an ineffective control on forum shopping,<sup>120</sup> especially when considered in conjunction with the very broad bases on which jurisdiction may be established in international tort cases in Australian courts. Until the principles of jurisdiction are reformed, double renvoi may be an essential tool in addressing forum shopping in Australia.

Taking these refinements into account, it is timely to consider the nature of the Chinese choice of law rule in *MMI v Neilson*. The Chinese rule permits the Chinese court to apply the law of the parties' joint nationality rather than the law of the place of the tort. In addition to other considerations about the application of renvoi in international torts, there are three reasons why the Chinese choice of law rule has a good claim to be applied. First, for the purposes of deciding an issue of renvoi, one might have thought that a specific choice of law rule which is tailored to the facts of a case should be treated differently from a more general choice of law rule. The Full Court in *MMI v Neilson* did not consider the difference between the Australian and the Chinese choice of law rule and in particular that the Chinese rule is better tailored to the circumstances of the case than the Australian rule. Secondly, the fact that both parties are from a different legal system from the place of the tort is commonly given as a justification for the application of a flexible exception to the general rule in common law systems.<sup>121</sup> Thirdly, Australian jurisdictional principles which determine if the Australian court is jurisdictionally competent and whether the Australian court should exercise jurisdiction regard the parties' residences as a relevant factor. The Chinese choice of law rule, unlike the Australian rule, is sympathetic to this factor.

## VI Conclusion

There is no doubt that the choice of law rule established in *Renault v Zhang* is simple and likely in straightforward cases to lead to certain, predictable results. These are important objectives, but should they invariably dominate other important objectives of the conflict of laws? A simple rule is unlikely to respond appropriately and justly to every case; it is difficult to think of an area of law which is more varied and complex than international torts.<sup>122</sup> There is a general dissatisfaction with the existing choice of law rule, and while that sense of dissatisfaction remains, parties will continue to exploit available escape devices, including renvoi, characterisation, and the substance/procedure distinction. This comes at considerable private and

118 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 41; *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [25]; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [7], [10]. For criticism of this tendency in the context of renvoi specifically, see Briggs, above n 22, at 877–80.

119 Briggs, above n 22, at 879.

120 R Garnett, 'Stay of Proceedings in Tort: A "Clearly Inappropriate" Test?' (1999) 23 *MULR* 30.

121 Law Commissions, Report, above n 116, p 332 [3.8]; *Tolofson v Jensen* [1994] 3 SCR 1022; (1994) 120 DLR (4th) 289 at 310; Anderson, above n 49, p 9.

122 J H C Morris, 'The Proper Law of the Tort' (1951) 64 *Harv L Rev* 881 at 884.

public costs. It is to be hoped that the High Court will take the opportunity which *MMI v Neilson* presents to make refinements to the principles for choice of law in international torts.