

## “TROUBLESOME AND OBSCURE”: THE RENEWAL OF *REVOI* IN AUSTRALIA

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### A. INTRODUCTION

It was famously observed that “[j]uristic speculation” on the problem of *renvoi* “has been almost infinite”,<sup>1</sup> and there are good reasons for it. *Renvoi* is the apogee of the most distinctive concepts of private international law – the point at which conflicts rules themselves conflict and, so, call for their own conflicts rules. Fortunately, though, it would appear from the reports that adjudication that deals with the problem is much rarer. The attention that the problem of *renvoi* has received from scholars has been mercifully disproportionate to its actual incidence, and judges often either do not see it when it occurs, or see *renvoi* and ignore it.<sup>2</sup>

As a result, *renvoi*'s appearance in a Western Australian case concerning a tort in the People's Republic of China, and the case's climb to the High Court of Australia, are events of considerable legal significance.<sup>3</sup> The decisions in *Neilson v Overseas Projects Corporation of Victoria Ltd* of McKechnie J at first instance in the Supreme Court,<sup>4</sup> and of the Full Court of the Supreme Court,<sup>5</sup> have already excited some attention in the scholarly literature.<sup>6</sup> In the first volume of this journal, Andrew Lu and Lee Carroll endorsed the decision of the Full Court to reject the doctrine of *renvoi* in any of its forms.<sup>7</sup> Analysing any application of *renvoi*

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<sup>1</sup> Note, “A Distinction in the *Renvoi* Doctrine” (1922) 35 *Harvard Law Review* 454.

<sup>2</sup> Cf M Davies, S Ricketson and G Lindell, *Conflict of Laws – Commentary and Materials* (Melbourne, Butterworths, 1997), 379.

<sup>3</sup> The Australian High Court is the first final court of appeal in the Commonwealth that has had to make a decision about the doctrine of *renvoi*. The United States Supreme Court considered the doctrine in *Richards v United States* 369 US 1 (1962). For decisions in American state courts, see EF Scoles, P Hay, PJ Borchers and SC Symeonides, *Conflict of Laws* (St Paul, West Group, 3rd edn, 2000), 134–9.

<sup>4</sup> [2002] WASC 231.

<sup>5</sup> *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206.

<sup>6</sup> R Yezerksi, “*Renvoi* Rejected? The Meaning of ‘the *Lex Loci Delicti*’ After *Zhang*” (2004) 26 *Sydney Law Review* 273; A Lu and L Carroll, “Ignored No More: *Renvoi* and International Torts in Australia” (2005) 1 *Journal of Private International Law* 35; M Keyes, “The Doctrine of *Renvoi* in International Torts: *Mercantile Mutual Insurance v Neilson*” (2005) 13 *Torts Law Journal* 1.

<sup>7</sup> Lu and Carroll, *supra* n 6.

largely within the context of the Australian choice of law rules for tort, they concluded that the recognition of *renvoi* in choice of tort law would be “undesirable”.<sup>8</sup> In *John Pfeiffer Pty Ltd v Rogerson*<sup>9</sup> in 2000 and *Regie Nationale des Usines Renault SA v Zhang*<sup>10</sup> in 2002, the High Court of Australia settled that the law of the place of the tort (the *lex loci delicti*) governed all interstate and foreign tort claims in any Australian jurisdiction, and allowed no exceptions to that rule – barring one based on public policy in foreign tort claims.<sup>11</sup> Lu and Carroll argued that any allowance of *renvoi* would introduce an exception to the unbending *lex loci delicti* rule “by stealth”,<sup>12</sup> and would therefore be “internally flawed”.<sup>13</sup> About the appeal in *Neilson* that was pending before the High Court at the time they wrote, Lu and Carroll thought that “[t]here is no suggestion that the Court will so soon resile from the position it declared [in *Renault* in 2002]”.<sup>14</sup>

The High Court decided *Neilson* in September 2005,<sup>15</sup> and surprised many by emphatically endorsing, by a six–one majority, the availability of the doctrine of *renvoi* in cross-border tort cases. Five of those judges embraced the doctrine of double *renvoi*. As will become apparent in this comment, there is more in the High Court’s decision in *Neilson* (than was the case in the Western Australian courts) to suggest that the Court’s doctrine and method of proving foreign law are “internally flawed”. The rationale for endorsing *renvoi* in *Neilson* was, in short, the object of securing uniformity of outcome with – what was claimed to be – the outcome that a Chinese court would reach in the case. But whether international uniformity was genuinely realised in *Neilson* is anyone’s guess. What is certain, however, is that in adopting the claimed Chinese approach to the circumstances of *Neilson* (which was presumed to be that the law of Western Australia applied) the High Court allowed the first reported instance of the application of the *lex fori* in a cross-border tort case since the *Pfeiffer–Renault* duo were decided.<sup>16</sup> This effectively negated, for the *Neilson* proceedings themselves, the retroactive consequences of *Pfeiffer* and *Renault*, which otherwise would have imposed a short Chinese limitation period on a claim that, at the time it was brought, would have been rightly thought to have been subject to the long six-year limitation period of the *lex fori*.<sup>17</sup> However, as a result *Neilson* might well have also given Australian choice of tort law an exception “by stealth”. If so, the High Court could also be compensating for deficient doctrine that the Court

<sup>8</sup> *Ibid*, 36.

<sup>9</sup> (2000) 203 CLR 503.

<sup>10</sup> (2002) 210 CLR 491.

<sup>11</sup> *Ibid*, 516–17, 520, 528–9.

<sup>12</sup> Lu and Carroll, *supra* n 6, 64.

<sup>13</sup> *Ibid*, 66.

<sup>14</sup> *Ibid*, 64.

<sup>15</sup> (2005) 221 ALR 213.

<sup>16</sup> R Mortensen, “Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches” (forthcoming 2006) 55 *International and Comparative Law Quarterly*.

<sup>17</sup> *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

itself has insisted that Australian choice of law must have. The *Pfeiffer–Renault* rule is unique in the Commonwealth in allowing no real exceptions to the *lex loci delicti* in cross-border tort claims, even if “the centre of gravity” for the claim were to sit heavily over the forum state. In other countries the *lex fori* might be applied in a tort claim by invoking a clear, but constrained, “flexible exception” to the general choice of law rule. In Australia, nevertheless, *renvoi* is now the only means by which a court can do this. It makes Australian choice of law method more obscure, but also suggests that other countries’ courts have no reason to treat *Neilson* as persuasive – nor to be lured down the troublesome *renvoi* path.

### B. NEILSON REPRISED

Barbara Neilson was an Australian citizen, and a long-term resident of and (in Australian terms) domiciled in Western Australia. In the early 1990s Barbara’s husband, George, was employed to work in China for Overseas Projects Corporation of Victoria Ltd (OPC). OPC was a Victorian Government-owned corporation, registered in Victoria. Its insurer was Mercantile Mutual Insurance (Australia) Ltd (MMI), a company incorporated in New South Wales. George’s employment contract entitled him to a flat held by OPC in Wuhan, China, and for Barbara to accompany him there.

The two storeys of the flat in Wuhan were connected by an internal staircase that had no balustrade. The Neilsons complained to OPC about this, but no action was taken by OPC by October 1991 when, one night, Barbara fell over the edge of the staircase. She injured her back and head, and was initially hospitalised in China for three weeks. On medical advice, she returned to Australia after being discharged from hospital.

In June 1997, Barbara brought claims in the Supreme Court of Western Australia against OPC in contract and tort for occupier’s liability. MMI was joined as a third party. It is useful to note that the Supreme Court was exercising a state-based jurisdiction, and that the forum was therefore Western Australia.<sup>18</sup> The parties agreed that, if the claims were in time, Barbara was entitled to damages of AU\$300,000. Although questions of liability were dealt with at trial, the ultimate question on which *Neilson* turned was whether the claims – brought just less than six years after the accident – were time-barred. At this point, Chinese law offered some advantage to OPC and MMI. The General Principles

<sup>18</sup> There was nothing in the claims brought in *Neilson* to suggest that the Supreme Court was exercising its federal jurisdiction (which would make the forum Australia as a whole). Although there is federal diversity jurisdiction in Australia for matters between “residents” of different states, a “resident” must be a natural person. Diversity jurisdiction is therefore not being exercised where one of the parties is a corporation, or where a corporation is joined as a third party: *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22; *Rochford v Dayes* (1989) 84 ALR 405. McKechnie J’s belief that he was exercising federal diversity jurisdiction was incorrect: [2002] WASC 231, [110].

of Civil Law of the People's Republic of China provided, in Article 8, that the laws of the People's Republic applied to civil activity in China. Article 136 set a one-year limitation period for claims relating to personal injuries although, "under special circumstances", Article 137 allowed a court to extend this. By the time *Neilson* came to trial, the *Pfeiffer–Renault* duo had been decided and a claim in tort for a wrong that occurred in a foreign country would, if one of the parties could prove the relevant foreign law, be governed by the *lex loci delicti*. In all cases, this would include the *locus delicti*'s limitation period.<sup>19</sup> Unless an extension were granted under Article 137, this would have resolved the case in OPC's and MMI's favour. However, Chapter VIII of the General Principles of Civil Law set out the Chinese choice of law rules for a range of civil matters, including, in Article 146, the choice of law rule for claims in delict:

"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."

The argument for Barbara was that, by the second sentence of Article 146, the *lex loci delicti* would itself apply the law of Western Australia as the law of the country where all parties were nationals. The Western Australian limitation period (and for that matter the Victorian) was six years,<sup>20</sup> and so the claim would be within time.

As Lu and Carroll have recounted,<sup>21</sup> at first instance McKechnie J dismissed the claim in contract but allowed the claim in tort.<sup>22</sup> In light of *Renault*, the tort claim was governed by Chinese law but, for two reasons, was brought within time.<sup>23</sup> First, his Honour considered that there were "special circumstances" for an extension of the one-year limitation period under Article 137, and held that he could extend it.<sup>24</sup> This was against the expert evidence on Article 137 that had been tendered at trial. Further, McKechnie J held that the second sentence of Article 146 gave him a discretion to apply Australian law, which he did "because both parties are nationals of Australia".<sup>25</sup>

Although there is no mention of the doctrine in his Honour's judgment, in giving some application to a Chinese choice of law rule that differed from the Western Australian, McKechnie J was recognising the doctrine of *renvoi*.<sup>26</sup> MMI appealed to the Full Court of the Supreme Court,<sup>27</sup> which plainly did see the

<sup>19</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 544, 554, 571–4.

<sup>20</sup> s 38 Limitation Act 1935 (WA); s 5 Limitation of Actions Act 1958 (Vic).

<sup>21</sup> Lu and Carroll, *supra* n 6, 46–51.

<sup>22</sup> [2002] WASC 231.

<sup>23</sup> *Ibid*, [122]–[123].

<sup>24</sup> *Ibid*, [191]–[198].

<sup>25</sup> *Ibid*, [199]–[208].

<sup>26</sup> McKechnie J is not the first Australian judge effectively to invoke the doctrine of *renvoi* without being aware of it. See *In the Will of Lambe* [1972] 2 NSWLR 273.

<sup>27</sup> *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206.

*renvoi*. McLure J (with whom Johnson J and Wallwork AJ agreed)<sup>28</sup> disagreed with both of the critical conclusions in McKechnie J's judgment. Her Honour held that McKechnie J had incorrectly rejected the expert evidence on Article 137 that by Chinese principles no "special circumstances" existed to justify an extension of Article 136.<sup>29</sup> She also held that the doctrine of *renvoi* had no application in tort cases,<sup>30</sup> and was reinforced in that conclusion by the principles of territoriality, certainty and predictability informing the decision in *Renault*.<sup>31</sup> The governing law was therefore domestic Chinese law.<sup>32</sup>

In the next appeal, the High Court of Australia decided that Barbara's claim in tort was within time.<sup>33</sup> The argument that Article 136 could be extended was not pursued, so the decision rested squarely on the application of Western Australian law. Two points were essential to this result. First, by a majority of five judges (Gleeson CJ and Gummow, Hayne, Callinan and Heydon JJ) to two (McHugh and Kirby JJ), it was held that the second sentence would be applied in the present case, and that Chinese law therefore remitted the question of the applicable limitation period to the law of Western Australia. Secondly, the second sentence's remission must be accepted. Six judges (Gleeson CJ and Gummow, Hayne, Kirby, Callinan and Heydon JJ; McHugh J dissenting) accepted that the doctrine of *renvoi* was applicable in foreign tort claims.

### 1. Proof of Foreign Law

Although the question of *renvoi* will stimulate most of the interest in *Neilson*, it could not have arisen without proof that the second sentence of China's Article 146 required the application of Western Australian law as the *lex patriae*. But the necessary proof was attained by the most curious means. Assuming the adoption of any doctrine of *renvoi*, two conclusions had to be made about the second sentence for Western Australian law to apply:

1. The second sentence applied in the circumstances of *Neilson*; and
2. The national law of the parties, as that was understood in the second sentence, was the law of Western Australia.

If the doctrine of double *renvoi* were adopted, yet another conclusion had to be made.

<sup>28</sup> *Ibid.*, 222.

<sup>29</sup> *Ibid.*, 220.

<sup>30</sup> *Ibid.*, 214, 216.

<sup>31</sup> *Ibid.*, 214–16.

<sup>32</sup> *Ibid.*, 220.

<sup>33</sup> (2005) 221 ALR 213.

3. Either (a) the second sentence made reference to the domestic rules only of the law of Western Australia (ie, China has no-*renvoi*), or (b) if recognising the Western Australian choice of law rules that required the application of the law of China, the second sentence rejected the remission (ie, China rejects any *renvoi*).

Little evidence was presented at trial on any of these issues. The only expert witness, who gave evidence for OPC, was a delicts lawyer, with no special knowledge of Chinese private international law. Once the question of China's choice of law was raised by Barbara's lawyers as an afterthought, the expert hesitantly offered that a Chinese court might apply the *lex patriae* if it appeared just and reasonable that the law of the foreign country should apply instead of that of China (as the *locus delicti*).<sup>34</sup> On the last occasion when the High Court considered principles for proving foreign law – *Renault* – the majority accepted that foreign law can only be relied upon if proved by evidence.<sup>35</sup> That was where *Neilson* ended for McHugh and Kirby JJ, who accepted that the only aspects of Chinese law that had been proved were its internal law of limitation in Article 136. Barbara's claim should therefore be denied.<sup>36</sup> The majority (Gleeson CJ and Gummow, Hayne, Callinan and Heydon JJ) effectively ignored the *Renault* approach to foreign law, and claimed to adopt the presumption that, in the absence of evidence to the contrary, the foreign law is taken to be identical to the *lex fori*. The way this was to apply in *Neilson* was that the English translation of the second sentence was accepted as having been proved, but its application and effect were not. Under the presumption of identity, the meaning of the second sentence would be drawn from the English translation of Article 146 by Australian principles of statutory interpretation.<sup>37</sup> Two observations, though, can be made about this claim. First, Gleeson CJ – alone – said that the expert's evidence was "just enough" to reach the necessary conclusions.<sup>38</sup> However, nothing in the Chief Justice's reasons for holding that a Chinese court would apply Western Australian law stemmed from the expert's evidence. They were considerations that Gleeson CJ himself surmised would see the *lex patriae* applied, and so, as with the other judges in the majority, the Chief Justice actually put a partial Australian gloss on the second sentence. Secondly, the majority's claim that the second sentence would be interpreted by using Australian principles of construction was only half-true. The concepts of the *lex fori* were used selectively. There are decisive aspects of the second sentence for which Australian constructions were overlooked.

<sup>34</sup> *Ibid.*, 216–17, 241, 275. Callinan J was not sure that the cross-examination did draw this from the expert: *ibid.*, 275.

<sup>35</sup> (2002) 210 CLR 491, 518–19 (Gleeson CJ and Gaudron, McHugh, Gummow and Hayne JJ).

<sup>36</sup> (2005) 221 ALR 213, 242–3, 275–6, 280.

<sup>37</sup> *Ibid.*, 242–3, 275–6, 280.

<sup>38</sup> *Ibid.*, 217.

(a) *Conclusion 1: The Second Sentence Applies*

For the second sentence to apply, the parties had to have a common nationality or domicile. That was necessary but not sufficient, as the sentence then provided that this meant a Chinese court “may” apply the *lex patriae* or the *lex domicilii*. The majority therefore accepted that “something else” was required for this permissive exception to China’s usual *lex loci delicti* rule to be triggered. Gummow and Hayne JJ applied general principles used to exercise statutory discretions in Australia: “the relevant power or discretion would be exercised, as it would by an Australian court under an Australian statute, having regard to its scope and the object for which it was conferred.”<sup>39</sup> This is where the majority gave the second sentence its Australian gloss. They were led to conclude that the *lex patriae* would be applied after assessing a range of different, but overlapping, considerations: relations between the parties had been created in Australia; the Chinese authorities and Chinese interests were unaffected by the litigation (Gleeson CJ);<sup>40</sup> all parties were Australian; the condition of the flat was not relevant (Gummow and Hayne JJ);<sup>41</sup> OPC was owned by an Australian government; there might be a need to interpret a contract made in Australia; the cost and quality of medical treatment would be measured by Australian standards; Chinese nationals would not be giving evidence; the outcome of the case would be of no interest to Chinese lawmakers; and there was no allegation of any breach of Chinese building laws or of Chinese laws of occupier’s liability (Callinan and Heydon JJ).<sup>42</sup>

(b) *Conclusion 2: The National Law of the Parties was Western Australian*

The Court generally viewed this conclusion as problematic,<sup>43</sup> as time limitation on tort claims is not, within the Australian federation, a matter of any national concern. There was in *Neilson* no evidence before the courts as to how Chinese law understood nationality. The second sentence’s reference to the *lex patriae* would have met what Falconbridge called the problem of nationality in “pluri-legislative territorial units”,<sup>44</sup> which Commonwealth courts have tried to solve by assuming (effectively by reference to the *lex fori*) that places of some prior domicile are the places of nationality.<sup>45</sup> However, this would not have worked in

<sup>39</sup> *Ibid*, 242–3, citing *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 75–76.

<sup>40</sup> *Ibid*, 217.

<sup>41</sup> *Ibid*, 243.

<sup>42</sup> *Ibid*, 276. The last consideration was patently incorrect as, by the time of the appeal to the Australian High Court, all parties had accepted that, the limitation period to one side, there was liability (whether that would be determined by Chinese or Western Australian law).

<sup>43</sup> *Ibid*, 215, 216, 234, 253, 261, 266, 271.

<sup>44</sup> JD Falconbridge, *Conflict of Laws* (Toronto, Canada Law Book Co, 2nd edn, 1954), 199; JD Falconbridge, “*Renvoi and the Law of Domicile*” (1941) 19 *Canadian Bar Review* 311.

<sup>45</sup> *Simmons v Simmons* (1917) 17 SR (NSW) 419; *Re O’Keefe, deceased* [1940] Ch 124.

*Neilson*, as personal injuries law (including time limitations) is a state legislative concern and the Australian law of domicile would have all three parties domiciled in different states.<sup>46</sup> Indeed, the Australian concept of nationality would not have helped either, as citizenship cannot be held by a corporation like OPC or MMI.<sup>47</sup> And even if the concept of Australian nationality were stretched to include Australian-registered and held corporations, the common Australian nationality would not have given an applicable *lex patriae* as there is no national law of limitation in tort claims unless the court is exercising federal jurisdiction.<sup>48</sup> A Chinese court would certainly not be exercising Australian federal jurisdiction when trying to determine what the Australian national law on limitation would be.<sup>49</sup> Evidently, the presumption of identity with the *lex fori* had to be abandoned for the majority to reach conclusion 2. The parties had merely assumed that the “national law” was Western Australian, an assumption that was helped by the fact that the Victorian limitation period, at the time, was also six years.<sup>50</sup>

(c) *Conclusion 3: China Uses a Theory of No-Renvoi*

As will be seen below, the conclusion that only the internal law of Western Australia would be applied by a Chinese court was necessary for any judges who adopted the doctrine of double *renvoi*, and five did. All reached conclusion 3a, that the second sentence, in having the claim governed by the *lex patriae*, limited that to the internal rules of the *lex patriae*.<sup>51</sup> Accordingly, from the Chinese perspective there was no *renvoi*. Gleeson CJ and Heydon J inferred this from the text of the second sentence. Its reference to the *lex patriae* being “applied” meant that this was the law that would determine rights and responsibilities.<sup>52</sup> Gleeson CJ also believed that there was “no reason of policy” why a Chinese court would not apply the law of Western Australia.<sup>53</sup> Gummow and Hayne JJ noted that

<sup>46</sup> PE Nygh and M Davies, *Conflict of Laws in Australia* (Sydney, Butterworths, 7th edn, 2002), 247. “Australian” domicile can only arise in relation to an exercise of federal legislative power: *Lloyd v Lloyd* [1962] VR 70. There has been no exercise of federal power in the field of tort, and the opportunity to do so would be extremely limited. The only previous Australian tort case in which domicile had been considered relevant was *Warren v Warren* [1972] Qd R 386, where a defence of interspousal immunity to a tort claim was dealt with by the law of the *state* where the parties were domiciled.

<sup>47</sup> Australian Citizenship Act 1948 (Cth); Nygh and Davies, *supra* n 46, 262–70.

<sup>48</sup> In which case it applies the limitation period of the state in which it is sitting: ss 79, 80 Judiciary Act 1903 (Cth).

<sup>49</sup> Even the Western Australian court in *Neilson* was not exercising federal jurisdiction: see *supra* n 18.

<sup>50</sup> Australian courts are not bound to accept the parties’ agreed assumptions about the content of the foreign law if the assumptions are plainly untenable: *Damberg v Damberg* (2001) 52 NSWLR 492. In this case, the assumption of common nationality was, with little doubt, incompatible with Australian law, so there are good reasons to suggest that the High Court did not have to accept it.

<sup>51</sup> Lu and Carroll, *supra* n 6, provide some support for the possibility that China actually does recognise *renvoi*.

<sup>52</sup> (2005) 221 ALR 213, 217, 282–83.

<sup>53</sup> *Ibid.*, 219.

there was no evidence that the second sentence would make any reference to the forum's choice of law rules and that Article 146's choice of another law was a final reference out of the Chinese legal system altogether.<sup>54</sup> Callinan J, who adopted the doctrine of single *renvoi*, did not have to reach conclusion 3, but still preferred avoiding any further complication that would arise if it were assumed that the law of China recognised the problem of *renvoi*.<sup>55</sup>

Arguably, the method adopted for proving the content of Article 146 belies the reasons for identifying foreign law and, for that matter, for the *Neilson* Court's adoption of the doctrine of the double *renvoi*. This *lex patriae* rule began with an unofficial English translation of China's General Principles. It then subjected the translation to Australian principles of judicial discretion, but only used the *lex fori* to a point. This gloss was then buffed by incorrect assumptions that the parties made about Australian nationality, and then, returning to the translation, technical inferences about the meaning of the word "applied". This "Chinese" choice of law rule was therefore really a hotchpotch. The best that can be said about this is that we can have little confidence that the rule accurately reflects any Chinese court's approach to the second sentence. The worst, is that the rule was invented to get to the *lex fori*. And the only reason why this syncretic method of constructing the foreign choice of law rule was even possible is that it is allowed – even forced – by the recognition of the doctrine of double *renvoi*.

## 2. Renvoi

### (a) *The Whole Law*

"[T]he *lex loci delicti* is the whole of the law of that place."<sup>56</sup> Gummow and Hayne JJ's rationale for the use of the doctrine of *renvoi* in Australian choice of tort law accepted that, if the *locus delicti* identified by the Australian forum's choice of law rule included a choice of law rule that would have the matter governed by the law of some place other than the *locus*, effect would have to be given to that foreign selection as well. This view of the scope of the selected *lex* was taken by all of the other judges, except McHugh J.<sup>57</sup> Even Kirby J, who dissented because he could not accept that Barbara had proved that Chinese law did remit the question of limitation to the law of Western Australia, thought that the Western Australian choice of law rule requiring application of the *lex loci delicti* "suggests a reference to *all* of the law of that place that local courts would normally apply in deciding the proceedings, were such proceedings commenced there."<sup>58</sup> More will be said of the logic of this claim below, but it at least implies that, if the foreign

<sup>54</sup> *Ibid*, 244.

<sup>55</sup> *Ibid*, 277.

<sup>56</sup> *Ibid*, 238.

<sup>57</sup> *Ibid*, 217–18, 274, 278–9, 281–82.

<sup>58</sup> *Ibid*, 256.

choice of law rule is proved, the forum's choice of law rules should pick it up when making their initial selection of the *lex loci delicti*.

(b) *Double Renvoi*

The doctrine of double *renvoi* – also known as the foreign court theory – is that the forum court will determine the rights and liabilities of the parties in the same way that, according to the evidence on foreign law accepted by the forum court, a court in the relevant foreign country would. In other words, the forum court adopts the *result* that the foreign court would presumably reach. That seems simple enough, except that it means that it becomes necessary to identify the foreign jurisdiction's choice of law rules and how the foreign law deals with the problem of *renvoi* that the circumstances of the case in hand are going to present to it. In *Neilson* the doctrine of double *renvoi* was accepted by a majority of five judges – including Kirby J, who dissented in the result. Therefore, once the forum's choice of law rule pointed to the application of a foreign law, Gummow and Hayne JJ thought that “basic considerations of justice require that, as far as possible, the rights and obligations of the parties should be the same whether the dispute is litigated in the courts of that foreign jurisdiction or is determined in the Australian forum.”<sup>59</sup> Gleeson CJ and Kirby and Heydon JJ made similar observations about the need, under the method of Australian choice of tort law, to piggyback on the result that it seemed that the foreign court would reach.<sup>60</sup> And the local judge had to be scrupulous in matching the presumed decision of the foreign court. Although, at trial, McKechnie J tried something like that in claiming to be able to extend the Chinese limitation period, his mistake, according to the High Court, had been “to step in the shoes of a foreign judge, exercising that judge's powers as if sitting in the foreign court”.<sup>61</sup> There was probably enough in the past decisions of common law courts to suggest the judge could do that,<sup>62</sup> but the identification with the foreign court's presumed decision was not precise enough for the High Court. As Kirby J put it, the role of the Western Australian judge “was to ascertain, according to the evidence or other available sources, how the foreign court itself would have resolved the substantive rights of the parties in an hypothetical trial conducted before it.”<sup>63</sup>

<sup>59</sup> *Ibid.*, 235.

<sup>60</sup> *Ibid.*, 217–18, 257, 260, 261, 281–82.

<sup>61</sup> *Ibid.*, 260 (Kirby J). See also *ibid.*, 217–18, 240, 274, 282.

<sup>62</sup> In *Collier v Rivaz* (1841) 2 Curt 855, 863; 163 ER 608, 611, Sir Herbert Jenner, although seeming to adopt the doctrine of single *renvoi*, said on a remission from Belgian law that “[t]he Court sitting here [in England] . . . decides as it would if sitting in Belgium”.

<sup>63</sup> (2005) 221 ALR 213, 260.

(c) *Single Renvoi*

Callinan J noted the problem of the *circulus inextricabilis* if the Western Australian choice of law rule selected the law of China as the governing law, only to find that the law of China would require Western Australian law to apply and that it would recognise the Western Australian choice of law rule that referred the question to the law of China.<sup>64</sup> Unlike the other judges of the majority in *Neilson*, Callinan J thought that a solution that was not “entirely satisfactory intellectually and in logic” had to be adopted.<sup>65</sup> He therefore preferred to break the *circulus* by accepting the *renvoi*. “[T]he right course to adopt here is for the Australian courts to accept the (likely) Chinese reference to Australian law in accordance with the practice of most jurisdictions.”<sup>66</sup> The plain rationale for Callinan J’s adoption of the theory of single *renvoi* was the priority that it gave to application of the *lex fori*.

“[I]f the evidence shows that the foreign Court would be likely to apply Australian law by reason of its choice of law rules or discretions, then the Australian common-law of torts should govern the action. This is a solution which offers finality, and limits the need to search for and apply foreign law.”<sup>67</sup>

It therefore appears that Callinan J did not necessarily endorse the use of single *renvoi* in the case of a transmission, at least if the third jurisdiction were not another Australian state or territory.

(d) *No-Renvoi*

The only judge in the *Neilson* appeal to the High Court who believed it best not to allow the problem of *renvoi* at all was McHugh J. As has been noted, McHugh J held that Barbara had not managed to prove the content of the Chinese choice of law rule. However, his Honour would not have given effect to any foreign choice of law rule even if it had been proved by evidence placed before the court. Rejecting the doctrine of *renvoi* was most compatible with the *Pfeiffer–Renault* duo, and consequently any remission suggested by the second sentence could not be invoked so as to apply the Western Australian limitation period. The reference to the *lex loci delicti* was therefore, in all cases, a reference to the domestic law of the *locus delicti*. In *Neilson*, this was Article 136 and, accordingly, the claim was out of time.<sup>68</sup>

McHugh J denied that it was possible for a forum court to apply the whole of the *lex loci delicti*.<sup>69</sup> If the Western Australian court were to apply the doctrine of single *renvoi*, it would not apply the whole of the foreign law in that it would not

<sup>64</sup> *Ibid.*, 277.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, 278.

<sup>67</sup> *Ibid.*, 278–79.

<sup>68</sup> *Ibid.*, 229.

<sup>69</sup> *Ibid.*, 227.

apply the foreign law's approach to *renvoi*.<sup>70</sup> The doctrine of the double *renvoi* would break down completely if also adopted by the relevant foreign legal system, or if the foreign legal system's approach to *renvoi* had not been proved by evidence presented to the court. McHugh J accepted that the doctrine of double *renvoi* would work if the foreign law either rejected the doctrine of *renvoi* altogether, or had a theory of single *renvoi*,<sup>71</sup> but gave no reasons why double *renvoi* should not be accepted in a case like that.

### C. *RENOI'S* RENEWAL – A REVIEW

In suggesting that the academic literature had probably exhausted the arguments for and against the doctrine of *renvoi*, Sir Otto Kahn-Freund may have been close to the mark.<sup>72</sup> *Neilson*, I suggest, merely reinforces our understanding of the shortcomings of the doctrine of *renvoi*, and especially of double *renvoi*. However, the literature tends to concentrate on the conceptual difficulties with the doctrine. It is usually assumed that the forum court knows the foreign law and, specifically, knows its choice of law rules. This is not necessarily, or even commonly, the case. If, as in *Neilson*, the foreign domestic law is to the defendant's advantage, it will be the defendant who initially raises the foreign law in the pleadings and who presents the evidence needed to prove it. It may only be at the time of trial that the claimant becomes conscious that there is a potential advantage in proving a remission to the *lex fori* – as also happened in *Neilson* – by which time it could be too late to muster favourable expert evidence on the point. So, while the conceptual difficulties with the doctrine certainly loom large in the High Court's decision in *Neilson*, the case also shows how troublesome the doctrine can be when the foreign law is not proved, or only proved in part.

#### 1. The Whole Law

The conceptual source of the problem of *renvoi* continues to be the claim that, when the forum's choice of law rule selects the foreign law for the determination of the case, the forum court's duty is to apply the *whole* of the foreign law. This was the rationale of the support for double *renvoi* by the *Neilson* majority, who claimed not only to "see" the whole of the Chinese law but also to give effect to the whole of the Chinese law relevant to a delictual claim.<sup>73</sup>

<sup>70</sup> *Ibid*, 228.

<sup>71</sup> *Ibid*, 225–26.

<sup>72</sup> O Kahn-Freund, *General Problems of Private International Law* (Leyden, Sijthoff, 1976), 285. Although note the subsequent introduction of game theory to the debate in L Kramer, "Return of the *Renvoi*" (1991) 66 *New York University Law Review* 979.

<sup>73</sup> *Ibid*, 217–18, 238–39, 274, 278–79, 281–82.

However, the High Court did no such thing. The very method adopted in a *renvoi* case belies the claim that the whole of the foreign law is being applied, and in this respect *Neilson* was no exception. If the distinction between “internal rules” and “choice of law rules” is maintained – and both protagonists and antagonists of the doctrine of *renvoi* effectively maintain it – then it is simply not possible to apply the whole of the foreign law. Internal and choice of law rules are mutually exclusive in application,<sup>74</sup> and frequently in definition.<sup>75</sup> The internal rules will dispose of the issue before the court. The choice of law rules will select a jurisdiction but, in themselves, will not show how the case will be determined. They enable a choice to be made between alternative bodies of internal laws that, if the choice is of practical significance, give different dispositions of the issue that has to be determined.<sup>76</sup> It is possible that a forum court might apply both the internal rules and choice of law rules of the relevant foreign law at the same time, but only when the forum and foreign choice of law rules select the same *lex causae*, or, in other words, where the foreign law applies, what is from its own perspective, the *lex fori*.<sup>77</sup> If, in *Neilson*, the Western Australian court applied the first sentence of Article 146 (which like the forum’s choice of law rule required application of the *lex loci delicti*) and Article 136, then both the internal and choice of law rules of the People’s Republic would have been applied.

This is not what happens when *renvoi* arises, as it is only a difference between the effect of the forum’s and the foreign country’s choice of law rules that gives the doctrine life.<sup>78</sup> Here, the question is whether the forum’s choice of law rules select, to the exclusion of the other, the internal rules of the foreign country or its choice of law rules. This is old conflicts lore,<sup>79</sup> but in *Neilson* the High Court missed the point altogether.<sup>80</sup> Even McHugh J, who denied that it was ever possible to apply the whole of the selected foreign law,<sup>81</sup> did not see that the option of rejecting the doctrine of *renvoi* or of adopting some version of it

<sup>74</sup> EH Abbot, “Is the *Renvoi* a Part of the Common Law” (1908) 24 *Law Quarterly Review* 133, 135.

<sup>75</sup> See section 6(1) of the Wills Act 1963 (UK), which defines “internal law” as “the law that would apply in a case where no question of the law in force in any other territory or State arose.” The provision is replicated in all Australian jurisdictions: R Mortensen, *Private International Law* (Sydney, Butterworths, 2000), 314. In s 9(5) of the Private International Law (Miscellaneous Provisions) Act 1995 (UK), “the internal law” is called “the applicable law” and is similarly defined as exclusive of “any choice of law rules”.

<sup>76</sup> Abbot, *supra* n 74, 135. See also WR Lederman, “Classification in Private International Law” (1951) 29 *Canadian Bar Review* 1, 15–16, where the terms “dispositive rules” and “indicative rules” are used instead.

<sup>77</sup> Abbot, *supra* n 74, 136.

<sup>78</sup> Cf Lu and Carroll, *supra* n 6, 62, 64, where it is believed that *renvoi* could arise even where both places have a *lex loci delicti* rule. This would only be the case if the two places ascribed different *loci* to the wrong.

<sup>79</sup> Abbot, *supra* n 74.

<sup>80</sup> Even though literature that acknowledged this analysis of the *lex* was cited, the consequences of the analysis were not mentioned: (2005) 221 ALR 213, 234–35, 243–44.

<sup>81</sup> *Ibid.*, 227–9.

required the forum, through its choice of law rule, to prefer one aspect of the foreign law over another. The option was seen, though, with remarkable clarity, in the Full Court of the Supreme Court, where McLure J noted that the role of the *Pfeiffer–Renault* choice of law rule was to identify “the law applicable to the determination of the relevant substantive rights in dispute (the *lex causae*)” and “not the jurisdiction or law area which in turn will identify (or facilitate the identification of) the *lex causae*.”<sup>82</sup> However, the High Court inverted the Full Court’s priorities. Accordingly, the approved method is now that, if the content of the foreign law proved to the forum court allows it, the role of the Australian choice of law rule is to select a foreign choice of law rule that itself chooses the law of a jurisdiction that will give a rule that will dispose of the case. Of course, if the foreign choice of law rule is not known to the forum court, then the foreign internal rules will be applied with no reference to the problem of *renvoi*. But after *Neilson*, if more of the foreign law is proved to the court, the forum choice of law rule must pick up the foreign choice of law rule in preference to the foreign internal rules.

Once the role of choice of law rules is expressed in this way, the policy weakness of *Neilson* immediately becomes evident. Having to select one aspect of the foreign law instead of another, why would the Australian choice of law rule choose the foreign choice of law rule over its internal rules? Or, in the context of *Neilson*, what policy reasons would suggest that the Western Australian *lex loci delicti* rule should prefer application of China’s *lex patriae* rule over its one-year limitation period for personal injuries claims in delict? The answer must be, none that the High Court had previously considered significant in cross-border tort cases.

#### (a) *The Logic of Choice of Law Policy*

The question can be addressed both in the abstract and in the policy context of *Pfeiffer–Renault*. If the forum’s choice of law rule is informed by a given set and arrangement of policies then, in most cases, it risks compromising those policies if it is taken to prefer a selection of a different choice of law rule that is, presumably, shaped by a different set or arrangement of policies. To illustrate with the more common scenario of *renvoi* cases – the civil codes have emphasised nationality as a connection for questions of succession to movable property, where the common law, whether by accident or design, has required them to be dealt with by the law of a place with which the deceased had a thicker connection – the *lex domicilii*.<sup>83</sup> If, by an Australian state’s use of single or double *renvoi*, a New Caledonian *lex domicilii* is taken to mean New Caledonia’s selection of the *lex*

<sup>82</sup> *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 216.

<sup>83</sup> Ie, because domicile requires both residence and an intention to reside indefinitely in the place, where nationality usually requires no physical association with the place.

*patriae*, the Australian forum has to some extent abandoned its policy preference for the matter to be determined by a place with which the deceased had a substantial personal connection in favour of one where the connection was possibly only formal.<sup>84</sup> And because the doctrine of *renvoi* functions irrespective of the nature of the connection preferred by the foreign law, there is a good chance the conflicts policies of the forum will defer to those of the foreign law – no matter how far removed from the forum’s policies they might be.

(b) *Uniformity – a Second-Order Policy*

If the forum’s choice of law policy is to give overriding effect to uniformity of outcome with the foreign place then, despite the argument just made, it can certainly be said to be respecting forum policy while also, through *renvoi*, giving effect to the selected foreign country’s choice of law policies. However, uniformity of outcome cannot stand as the sole policy rationale for a choice of law rule. It would not tell us why, in a foreign succession case, the choice of law rule should first select the *lex domicilii* instead of, say, the *lex patriae*, the law of the place of death or some other foreign system. Although uniformity of outcome was a relevant policy consideration in *Pfeiffer* and *Renault*,<sup>85</sup> it could not have been significant for the shaping of the *lex loci delicti* rule. Uniformity could not even be first in sequence in the set of policies that, together, were held to direct how a tort case was to be decided, as it cannot by itself single out one foreign legal system for the initial reference made by a conflicts rule in a cross-border case. Why, in a tort case, should a Western Australian judge even be asking whether uniformity of outcome with the decision of a Chinese court is worthwhile, unless some *other* policy first makes the Chinese legal system relevant to the decision? It is territoriality, above all, that takes us to the *locus delicti*. And it is territoriality, and possibly other related considerations like party expectations, which are therefore first-order jurisdiction-selecting policies that initially bring us to the point of asking whether the forum court’s decision in the case should, in the interests of international uniformity of outcome, defer to the *forum delicti*’s presumed decision in the case. If the forum court decides that it must defer to the foreign court’s different choice of law rule, then it may well be giving effect to a second-order policy of uniformity but, in doing so, must also displace the first-order policy of territoriality that made decisional harmony with the *forum delicti*, instead of the courts of some other country, relevant in the first place.

<sup>84</sup> *Simmons v Simmons* (1917) 17 SR (NSW) 419.

<sup>85</sup> I.e., to the extent that the High Court wished to discourage forum shopping: (2000) 203 CLR 503, 532, 539, 552–53; (2002) 210 CLR 491, 533–34, 538.

*(c) Policies for Choice of Tort Law*

Naturally, the forum's choice of law rules, especially if of a common-law source, might have no articulated policy basis.<sup>86</sup> A choice of law rule might just have emerged by the habit of adjudication, and might only persist by the weight of precedent. Even if that point is conceded, it does not defeat the argument that the use of *renvoi* in *Neilson* was misconceived. In tort cases, especially in Australia, there is a strong argument that *renvoi* necessarily means there is a blasé predetermination that forum choice of law policy is to be discarded. In the *Pfeiffer–Renault* duo, the High Court, forced into the position through its own confusing adjudication on choice of tort law in the 1990s,<sup>87</sup> explored at length the policies that should inform the selection of the governing law for, first, interstate torts and, then, foreign wrongs. The policy reasons that were determinative in *Pfeiffer* were the territorial claims of the local lawmaker, pre-litigation expectations, certainty, predictability and the deterrence of forum shopping.<sup>88</sup> In *Renault*, certainty of result was the overriding policy objective that the court adopted for foreign tort cases,<sup>89</sup> although the need to align the choice of law rule for foreign wrongs with that for interstate torts was also significant.<sup>90</sup> In a concurring judgment, Kirby J also gave weight to territoriality, expectations in cross-border travel, simplicity and the deterrence of forum shopping.<sup>91</sup> Importantly for the present, though, is that the Court conclusively determined that the rule that best realised that policy set, and the relative priority that should be given to each of those policies, was one that selected the *lex loci delicti* – with no exceptions.

As soon as the High Court applied the *lex fori* in a cross-border tort case, it began to dismantle the policy substructure of *Pfeiffer–Renault* and to allow litigation to be directed by principles that are substandard by its own measures. In *Neilson*, only Gummow, Hayne and Kirby JJ referred to the policies of the *Pfeiffer–Renault* duo when justifying the use of *renvoi* in a tort case. Gummow and Hayne JJ claimed that certainty and simplicity were better served by the use of *renvoi* than by ignoring it. The tortuous method by which the Court got to apply the *lex fori* in *Neilson* itself makes this claim hard to swallow, but Gummow and Hayne JJ thought that ignoring the *renvoi* “does not assist certainty and simplicity because it requires the law of the forum to divide the rules of the foreign legal system between those rules that are to be applied by the forum and those that are not.”<sup>92</sup> Along with Kirby J, their Honours believed that *renvoi* avoids this need to

<sup>86</sup> Cf F Juenger, *Choice of Law and Multistate Justice* (London, Martinus Nijhoff, 1993), 135–36.

<sup>87</sup> *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433. The confusion that resulted from these decisions is recounted in M Davies, “Exactly What is the Australian Choice of Law Rule in Torts Cases?” (1996) 70 *Australian Law Journal* 711.

<sup>88</sup> (2000) 203 CLR 503, 532, 533–34, 536, 538–40, 541, 544, 552–53, 560.

<sup>89</sup> (2002) 210 CLR 491, 517.

<sup>90</sup> *Ibid.*, 515–16, 535–36.

<sup>91</sup> *Ibid.*, 533–4, 535–6, 537–8.

<sup>92</sup> (2005) 221 ALR 213, 236.

draw lines inside the foreign law by requiring the whole of the foreign law to be applied.<sup>93</sup> However, my central argument is that *renvoi* does not involve application of the whole of the foreign law and, in fact, that it demands that the court make, and give effect to, the very distinction in the foreign law that Gummow and Hayne JJ said should not be imposed on it. Whatever approach is taken, the foreign law's choice of law and internal rules may have to be distinguished. And only part of the foreign law – in Gummow and Hayne JJ's words, “an incomplete and incoherent reflection of the law of that place”<sup>94</sup> – can be applied whether there is no-*renvoi* or otherwise. It certainly may not always be clear where to draw the line, but it only becomes more important to know in some detail what falls on either side of the line when, as now in Australian jurisdictions, the forum has adopted the doctrine of *renvoi*. Oddly, in *Neilson* Gummow and Hayne JJ also endorsed the idea that, in foreign tort cases, less significance should be given to the application of a personal law.<sup>95</sup> The decision nevertheless elevated a formal-personal law – the *lex patriae* – over the policies of territoriality, giving effect to party expectations and, I would argue, certainty and predictability that were more significant in shaping the *Pfeiffer-Renault* rule in the first place.

(d) *The Priority of Internal Rules*

Accordingly, if a choice of law rule is to select only one aspect of the foreign law to the exclusion of the other, it is better to select its internal rules. Dr Keyes, in a mild defence of double *renvoi*, suggests that this argument, that *renvoi* necessarily compromises the forum's choice of law rules, applies equally where the internal law is selected. This also involves a “diminution of sovereignty” on the part of the forum court, a deference to foreign laws.<sup>96</sup> While this is true, it still does not answer the question why, if a choice must be made (within a forum choice of law rule) between a foreign choice of law rule and a foreign internal rule, preference is given to the choice of law rule. All choice of law rules have an object of identifying a system of municipal law that is best placed to dispose of the case, and in that respect are inherently designed to unleash the different set of policies represented by internal laws. A foreign choice of law rule, however, has a similar purpose to the forum choice of law rule, even if its underlying first-order policies see it select a different *lex causae* to that preferred by the forum. We require the first-order policies that inform choice of law rules and internal rules to be different. We have more reason to question the policy assessments made when rules that ostensibly function for the same purpose differ. Where the purpose of a choice of law rule is to identify the more appropriate law for dealing with litigation, the “irresistible” choice is therefore no-*renvoi*.<sup>97</sup> It barely seems credible that

<sup>93</sup> *Ibid.*, 236, 256.

<sup>94</sup> *Ibid.*, 236–37.

<sup>95</sup> *Ibid.*, [238].

<sup>96</sup> Keyes, *supra* n 6, 6.

<sup>97</sup> Lu and Carroll, *supra* n 6, 63; Kramer, *supra* n 72, 1029, 1044.

the role of a forum choice of law rule could just be to make the first hop to a foreign law, indifferent to where it is next to step and jump in the search for an appropriate *lex causae*.

The expressed objective of choice of law in *Neilson* was uniformity of outcome or “decisional harmony” – the aim of achieving in an Australian forum the result that would be achieved in a relevant foreign court.<sup>98</sup> The traditional expression of this objective in the doctrine of double *renvoi* not only aims to adopt the result that the foreign law would suggest, but also aims to adopt the result that a *court* in the foreign place would reach. Accordingly, the only policy that influenced the development of the *Pfeiffer–Renault* rule that can also be regarded as formally relevant to the decision in *Neilson* is the deterrence of forum shopping. Kirby J still acknowledged in *Neilson* the importance of territoriality, and of the general expectations of the parties that the *lex loci delicti* will govern their respective rights and liabilities, but seems deliberately to have subordinated these policies to the second-order policy of uniformity.<sup>99</sup> If the High Court really did in *Neilson* what it claimed to be doing, it was aiming to give a result that was not influenced by the choice of forum. However, given the uncertainties surrounding the proof of “Chinese” choice of law, we can have little confidence that this is what the Court achieved. And why uniformity, which can never stand alone as a choice of law policy, should be given this priority is unclear. It means that the primary policies of territoriality, expectations and, I suggest, predictability, certainty and simplicity were discarded after the initial reference to the foreign law was made. The order in which they were sequenced in the *Pfeiffer–Renault* duo was therefore reconfigured. There is nevertheless a more direct, accurate and efficient way of finding the result that the foreign court would reach than by choice of law and the doctrine of *renvoi*. This should lead us to doubt whether there is a sensible place for uniformity in choice of law at all.

## 2. Free Riding

As a means of dealing with the possibility of remission or transmission, the doctrine of double *renvoi* is “scarcely a solution at all”.<sup>100</sup> It is a judicial abdication of any responsibility for finding a solution, ostensibly made to secure uniformity of outcome. The logical defects of the approach are well known. To be persuaded, like the High Court of Australia has been, that the doctrine of double *renvoi* is the best approach to take to *renvoi*, it must be equally confident that foreign lawmakers have been persuaded that it is *not* the best approach to take. For double *renvoi* only works when the foreign law is able to direct, in the circumstances of the case, a decision that is independent of the forum court. There are

<sup>98</sup> (2005) 221 ALR 213, 217–18, 235, 257, 260, 261, 281–82.

<sup>99</sup> *Ibid.*, 256.

<sup>100</sup> EI Sykes and MC Pryles, *Australian Private International Law* (Sydney, Law Book Co, 3rd edn, 1991), 220.

two immediate problems with that assumption, both of which converge in *Neilson*. The first is that it is manifestly obvious that Australia is not the only place to have been persuaded that double *renvoi* is the best response to the potential for remission or transmission.<sup>101</sup> It is English in origin and, although largely only applied in trial judge decisions until *Neilson*,<sup>102</sup> assumed to be the likely approach in most of the common-law Commonwealth. True, choice of law rules are relatively uniform across these countries, and so *renvoi* is less likely to arise between them. However, there is sufficient divergence in choice of law rules in the traditional *renvoi* fields of succession and marriage for the possibility of a *renvoi* to occur.<sup>103</sup> The problem when the foreign law uses the doctrine of double *renvoi* is that, in deciding how the foreign court would decide the case, it meets the foreign court's assumption that its decision will depend on how the forum court will decide the case. This is mutual deference – a stalemate. Neither place's laws can "move" in the metaphorical exchange that occurs in *renvoi* cases. Secondly, is the implicit assumption in double *renvoi* theory that the foreign law has resolved how a *renvoi* case before it would be resolved (by some means other than double *renvoi*). The ambiguities of the law, the complexity and obscurity of the issues, and the competing policy considerations of different approaches to *renvoi* are likely to be as alive in other countries as they were in Australia, and there is a high risk that the foreign law's approach to *renvoi* will be as uncertain as Australia's was until *Neilson*. This difficulty has been confronted before in decisions where there was conflicting evidence on how the foreign law would approach the problem. It led to the tragically comic role-plays of *Re Duke of Wellington*<sup>104</sup> and *Estate of Fuld; Hartley v Fuld (No 3)*,<sup>105</sup> where English judges had to imagine how a Spanish or German judge would, with uncertainty in the foreign laws, decide the question of *renvoi* – as long as it was by any method other than England's. *Neilson*, however, is worse. For, unlike *Duke of Wellington* or *Fuld*, the Western Australian courts were confronted with no evidence whatsoever on how Chinese law would deal with the problem of *renvoi*. According to the High Court in *Renault*, the usual approach, where there is no evidence on point, is to apply the law of the forum as the court would in a purely domestic case.<sup>106</sup> In *Neilson*, McHugh J thought that the problem with this was that, as the Australian approach to *renvoi* was, now,

<sup>101</sup> Cf EN Griswold, "Renvoi Revisited" (1938) 51 *Harvard Law Review* 1165, 1190–2, where it was suggested that the problem of the two jurisdictions using double *renvoi* had not yet arisen, and therefore should not interfere with its present adoption in the forum court.

<sup>102</sup> Cf *Kotia v Nahas* [1941] AC 403, 413 where, in an appeal to the Privy Council from Palestine, double *renvoi* was given *obiter* support.

<sup>103</sup> At the time of writing, the Australian states had adopted uniform Defamation Acts that required national (and so cross-border) defamations to be dealt with by the law of the one state or territory "with which the harm . . . has its closest connection" (s 11), although the federal territories still applied the common law *lex loci delicti* rule. A *renvoi* is possible in this scenario.

<sup>104</sup> [1947] 1 Ch 506, 515–21.

<sup>105</sup> [1968] P 675, 701–02.

<sup>106</sup> (2002) 210 CLR 491, 518–19.

the doctrine of double *renvoi*, the court would have to assume that China would also use double *renvoi*. The consequence? Stalemate.<sup>107</sup> And if there is stalemate, then the court only has three options. Either it can adopt a different approach to *renvoi* in all cases (as McHugh J would have). Or, secondly, it can adopt a different approach to *renvoi* in proven cases of stalemate, thereby only abandoning the objective of uniformity where, because the foreign court has a similar high regard for uniformity, the mutual deference of the courts to each others' decisions means that uniformity cannot be achieved. That, though, would only further complicate an already obscure choice of law method. The third response to stalemate is that the court can do its best, even by surreptitious means, to avoid having the foreign law look as though it uses double *renvoi*.

In truth, the evidential problems of *Neilson* did not require the Court to go as far as McHugh J's stalemate. The evidence that a Chinese court would have applied the *lex patriae* was as silent as the evidence on a Chinese approach to solving *renvoi*, and so the Court could have safely assumed there was not even a potential remission.<sup>108</sup> However, once the High Court satisfied itself that there was a "Chinese" choice of law rule that required application of the law of Western Australia, the problem of finding a Chinese approach to *renvoi* became more onerous than even the task of sifting the evidence of foreign law in *Duke of Wellington* or *Fuld*. Hence the majority concluded that the Chinese choice of law rule, as interpreted by Australian principles, ignored any *renvoi* from Western Australia's choice of law rule. If the presumption of identity is used, no evidence of whether the second sentence would recognise the Western Australian choice of law rule should see it presumed that the Chinese court used double *renvoi*. Gummow and Hayne JJ, though, made a negative presumption. No evidence that the second sentence incorporated a doctrine of *renvoi* led, according to their Honours, to the inference that the forum's approach did *not* apply.<sup>109</sup> This looks like the third response to stalemate.

### 3. The Homing Trend

Professor Cowan observed that, despite persistent criticism, the "troublesome and obscure" doctrine of *renvoi* continued to exist. In itself, its durability lent support to the suspicion that "*renvoi* fills a vital practical need in the field of the conflict of laws".<sup>110</sup> That need, though, is less commonly identified as realising the objective of international uniformity of outcome (which was the articulated

<sup>107</sup> (2005) 221 ALR 213, 225. McHugh J called it "infinite regression". This term was first really used, and is more appropriate, for a case where the two countries involved use the doctrine of single *renvoi*: TA Cowan, "Renvoi Does Not Involve a Logical Fallacy" (1938) 87 *University of Pennsylvania Law Review* 34, 47; EN Griswold, "In Reply to Mr Cowan's Views on Renvoi" (1939) 87 *University of Pennsylvania Law Review* 257, 257.

<sup>108</sup> As McHugh and Kirby JJ actually determined: (2005) 221 ALR 213, 229–30, 266.

<sup>109</sup> *Ibid.*, 244.

<sup>110</sup> Cowan, *supra* n 107, 34, 35.

rationale of *Neilson*) than that “the ends of justice will be served just as well, if not better, by the application of the familiar law of the forum rather than the unfamiliar law of a foreign jurisdiction” (which was the actual result of *Neilson*).<sup>111</sup> It is difficult to leave a close reading of *Neilson* without getting the impression that the High Court made all efforts to have the *lex fori* – Western Australian law – apply to the case. Every unprecedented step taken by the High Court carefully laid a pathway to the forum. The recognition of the doctrine of *renvoi* (whether single or double) in a tort case, for the first time, made evidence of a foreign choice of law rule admissible. In failing to accept that inadequate evidence about the second sentence meant that, in accordance with the principles of *Renault*, it should be ignored, the Court gave the Chinese choice of law rule some small purchase in the proceedings. Its application of Australian principles of construction to the text of the second sentence was highly selective. There are too many tenuous links in this chain to dispel the suspicion that the majority were endeavouring to apply the *lex fori*.

There is a good reason why, at times, a cross-border tort case should be governed by the *lex fori*. That reason is that the “centre of gravity” for the proceedings lies so clearly over the forum that the territorial pull of the *lex loci delicti* is exceptionally weak. This preferably occurs at the point where applying the *lex loci delicti* would upset reasonable party expectations (held at the time of the wrong) about the law that would govern their rights and liabilities. *Neilson* was no such case. Indeed, it was an unconvincing case for the application of the *lex fori*. An assessment of the geographic contacts of the case with various jurisdictions does not put *Neilson*’s “centre of gravity” over Western Australia. The *only* contact the case had with the state was the plaintiff’s residence. This, for instance, would not be sufficient to allow the *lex fori* to be applied under the “flexible exceptions” to the United Kingdom’s<sup>112</sup> or Canada’s *lex loci delicti* rules where, at the barest minimum, all parties would have to be forum-residents. In Canada, much more than that would now be required before the “injustice” of the *lex loci delicti* would allow the *lex fori* to be applied instead.<sup>113</sup>

The slim connections between the proceedings in *Neilson* and Western Australia were, nevertheless, cloaked by the good fortune that Victoria, which arguably had thicker contacts with the litigation, also had a six-year limitation period at the time the proceedings were commenced.<sup>114</sup> There was no loss to OPC to concede that, if somewhere in Australia provided the *lex patriae*, it was Western Australia. The point might well have been contested if, as is now the case, Victoria had a three-year limitation on personal injuries claims,<sup>115</sup> or if the defen-

<sup>111</sup> *Ibid.*, 34.

<sup>112</sup> *Garland v Simmons* [2001] 1 WLR 1003; cf *Hulse v Chambers* [2002] 1 All ER (Comm) 812; *Roerig v Valiant Travellers Limited* [2002] 1 All ER 961; *Harding v Wealands* [2005] 1 All ER 415.

<sup>113</sup> *Wong v Lee* (2002) 211 DLR (4th) 69; *Somers v Fournier* (2002) 214 DLR (4th) 611.

<sup>114</sup> S 5 Limitation of Actions Act 1958 (Vic).

<sup>115</sup> S 3(2) Limitation of Actions (Amendment) Act 2002 (Vic).

dant, like the insurer, had been incorporated in New South Wales, which had a three-year limitation period at the time the proceedings were commenced.<sup>116</sup> As has been seen, even the High Court majority were uncomfortable with the assumption that Western Australia was the place of nationality.<sup>117</sup> They did not have to accept the concession,<sup>118</sup> but did. Viewed purely in terms of “proper law” or “centre of gravity” considerations, *Neilson* is therefore one of the more extreme cases in which a Commonwealth court has applied the *lex fori* in contemporary cross-border tort litigation.<sup>119</sup> Still, we have become used to the High Court of Australia lamenting the evils of forum shopping while stating doctrine that then sees the *lex fori* applied.<sup>120</sup>

#### D. ENVOI

*Neilson v Overseas Projects Corporation of Victoria Ltd* may help to reinforce, across the Commonwealth, the predominance of double *renvoi* in areas of choice of law where remission or transmission has been recognised. It may also help to challenge the view that the categories in which *renvoi* is available are closed and limited to marriage, legitimation and succession.<sup>121</sup> In Australia, *renvoi* is now part of the law of tort. Outside Australia its relevance to cross-border tort claims is possible, but more doubtful – especially if, as in most cases, *renvoi* would assist application of the *lex fori*. The double actionability rule of *Boys v Chaplin*,<sup>122</sup> which must be assumed to direct the approach taken by many Commonwealth courts, already makes reference to the *lex fori*. The United Kingdom has expressly excluded the possibility of invoking *renvoi* for claims governed by the Private International Law (Miscellaneous Provisions) Act 1995.<sup>123</sup> And the Canadian choice of law rule, which is the closest to the Australian, allows an exception in favour of the relevant Canadian forum where “injustice” might be caused by applying the *lex loci delicti* in foreign tort cases.<sup>124</sup> In tort cases, other countries have more transparent and efficient means of applying the *lex fori* in exceptional cases.

<sup>116</sup> S 18A Limitation Act 1969 (NSW).

<sup>117</sup> (2005) 221 ALR 213, 215, 216, 234, 253, 261, 266, 271.

<sup>118</sup> See *supra* n 50.

<sup>119</sup> Cf *Gill v Gill* 2000 BCSC 870.

<sup>120</sup> *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 212; *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 23, 29, 50; *Sievens v Head* (1993) 176 CLR 433, 452.

<sup>121</sup> Cf *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, 1008.

<sup>122</sup> [1971] AC 356.

<sup>123</sup> S 9(5) Private International Law (Miscellaneous Provisions) Act 1995 (UK). The proposed “Rome II Regulation” for the European Union, in Article 20, also prohibits the use of *renvoi* for choice of law relating to non-contractual obligations within the EU: see Lu and Carroll, *supra* n 6, 41–42. The exclusion of *renvoi* is maintained by the Commission in its revised Rome II proposal in Article 21, see COM (2006) 83 final.

<sup>124</sup> *Tolofson v Jensen* [1994] 3 SCR 1022, 1054.

The High Court insisted that its adoption of double *renvoi* was not to be regarded as a statement of choice of law method for all cross-border proceedings in Australia.<sup>125</sup> However, there is nothing in the rationale for double *renvoi* – the selection of the “whole” of the *lex causae*<sup>126</sup> or the objective of international decisional harmony<sup>127</sup> – that is peculiar to the law of tort. *Renvoi* is potentially revived for, and extended to, any cross-border claims for which legislation does not prohibit it.

This would be a most unfortunate development, because it is possible – and I would put the chances no higher – that the use of *renvoi* in *Neilson* was motivated by the situation of the litigants in the case itself and, even more likely, by constraints peculiar to Australian choice of law doctrine. This also strongly suggests that courts in other parts of the Commonwealth should be careful not to treat *Neilson* as persuasive authority. Furthermore, if international decisional harmony is a worthy goal of private international law, other Commonwealth countries have other means that are both more accurate, and less expensive, for finding the decision of the foreign court.

### 1. *Neilson*: Negating Retroactivity

When Barbara’s claims were brought in the Supreme Court of Western Australia in 1997, most Australian lawyers would have rightly assumed that questions of time limitation in cross-border proceedings were generally procedural, and governed by the *lex fori*. The High Court had said so in 1991.<sup>128</sup> Two decisions turned the rules against Barbara by the time her claims got to trial. *Pfeiffer* made all questions of limitation matters of substance, governed by the *lex causae*.<sup>129</sup> *Renault* made the *lex causae* in claims involving foreign wrongs the *lex loci delicti*, and confirmed that questions of time limitation were for the *locus delicti*.<sup>130</sup> The claims in *Neilson*, like many others that were pending, were caught by the retroactive effect of law reform made by common law adjudication.<sup>131</sup> In practical respects, the High Court’s decision in *Neilson* therefore eliminated the problem that the retroactive consequences of *Pfeiffer–Renault* would upset the particular expectations that all parties would have had that, once proceedings were commenced in Western Australia, that state’s own limitation period would apply. Admittedly, there is no indication in the judgments in *Neilson* that the retroactivity of *Pfeiffer–Renault* worried the Court. There is, though, some suggestion by McKechnie J, at trial, that a preference for the *lex fori* also helped to vindicate the injured party’s claim – which is much the same thing.<sup>132</sup>

<sup>125</sup> (2005) 221 ALR 213, 237–38, 257, 283.

<sup>126</sup> *Ibid.*, 217–18, 238, 274, 278–79, 281–82.

<sup>127</sup> *Ibid.*, 217–18, 235, 257, 260, 261, 281–82.

<sup>128</sup> *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

<sup>129</sup> (2000) 203 CLR 513, 544, 554, 571–74.

<sup>130</sup> (2002) 210 CLR 491, 520.

<sup>131</sup> Mortensen, *supra* n 16.

<sup>132</sup> [2002] WASC 231, [205].

## 2. Australian Choice of Law Doctrine: The Absence of Exceptions

The High Court of Australia has gone to great lengths to develop choice of law rules in tort cases that intentionally differ from those of other Commonwealth countries, but has thereby also painted itself into a corner from which there is no conventional escape. It therefore used double *renvoi* – a desperate escape to the *lex fori* – and now allows the admission of evidence on foreign choice of law and foreign approaches to *renvoi*. The means of getting to apply the *lex fori*, or to achieve international uniformity, in *any* tort case therefore depend solely on the expensive, time-consuming, uncertain, and contested evidence of foreign experts in private international law. And that still gives no reasonable assurance that the foreign law is presented accurately.

If the reason for adopting *renvoi* was to allow application of the *lex fori*, then a “flexible exception” in favour of the *lex fori* must still be preferred for Australian choice of tort law.<sup>133</sup> *Renault*, however, denied a place for any exceptions to the *lex loci delicti* rule other than one based on public policy.<sup>134</sup> As the *lex loci delicti* had to be applied, only a means of referring to the law of the forum that was inside the *lex* itself was a logical possibility. That is precisely what *renvoi* does. Commenting on earlier stages of *Neilson*, Keyes therefore argued that the use of *renvoi* corrected the unusual inflexibility of the Australian rule for choice of law in foreign tort litigation.<sup>135</sup> This may be, but if the aim is to get to the *lex fori* then there are more certain and efficient ways of doing it. A flexible exception has two distinct advantages over *renvoi*, especially if it is an exception in the Canadian mould that only allows the *lex fori* to be applied – and only when the forum contacts are overwhelming and “injustice” would otherwise be caused.<sup>136</sup> First, the decision to apply the *lex fori* is a question of law, determined by reference to the less contestable geographic contacts of the case. Secondly, unlike *renvoi*, the Canadian exception does not allow reference to a third legal system. In most cases, the *lex fori* is where *renvoi* will end the *circulus*. But it need not, and the legitimacy of transmission was recognised in *Neilson*<sup>137</sup> (although Callinan J may have limited this to a transmission to another Australian state or territory).<sup>138</sup> Interestingly, soon after *Neilson* was decided, the Supreme Court of Canada dealt with *Castillo v*

<sup>133</sup> Lu and Carroll, *supra* n 6, 56; R Anderson, “International Torts in the High Court of Australia” (2002) 10 *Torts Law Journal* 132, 140–41; G Davis, “*John Pfeiffer Pty Ltd v Rogerson*: Choice of Law in Tort at the Dawning of the 21st Century” (2000) 24 *Melbourne University Law Review* 982, 1014–15; E James, “*John Pfeiffer Pty Ltd v Rogerson*: The Certainty of ‘Federal’ Choice of Law Rules for Intra-national Torts: Limitations, Implications and a Few Complications” (2001) 23 *Sydney Law Review* 145, 146, 163; G Lindell, “*Regie National des Usines Renault SA v Zhang*” (2002) 3 *Melbourne Journal of International Law* 362, 372–3.

<sup>134</sup> (2002) 210 CLR 491, 516. The basic choice of law rule was stated in even more categorical terms in *Neilson*: (2005) 221 ALR 213, 230, 235–36, 248, 255–56, 273–74.

<sup>135</sup> Keyes, *supra* n 6, 14–15.

<sup>136</sup> *Wong v Lee* (2002) 211 DLR (4th) 69; *Somers v Fournier* (2002) 214 DLR (4th) 611.

<sup>137</sup> (2005) 221 ALR 213, 238–39.

<sup>138</sup> *Ibid.*, 278–79.

*Castillo*,<sup>139</sup> which also involved the application of a foreign – Californian – one-year limitation period that barred a claim in tort relating to personal injuries. The Canadian Court was evidently less perturbed by the one-year limitation period than the Australian Court was,<sup>140</sup> but if it had been concerned that the limitation period was too short, the Canadian flexible – or “injustice” – exception was more likely to be the means of applying the *lex fori* than the introduction of *renvoi*. Although “flexible”, the exception marks more distinctly the threshold for the suitability of applying the *lex fori* to the claim and, as a result, could also serve as a doctrinal constraint on arguments that *renvoi*, which gives no such signal, could give a Canadian court an alternative path to the *lex fori*. *Castillo* therefore helps to show that, viewed only in terms of its result, *Neilson* was a weak case for application of the *lex fori*. It also reinforces that an exception like Canada’s gives home-grown principles for identifying more clearly when a case is an appropriate one for the *lex fori*, instead of leaving it to the unpredictable qualities of the foreign choice of law rule and the uncertainties of proving it.

### 3. Foreign Court Principles of Jurisdiction

The stated objective of the High Court in *Neilson* was not, though, the application of Western Australian law, but decisional harmony, in a relatively strict sense, with the presumed outcome of the foreign court.<sup>141</sup> In form, the doctrine of double *renvoi* gives total deference to the decision of the foreign court. Professor Briggs, again in a defence of *renvoi*, has noted how in this respect double *renvoi* complements the role of the doctrine of *forum non conveniens* – at least as that was stated in the *Spiliada* case.<sup>142</sup> The *Spiliada* doctrine also intends that litigation should be decided as it would in the most appropriate court but, through the mechanism of a conditional stay or dismissal of proceedings, by relocating the proceedings there and having the foreign court actually decide them. In *Neilson*, Kirby J thought that a court in China would be a “clearly more appropriate forum” for hearing the case<sup>143</sup> and Callinan J, although not conceding so much, acknowledged that it would be better placed to decide the questions of Chinese law.<sup>144</sup> The key point is that, if the foreign court’s decision deserves deference to the point that other local policies must comprehensively give way to it, then it is better that the claim be heard in the foreign court itself. Uniformity of outcome is a policy best left to principles of jurisdiction, and best excluded from principles of choice of law. Those Commonwealth courts that do use the

<sup>139</sup> 2005 SCC 83.

<sup>140</sup> *Tolofson v Jensen* [1994] 3 SCR 1022 itself dealt with short limitation periods within Canada. (2005) 221 ALR 213, 217–18, 235, 257, 260, 261, 281–82.

<sup>142</sup> *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460; A Briggs, “In Praise and Defence of *Renvoi*” (1998) 47 *International and Comparative Law Quarterly* 877, 879.

<sup>143</sup> (2005) 221 ALR 213, 246.

<sup>144</sup> *Ibid.*, 276.

*Spiliada* principles for determining whether to stay or dismiss proceedings therefore have a more direct, accurate and efficient means of deferring to the decisions of the foreign court.<sup>145</sup> They also have good reasons to refuse the adoption of double *renvoi*; a comparatively clumsy way of realising the same policy. Australian courts have reached the same point in interstate cases, in which forum selection is governed almost exclusively by the *Spiliada* principles.<sup>146</sup> If the case relates to an interstate tort, the High Court has held that the courts of the *locus delicti* are prima facie to be regarded as the most appropriate to determine the proceedings and the questions of law that govern them. Proceedings are likely to be transferred to the state *forum delicti* from the less appropriate state.<sup>147</sup> The same logic applies in international litigation, but the same principles do not. The High Court has rejected *Spiliada* for determining whether international proceedings should be retained by Australian courts. Its principles of *forum non conveniens* in international cases remain notoriously parochial, and will often allow the local court to retain the proceedings even where the foreign court is “clearly more appropriate”.<sup>148</sup> *Neilson* shows that the High Court is using the doctrine of double *renvoi* to do the work in international cases that the *Spiliada* principles of *forum non conveniens* do in interstate cases, and do better. Lu and Carroll’s prediction was that the adoption of *renvoi* in *Neilson* would make choice of tort law “internally flawed”.<sup>149</sup> Assessed against what reformed principles of international jurisdiction could achieve more accurately and with less fuss, *Neilson* also adds to the internal flaws of Australian private international law as a whole.

<sup>145</sup> Canada: *Amchem Products Inc v British Columbia (Workers’ Compensation Board)* [1993] 1 SCR 897, 931. New Zealand: *Club Méditerranée NZ v Wendell* [1989] 1 NZLR 216. Singapore: *Brinkerhoff Maritime Drilling Corporation v PT Airfast Services Indonesia* [1992] 2 SLR 776; *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97.

<sup>146</sup> *BHP Billiton Ltd v Schultz* (2004) 211 ALR 523.

<sup>147</sup> *Ibid*, 528, 549, 563, 564, 585–6.

<sup>148</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 558; cf Lu and Carroll, *supra* n 6, 63.

<sup>149</sup> Lu and Carroll, *supra* n 6, 66.