The Territorial Application of Statutes

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INTRODUCTION

Many statutes lay down rules of substantive law without any indication of their application in space; statutes are often expressed in general terms such as 'all contracts', 'any agreement', 'any will', or 'any conduct'. These general words must be given a limited territorial meaning because the Parliaments of the United Kingdom and Australia do not legislate for the whole world.[1] However, a statute may have extraterritorial operation. This occurs when a statute operates on persons, property or matters outside the territory of the enacting Parliament.[2]

In a case in which such a statute is relevant and there is an international element which is also relevant, the court may have to consider two issues:

(1) does the statute have extraterritorial operation; and

(2) what is the territorial scope of the statute?

These two issues, whilst related,[3] are distinct and should be addressed separately.[4]

If a court, when confronted by a foreign or domestic statute which employs general language, addresses the first issue then whatever the answer is the

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[1] *Mynott* v *Barnard* (1939) 62 CLR 68, 73 per Latham CJ; *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 22–3 per Kitto J (McTiernan and Windeyer JJ agreeing), 30–1 per Taylor J; *The Apollon* (1821) 9 Wheat 362; 22 US 111; 6 L ed 361 (S Ct) (1824), 370 per Story J; *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1126 per Lord Bridge of Harwich, 1136–8 per Lord Griffiths, and 1145–8 per Lord Jauncey of Tullichettle; *Re Doyle (dec'd); Ex Parte Brien* v *Doyle* (1993) 112 ALR 653; L Collins, *Dicey and Morris on the Conflict of Laws* (12th ed, 1993) 16–17; and FAR Bennion, *Statutory Interpretation* (2nd ed, 1992) 766–8; MC Pryles, 'The Applicability of Statutes to Multistate Transactions' (1972) 46 ALJ 629, 630–7.

[2] *The Attorney General* v *Australian Agricultural Company* (1934) 34 SR (NSW) 571, 577; AE Anton, *Private International Law* (2nd ed, 1990) 90–3; PH Lane, *A Manual of Australian Constitutional Law* (5th ed, 1991) 13; and Bennion, op cit (fn 1) 255–78, especially 257.

[3] DS Kelly, *Localising Rules in the Conflict of Laws* (1974) 79–80, and see infra.

[4] *Mynott* v *Barnard* (1939) 62 CLR 68, 76–7 per Latham CJ; *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1933) 50 CLR 581, 600; Bennion, op cit (fn 1) 223–78; E Sykes and MC Pryles, *Australian Private International Law* (3rd ed, 1991) 241–6 where the authors discuss exclusively the territorial scope of a statute; Kelly, op cit (fn 3) 79–80; and Pryles, op cit (fn 1) 630–7. In *Moran* v *Pyle National (Canada) Ltd* (1973) 43 DLR (3d) 239 the Court was exclusively concerned with the territorial scope of the statute in question in that case.

court may, be it explicitly or implicitly, determine the territorial scope of the statute, ie the first issue can receive merely a yes/no answer or a detailed answer, and in the event of the latter it may be that the answer to the second issue is also revealed.[5]

If we were solely concerned with a common law[6] cause of action[7] then both of these issues would be irrelevant and we would refer directly to private international law to determine the applicable law.[8] The disparate treatment of common law and statutory causes of action appears, at least prima facie, to be incongruous.[9] The conundrum being that a statutory cause of action being a private right created by a civil enactment[10] is for almost all other purposes the equivalent of a common law cause of action and it would appear that both should be regulated in their application to cases with a foreign element by the same rules.[11]

It is pertinent at this juncture to note that there is a distinction between 'procedural jurisdiction' and 'substantive jurisdiction' which is relevant if a court is considering a statutory cause of action or right.[12] The former is jurisdiction in the sense of amenability of the defendant to the court's writ.[13] The latter is jurisdiction in the sense of entertainment of disputes as to a particular subject matter.[14] Provisions which provide for 'exorbitant' or 'long

[5] Infra.

[6] Vis-a-vis a cause of action created by statute.

[7] The term 'cause of action' is used in this article to describe the legal consequences of a factual situation — the action available to a plaintiff — not the factual situation itself: cf *Letang* v *Cooper* [1964] 2 All ER 929, 934.

[8] For example P North and JJ Fawcett, *Cheshire and North's Private International Law* (12th ed, 1992) 8; and Dicey and Morris (1993) 3–4. However, it appears that some judges and jurists hold the view that the common law itself is territorial in a sense not governed by the rules of private international law but rather by a version of the presumption against extraterritorial legislation: *Clayton* v *Clayton* [1937] SC 619, 627 per Lord Normand; Kelly, op cit (fn 3) 6–7; Anton, op cit (fn 2) 94; and Bennion, op cit (fn 1) 255. Contrast O Kahn-Freund 'Reflections on Public Policy in the English Conflict of Laws' (1953) 39 *Transactions of the Grotius Society* 39, 59; and Sykes and Pryles, op cit (fn 1) 244, fn 216.

[9] Kahn-Freund, op cit (fn 8) 59.

[10] Vis-a-vis a criminal enactment.

[11] Compare Kahn-Freund, op cit (fn 8) 59–65; Bennion, op cit (fn 9) 258, 264, 269; and *Broom* v *Morgan* [1953] 1 All ER 849, 854 per Denning LJ; cf *Dennick* v *Central Railroad Company of New Jersey* 103 US 11; 26 L ed 439 (S Ct) (1880) 441.

[12] *David Syme & Co Ltd* v *Grey* (1992) 115 ALR 247, 256–7 per Gummow J; *Flaherty* v *Girgis* (1987) 162 CLR 574, 598 per Mason ACJ, Wilson and Dawson JJ; *Tycoon Holdings* v *Trencor Jetco Inc* (1992) 34 FCR 31, 37, specifically addressing the RFC version of O 11 and the *Trade Practices Act* 1974 (not Part VA); *Weber* v *Aidone* (1981) 36 ALR 345, 347 per Gibbs CJ; *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612, 649–50, 654 (S Ct) per Scalia J (O'Connor, Kennedy and Thomas JJ agreeing) in a dissenting judgment; and *Inter-provincial Cooperatives and Dryden Chemicals Ltd* v *R* [1976] 1 SCR 477, 498 per Laskin CJC (Judson and Spence JJ concurring) dissenting. Compare *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1135 per Lord Bridge of Harwich; *Myer Emporium Ltd* v *Commissioner of Stamp Duties* (1967) 87 WN (Pt 2) (NSW) 115, 130 per Walsh JA (Jacobs JA agreeing); GB Born and D Westin, *International Civil Litigation in US Courts* (2nd ed, 1992) 27ff, 541–2; JJ Fawcett, 'Products Liability In Private International Law: A European Perspective' (1993) *Recueil des Cours* 229–30. Contrast semble Sykes and Pryles, op cit (fn 4) 20; and AI Tonking and LM Castle, *Australian Trade Practices Reporter* (1991), para 14–900.

[13] Ibid.

[14] Ibid.

arm' jurisdiction such as the British RSC 0 11 r 1 and its Australian equivalents do not provide a court with jurisdiction over the subject matter of the action. If the plaintiff's cause of action is statutory the issue of substantive jurisdiction will be resolved by application of one of the three methods outlined below, viz the presumption against extraterritorial legislation, the purposive approach to the legislation, and the application of the rules of private international law.[15] Therefore it appears that the ability to effect service of proceedings on a foreign defendant under a long arm service provision such as RSC 0 11 r 1 will not conclusively establish the application of a statute of the forum to either the dispute or the foreign defendant.[16] It is 'substantive jurisdiction' when the plaintiff's cause of action is statutory with which this article deals.[17]

A number of commentators have suggested that it would seem unreasonable that a manufacturer engaged solely in production for the domestic market should be subjected to liability which may be more onerous than under their domestic law merely because in a particular case their product was exported without their knowledge.[18] These commentators have suggested that a condition of liability should be created to the effect that the person sued knew, or could reasonably foresee, that their product would be exported.[19] This condition would appear to be akin to a specialised version of the 'stream of commerce' requirement which the US Supreme Court has imposed in suits, most notably product liability litigation, against foreign defendants in American courts.[20] This requirement is based upon the court's interpretation of the fourteenth amendment to the US Constitution.[21] No similar principle has been developed by Anglo-Australian courts and no similar basis for such a requirement yet exists.[22] Accordingly, it appears that if the requirements of substantive and procedural jurisdiction can be established against a foreigner who intends to engage solely in domestic activity, then it can be made liable pursuant to either a forum statute or a parallel negligence action.[23]

[15] Infra. If the plaintiff's cause of action is at common law then the rules of private international law merely determine which jurisdiction's laws are applicable.

[16] *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1135 per Lord Bridge of Harwich (Lords Griffiths, Ackner and Lowry agreeing); semble *David Syme & Co Ltd* v *Grey* (1992) 115 ALR 247, 257–60 per Gummow J; cf *Theophile* v *Solicitor General* [1950] AC 186, 195 per Lord Porter; semble *Davidsson* v *Hill* [1901] 2 KB 606, 613–15 (DC) per Kennedy J (Phillimore J agreeing). Contrast semble *Williams* v *The Society of Lloyd's* [1994] 1 VR 274, 310.

[17] For example Dicey and Morris, op cit (fn 1) Ch 11 for a discussion of 'procedural jurisdiction'.

[18] For example DJ Harland, 'Products Liability And International Trade Law' (1977) 8 *Sydney Law Review* 358, 370; semble R Nelson-Jones and P Stewart, *Product Liabilty: The new law under the Consumer Protection Act 1987* (1988) 98.

[19] Harland, loc cit (fn 18); semble Nelson-Jones, op cit (fn 18) 98; United Nations, *Commission on International Trade Law Report* (1975) para 67.

[20] Born and Westin, op cit (fn 12) 78ff, especially 94 fn 4.

[21] Id 69.

[22] Compare SW Cavanagh and CS Phegan, *Product Liability in Australia* (1983) 241; Harland, op cit (fn 18) 370, and *MacGregor* v *Application des Gaz* [1976] Qd R 175, 176–7. Contrast *Moran* v *Pyle Nahonal (Canada) Ltd* (1973) 43 DLR (3d) 239, 250–1.

[23] Compare Harland, op cit (fn 18) 370.

In the USA, a discussion of the territorial scope or extraterritorial operation of a statute may well necessitate a discussion of issues such as the effects doctrine[24] and the legislative jurisdiction of a country.[25] However, at least in more modern times,[26] neither English nor Australian courts have given any weight to these considerations nor have they adopted the US effects doctrine approach.[27]

[24] The 'effects doctrine' is a putative principle of international law that provides that a state has jurisdiction to make its laws applicable to 'activity outside the state, but having or intended to have substantial effect within the state's territory': American Law Institute, *Restatement Foreign Relations Law* (3rd ed, 1987) vol 1, 239; Born and Westin, op cit (fn 12) 573.

[25] For example *United States* v *Aluminium Co of America* 148 Fed Rep 2d 416 (1945), 443 per Learned Hand J for the Court, *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612, 638–9 (S Ct) per Souter J (Rehnquist CJ, White, Blackum and Stevens JJ agreeing) in a majority judgment; Born and Westin, op cit (fn 12) 4–13, 572ff; American Law Institute, op cit (fn 24) 235–54; *Ahlstrom* v *Commission of the European Communities Joined Cases 89 to 129/85* (1988 — V) ECR 5193, 5220–24. However, it appears that during this century the issue of the legislative jurisdiction of a country has become less significant in the determination of the extraterritorial operation of American statutes: Born and Westin, op cit (fn 12) 586–8, 590–3, 611; and American Law Institute, op cit (fn 24) vol 1, 235–37. A possible explanation for the utilisation of these principles in American decisions vis-a-vis their lack of treatment in Anglo-Australian decisions is that it appears that US courts have equated the US Constitution's limits on the extraterritorial operation of US law with those imposed by international law: Born and Westin, op cit (fn 12) 589.

[26] That is, since early this century: MC Pryles, 'The Basis of Adjudicatory Competence in Private International Law' (1972) 21 ICLQ 61, 62–6.

[27] For example *Barcelo* v *Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 423ff per Dixon J, 410 per Starke J; *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 595–6 per Gavan Duffy CJ and Starke J (dissenting), 601 per Dixon J; *In re Seagull Co Ltd* [1993] Ch 345, 354–5 (CA) per Peter Gibson J (Lloyd and Hirst LJJ agreeing), and 360 per Hirst LJ (Lloyd LJ agreeing); *The Esso Malaysia* [1975] 1 QB 198; *In re Bank of Credit and Commerce International SA*, The Times, 11 August 1993, 455; *Croft* v *Dunphy* [1933] AC 156, 164 (PC); *Trustees Executors and Agency Co Ltd* v *Federal Commissioner of Taxation* (1932) 49 CLR 220, 232–5 per Evatt J; *R* v *Foster; ex parte Eastern and Australian SS Co Ltd* (1959) 103 CLR 256, 267 per Dixon CJ, and 309–11 per Windeyer J; *Trade Practices Commission* v *Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305, 318 per Lockhart J; *Yorke* v *British and Continental SS Co* (1945) 78 Ll LR 181 (CA); *Re Doyle (dec'd); ex parte Brien* v *Doyle* (1993) 112 ALR 653; *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1126, 1132–3 per Lord Bridge of Harwich (however, note the reference at 1132 to 'the jurisdiction of the British legislature'), 1135–8 per Lord Griffiths, and 1145–8 per Lord Jauncey of Tullichettle; *Tomalin* v *S Pearson & Son Ltd* [1909] 2 KB 61; *Clark* v *Oceanic Contractors Inc* [1983] 2 AC 130, 141, 144–6 per Lord Scarman, 152 per Lord Wilberforce; *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 31 per Taylor J; Kahn-Freund, op cit (fn 8) 60–1; Lane, op cit (fn 2) 13–4; and especially Pryles, op cit (fn 26) 62–6; Pryles, op cit (fn 1) 629–30; Olmstead (ed), *Extra-territorial application of laws and responses thereto* (1984) xiii per Lord Wilberforce, 40 per Meessen; and Bennion, op cit (fn 1) 255–78, especially 267. Contrast *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 23 per Kitto J (McTiernan and Windeyer JJ agreeing) where His Honour stated that, whilst not resting his conclusion upon these considerations, dis-

THE RESOLUTION OF BOTH ISSUES BY DIFFERENT METHODS OF STATUTORY INTERPRETATION

It appears in addition to the rules and canons of statutory interpretation that are employed in all cases in which the meaning of a statutory provision must be ascertained, that three distinct methods, each under the rubric statutory interpretation, have been employed by the courts and proffered by jurists to reach a decision on both issues when confronted by a statute which employs general language that does not expressly provide for its scope of territorial application.[28]

On first glance it appears that the Supreme Court of Canada would have the territorial scope of statutes determined in a different way. In *Moran* v *Pyle*

cussions upon the question of the legislative jurisdiction of a country at the proceedings of the Committee on the Extra-Territorial Application of Restrictive Trade Legislation at the 1965 Tokyo conference of the International Law Association had 'relevance' to questions of statutory construction where the issue is the extraterritorial operation of a statute because 'as Lord Russell of Killowen said in the *Jameson Case* [[1896] 2 QB 425, 430] after stating the general rule [ie the presumption against extraterritorial legislation] ... "That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory".' Contrast *Macleod* v *Attorney-General of New South Wales* [1891] AC 455, 458 (PC); however, the view of the Privy Council in *Macleod* that the legislature has no power over anyone other than its subjects or residents or visitors to its 'kingdom' appears to be irreconcilable with more modern authority: see, eg, Bennion, op cit (fn 1) 264–7; *Myer Emporium Ltd* v *Commissioner of Stamp Duties* (1967) 87 WN (Pt 2) (NSW) 115, 129–30 per Walsh JA (Jacobs JA agreeing); the European Court of Justice's position in *Ahlstrom* v *Commission of the European Communities Joined Cases 89 to 129/85* (1988 V) ECR 5193, 5243–4. See, however, for discussions of legislative jurisdiction and the effects doctrine which refer specifically to Anglo-Australian law: Olmstead (ed), op cit (fn 26) generally; Pryles, op cit (fn 26) 62–6; FA Mann, 'The Doctrine Of International Jurisdiction Revisited After Twenty Years' (1984) *Recueil des Cours* 1; FA Mann, 'The Doctrine Of Jurisdiction in International Law' (1964) *Receuil des Cours* 1; and see fn 25 for material dealing specifically with the US.

[28] For example *Re Perkins, deceased* (1958) 58 SR (NSW) 1; Australia, Law Reform Commission, *Choice of Law* (1992) 32–4; Senate Standing Committee on Legal and Constitutional Affairs, *Product Liability — Where Should the Loss fall?* (1992) 30, 79–83; Kelly, op cit (fn3) 14–15 and Chapter III generally; Dicey and Morris, op cit (fn 1) 15–17; CGJ Morse, 'Product Liability in the Conflict of Laws' (1989) 42 *Current Legal Problems* 167, 180–6; and Bennion, op cit (fn 1) 256–7. Methods to resolve these issues other than those discussed here have been endorsed by judges. Most notable perhaps are the views expounded by Starke and Evatt JJ in *Barcelo* v *Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391. Starke J, 415, stated that the scope of the words of a Victorian statute went so far as the constitutional legislative authority of the State of Victoria extended: contrast 427–8 per Dixon J; *Mynott* v *Barnard* (1939) 62 CLR 68, 75–7 per Latham CJ; *International Computers (Australia) Pty Ltd* v *Weaving* [1981] 2 NSWLR 64, 73; and Kelly, op cit (fn 3) 79–80. Evatt J, 433–4, stated that the court should determine the case on the assumption that the person or matter had a sufficiently substantial nexus with the forum to counter any suggestion that the statute was unconstitutional and therefore the case is to be decided without regard to the issue of territorial scope. However, neither of these methods has achieved the currency or the adherents of the three methods discussed in the body of this thesis: cf Sykes and Pryles, op cit (fn 1) 243, 245–6; and Kelly, op cit (fn 3) 46–7, 79–80. Furthermore, it appears that the methods of both Starke and Evatt JJ could only be applicable to the legislation of a non-sovereign state such as the Australian states which, by their respective constitutions, can only make laws for the peace, welfare and good government of the state (the exact terms used in the constitutions vary, however they have always been interpreted to be identical in their meaning and application across the states).

National (Canada) Ltd[29] the plaintiff sought to apply the *Fatal Accidents Act RSS 1965 c 109* (Saskatchewan) to a foreign manufacturer. The court appeared to determine the territorial scope of the Act not by reference to whether the Act had application to foreign manufacturers, but rather by reference to where the *locus delicti* was.[30] The court stated that if the *locus* was within the jurisdiction then the Act, even in its application to a foreign manufacturer and a foreign manufactured product, was deemed to be operating 'intra-territorially'.[31] However, in the present author's opinion, this case neatly illustrates that, in accordance with the authorities which advocate the application of the rules of private international law to statutes, if a statute creates a cause of action that is characterised as a tort it will be applicable in a particular case without the need to resort to the choice of law rule in tort if the *locus delicti* is within the jurisdiction — a trite principle in tort choice of law. However, if this assessment be incorrect then it would appear that the court's approach in *Moran* smacks of an effects doctrine approach.[32] As has been stated above, an approach such as this has not found favour in Anglo-Australian law dealing with the determination of the territorial scope of statutes.[33]

Whilst this thesis will treat the ascertainment of the territorial scope of a statute and the issue of whether it has extraterritorial operation as a matter of principle, it appears that pragmatic matters may overlay these 'principles'. It appears that the method which the courts have utilised to resolve these issues may be an artefact of a deliberate, semiconscious or perhaps inadvertent decision on the part of the parties which has little or nothing to do with the legal merits of either method. If both parties choose to argue their case exclusively along the lines of the presumption against extraterritorial legislation or the purposive approach then they can effectively disbar the judge from considering the alternative method — application of the rules of private international law — in cases in which the statutory provision is characterised as tortious.[34] This scenario arises by virtue of the facts that both English and Australian courts treat foreign law as facts,[35] the pleading of foreign law is voluntary,[36] and the tort choice of law rule itself requires the ascertainment and application of foreign law.[37] Because foreign laws are facts judges are

[29] (1973) 43 DLR (3d) 239.

[30] This is, of course, the method utilised to determine whether a tort is foreign or not for the purpose of the choice of law rule in tort: eg *Voth* v *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

[31] *Moran* v *Pyle National (Canada) Ltd* (1973) 43 DLR (3d) 239, 242. Cf *Trade Practices Commission* v *Meat Holdings* (1988) 83 ALR 299, 356.

[32] The seminal US decision dealing with the effects doctrine is *United States* v *Aluminium Company of America* 148 Fed Rep 2d 416 (1945).

[33] See fn 27 supra.

[34] Compare *Lee* v *Dale* (1984) Aust Torts Reports 80-572; and *Beck* v *Beck* (1986) 56 OR (2d) 205. It appears that this could also occur in cases in which the provision can be characterised as contractual. Cf an inverse situation discussed in Kelly, op cit (fn 3) 12.

[35] Cheshire and North, op cit (fn 8) 107; Dicey and Morris, op cit (fn 1) 226; R Fentiman, 'Foreign Law in English Courts' (1992) 108 LQR 142-3, 146-7.

[36] Dicey and Morris, op cit (fn 1) 229-30; Fentiman, loc cit (fn 35) 149-53.

[37] Infra.

deemed ignorant of them unless they have been pleaded and proved.[38] Jurists have suggested that there are a number of reasons why the parties may choose not to plead or prove foreign law[39] including, inter alia, the pointlessness of pleading the foreign law at all, the cost or time involved in proving foreign law, and the risk of misapplication of the foreign law.[40] If a court is to apply the rules of private international law to a statute which has been characterised as tortious then they must utilise foreign law because the tort choice of law rule requires that, except in an exceptional case,[41] for an act done in a foreign country to be actionable as a tort in England or Australia it must be, inter alia, actionable according to the law of the foreign country when it was done.[42] Accordingly, a court will be unable to apply the rules of private international law to a statutory provision which has been characterised as tortious if the parties fail to plead and prove foreign law.

THE PRESUMPTION AGAINST EXTRATERRITORIAL LEGISLATION

It is often stated in various terms that there is a rebuttable common law presumption of statutory interpretation[43] that Parliament (both British and Australian) only intends its statutes to operate on persons and matters within its territory and its legislation must be construed accordingly.[44] However, it appears that, at least in the case of civil enactments[45] dealing with private

[38] Cheshire and North, op cit (fn 8) 107; Dicey and Morris, op cit (fn 1) 226–7; and Fentiman (1992) 146–7.

[39] Fentiman (1992) 150–3; for a curial view see *Muduroglu Ltd* v *TC Ziraat Bankasi* [1986] QB 1225, 1246 per Mustill LJ.

[40] Ibid.

[41] *Red Sea Insurance Co* v *Bouygues SA* [1995] 1 AC 190 (PC); and *McKain* v *R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

[42] Id 932–3.

[43] Herein described as 'the presumption against extraterritorial legislation'.

[44] For example *Gold Star Publications Ltd* v *DPP* [1981] 1 WLR 732, 737 per Lord Simon of Glaisdale; *CEB Draper & Son Ltd* v *Edward Turner & Son Ltd* [1964] 3 All ER 148, 150 per Lord Denning MR; *Re Doyle (dec d); Ex Parte Brien* v *Doyle* (1993) 112 ALR 653; *Ex Parte Blain* (1879) 12 Ch D 522; *Tomalin* v *S Pearson & Son Ltd* [1909] 2 KB 61, *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1126, 1132–3 per Lord Bridge of Harwich, 1135–8 per Lord Griffiths, 1145–8 per Lord Jauncey of Tullichettle; *Morgan* v *White* (1912) 15 CLR 1, 13 per Isaacs J; *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10; *Clark* v *Oceanic Contractors Inc* [1983] 2 AC 130, 141, 144–6 per Lord Scarman, 152 per Lord Wilberforce; Dicey and Morris, op cit (fn 1) 16–17; *Arab Bank plc* v *Mercantile Holdings Ltd* [1994] 2 WLR 307, 313–14; Anton, op cit (fn 2) 91; and DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) 96–100. Compare the US position in *Equal Opportunity Commission* v *Arabian American Oil Company* 111 S Ct 1227 (1991) and Born and Westin, op cit (fn 12) 574ff. Contrast, in cases of civil enactments dealing with private rights, *BBC Enterprises* v *Hi-Tech Ltd* [1990] 1 Ch 609 (CA) per Staughton J (Sir Nicholas Browne-Wilkinson V-C concurring) 617. One American court has stated that 'reliance on this presumption is misplaced, however, when the conduct under scrutiny has not occurred wholly outside the United States, or ... could otherwise affect domestic conditions': *Tamari* v *Bache & Co (Lebanon)* 469 US 871; 730 F 2d 1103, 1107 fn 11 (7th Circuit), cert denied.

[45] Vis-a-vis criminal enactments.

rights, this presumption can be easily rebutted.[46] The legislature's intention that a statute is to have extraterritorial operation must be provided for by express words[47] or it must arise by 'necessary implication' in cases where the policy, object or purpose of the statute so requires.[48] In the case of the subjects of a state resident abroad it appears that this intention is easier to divine.[49] In Australia s 21 of the *Acts Interpretation Act* 1901 (Cth) provides:

> In any Act, unless the contrary intention appears ... (b) references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and matters and things in and of the Commonwealth.[50]

This presumption against extraterritorial legislation has been stated both curially and extra- curially to be based upon the presumption that every

[46] *BBC Enterprises* v *Hi-Tech Ltd* [1990] 1 Ch 609, 617 per Staughton J (Sir Nicholas Browne-Wilkinson V-C concurring); *Goliath Portland Cement Co Ltd* v *Bengtell* (1994) 33 NSWLR 414, 427–8 per Kirby P (Cole A-JA agreeing on this point); *Irish Shipping Ltd* v *Commercial Assurance Co Plc* [1990] 2 WLR 117, 124–6 per Staughton LJ; Dicey and Morris, op cit (fn 1) 16–17; and Kelly, op cit (fn 3) 79. Contrast *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1137 per Lord Griffiths.

[47] *Re AB & Co* [1900] 1 QB 541, 544; *Ex Parte Blain* (1879) 12 Ch D 522, 526; *The Amalia* (1863) 1 Moore PC (NS) 471, 474; 15 ER 778, 779 per Dr Lushington; *Theophile* v *Solicitor-General* [1950] AC 186, 195 per Lord Porter; *R* v *West Yorkshire Coroner; ex parte Smith* [1983] QB 335, 358 per Donaldson LJ; *Clark (Inspector of Taxes)* v *Oceanic Contractors Inc* [1983] 2 AC 130, 152; see also fn 48.

[48] See *In re Seagull Co Ltd* [1993] Ch 345, 354 per Peter Gibson J (Lloyd and Hirst LJJ agreeing); *In re Paramount Airways Ltd* [1993] Ch 223, 236, 239 per Sir Donald Nicholls V-C (Taylor and Farquharson LJJ agreeing); *Goliath Portland Cement Co Ltd* v *Bengtell* (1994) 33 NSWLR 414, 428 per Kirby P (Cole A-JA agreeing on this point); *Clark* v *Oceanic Contractors Inc* [1983] 2 AC 130, 145 per Lord Scarman; *Jeffreys* v *Boosey* (1854) 4 HLC 815, 970; 10 ER 681, 742; *Air-India* v *Wiggins* [1980] 1 WLR 815, 821–2 per Lord Scarman; *Ex Parte Blain* (1879) 12 Ch D 522, 526 per James LJ; *Morgan* v *White* (1912) 15 CLR 1, 13 per Isaacs J; *Brook* v *Brook* [1861] 9 HLC 193; 11 ER 703; Bennion, op cit (fn 1) 267–8, 270–2. Cf *Equal Opportunity Commission* v *Arabian American Oil Company* 111 S Ct 1227 (1991).

[49] Bennion, op cit (fn 1) 264, 269–74; Anton, op cit (fn 2) 92; *Air-India* v *Wiggins* [1980] 1 WLR 815, 819 per Lord Diplock; *MacKinnon* v *Donaldson Lufkin & Jenrette Securities Corp* [1986] Ch 482, 496.

[50] In *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 607 per Evatt J, and 612–3 per McTiernan J, their Honours appeared to suggest that the territorial scope of an Act could be determined by reference to the forum *Interpretation Act's* version of s 21(b). Both judges stated that the relevant legislation applied to 'obligations "in and of New South Wales".' However, as Dixon J stated, at 600, when attempting to determine the exact territorial scope of a statute (vis-a-vis whether the statute has extraterritorial operation) the application of an *Interpretation Act* provision such as s 21(b) does no more than restate the question: 'Nor does s 17 of the *Interpretation Act* 1897 (NSW) [the provision from which s 21(b) was copied verbatim] supply any guide as to the exact nature of the limitation to be placed upon the general words of s 5 of the *Interest Reduction Act* 1931 ... If the 'obligation to pay interest' is a 'matter or thing' within this provision [ie s 17], the question remains: When is it a matter or thing in and of New South Wales?'; cf *Re Perkins, deceased* (1958) 58 SR (NSW) 1; *Moran* v *Pyle National (Canada) Ltd* (1973) 43 DLR (3d) 239, 242; *Mynott* v *Barnard* (1939) 62 CLR 68, 76–7 per Latham CJ; *Kay's Leasing Corporation Pty Ltd* v *Fletcher* (1964) 116 CLR 124, 143 per Kitto J; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) 125; and Kelly, op cit (fn 3) 79.

statute is to be interpreted and applied so as not to be inconsistent with the comity of nations or with the established rules of international law.[51]

This method has been utilised by the courts in order to determine whether a statute has extraterritorial operation and in making this determination courts have oftentimes generated, as a byproduct, some general criteria for the spatial application of the statute.[52]

In *Clark* v *Oceanic Contractors Inc*[53] Lord Wilberforce stated that the 'territorial principle',

> which is really a rule of construction of statutes expressed in general terms, and which as James LJ[54] said [is] a 'broad principle', requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating.
>
> Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration? The contention being that, as regards companies, the statute cannot have been intended to apply to them if they are non-resident, one asks immediately-why not?[55]

However, more recently, Lord Griffths[56] in *Holmes* v *Bangladesh Biman Corporation*[57] stated, in response to a reference by the Court of Appeal in that case to the presumption against extraterritorial legislation as a 'tentative assumption that it was not intended to subject transactions taking place abroad to British statutory rules overriding the proper law of the transaction',[58] that the presumption 'is far more deeply entrenched than a "tentative assumption".'[59]

It appears that it is not each and every element of a statutory provision which must be ascribed a local territorial content.[60] In *Fox* v *Lawson*[61] the House of Lords was considering penal legislation, in respect of which the

[51] For example *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1137 per Lord Griffiths, and 1147 per Lord Jauncey of Tullichettle; *Gold Star Publications Ltd* v *DPP* [1981] 1 WLR 732, 737 per Lord Simon of Glaisdale (dissenting, but not on this point); *Colquhoun* v *Brooks* (1888) 21 QBD 52, 56–9 per Lord Esher MR, affirmed (1889) 14 AC 493; *Attorney-General* v *Prince Ernest Augustus of Hanover* [1957] AC 436, 462 per Viscount Simonds; *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 23 per Kitto J (McTiernan and Windeyer JJ agreeing), 31 per Taylor J; Bennion, op cit (fn 1) 255. Contrast *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612, 650–1 (S Ct) per Scalia J (O'Connor, Kennedy and Thomas JJ agreeing) in a dissenting judgment where His Honour states that the presumption against extraterritorial legislation and the presumption that 'Congress ought never to be construed to violate the law of nations' are 'wholly independent' of each other.

[52] *Mynott* v *Barnard* (1939) 62 CLR 68, 76–7 per Latham CJ.

[53] [1983] 2 AC 130.

[54] Lord Wilberforce is here referring to the judgment of James LJ in *Ex Parte Blain* (1879) 12 Ch D 522.

[55] [1983] 2 AC 130, 152.

[56] Lords Ackner and Lowry agreeing.

[57] [1989] 1 AC 1112.

[58] *Holmes* v *Bangladesh Biman Corporation* [1988] 2 Lloyd's Rep 120, 123.

[59] [1989] 1 AC 1112, 1138.

[60] Whilst the provisions of s 21(b) of the *Acts Interpretation Act* 1901 (Cth) would appear to contradict this, the interpretation of a provision identical to s 21(b) in *O'Connor* v *Healey* (1967) 69 SR (NSW) 111 (CA) (approved in *Goliath Portland Cement Co Ltd* v *Bengtell* (1994) 33 NSWLR 414, 428 per Kirby P (Cole A-JA agreeing on this point)), quoted infra, militates against such an interpretation of s 21 (b).

[61] [1974] AC 803.

presumption is very strong.[62] The facts of the case are in short compass. The driver of a goods vehicle drove it in the course of his employment in England and France on round journeys beginning and ending in England. He was charged with, inter alia, exceeding an 11 hour work day contrary to s 96(3)(a) of the *Transport Act* 1968 (UK). The court held that in deciding whether an offence had been committed under s 96(3)(a) it was right to take into account the period of driving which occurred in France. In delivering his judgment Lord Diplock[63] stated:

> Bridge J [the judge at first instance]...appears to have considered that the relevant presumption as to the territorial effects of Acts of Parliament was not merely that Parliament did not intend to make it an offence in English law to do anything in places outside the jurisdiction of the English courts but that any reference in an Act of Parliament to doing anything, even though not unlawful, was to be understood as excluding doing that thing abroad. In this he was mistaken; there is no such presumption.[64]

From the above discussion the task of determining the territorial scope of a statute according to this method can be distilled in this form: the courts will be concerned to inquire as to the persons with respect to whom Parliament is presumed to have been legislating, and in making that inquiry Parliament is to be taken to have been legislating only for persons within its territory, unless the contrary is expressed or is necessarily implicit.[65]

THE PURPOSIVE APPROACH TO THE LEGISLATION

A court may attempt to interpret the statute in light of its subject matter, object or purpose so as to read into it territorial limitations, if any, which the legislature would have expressed had it addressed itself to the matter, and so as to determine whether or not a statute has extraterritorial operation.[66]

[62] *Air-India* v *Wiggins* [1980] 1 WLR 815, 819 per Lord Diplock; *R* v *Treacy* [1971] AC 537, 551; Lane, *The Trade Practices Act — Its Constitutional Operation* (1966) 126; Graveson, *Conflict of Laws: Private International Law* (1974) 5, 181; Bennion, op cit (fn 1) 264; *R* v *Jameson* [1896] 2 QB 425, 430–1. Contrast *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1137 per Lord Griffiths (Lords Ackner and Lowry agreeing).

[63] The rest of their Lordships agreed with Diplock LJ.

[64] [1974] AC 803, 809. Cf *O'Connor* v *Healey* (1967) 69 SR (NSW) 111 (CA) (approved in *Goliath Portland Cement Co Ltd* v *Bengtell* (1994) 33 NSWLR 414, 428 per Kirby P (Cole A-JA agreeing on this point)) quoted infra; and *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 612 per McTiernan J. Contrast *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 22–3 per Kitto J (McTiernan and Windeyer JJ agreeing).

[65] Compare *In re Paramount Airways Ltd* [1993] Ch 223, 233, 236 per Sir Donald Nicholls V-C (Taylor and Farquharson LJJ agreeing); *In re Seagull Co Ltd* [1993] Ch 345, 354 (CA) per Peter Gibson J (Lloyd and Hirst LJJ agreeing), 360 per Hirst LJ (Lloyd LJ agreeing); *Re Clore (deceased) (No 3)* [1985] 2 All ER 819, 827 (Ch D); and *Holmes* v *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1148 per Lord Jauncey of Tullichettle (Lords Griffiths, Ackner and Lowry agreeing).

[66] For example *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 595–6 per Gavan Duffy CJ, 597 per Starke J (dissenting); *Mynott* v *Barnard* (1939) 62 CLR 68, 86 per Latham CJ; *Attorney-General for Alberta* v *Huggard Assets Ltd* [1953] AC 420, 441 per Lord Asquith of Bishopstone; *Goliath Portland Cement Co Ltd* v

Sykes and Pryles,[67] drawing largely upon the work of Kelly,[68] discuss a method for the determination of a statute's territorial scope whereby 'the court may supply criteria for application which vary from the traditional choice of law criteria and may be dependent upon policy considerations but on the whole would reflect a process of statutory interpretation'. They suggest that this method will be applicable where the categories provided by the rules of private international law are 'inadequate to cover the transaction in issue'.[69] However, they also make note of 'other cases where the rules of private international law do provide a *prima facie* applicable choice of law rule but the court has not adopted this and has preferred to use' the method which they suggest.[70] Referring to Kelly,[71] they conclude that 'it seems that the High Court is likely in the future to solve questions of the implied territorial operation of a statute more in terms of statutory interpretation than by reference to the limitations of the common law rules of private international law.[72]'

The purposive approach has been described by the editors of Dicey and Morris as 'an artificial method, and perhaps a dangerous one, because ex hypothesi the legislature gave no thought to the matter — if it had done so it would have expressed the limitations.'[73] This is not the only attack which the editors of Dicey and Morris make upon this method 'during the era of the statutists, [this theory] dominated the theory and practice of the conflict of laws. The meagreness of the results achieved by the statutists should be warning enough to show that it is a method to be used with caution.'[74]

Bengtell (1994) 33 NSWLR 414, 428 per Kirby P (Cole A-JA agreeing on this point); *Davidsson* v *Hill* [1901] 2 KB 606 (DC), 613–15 per Kennedy J (Phillimore J agreeing); *Re Greenfield* [1985] 2 NZLR 662, 666; *In re Paramount Airways Ltd* [1993] Ch 223, 235–9 per Sir Donald Nicholls V-C (Taylor and Farquharson LJJ agreeing); *In re Seagull Co Ltd* [1993] Ch 345 (CA), 355–6 per Peter Gibson J (Lloyd and Hirst LJJ agreeing), 360 per Hirst LJ (Lloyd LJ agreeing); *Tamari* v *Bache & Co (Lebanon)* 730 F 2d 1103, 1107 (7th Cir). The certificate was denied, 469 US 871 (1984); JHC Morris, 'The Choice of Law Clause in Statutes' (1946) 62 LQR 170; Dicey and Morris, op cit (fn 1), 15–17; Morse, op cit (fn 28) 185; Sykes and Pryles, op cit (fn 4) 202, 243–5 fail so much as to mention the presumption against extraterritorial legislation in their discussions; cf Cheatham, *Cases and Materials on Conflict of laws* (1952) 965–82; Kelly, op cit (fn 3) generally and especially 85ff; *Pugh* v *Pugh* [1951] P 482; *Booth* v *Booth* (1861) 9 HLC 193, 225; 11 ER 703, 716.

67 Sykes and Pryles, op cit (fn 4) 243–5; cf Senate Standing Committee on Legal and Constitutional Affairs (1992) 30, 83.

68 Kelly, op cit (fn 3).

69 That is, the statute is *sui generis*: Sykes and Pryles, op cit (fn 4) 244.

70 The only case which they make reference to for this point is *Kay's Leasing Corporation Pty Ltd* v *Fletcher* (1964) 116 CLR 124.

71 Kelly, op cit (fn 3) 6–10, 84.

72 Sykes and Pryles, op cit (fn 4) 245. The footnotes in the original text have been included. Compare CC Hodgekiss, 'Forum Statutes and International Financing' (1982) 4 *Australian Mining and Petroleum Law Journal* 212.

73 Dicey and Morris, op cit (fn 1) 17; cf Mann, op cit (fn 27) 30; and Kelly, op cit (fn 3) 78, 80, 86.

74 Dicey and Morris, op cit (fn 1) 21; cf O Kahn-Freund, 'General Problems Of Private International Law' (1974) III 143 *Recueil des Cours* 139, 243ff.

Kelly[75] has warned that this method 'concentrates attention on particular, intrinsic policies'[76] and in so doing a number of extrinsic factors, such as 'the need for interstate and international harmony ... the desirability of simplicity and ease of administration, and the need for certainty, uniformity and predictability of results'[77] may fail to be taken into account; factors which, he opined, the rules of private international law have already taken into account by virtue of the process of their formulation. He noted that there will be cases where reliance on the statute's purpose will not be of assistance. Examples which he gave included cases in which the statute's original purpose no longer had any 'present validity',[78] 'the fact that different objects may be sought to be attained by a given rule at different times in history',[79] and 'even in states where legislative debates are admissible aids in the [interpretation of statutes] ... there may well remain doubt concerning the precise historical objects of a given rule, or of the order of importance of several, possibly conflicting, historical objects of that rule.'[80] However, he opined that 'any doubt of [the latter] type is to be resolved by reference to the ends rationally to be served by legislation of that type' and 'the mischief rule can be adapted to allow for changes in the objects to be attained by decisional rules'.[81]

Nevertheless it appears that this method has been adopted as the, part of, or an alternative, basis for a number of decisions in which this issue has arisen.[82]

It appears that if this method can be invoked then it is to be applied in preference to either of the other methods. In *Goliath Portland Cement Co Ltd* v *Bengtell*, Kirby P stated that:

> The principle of territorial interpretation competes with the more general rule that courts should give an ample construction to the language used by the legislature in order to achieve the purpose of parliament disclosed by that language ... the authority of this court cautions against an unduly rigid application of a construction of statutes to require strict territorial connection ... As in all tasks of statutory construction, the duty of the court is to seek faithfully to give meaning to the presumed purpose of parliament.[83]

Kelly[84] has opined that a court applying the purposive approach may take into account the presumption against extraterritorial legislation and provisions such as s 21(b) of the *Acts Interpretation Act* 1901 (Cth) in deciding whether or not to limit the spatial application of a statute which fails to indi-

[75] Kelly, op cit (fn 3) 88–9.
[76] Ibid.
[77] Ibid.
[78] Id 91.
[79] Id 92.
[80] Id 91–2.
[81] Id 94. Contrast de Boer, *Beyond Lex Loci Delicti: conflicts, methodology and multistate torts in American case law* (1987) 426–8.
[82] Supra (fn 67); *Goliath Portland Cement Co Ltd* v *Bengtell* (1994) 33 NSWLR 414, 428 per Kirby P (Cole A-JA agreeing on this point); Dicey and Morris, op cit (fn 1) 20–1; Kelly, op cit (fn 3) 81.
[83] (1994) NSWLR 414, 428 (Cole A-JA agreeing on this point). Compare s 15AA(1) of the *Acts Interpretation Act* 1901 (Cth). See also fn 48 supra and fn 98 infra.
[84] Op cit (fn 3) 85.

cate its territorial scope. However, he concluded that it is the statute's purpose which must be pre-eminent, and he opined that the purposive approach 'indicates that territorially unlimited application will be inappropriate whenever the object of the statute will not thereby be significantly furthered', and is 'suggestive of positive teleological criteria for the interpretation qua territorial extension of specific decisional rules'.[85]

APPLICATION OF THE RULES OF PRIVATE INTERNATIONAL LAW

The third method of statutory interpretation adopted in the reported decisions is to apply the rules of private international law, more specifically those dealing with choice of law, to the statute.[86] Accordingly a forum statute is only

[85] Ibid.

[86] *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 595–6 per Gavan Duffy CJ and Starke J (dissenting), 601 per Dixon J; *Barcelo* v *Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 423ff per Dixon J, cf 410 per Starke J; *Mynott* v *Barnard* (1939) 62 CLR 68, 79 per Latham CJ; *Koop* v *Bebb* (1951) 84 CLR 629; *Augustus* v *Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245, 259; *Re X* [1960] VR 733; *Kay's Leasing Corporation Pty Ltd* v *Fletcher* (1964) 116 CLR 124, 143 per Kitto J; *Meyer Heine Pty Ltd* v *The China Navigation Co Ltd* (1966) 115 CLR 10, 38–9 per Menzies J (dissenting); *Ex Parte Richardson; Re Hildred* [1972] 2 NSWLR 423 (CA); *Francis Travel Marketing Pty Limited* v *Virgin Atlantic Airways Limited* (1994) ATPR 41–332; *Jabbour* v *Custodian of Israeli Absentee Property* [1954] 1 WLR 139, 152–3; *Monterosso Shipping Co Ltd* v *International Transport Workers Federation* [1982] 3 All ER 841; *Harding* v *Queensland Commissioner of Stamps* [1898] AC 769; *Re Malandonado's Estate* [1954] P 223; *Apple Corps Ltd* v *Apple Computer Inc* [1992] FSR 431, 469–71; *Arab Bank Plc* v *Mercantile Holdings Ltd* [1994] 2 WLR 307, 313; *Re Doyle (dec'd); Ex Parte Brien* v *Doyle* (1993) 112 ALR 653; *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612 (S Ct), 651–2 per Scalia J (O'Connor, Kennedy and Thomas JJ agreeing) in a dissenting judgment, and the American decisions there cited; *United States* v *Aluminium Co of America* (1945) 148 Fed Rep 2d 416, 443; *Irish Shipping Ltd* v *Commercial Assurance Co Plc* [1990] 2 WLR 117, 124–6 per Staughton LJ; *Li Lian Tan* v *Durham* [1966] SASR 143; *O'Connor* v *Wray* [1930] 2 DLR 899; *Couture* v *Dominion Fish Co* (1909) 19 MR 65; *Young* v *Industrial Chemicals Co Ltd* [1939] 4 DLR 392, 394, 398–9; *Kolsky* v *Mayne Nickless Ltd* [1970] 3 NSWLR 511; *Kemp* v *Piper* [1971] SASR 25 (FC); *Pugh* v *Pugh* [1951] P 482; *Plozza* v *South Australia Insurance Company* [1963] SASR 122; *Kerr* v *Palrey* [1970] VR 825; *Stewart* v *Honey* (1972) 2 SASR 585, 592–3 per Bray CJ; *Joss* v *Snowball* [1970] 1 NSWR 426, 430 per Jacobs and Holmes JJA; *Baldry* v *Jackson* [1977] 1 NSWLR 494; *Lucas* v *Gagnon* (1992) 99 DLR (4th) 125; cf in a Canadian constitutional law context, *Inter-provincial Cooperatives and Dryden Chemicals* v *The Queen* [1976] 1 SCR 477, 491–502 per Laskin CJC (Judson and Spence JJ concurring) dissenting, 521ff per Ritchie J in the majority; contrast Pigeon J (Martland and Beetz JJ concurring) in the majority at 511–15; Forsyth, *Conflict of Laws* (1990) 10 dealing specifically with South African law; Pryles, op cit (fn 1); AI Sykes and MC Pryles, *Conflict of Laws: commentary and materials* (1988) 96–7, Sykes and Pryles, op cit (fn 4) 118–9, 202, 241–3, 246; Kelly, op cit (fn 3); Morse op cit (fn 28) 184–6; Bennion, op cit (fn 1); cf *Myer Emporium Ltd* v *Commissioner of Stamp Duties* (1967) 85 WN (NSW) 115, 122 per Wallace P (Jacobs JA agreeing). There are also a number of cases in which the courts have applied the principles of private international law to a foreign statute to determine its territorial scope: see eg *McElroy* v *McAllister* [1949] SC 110; *O'Connor* v *Wray* [1930] 2 DLR 899; *Gould* v *Incorporated Nominal Defendant* [1974] VR 488; *Hall* v *National and General Insurance Co Ltd* [1967] VR 355; *Nominal Defendant* v *Bagot's Executor* [1971] SASR 346; *Hodge* v *Club Motor Insurance* (1974) 7 SASR 86; *Ryder* v *Hartford lusurance Company* [1977] VR 257; *Borg Warner (Australia) Ltd* v *Zupan* [1982] VR 437.

applicable if the *lex causae* according to the choice of law rule applicable to that statute, is the *lex fori*.[87] Therefore, in applying this method, criteria for the application of the statute will be generated which will determine the territorial scope of its operation.[88]

In *Wanganui-Rangitikei Electric Power Board* v *AMP Society*[89] Dixon J (as he then was) of the High Court of Australia referred to what he described as a 'well settled rule of construction'.[90] He stated:

> An enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognized in our Courts, it is within the province of our law to affect or control. The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter. But, in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as extending to cases which, according to the rules of private international law administered in our Courts, are governed by foreign law.[91]

[87] Ibid. See also *Barcelo* v *Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 428 per Dixon J; and *Francis Travel Marketing Pty Limited* v *Virgin Atlantic Airways Limited* (1994) ATPR 41-332, 42 395.

[88] *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 601 per Dixon J; and *Barcelo* v *Elecrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 424-7 per Dixon J; cf *Young* v *Industrial Chemicals Co* [1939] 4 DLR 392, 394; Kelly, op cit (fn 3) 67.

[89] (1934) 50 CLR 581, 601.

[90] More recently Burchett J of the Federal Court of Australia described it as 'an entrenched rule of construction': *Re Doyle (dec'd); Ex Parte Brien* v *Doyle* (1993) 112 ALR 653, 664; *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612, 653 (US S Ct) per Scalia J (O'Connor, Kennedy and Thomas JJ agreeing) in a dissenting judgment, who described it as 'firmly established in [American] jurisprudence'. The Senate Standing Committee on Legal and Constitutional Affairs (1992) described it as the 'Traditional Approach' (at 79), as did Sykes and Pryles, op cit (fn 4) 244.

[91] *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 601 per Dixon J. Bray CJ of the South Australian Supreme Court also summarised the law in this area in *Kemp* v *Piper* [1971] SASR 25, 29 (Bray CJ applied the tort choice of law rule to the *Wrongs Act* 1936-1959 (SA)):

> [Counsel for the Defendant] contended that the South Australian legislature had no power to legislate with regard to accidents in Victoria without any South Australian nexus. He said that it could have passed a valid enactment with regard to accidents outside South Australia if it had confined its provisions to cases with some South Australian nexus, such as the domicil or residence of the parties in South Australia, but that it had not done so .... It seems to me that [Counsel for the Defendant's] argument reveals a misunderstanding of the way in which the rules of private international law operate. When the lex fori is applied in accordance with those rules to a case possessing a foreign element, this is not because the lex fori is held to possess some inherent power of extraterritorial operation, but because it is part of the international law applied by it, that the lex fori in the narrower sense, ie in its purely internal aspect, governs the particular situation notwithstanding the existence of the foreign element. It is not part of the law of South Australia that the *Wrongs Act* applies to accidents in Victoria, but it is part of the law of South Australia that its courts will entertain an action based on an act committed in Victoria if, inter alia, that act would have been actionable by South Australian law, including the provisions of the *Wrongs Act*, if it had occurred in South Australia.

Dixon J stated that this method allowed a statute to comply with the common law and statutory principle of statutory interpretation relating to extraterritorial legislation such that the scope of operation of the statute is territorial vis-a-vis extraterritorial.[92] In Dixon J's opinion this rule applied equally to a statute of the British or an Australian State's Parliament.[93]

Bennion appears to justify this method in stating that the rules of private international law may form a guide to the legislative intention.[94] Burchett J in *Re Doyle (dec'd); Ex Parte Brien* v *Doyle*[95] appeared to equate this method with the presumption against extraterritorial legislation.

Pearce stated that this method 'is really a specific application of the general assumption against legislation operating extraterritorially'.[96]

This method has been stated to be based upon the presumption that every statute is to be interpreted and applied so as not to be inconsistent with the comity of nations or with the established rules of international law.[97]

The application of this method must be subordinate to the terms of the Act being characterised and the context, subject matter or object of the Act.[98] If, for example, the statute provides that it applies only to acts of a person within the United Kingdom, then it can have no application to acts which take place outside the United Kingdom notwithstanding the determination which the application of the applicable rule of private international law may generate.[99] In *Wanganui-Rangitikei Electric Power Board* v *AMP Society*[100] Gavan Duffy CJ and Starke J, in a joint dissenting judgment, stated that:

[92] *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 601 per Dixon J; *Barcelo* v *Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 424–7 per Dixon J; cf *Young* v *Industrial Chemicals Co* [1939] 4 DLR 392, 394.

[93] *Barcelo* v *Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 427ff per Dixon J; cf in an American context, *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612 (S Ct), 649–50, 654 per Scalia J (O'Connor, Kennedy and Thomas JJ agreeing) in a dissenting judgment, and the American decisions there cited.

[94] Bennion, op cit (fn 1) 766–8.

[95] (1993) 112 ALR 653, 665.

[96] Pearce and Geddes, op cit (fn 44) 99. Contrast Senate Standing Committee on Legal and Constitutional Affairs, op cit (fn 28) 8.

[97] See eg *Barcelo* v *Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 421–2 per Dixon J; and *Re Doyle (dec'd); ex parte Brien* v *Doyle* (1993) 112 ALR 653, 665.

[98] *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612 (S Ct), 652 per Scalia J (O Connor, Kennedy and Thomas JJ agreeing) in a dissenting judgment; *Meth* v *Norbert Steinhardt and Son Ltd* (1960) 105 CLR 440 (reversed on other grounds (1962) 107 CLR 187); *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 595–6 per Gavan Duffy CJ and Starke J, 601 per Dixon J; *Def Lepp Music* v *Stuart-Brown* [1986] RPC 274 (followed in: *James Burrogh Distillers Plc* v *Speymalt Whisky Distillers Ltd* [1989] SLT 561, 566; and *Tyburn Productions* v *Conan Doyle* [1991] Ch 75, 86–7); *Myer Emporium Ltd* v *Commissioner of Stamp Duties* (1967) 85 WN (Pt 2) (NSW) 115, 127 per Walsh JA (Jacobs JA agreeing); *Kay's Leasing Corporation Pty Ltd* v *Fletcher* (1964) 116 CLR 124, 143 per Kitto J; Pryles, op cit (fn 1) 635, 644; Bennion, op cit (fn 1) 767–8; Sykes and Pryles, op cit (fn 1) 241; Kelly, op cit (fn 3) generally and especially 5–10, 14–15, 83–4.

[99] *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612, 652 per Scalia J (O Connor, Kennedy and Thomas JJ agreeing) in a dissenting judgment; and *Def Lepp Music* v *Stuart-Brown* [1986] RPC 274 (followed in: *James Burrogh Distillers Plc* v *Speymalt Whisky Distillers Ltd* [1989] SLT 561, 566; and *Tyburn Productions* v *Conan Doyle* [1991] Ch 75, 86–7). See also *Salmon* v *Duncombe* (1886) 11 App Cas 627, 633–635.

[100] (1934) 50 CLR 581, 595–7.

> The rules regulating the choice of law ... when applied to legislative acts, must be used with some care, and not elevated into rules of law for the construction of statutes ... In each case, the language of the Act, the object of the Act, and the mischief to be remedied must be considered ... The rules governing the choice of law for the purpose of determining the rights of the parties as between themselves afford no sufficient reason for setting aside the golden rules of construction (1) that the object of the statute is to be considered, and (2) that the grammatical and ordinary sense of the words of a statute should be adhered to, unless such adherence would lead to some absurdity, or some repugnance or inconsistency with the rest of the statute.

However, Gavan Duffy CJ and Starke J were particularly concerned with the fact that, should the choice of law rule in contract determine the application of the Act, then the parties to a contract could effectively determine whether or not an Act would apply to their contract.[101] Their Honours clearly indicated their disapproval of this scenario,[102] and they appeared to be limiting the scope of their comments to cases in which the applicable choice of law rule was that in contract.[103]

This method requires that the relevant statutory provision be characterised.[104] In the case of a statute which creates a cause of action the statutory cause of action must itself be characterised as relating to a particular juridical concept or category, then the relevant private international law rule must be applied to the action so characterised.[105] If, however, the provision merely affects a cause of action or right the characterisation of which is certain, then the provision will relate to that category and may be applied as part of the *lex causae* if the relevant rule so requires.

One patent diffculty in the application of the rules of private international law exists. If a statute cannot be characterised according to the traditional categories then the rules of private international law cannot be applied to it.[106] Statutes which would appear to fall into this category would include those dealing with competition law or restrictive trade practices and statutes dealing with company law. It has been suggested that in these cases the statute should be characterised as *sui generis* and a choice of law rule specifically

[101] Compare Sykes and Pryles, op cit (fn 28) 245.

[102] Their Honours failed to indicate why this situation was so unusual, particularly so when the Act was not said to be mandatory in its nature and it did not contain a provision which prevented the parties from providing in their contract that the applicable law was not to be the law which included that Act or that that Act was not to apply to their agreement; cf Dicey and Morris, op cit (fn 1) 16, 21–6; *Irish Shipping Ltd* v *Commercial Assurance Co Plc* [1990] 2 WLR 117, 126 per Staughton LJ. Contrast *Kay's Leasing Corporation Pty Ltd* v *Fletcher* (1964) 116 CLR 124, 143 per Kitto J; and Sykes and Pryles, op cit (fn 28) 245.

[103] Ibid.

[104] See fn 89 supra.

[105] *Hartford Fire Insurance Co* v *California* (1993) 125 L ed 2d 612 (S Ct), 649–50, 654 per Scalia J (O'Connor, Kennedy and Thomas JJ agreeing) in a dissenting judgment, and the American decisions there cited; SM Waddams, *Products Liability* (3rd ed, 1993) 157; Bennion, op cit (fn 1) 766–8; Morse, op cit (fn 28) 184–6 (dealing specifically with the CPA); Australia, Law Reform Commission, *Product Liability* (1990) 37.

[106] For example Pryles, op cit (fn 1) 635; *Mynott* v *Barnard* (1939) 62 CLR 68, 91 per Dixon J.

tailored for the statute would have to be developed by the courts.[107] This specifically tailored rule would reflect the purpose of the statute.[108] This suggested resolution of the difficulty appears to the present author to be no more than the course employed under the nomenclature of the purposive approach.

The editors of Dicey and Morris state, in discussing the role of 'foreign rules of conduct'[109] in deciding a tortious claim which is based upon foreign conduct, that[110]

> an act done abroad is not in England actionable in tort as a breach of an English statute.[111] Statutes which create new rules of conduct[112] [which they include within the prohibition] must, in this respect, be distinguished from those which remove exceptions to common law liabilities, such as the defence of common employment[113] or of compulsory pilotage,[114] or which attach new liabilities to the violation of existing rules of conduct, such as the Fatal Accidents Act 1976.[115]

If the editors of Dicey and Morris are merely reasserting the death of the vested rights theory in England then no issue can be taken with their statement. If they are merely trying to say that an action in tort will not lie in England which is based on a foreign statute, for example breach of statutory duty where the statute is a foreign statute or an action based upon a statutory cause of action which is created by a foreign statute, then, again, this is not objectionable.[116] The editors of Dicey and Morris appear to be discussing the action for breach of statutory duty and not extending their discussion to statutory causes of action which may be characterised as tortious,[117] nevertheless the editors' statement appears to oversimplify the matter and it may be interpreted as expressing an opinion the compass of which extends beyond

[107] Morse, op cit (fn 28) 185; Sykes and Pryles, op cit (fn 28) 202, 244; Dicey and Morris, op cit (fn 1) 44; SW Cavanagh and CS Phegan, *Product Liability in Australia* (1983) 254–5; and *Plozza* v *South Australia Insurance Company* [1963] SASR 122, 127–8.

[108] Ibid.

[109] Described as 'rules of the road, speed limits, regulations concerning the construction, state or maintenance of vehicles, brakes, tyres, collision regulations, safety regulations for factories or mines, or building regulations': Dicey and Morris, op cit (fn 1) 1513; ie statutes which may allow for an action for breach of statutory duty but do not establish an independent statutory cause of action.

[110] Dicey and Morris, op cit (fn 1) 1513.

[111] *Yorke* v *British and Continental SS Co* (1945) 78 LI LR 181 (CA).

[112] For example, the *Factories Acts*. The same applies to statutes imposing insurers' liabilities, eg the former *Workmen's Compensation Acts*.

[113] *Law Reform (Personal Injuries) Act* 1948 s 1; see *Parker* v *Commonwealth* (1965) 112 CLR 295, 307.

[114] *Pilotage Act* 1987, s 16; *The Arum* [1921] P 12, and *The Waziristan* [1953] 1 WLR 1446 rest on the assumption that the provision in force at that time (equivalent to this provision) satisfies cl (l)(a) of the Rule [Rule 203].

[115] *Davidsson* v *Hill* [1901] 2 KB 606 (CA); *The Esso Malaysia* [1975] QB 198; *Koop* v *Bebb* (1951) 84 CLR 629. Contrast *Young* v *Industrial Chemicals Co Ltd* [1939] 4 DLR 392 (BC). See PRH Webb, 'The Conflict Of Laws And The English Fatal Accidents Acts' (1961) 24 MLR 467. In *The Esso Malaysia* [1975] 1 QB 198, 206, Brandon J approved the distinction drawn by Dicey and Morris regarding the *Fatal Accidents Acts*.

[116] See eg *Gould* v *Incorporated Nominal Defendant* [1974] VR 488, 495.

[117] As in the case of the only authority which the editors' cite for their proposition: *Yorke* v *British and Continental SS Co Ltd* [1945] LI LR 181 (CA).

merely actions for breach of a foreign statutory duty.[118] If the territorial scope of an English Act is such that it is capable of applying to foreign conduct then it will so apply. It is only when the Act is limited in its operation to domestic conduct that the editors' statement would be true, ie the act is not actionable in England because the English Act does not operate extraterritorially or would not extend in its territorial scope to the foreign conduct. However, if the compass of their statement goes beyond this and posits that English statutes that create a cause of action that can be characterised as tortious cannot apply to foreign conduct, then it flies in the face of authority,[119] and indeed their own work,[120] and it ignores the capacity of the English Parliament to legislate extraterritorially.[121] The only authority cited which supports the editors' proposition[122] was a case in which the court interpreted the relevant English Regulation to apply only in respect of ships in docks and harbours in the United Kingdom and so the Regulation could not upon an interpretation of its own terms, not by some overriding principle of law such as that suggested by the editors of Dicey and Morris, apply to an act which took place elsewhere in the world. The court in that case did not make the distinction which the editors seek to make between statutes creating new rules of conduct and those which remove exceptions to common law liabilities or which attach new liabilities to the violation of existing rules of conduct, and in the case of some of the statutes which the editors describe as attaching new liabilities to the violation of existing rules of conduct, vis-a-vis creating new rules of conduct, the courts have described the statute as creating an entirely new cause of action.[123]

[118] Compare *The Esso Malaysia* [1975] 1 QB 198, 206 per Brandon J.

[119] For example *Walker* v *WA Pickles Pty Ltd* [1980] 2 NSWLR 281, 290 per Glass JA (286–7 Hutley JA agreeing) and *Young* v *Industrial Chemicals Co Ltd* [1939] 4 DLR 392, 398–9 (BC)

[120] Dicey and Morris op cit (fn 1) 15–17.

[121] For example Bennion, op cit (fn 1) 263–8, especially 267; *In re Paramount Airways Ltd* [1993] Ch 223, 240 per Sir Donald Nicholls V-C (Taylor and Farquharson LJJ agreeing); *In re Seagull Co Ltd* [1993] Ch 345, 354–5 (CA) per Peter Gibson J (Lloyd and Hirst LJJ agreeing); *Gold Star Publications Ltd* v *DPP* [1981] 1 WLR 732, 737 per Lord Simon of Glaisdale (dissenting, but not on this point); Sykes and Pryles, op cit (fn 28) 241; Pryles, op cit (fn 1) 62–6.

[122] That is, *Yorke* v *British and Continental SS Co Ltd* [1945] L1 LR 181 (CA).

[123] For example, *Koop* v *Bebb* (1951) 84 CLR 629, 641, discussing the Victorian equivalent to *Lord Campbell's Act*; *Victorian Railways Commissioners* v *Speed* (1928) 40 CLR 434, 440–1 discussing *Lord Campbell's Act*; *The Vera Cruz* (1884) 10 App Cas 59 (HL) discussing the *Fatal Accidents Acts*; In *Downs* v *Williams* (1971) 126 CLR 61, 84, Windeyer J in discussing *Lord Campbell's Act* stated: 'What it [the Act] did was to create a cause of action which Lord Blackburn described as "new in its species, new in its quality, new in its principle, in every way new": *Seward* v *The 'Vera Cruz'* (1884) 10 App Cas 59, 70–1'; *Davidsson* v *Hill* [1901] 2 KB 606, 613 per Kennedy J (Phillimore J agreeing) discussing the *Fatal Accidents Acts*. Compare Sykes and Pryles, op cit (fn 28), 572–3. Contrast *The Esso Malaysia* [1975] 1 QB 198, 206 per Brandon J approving the distinction drawn by Dicey and Morris regarding the *Fatal Accidents Acts*.

THE INTERRELATIONSHIPS OF THE THREE METHODS

In at least two reported decisions the courts have used more than one of the three methods discussed above in the determination of the spatial application of a forum statute. In *Pugh* v *Pugh*[124] the court was required to determine whether or not the *Act of Marriage Act* 1929 (UK) affected the capacity to contract marriage of all persons domiciled in England wherever the marriage may be celebrated.[125] It appears that in reaching its decision the court employed both the purposive and private international law methods. In that case both methods produced the same result. In *Re Perkins, deceased*[126] McLelland J was called upon to determine the territorial scope of a testator's family maintenance statute. He followed Dixon J's reasoning in *Wanganui-Rangitikei Electric Power Board* v *AMP Society*,[127] in applying the rules of private international law to the statute, and in so doing he refused to apply the presumption to it.[128] He also found that the Act's purpose was not of any assistance in that particular case.

It may be that both the presumption and private international law methods are able to be employed to work together. The extraterritorial operation of a statute (the existence of which is determined by the application of the presumption against extraterritorial legislation) being that operation beyond which the relevant rule of private international law will allow a statute to operate.[129] This is subject, of course, to the possibility that a statute may proscribe the application of either method.[130]

Kahn-Freund has stated that the

> rule against the extraterritorial operation of statutes is, I submit, innocuous, because it is, in itself, meaningless. In order to determine whether the application of a statute to a case would be 'extraterritorial', you must decide what factors connecting the claim or case with the territory you regard as relevant. 'Extraterritorial' may refer to events *extra territorium,* to persons somehow belonging to another territory, to property situated *extra territorium,* to contracts subject to foreign law, etc, *ad infinitum.*[131]

Whilst Kahn-Freund appears to have oversimplified the position somewhat in describing the presumption as 'meaningless', it is true that the application of the presumption against extraterritorial legislation merely supplies the court with a positive or negative response to a particularised version of the

[124] [1951] P 482.
[125] Dicey and Morris, op cit (fn 1) 17.
[126] (1958) 58 SR (NSW) 1.
[127] (1934) 50 CLR 581, 595–7.
[128] (1958) 58 SR (NSW) 1, 8.
[129] Compare *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 601 per Dixon J; *Barcelo* v *Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 424–7 per Dixon J; *Young* v *Industrial Chemicals Co* [1939] 4 DLR 392, 394; *Kemp* v *Piper* [1971] SASR 25, 29 per Bray CJ; Bennion, op cit (fn 1) 256–7; and Pearce and Geddes, op cit (fn 44), 99–100
[130] See fns 48 and 98 supra.
[131] Kahn-Freund, op cit (fn 8) 60. Cf *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581, 600 per Dixon J; *Moran* v *Pyle National (Canada) Ltd* (1973) 43 DLR (3d) 239, 242.

question 'does this statute apply to the foreign person or matter?' It does not attempt to provide the court with more generalised formula for the determination of the spatial application of the statute.[132] Undoubtedly, a number of applications of the presumption against extraterritorial legislation would generate a more robust picture of the spatial application of the statute as the manifold possible spatial applications of the statute are explored. If the rules of private international law are applied to a statute they will generate criteria for the determination of the territorial scope of the statute. If these criteria are satisfied then the statute will be applicable to the case regardless of any considerations of whether or not the statute, in so operating, is operating extraterritorially. Indeed, some judges, most notably Dixon J of the High Court of Australia, have stated that the operation generated by the application of the rules of private international law must *ipso facto* be intraterritorial.[133] If the presumption against extraterritorial legislation and the method of applying the rules of private international law to statutes do co-exist the only possible operation for the presumption can be in those cases in which a party wishes to apply the statute in circumstances which go beyond those for which the relevant private international law rule would provide. However, the case books are littered with cases in which the presumption has been applied without any reference to the rules of private international law. Therefore, it appears that, at least in practice, the rules of private international law need not be resorted to before the presumption and these two methods are treated as mutually exclusive rather that complimentary.

Mann reconciled the presumption and the application of the rules of private international law in this way. He initially opined that the presumption is the 'most significant'[134] 'implied self-limiting provision'[135] included in any legislation.[136] He then stated: 'Two questions must be clearly distinguished: does English law apply? If so, does the internal English statutory provision extend to the circumstances in issue?'[137] He stated that the presumption 'presupposes the application of English law' and hence is merely an emanation of the second question. Mann had previously stated that 'English law, including statute law, ... is only applicable if, in accordance with the rules of the conflict of laws, the *lex causae* is English'.[138] Mann's analysis therefore requires the interaction of the two methods and attributes to them distinct and different roles in the determination of the territorial scope of a statute which is silent on this issue.

As for the purpose method. If the subject matter, object or purpose of the statute requires a particular territorial scope, albeit extraterritorial, then this

[132] Compare *Mynott* v *Barnard* (1939) 62 CLR 68, 76–7 per Latham CJ; and Kelly, op cit (fn 3) 79–80.
[133] See fn 129 supra.
[134] FA Mann, 'Statutes And The Conflict Of Laws' (1972–3) 46 BYIL 117, 127.
[135] Ibid.
[136] Id 127ff and especially 142–3. Cf Kahn-Freund op cit (fn 74) at 240–3.
[137] Mann, op cit (fn 134) 127. It is regrettable that the clear distinction is frequently being blurred, particularly in the United States: Anton, *Private International Law* (1967) 73ff, seems to treat the second question as a conflict question.
[138] Id 124.

must be adhered to. Neither the presumption against extraterritorial legislation nor the application of the rules of private international law can mollify this result because both methods will be rebutted or ousted by a legislative subject matter, object or purpose that requires a scope that differs from that provided by either of these methods.[139]

CONCLUSION ON THE THREE METHODS

It is not the purpose of this thesis to discuss the merits of the three methods discussed above for determining the territorial scope and/or whether or not a statute has extraterritorial operation, as this has been undertaken by a number of eminent jurists, albeit not with a view to all three of the methods adumbrated above.[140] The purpose of this article was merely to highlight the competing methods for the resolution of the issue of the spatial application of statutes, and to suggest that despite an apparent perception of unanimity of view as to how this problem is solved, in fact such unanimity is illusory. As was suggested earlier in this article, it appears to the present author that the development of this area of law may be more an artefact of the parties' conduct of the matter before the courts than any reasoned jurisprudence. In a subsequent article the present author will attempt to apply these methods to similar statutory causes of action in England and Australia, namely Part I of the *Consumer Protection Act* 1987 (UK) (the 'CPA') and Part VA of the *Trade Practices Act* 1974 (Cth) (the 'TPA'). This subsequent article will attempt: a determination of whether the method of applying the rules of private international law can be applied to the CPA or the TPA; the application of the presumption against extraterritorial legislation and the purpose method to both the CPA and the TPA; and, the application of the rules of private international law to both the CPA and the TPA.

[139] See fns 48 and 97 supra.
[140] For example Kelly, op cit (fn 3).