INTERSTATE CONFLICTS AND THE ENFORCEMENT OF AN AUSTRALIAN STATE'S "GOVERNMENTAL INTERESTS" WITHIN AUSTRALIA

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1 INTRODUCTION

It has been clearly established in the common law world for a long time that foreign penal and revenue laws are unenforceable in a forum court.[1] *Dicey* and *Morris* state the rule thus: "English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State".[2] While the first two categories of foreign laws are well established, there is considerable doubt, outside of Australia, as to whether the third residual category of "public laws" can be justified.[3]

The High Court in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*[4] (which will be referred to in this article as "*Spycatcher*"), was called on to decide whether it would allow a claim of the British Government to be heard in Australia.[5] One of the arguments raised against allowing the action to go ahead was that it would potentially involve an Australian court enforcing a foreign penal, revenue or other public law. In the course of rendering its decision, the Court reformulated the principles stated above into a broader principle. The Court stated that Australian courts will not enforce the "governmental interests" of a foreign sovereign. By this, the Court meant "the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government".[6] This rule or principle will be referred to, in this paper, as the "non-enforcement principle".

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1 Authority against the enforcement of foreign penal laws goes back at least as far as the case of *Folliott v Ogden* (1789) 1 H Bl 123; 126 ER 75. The comparable rule against foreign revenue laws is at least as old. For example, in 1928 Tomlin J said "[i]t seems to be plain that at any rate for somewhere about 200 years, since the time of Lord Hardwicke, the judges have had present to their minds the notion, and have repeatedly said that the Courts of this country do not take notice of the revenue laws of foreign States": *In re Visser* [1928] 1 Ch 877, 881-2.

2 L Collins (ed), *Dicey and Morris on The Conflict of Laws* (11th ed 1987) Vol 1, 100.

3 The position in England is unclear. In *Attorney-General (NZ) v Ortiz* [1984] AC 1 the Court of Appeal was divided as to whether such a "residual" category existed. Subsequent House of Lords decisions in that case [1984] AC 35, and in *Williams and Humbert Ltd v W & H Trademarks (Jersey) Ltd* [1986] 1 AC 368 have not clarified the position. The principle against the enforcement of foreign "political" or "public" laws has never been applied in the United States; see A Ehrenzweig, *Private International Law* 1967 (General Part), 164.

4 (1988) 165 CLR 30.

5 It is not proposed to discuss the facts of the case in detail. For analysis and criticisms of the case see generally, M Howard, "Spycatcher Downunder" (1989) 19 UWAL Rev 158; F A Mann, "Spycatcher in the High Court of Australia" (1988) 104 LQR 497; P B Carter, "Transnational Recognition and Enforcement of Foreign Public Laws" (1989) 48 Cambridge L J 417.

6 *Supra* n 4, 42.

The High Court in *Spycatcher*,[7] clearly understood penal and revenue laws to be examples of a broader group of foreign laws which ought to be unenforceable in Australian courts. Rather, than calling this group of laws "public laws" the Court opted for the expression of "governmental interests".[8] This was because the Court said that "[t]he expression "public laws" has no accepted meaning in our law".[9] By adopting such a rule the Court was able to state one underlying rationale for the non-enforcement of all such foreign laws. It also meant that courts applying the rule would not need to be concerned with the narrow question of whether a particular foreign law was "penal" or of a "revenue" nature.[10]

This paper considers whether the non-enforcement principle should be applied within Australia; that is, between Australian states.[11] If it was then one state's "governmental interests" would not be enforced in another state. This issue is part of the wider issue of whether the rules of private international law[12] are applicable at all within Australia; and indeed this issue is tackled in the light of the recent High Court cases of *Breavington v Godleman*[13] and *McKain v RW Miller & Co (South Australia) Pty Ltd.*[14] Although doing little to clarify the law, it is clear from the latter case that a majority of the present High Court is comfortable with the general application of the rules of private international law within Australia. The paper then considers "governmental interests" or "public" laws in particular, and argues that it would not be appropriate to apply the non-enforcement principle within Australia; notwithstanding the general position adopted most recently by the High Court. The paper also considers the impact of the recently introduced cross-vesting of jurisdiction scheme. As will be seen, it is difficult to be certain as to the impact of the scheme on the principle. However, the paper argues that it is

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7 *Supra* n 4.

8 Care should be taken with this expression because the meaning ascribed to it by the High Court is by no means universal. In the United States, the notion of a government's interests has been used as a tool for deciding between competing statutes of different states; see *Alaska Packers Association v Industrial Accident Commission of the State of California* (1935) 294 US 532.

9 *Supra* n 4, 42.

10 In some of the cases the classification of the foreign law concerned has been attended by a certain artificiality. For example, in *Metal Industries (Salvage) Ltd v Owners of the ST "Harle"* [1962] SLT 114 the Court held that a claim by the French government for an employer's contributions to a state health insurance and family benefits scheme was a claim for the enforcement of a French revenue law. By so classifying the action the Court was able to bring the action within the rule against the enforcement of foreign revenue laws.

11 Unless otherwise stated, a reference in this paper to one or all of the Australian states includes the Territories.

12 The writer has no particular preference for the expression of "private international law" over that of "conflicts of laws". However, "private international law" has been used, in general, in this paper in recognition of the fact that the origins of this area of law, and the bulk of its developments, were in response to the laws of other nations. This is in line with the views of A Ehrenzweig, "Interstate and International Conflicts Law: A Plea for Segregation" (1957) 41 Minnesota L Rev 717, 718 n 8. However, this is by no means a universal view, as others have argued that the history of private international law or conflicts of law is in inter-provincial conflicts within loose federations; see E Cheatham, "A Federal Nation and Conflict of Laws" (1950) 22 Rocky Mountain L Rev 109, 110, and A Du Bois, "The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions" (1933) 17 Minnesota L Rev 361, 361-2.

13 (1988) 169 CLR 41.

14 (1991) 174 CLR 1.

probably the case that the cross-vesting scheme is against the applicability of the non-enforcement principle within Australia.

A *Should Private International Law Rules, in General, be Applied to Interstate Situations?*

One might have thought that in a federal system of government, how one component of that system dealt with the applicability or enforceability of another component's laws would raise fundamental questions as to the nature of the system.[15] One might have also imagined that this issue would have been subjected to much discussion and analysis, both curial and extra-curial. This has not been the Australian experience before the High Court cases of *Breavington*[16] and *McKain*.[17] The approach of Australian courts since federation has overwhelmingly been to treat Australian states *inter se* as though they were foreign countries. Hence, the rules or principles of private international law have traditionally been applied to interstate situations in Australia. There has been no questioning whether this is appropriate in the Australian federal system. This reflects a particular view of the way that federation affected the colonies, and what their position and status is, as states, under the Constitution.

This "traditional" approach to the formation of the Australian states is to see them, under the Constitution, as remaining largely separate and independent, as they were when they were colonies. The only effect of federation, on this view, is that a few express powers were ceded to the new central government, but that no fundamental change occured. This has been seen as the traditional view of federation in the United States of America as well. Hence, in 1893 it was said:

> Though the citizens of the several States are one people and one nation under the unity of the National government as the supreme authority within the limitations of the constitution, yet the States themselves are severally sovereign, independent and foreign to each other in regard to their internal and domestic affairs.[18]

This approach was carefully analysed in *Breavington*[19] and *McKain*.[20] The High Court has not however spoken with one voice on the issue. Indeed, one might wonder whether the issue has ever been attended with more uncertainty despite being pronounced upon by the highest court in the land in two recent cases.

Breavington[21] saw the High Court, by a majority, say that the traditional private international rule relating to foreign torts was inapplicable to torts which are committed within Australia. The majority of the Court via different paths, which are considered below, propounded a rule whereby the *lex loci delicti* would be applied in almost if not all cases. In so doing great doubt was

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15 Cowen recognised this as he said in the context of the full faith and credit provision of the Constitution "[t]his involves high policy considerations which turn principally upon the inter-relation of the component parts of the Australian federal structure": Z Cowen, "Full Faith and Credit The Australian Experience" (1952) 6 Res Judicatae 27, 50.

16 *Supra* n 13.

17 *Supra* n 14.

18 Estabrook, "Rorer on Inter-state Law" (2nd ed 1893), 12.

19 *Supra* n 13.

20 *Supra* n 14.

21 *Supra* n 13.

cast on the notion that private international rules were to be applied between the Australian states as though they were separate countries *inter se*.

Barely three years later, a differently constituted majority of the High Court, in *McKain*,[22] reaffirmed the traditional approach of applying the private international rule relating to foreign torts to torts which are committed within Australia. Logically such an approach must point towards the application of the rules of private international law generally within Australia and so aligns a majority of the present High Court with many earlier decisions. For example, Williams J said in 1947 "[f]or the purposes of private international law, South Australia is a foreign country in the courts of New South Wales",[23] and Windeyer J said in 1964 "[t]he states are separate countries in private international law, and are to be so regarded in relation to one another".[24] Such statements are reflective of the approach adopted by the High Court in a number of cases.[25]

Part of this approach has involved the rejection of the notion that federation, of itself, has altered the applicability of private international rules within Australia. One example of this will suffice. In *Anderson v Eric Anderson Radio and TV Pty Ltd*[26] Windeyer J dismissed an argument that the notion or laws of the federal system had a role to play in that case.[27] The case had been brought in New South Wales and concerned an accident which occurred in the Australian Capital Territory. He said:

> The laws of the Commonwealth are not a transcendent system of jurisprudence supernally hovering over the laws of the States. Where a State law is inconsistent with a valid Commonwealth law, the latter prevails. That is all.[28]

While the notion of each Australian state being as foreign to each other as Norway[29] is to Australia may seem odd to most Australians,[30] it was not questioned seriously in Australian courts until quite recently. Indeed, if one takes the "traditional" view then it is a consistent and natural result.

As suggested by the statement from Rorer above, the United States' courts have, like the High Court, applied private international law rules to interstate situations.[31] The point can illustrated by reference to a line of United States'

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22 *Supra* n 14.

23 *The Chaff and Hay Acquisition Committee v JA Hemphill and Sons Pty Ltd* (1947) 74 CLR 375, 396.

24 *Pedersen v Young* (1964) 110 CLR 162, 170.

25 See *Koop v Bebb* (1951) 84 CLR 629; *Kay's Leasing Corp v Fletcher* (1964) 116 CLR 124; and *Anderson v Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20.

26 *Anderson v Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20.

27 L K Murphy, QC, had argued that s 118 of the Commonwealth Constitution and s 18 of the State and Territorial Records Recognition Act 1901 (Cth) were relevant to the choice of law to be applied to the tortious claim.

28 *Supra* n 25, 45.

29 The writer, in earlier drafts, used the USSR as an example of a country foreign to Australia, but events have rather overtaken the reference.

30 Dunphy J made a similar observation in *Permanent Trustee Co (Canberra) Ltd v Finlayson and Ors* (1967) 9 FLR 424. It is cited below. The writer recognises that how odd the notion will appear to Australians may well depend to a large part on the season in which the notion is put. It is the speculation of the writer (untested, except anecdotally) that during summer this notion will appear oddest to Australians.

31 A striking example of this occurred in *Huntington v Attrill* (1892) 146 US 657. The United States Supreme Court considered a suit brought in a Maryland court to enforce a New York judgment obtained pursuant to a New York statute. The Supreme Court considered whether the New York judgment was based on a penal statute, because of the principle that a court

cases which applied the private international law concept of comity between nations to interstate disputes.[32] In one such case it was said that

> [t]reating the two states as sovereign and foreign to each other ... it is elementary that the right to enforce a foreign contract in another foreign country could alone rest upon the general principles of comity.[33]

(1) The Decisions in Breavington and McKain

Breavington[34] has a threefold significance. First, it established, albeit briefly, a separate choice of law rule for torts within Australia.[35] Secondly, the majority of the judges were prepared to reconsider the relationship which the states enjoyed with each other under the Constitution and federation. Thirdly, because of the first two, doubt was thrown by the case on the applicability of private international law rules, in general, to interstate situations.

In the course of the argument and judgments, unprecedented prominence was given to both the full faith and credit provisions and federal considerations of a more general nature.[36] It was a decision which according to Toohey J, in an

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will not enforce the penal laws of another country. In adopting this approach the Supreme Court expressly followed the reasoning of the Judicial Committee of the Privy Council in the case of the same name (see [1893] AC 150), even though the Judicial Committee had been considering the enforceability of the same New York judgment in Ontario, Canada. The Judicial Committee in this case relied upon the United States Supreme Court decision in *State of Wisconsin v Pelican Insurance Co of New Orleans* (1888) 127 US 265, which concerned an interstate conflict. There was thus complete interchangeability with an interstate decision being applied to an international conflict decision and that international decision then being applied to an interstate decision. Query whether *Huntington v Attrill* now represents the law in the United States following the Supreme Court cases of *Fauntleroy v Lum* (1908) 210 US 230 and *Milwaukee County v M E White Company* (1935) 296 US 268.

32 See *The Bank of Augusta v Earle* (1839) 10 L ed 274; *Dunlap v Rogers* (1867) 93 Am Dec 433; *Bond v Hume* (1917) 243 US 15.

33 *Bond v Hume* (1917) 243 US 15. A notable exception to this is the judgment of M'Kinley J who dissented in *The Bank of Augusta v Earle* (1839) 10 L ed 274. His Honour found that comity was inapplicable to an inter-state situation. This was because it was a principle of international law, and the states had no national personality or power remaining as they had conferred such power on the Federal Government by the Constitution (*ibid* 598). Whether or not his Honour would have rejected the application of all private international law rules to interstate situations is, of course, a moot point. Arguably, from this judgment, M'Kinley J may well have allowed more "domestic" private international law rules to apply between the states.

34 *Supra* n 13.

35 Although this may not be a desirable thing, as it has been observed that "[i]t is commonplace to remark, that the variety of factual circumstances and issues brought within the general category of tort, make a single, rigid choice of law rule inappropriate to the resolution of all cases concerning foreign torts": V Kerruish, "Actions Concerning Inter-State Torts: Recent Developments in Australian Conflicts Law" (1985) 16 UWAL Rev 64, 65. See also the criticisms of the new rule by M Pryles, "The Law Applicable to Interstate Torts : Farewell to Phillips v Eyre?" (1989) 63 ALJ 158, 175-6. The choice of law rules for conflicts within Australia have been now affected significantly by the operation of the cross-vesting scheme.

36 *Eg* the issue of s. 118 of the Constitution was raised early on the first morning of argument by Deane J; see page 29 of the Transcript for the 6th of August, 1987. The parties argued the matter before the High Court for a day. The High Court then indicated it would attempt to resolve the case without recourse to the Constitution which would necessitate "bringing in" the states and the Commonwealth; see page 72 of the Transcript for the 6th of August, 1987. However, the Court felt unable to do so and when argument in the case

extra-curial address, "gave unprecedented recognition to the federal nature of Australian interstate conflicts problems".[37]

Briefly the relevant facts were these. There was a motor vehicle accident in the Northern Territory in which Mr Breavington was injured. Mr Breavington was a passenger in a vehicle which collided with a vehicle driven by Mr Godleman. Mr Breavington sued Mr Godleman, amongst others, in negligence in the Victorian Supreme Court. At the time of the accident both of them had been residents in the Northern Territory, but by the time of the action, Mr Godleman was a resident of Victoria. The question posed was which law should be applied by the Victorian Supreme Court, that of the Northern Territory or that of Victoria.[38] The High Court unanimously decided that the Supreme Court of Victoria should have applied the law of the Northern Territory, including the relevant Northern Territory Act. A clear majority were of the view that this law should have been applied because it was the *lex loci delicti*, although it could not be said that their Honours agreed as to why that law should be applied. This result, which represents the first significance of the case as set out above, has been followed in Australia.[39]

McKain[40] concerned the question of whether the New South Wales Supreme Court, in a tortious matter arising out of an injury which occurred in South Australia, was bound to apply the South Australian or New South Wales limitation periods.[41] It was common ground between the parties that the question of liability fell to be determined by the law of South Australia; being the place where the tort occurred.

Given that the Plaintiff conceded that *Breavington*[42] dictated that South Australia law should govern the substantive issues, one might have expected that the Court in *McKain*[43] would have concentrated on the issue of whether the South Australian statutes were part of the substantive law of South Australia or not. However, the majority took the opportunity to reconsider and restate the choice of law rule which was applicable to torts occuring in Australia.

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recommenced on the 1st of December, 1987, the Commonwealth, all states (except Tasmania) and the Northern Territory were represented.

37 The Fourth Sir Leo Cussen Memorial Lecture (1990) 6 Australian Bar Review 185.

38 The question was important in this case because the Motor Accidents (Compensation) Act 1979 (NT) significantly restricted the right of a Plaintiff to recover for certain losses. At the relevant time there was no such restriction on recovery under Victorian law. Since then a similar scheme has been introduced into Victoria; see Transport Accident Act 1986 (Vic).

39 See *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 93 ALR 131 (special leave to the High Court denied 11 May, 1990). In this case the Plaintiff sued his employer in New South Wales in tort for injuries he suffered in the Northern Territory. The Court unanimously held that *Breavington* was authority that the *lex loci delicti* should be applied, although the Court of Appeal could not extract a single reason from the High Court as to why this should be so; see also *Waterhouse v ABC* (1989) 86 ACTR 1, 19; *Amor v Macpak Pty Ltd* (1989) 95 FLR 10, 12-3; *Anglo-Australian Foods v Von Planta* (1988) 20 FCR 34, 38-9.

40 *Supra* n 14.

41 If the South Australian limitation period had been applied the Plaintiff's case would have been statute barred. The South Australian limitation period was found in the Limitation of Actions Act 1936 (SA) and the Workers' Compensation Act 1971 (SA).

42 *Supra* n 13.

43 *Supra* n 14.

The next section of the paper considers the views of various members of the Court as expressed in *Breavington*[44] and *McKain*.[45]

(a) Breavington and "Full Faith and Credit"

Because the Court in *Breavington*[46] was considering whether a law of a territory should be applied in a state court, the direct applicability of s 118 of the Constitution,[47] and of s 18 of the State and Territorial Laws and Records Recognition Act 1901 (Cth)[48] became relatively unimportant issues. Apart from Deane J, the other members of the Court were of the view that by its terms s 118 did not apply to the laws of a Territory and therefore had no direct bearing on the case.[49] The same judges were also of the view that s 18 of the Recognition Act was not directly relevant as the section did not apply to either state or territory statutes.[50] Hence, the High Court clearly rejected the argument that the Northern Territory statute should be applied because the Victorian Supreme Court was obligated to give it "full faith and credit" according to the strict terms of s 118.

Yet, as Dawson J said:

> Notwithstanding that neither s 118 of the Constitution nor s 18 of the Recognition Act have any application [to the Northern Territory Act], it [was] argued that the application of s 118 to State laws does bring about a regime which displaces *Phillips v Eyre* and requires a choice of law of its own.[51]

This argument led to the majority of the Court reassessing the states' relationship to each other, as it decided whether the private international rule applicable to torts should be applied within Australia.

(b) Breavington and McKain and the Federal Structure

Mason CJ

In *Breavington*[52] the Chief Justice held that the law of the Northern Territory ought to have been applied as it was the *lex loci delicti*. His Honour did not decide whether the *lex loci delicti* would always govern an interstate tort, or whether in certain circumstances that law should be departed from.[53]

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44 *Supra* n 13.

45 *Supra* n 14.

46 *Supra* n 13.

47 S 118 of the Constitution provides: "Full faith and credit shall be given, throughout the Commonwealth to the laws, public Acts and records, and the judicial proceedings of every State".

48 This Act will be referred to as "the Recognition Act" for the balance of this paper. Section 18 of the Act provides: "All public acts records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken."

49 *Breavington supra* n 13, 80 *per* Mason CJ; 93,95 *per* Wilson and Gaudron JJ; 114 *per* Brennan J; 148 *per* Dawson J; 163-4 *per* Toohey J. Mason CJ, Wilson J and Gaudron J were of the view that s 118 could not be a self-executing command to accord "full faith and credit" because of the presence in the Constitution of s 51(25). The other judges did not comment on this.

50 *Ibid*, 80 *per* Mason CJ; 94-5 *per* Wilson and Gaudron JJ; 115 *per* Brennan J; 150, 166 *per* Toohey J.

51 *Breavington, supra* n 13, 150.

52 *Supra* n 13.

53 It is difficult to comment on whether the judgment of Mason CJ in *Breavington* would support a residual "flexibility exception", such is present in the judgment of Lord

There was no need for his Honour to decide the question on the facts of this case, as there was "simply no reason to depart from the *lex loci delicti* as the primary or basic law to be applied".[54] Chief Justice Mason adopted the *lex loci delicti* as the basic law to be applied within Australia because

> Australia is one country and one nation. When an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction .... It may come as no surprise to him to find that the local law governed his rights and liabilities in respect of any wrong.... In these circumstances there may be a stronger case for looking to the place of the tort as the governing law for the purpose of determining the substantive rights and liabilities of the parties in respect of a tort committed within Australia.[55]

As noted above, in line with the United States authorities, his Honour did not see that s 118 of the Constitution changed substantially the choice of law issues. In *McKain*, Mason CJ reaffirmed that he did not understand s 118 to be a choice of law provision.[56]

It is clear from the judgment that Mason CJ in *Breavington*[57] was laying down a rule only for torts within Australia. It is however significant that his Honour arrived at a choice of law rule by considering Australia as one country rather than as a group of independent separate legal systems. Notwithstanding this, there is nothing in his Honour's judgment which suggests an outright rejection of the application of private international law rules within Australia in general.

Wilson, Deane and Gaudron JJ

In *Breavington*[58] three judges, Wilson and Gaudron JJ in a joint judgment, and Deane J separately, relied heavily on matters of a "federal nature". This was particularly true of implications which their Honours drew from the Constitution.

Justices Wilson and Gaudron recognised in their judgment the

> seeming incongruity in the determination of liability for tortious acts occurring in Australia but involving an interstate aspect by reference to the choice of law rules of private international law.[59]

Even though their Honours found that s 118 of the Constitution had no direct or immediate application to the question at hand,[60] it was an important consideration in their Honours' decision to apply the law of the Northern Territory. Hence their Honours said:

> The problem of one set of facts giving rise to one legal consequence by operation of one State law and another legal consequence by operation of another State law was resolved by the requirement in s 118, to which the Constitutions, the powers and laws of the States are by ss 106, 107 and 108 made subject, ... that the one set of facts occurring in a State would be adjudged

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Wilberforce in *Chaplin v Boys* [1971] AC 356. From the judgment, however, one gains the impression that Mason CJ may be of the view that the need for such a "flexibility exception" within Australia will be extremely limited.

54 *Supra* n 13, 79.
55 *Ibid* 78.
56 *Supra* n 14 at 19.
57 *Supra* n 13.
58 *Supra* n 13.
59 *Ibid* 85.
60 *Ibid* 95.

> by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication.[61]

This constitutional solution was given effect to, in their Honours' view, "only by the adoption of an inflexible rule"[62] that the *lex loci delicti* should apply to torts within Australia. By this their Honours implicitly rejected the older approach which would have said that, in the absence of a constitutional provision to the contrary, each state was independent and retained its own private international law rules.

Justice Deane did not subject the words of s 118 to the close reading of the other members of the Court. Indeed, rather than relying expressly on s 118, his Honour considered the Constitution and the federal structure as a whole. From this, Deane J was of the opinion that the Constitution had established for Australia a "unitary system of law". His Honour said:

> By "a unitary system of law", I mean a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent or reconciliable.... What is essential is that the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise.[63]

This was similar to the conclusion reached by Wilson and Gaudron JJ above. Justice Deane, however, went further and found expressly that it would be inappropriate to apply private international law rules within Australia. He justified this conclusion by reference to three broad considerations. They were that the application of such rules

> ignores the significance of the federation of the former Colonies into one nation. It frustrates the manifest intention of the Constitution to create a unitary national system of law. It discounts the completeness of the Constitution which, by the national legal structure which it establishes and by its own provisions, itself either precludes or provides the means of resolving competition and inconsistency between the laws of different States.[64]

Justice Deane held that the law of the Northern Territory applied because the "reconciliation of competing laws of different States is ordinarily to be found in the prima facie" territorial competence of each state;[65] a conclusion similar to that reached by Wilson and Gaudron JJ.

By the time that *McKain*[66] was argued before the Court, Wilson J had retired. However, Deane and Gaudron JJ in separate judgments in *McKain*[67]

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61 *Ibid* 98. This use by their Honours of s 118 of the Constitution is reminiscent of Marks J in *Borg Warner (Australia) Ltd v Zuppan* [1982] VR 437, 461 where his Honour said "[t]hese [full faith and credit] provisions either singly or cummulatively cannot in my view be construed as a constitutional or legal mandate to the States to apply each others" laws .... However the mandate enshrines linchpin policy of Federation, that the States and Territories of Australia, whilst sovereign, are fused in one nation, with transcending identity and mutuality of interests."

62 *Supra* n 13, 98.

63 *Ibid* 121.

64 *Ibid* 125.

65 *Ibid* 136.

66 *Supra* n 14.

67 *Id.*

affirmed their respective approaches to the implications which were able to be drawn from the federal structure.

Brennan and Dawson JJ

The judgments in *Breavington*[68] of Brennan and Dawson JJ, rendered separately, reflected their Honours' understanding that the colonies which had been independent prior to federation, had, as states, maintained that independence *inter se* after 1901 except "to the extent ... that the Constitution affected their mutual independence or exposed that independence to affection by federal law".[69] In this, their Honours echoed the remarks of Windeyer J in *Anderson*[70] cited above, and showed their adherence to the "traditional" view of the effect of federation and the Constitution; a view contrary to that of the majority of the Court in *Breavington*.[71]

Rather than finding anything in the Constitution or Commonwealth law which would render private international law inapplicable within Australia, Brennan J found that the federal system supported the application of private international law rules. His Honour said:

> Far from disturbing the Australian federation, the common law rules applicable in respect of extraterritorial wrongs appropriately reflect the mutual independence of the several Australian States and Territories.[72]

This view was accepted by the majority judgment in *McKain*.[73]

Reflecting their respective reasoning, both Brennan J and Dawson J in *Breavington*[74] applied the common law rule found in *Phillips v Eyre*.[75] Clearly their Honours, at least in the area of torts, affirmed the application of private international law within Australia.

Their Honours reaffirmed and refined these views in the majority judgment in *McKain*[76] in which they were joined by Toohey and McHugh JJ. This majority judgment pointed out that only Wilson, Deane and Gaudron JJ had, in *Breavington*,[77] relied on implications drawn from the Constitution, and that therefore a majority of the Court in that case had rejected the notion that the Constitution overrode the common law choice of law rules in respect of torts within Australia. While this may be correct, the majority in *McKain*[78] failed to mention that a clear majority in *Breavington* had rejected the application of the traditional rule in *Phillips v Eyre* to torts within Australia. Their Honours,

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68 *Supra* n 13.

69 *Ibid* 107 *per* Brennan J; see also 142 *per* Dawson J.

70 *Supra* n 25.

71 *Supra* n 13. A view which has been rejected by some commentators, such as Detmold: "The two legal orders [of the states and the Commonwealth] are not of equal status. The States have submitted themselves to the Commonwealth, and the Commonwealth legal order therefore embraces the State legal order": M J Detmold, *The Australian Commonwealth* (1985), 19.

72 *Ibid* at 111.

73 *Supra* n 14.

74 *Supra* n 13.

75 (1870) QB 1. Their Honours recognised the development which had taken place in the rule, and seemed content to accept modern restatements of it, in cases such as *Chaplin v Boys* [1971] AC 356. Their Honours were careful, however, to reject the "flexibilty exception" present in Lord Wilberforce's judgment in that case; see *Breavington supra* n 13 at 111-4 *per* Brennan J and at 147-8 *per* Dawson J.

76 *Supra* n 14.

77 *Supra* n 13.

78 *Supra* n 14.

rather, adopted the refined formulation of the rule in *Phillips v Eyre* as set out in the judgment of Brennan J in *Breavington*.[79]

Toohey J

Justice Toohey, in *Breavington*[80] in many respects followed the same path that Brennan and Dawson JJ had adopted. His Honour firstly traced the development of the rule in *Phillips v Eyre*, and despite a reservation,[81] seemed prepared to adopt a formulation of the rule subject to any limitation present within the Constitution.[82] Toohey J was, however, a little unclear as to the impact that Australia's federation had upon the application of private international law rules between the Australian states. It seems from his judgment that he would apply the rules of private international law within Australia unless they resulted in an undesirable resolution of a particular case. His Honour, for example, quoted, with approval, from the judgment of Marks J in the Victorian Full Court case of *Borg Warner (Aust) Ltd v Zuppan*[83] to the effect that private international law rules may frustrate the proper operation of state laws in Australia.[84] In this case, however, Toohey J found that it was consistent with both "the common law choice of law principles as they have now developed ... [and] the relation of Victoria and the Territories as members of the federation"[85] that the law of the Northern Territory should be applied, via the application of the appropriate private international rule. However, as discussed above, these reservations about the impact of the federation were ceratinly not present in the majority judgment in *McKain*.[86]

Summary

Breavington[87] and *McKain*[88] create doubt on two fronts. The first is what is the rule to apply to torts within Australia. *Breavington*[89] saw a clear majority

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79 This formulation was: "A plainitff may sue in the forum to enforce a liability in respect of a wrong occurring outside of the territory of the forum if - 1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defndant a civil liability of the kind which the the plaintiff claims to enforce; and 2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce": *supra* n 13, 110-111.

80 *Supra* n 13.

81 Toohey J thought the reference to "another country" (in formulations of the rule in *Phillips v Eyre*) "strikes a somewhat discordant note as between the States and Territories of Australia ....": *supra* n 13, 160.

82 *Ibid* 163. Toohey J accepted Lord Wilberforce's "flexibility exception" as opposed to Brennan and Dawson JJ in *Breavington*.

83 [1982] VR 437, 460-461.

84 Toohey J at 167 quoted from the judgment of Marks J ([1982] VR 437, 460-1) that "having regard to the present-day mobility of people and traffic in and out of the Australian States and Territories individual schemes must be seen as operating together to form something in the nature of a single interlocking structure for the nation. The application of private international law rules as though each scheme was that of a sovereign state at arm's length tends to frustrate their planned operation, and increases the likelihood of unintended windfalls and losses".

85 *Supra* n 13, 167.

86 *Supra* n 14.

87 *Supra* n 13.

88 *Supra* n 14.

89 *Supra* n 13, which has been followed in a number of cases, see *supra* n 39 .

of the Court reject a formulation based on *Phillips v Eyre*, yet in *McKain*,[90] barely three years later, a majority of the Court in *obiter dicta* has propounded a test based on *Phillips v Eyre*.

On the more general question of whether private international rules should be applied within Australia, the picture is little clearer. It can be said that three judges in *Breavington* were against the application of private international law rules within Australia.[91] Another rejected the application of the relevant private international law rule because of the nature of Australia as a nation.[92] The remaining three judges were in favour applying private international law rules within Australia; two clearly so,[93] with the third apparently conceding that federal factors could have an impact on the relevant choice of law rule.[94]

At its weakest it can be deduced from *Breavington*[95] that the majority of judges saw that the federation of the states, under the Constitution, altered the applicabiltiy of the rules of private international law between the states. Yet the majority in *McKain*[96] was clearly in favour of applying the rules of private international law.

(2) Commentators' Views

On the general question of whether the rules of private international law should be applied within a federation academic commentators, perhaps not surprisingly, have been divided in their views. Falconbridge seemed to be in favour of there being international conflicts rules applied by United States' courts which were distinct from the rules applied to conflicts between the several states. However, he saw no problem with the same set of rules being applied by Canadian courts to both conflicts between Canadian provinces, and international conflicts. Falconbridge did not even recognize this inconsistency.[97]

The views set out below are those of commentators writing in the context of the United States. The issue appears not to have been discussed, at length, in an Australian context.[98] Interestingly enough none of the United States writers have approached the issue by re-examining the relationship between the several states, or by challenging the notion that they are *prima facie* separate. This is perhaps understandable in the United States, where the states are largely free to determine their own conflicts rules. This is because

> [t]he Supreme Court of the United States was not invested with an original jurisdiction to apply the national law to an extent comparable with the

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90 *Supra* n 14.

91 *Supra* n 13 *per* Wilson, Deane and Gaudron JJ.

92 Mason J.

93 Brennan and Dawson JJ.

94 Toohey J.

95 *Supra* n 13.

96 *Supra* n 14.

97 J D Falconbridge, *Essays on Conflict of Laws* (1947) 227-234.

98 V Kerruish *supra* n 35, 87, said of traditional conflicts doctrine that "[i]t is evident that a body of doctrine evolved in the context of conflicts of law between sovereign nations at arms length, is likely to need some adaptation to serve the purposes of a federation ... where the method [of choice of law] seems inappropriate, either in the result or because established categories and choice of law rules are inapposite, other methods ... can be used." See also M Pryles and P Hanks, *Federal Conflict of Laws* (1974), 67-8.

> jurisdiction of [the High Court]. Nor was it invested with a general appellate jurisdiction of the kind invested in [the High Court].[99]

Despite this, Ehrenzweig has argued strongly, over a number of years, for a distinction to be made between interstate and international conflicts situations.[100] Ehrenzweig argued that due to increased interstate commerce and migration there was a need for more uniform interstate conflicts rules. He saw that such needs were being met by new constitutional controls, and that

> [p]olicies developing such controls are obviously fundamentally different from those which continue to determine international conflicts ....[101]

From this point it was argued that

> [s]ome of these policy differences have resulted in the development in each field of large sectors which lack counterparts in the other.[102]

For Ehrenzweig the development of general rules for both interstate and international conflicts had retarded the development of satisfactory rules in both branches. As an example, it was argued that the assimilation of international and interstate conflicts rules may have "stifled the impact (so widely recognised in its American beginnings) of the general principles of public upon private international law".[103]

Scoles[104] argued that there was no need to develop separate conflicts rules for international and interstate situations if the courts adopted a policy analysis approach to conflicts situations.[105] This was because if a court

> in all cases thoroughly considers both the policies underlying the problem and the available legal solutions, the differences between interstate and international transactions will probably be accomodated in its final result.[106]

However, in Scoles' opinion, if such a policy approach was not adopted by the courts and

> conflict of laws is viewed solely as a body of doctrinal rules to be applied to fixed contacts, separate bodies of rules for interstate and international transactions must be developed.[107]

It appears that since Scoles expressed such views American courts have, for the most part, adopted a more policy orientated approach to conflicts issues. This perhaps has weakened the argument in the United States for a distinction

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99 Deane J in *Breavington*, *supra* n 13, 132. See also J D Falconbridge *supra* n 97, 234-7 for a comparison of the United States Supreme Court's jurisdiction with that of the Canadian Supreme Court, and the impact of this on conflicts rules in the two countries. As to why the United States Supreme Court has not attempted to be more of a court of general appellate jurisdiction see P Hay, "International Versus Interstate Conflicts Law in the United States" (1971) 35 Rabels Zeitschrift fur Auslandisches und Internationales Privatrecht 429, 486-7.

100 *Supra* n 12; *supra* n 3, 1-2.

101 *Supra* n 12, 720.

102 *Ibid* 721.

103 *Ibid* 729. There were many other examples quoted of the identification of the two leading to an unsatisfactory result.

104 E F Scoles, "Interstate and International Distinctions in Conflict of Laws in the United States" (1966) 54 California L Rev 1599.

105 Recognition of the role of policy in the formulation of conflicts rules was advocated 40 years previously. E G Lorentzen, "Territoriality, Public Policy and the Conflict of Laws" (1924) 33 Yale LJ 736, 745 argued that "[s]ound progress in [conflicts] ... can be made only if the actual facts be faced, which show that the adoption of the one rule or the other depends entirely upon considerations of policy which each sovereign state must determine for itself".

106 *Supra* n 104 at 1600.

107 *Ibid.*

to be drawn between interstate and international conflicts rules.[108] The same cannot be said of developments in Australian law, where policy analysis has not been utilized by the courts.[109]

Against these views is that of Yntema[110] who rejects any separation of conflicts rules based on an international/interstate distinction. For Yntema, private international law rules arise historically[111] and conceptually from the rules applied to interstate situations. He argues that the rules of private international law are designed to resolve

> problems of the legal order, of doing justice to the interests of individuals without undue sacrifice to prejudicial assertions of national policy ... [T]he solution of these problems is to be sought in extensions, however limited, of the principle of federalism, and therewith in the employment of the technique of conflicts law in dealing with private claims that have extraterritorial aspects.[112]

Yntema's conclusion is in line with a more cautious statement by Du Bois. Du Bois, writing much earlier than the others, concluded his review of the issue by saying:

> In the great majority of situations, it does not seem that there will be justification for introducing the complexity of reaching a different result in an international transaction than that arrived at in the interstate situation ... But, the possibility of proving the importance of the international element in a particular case should be kept in mind.[113]

2 THE NON-ENFORCEMENT PRINCIPLE WITHIN AUSTRALIA

It is clear from the decision in *McKain*[114] that there is not majority support for the general rejection of the rules of private international law in intra-Australia situations. It is also apparent from the above review of academic writings that there is not a clear consensus against the application of the rules of private international law within a federation. On this basis, the balance of this paper will consider whether the non-enforcement principle should be applied to interstate situations within Australia.

It is submitted that only by examining each area of law closely, can one come to any reasoned conclusion as to whether it is proper to apply to it the rules of private international law. This was recognised by Du Bois,[115] and its basis is that different considerations are at work in different areas of law. For example, in any consideration of the non-enforcement principle, considerations peculiar to governments will be influential. This may not be the case in a situation involving a contract between individuals. How these different factors bear on the application of private international law rules must be taken into account. As Scoles has argued

> [t]he differences between international and interstate cases vary with the particular factual situation involved .... The areas of sharp distinction tend to be those which are affected by public law considerations. These are areas in which

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108 P Hay, *supra* n 99.
109 V Kerruish, *supra* n 35, 87.
110 H E Yntema, "The Historic Bases of Private International Law" (1953) 2 American J of Comparative Law 297.
111 As noted at n 12, this view is not universally accepted.
112 *Supra* n 110, 299.
113 *Supra* n 12, 379.
114 *Supra* n 14.
115 *Supra* n 12, 372.

there is a governmental interest separate from that which exists through the litigants.[116]

The next three sections of the article consider the position at common law, the fourth will discusses the significance of the cross-vesting legislation.

A Laws to which the Non-Enforcement Principle Applies

As was discussed in outline above, the non-enforcement principle is directed against the enforcement of a foreign nation's "governmental interests". It is clear that in *Spycatcher*[117] the High Court did not intend that a narrow interpretation should be given to this expression. What is also clear is that the High Court did not believe that it was laying down a completely new rule, but rather was merely reformulating, and possibly extending, the reasoning on which the older authorities had rested. Because of this one can gain insight into the sort of laws which would be unenforceable now by considering some of the older authorities.

Before the decision in *Spycatcher*,[118] it had been held that actions for the recovery of state taxes,[119] taxes imposed by a political sub-division of a state,[120] death or estate duties,[121] and even compulsory employers' contributions to a state health insurance scheme[122] would not be entertained outside of a claimant jurisdiction, because they constituted foreign revenue laws. This was so irrespective of whether the jurisdiction, or political sub-division thereof, was trying to enforce its claim within the same country (that is, a state was suing in another state of the same federation) or in another country. There is no reason to think that the above kinds of laws would not be *prima facie* within the formulation of the High Court in *Spycatcher*.[123] Hence, taxes imposed by an Australian state, rates imposed by a local council, and presumably a range of charges or levies imposed by a state's statutory authorities, would not be recoverable in another Australian state if the non-enforcement principle were applied within Australia. Of course, whether an Australian state would commence in another state to recover taxes is problematic.[124] It is, and always has been, obvious that the definition of penal

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116 *Supra* n 104, 1602. see also R A Leflar, "Extrastate Enforcement of Penal and Governmental Claims" (1932) 46 Harvard L Rev 193, 215.

117 *Supra* n 4.

118 *Id.*

119 *State of Maryland v Turner* (1911) 132 NYS 173.

120 *Municipal Council of Sydney v Bull* [1909] 1 KB 7; *City of Regina v McVey* (1922) 23 OWN 32; *Wayne County v American Steel Export Co* (1950) 101 NYS (2d) 522; *City of Detroit v Proctor* (1948) 61 A 2d 412.

121 *In re* Visser [1928] 1 Ch 877; *Moore v Mitchell* (1929) 30 F 2d 600 US Cof Apps - 2d Circ.

122 *Metal Industries (Salvage) Ltd v Owners of the ST "Harle"* [1962] SLT 114.

123 *Supra* n 4.

124 This is due to certain authorities (see *Belyando Shire Council v Rivers* [1908] QWN 17; *Chenoweth v Summers* [1941] ALR 364 and *State of Victoria v Hansen* [1960] VR 582) which have held that an action may be prosecuted in the taxing state itself by serving a Defendant, who is out of the taxing state but within Australia, with a writ in respect of the unpaid taxes pursuant to the provisions of the Service and Execution of Process Act 1901 (Cth). The Act does not directly provide for the enforcement of revenue laws, but in these cases it was held that the respective taxes constituted implied contracts and the action was therefore within s 11(1)(b) and (c) of the Act. It is submitted, however, that care must be taken with these authorities. The leading case is *Belyando Shire Council v Rivers*, in which the action was to recover local government rates. In *Chenoweth* the action was for Victorian income tax, while in *Hansen* the action was for Victorian stamp duty. These later cases have added little of substance to the reasoning in *Rivers*. It is submitted that these

law included criminal laws *simpliciter*. However when used as a basis for not enforcing foreign laws a "penal" law took on an extended meaning. The United States Supreme Court in *State of Wisconsin v Pelican Insurance Co of New Orleans*[125] said that the rule against the enforcement of foreign penal laws also applied

> to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties.[126]

This definition was followed by the Judicial Committee of the Privy Council in *Huntington v Attrill*.[127] That is not to say that only criminal laws *simpliciter* have been included in the rule. For example, confiscatory decrees,[128] and laws adversely affecting an individual's rights or commercial interests[129] have been held to be "penal", and presumably would remain unenforceable under *Spycatcher*.[130]

It can be said then, with some confidence, that laws which on earlier authority were unenforceable because they were foreign penal or revenue laws will continue to be unenforceable. What is not clear is what additional foreign laws, apart from those designed to prevent the publication of supposedly national secrets, will have become unenforceable after *Spycatcher*.[131] The High Court has stated that its non-enforcement principle is designed to "prevent enforcement outside the territory of the foreign sovereign based on or related to the exercise of foreign governmental power ...".[132]

B The Reasoning Supporting the Non-Enforcement Principle

The High Court in *Spycatcher*,[133] like the House of Lords before it in *Governemnt of India v Taylor*,[134] relied on the decision of the High Court of Eire in *Peter Buchanan Ltd v McVey*[135] as supplying the reasoning upon which

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cases are vulnerable to attack because the proposition that taxes create contractual-type liabilities is by no means universally accepted. Additionally, the later cases rely heavily on *Rivers*, which was a case in which the Court did not have the benefit of argument from the Defendant. If these authorities are sound, a state is able to enforce its revenue laws without the need to commence an action in another state. M Pryles and P Hanks, *Federal Conflict of Laws* (1974) 17, observe that the Service and Execution of Process Act would "provide a simple means of avoiding the rule in *Government of India v Taylor*, if that rule does operate in the Australian federal context". Even if these authorities are sound, two things should be noted. First, they have no application to a situation where a state attempts to enforce its revenue laws in another state. Secondly, the authorities only apply to revenue actions while the non-enforcement principle spelt out in *Spycatcher* applies to a much broader range of actions.

125 (1888) 127 US 265.

126 *Ibid* 290.

127 [1893] AC 150, 157. This decision of the Judicial Committee, as mentioned, was followed in the United States Supreme Court decision of the same name.

128 *Banco de Vizcaya v Don Alfonso de Borbon Y Austria* [1935] 1 KB 140.

129 *In re Selot's Trust* [1902] 1 Ch 488; *In re Langley's Settlement Trusts* [1961] 1 WLR 41.

130 *Supra* n 4.

131 *Id.*

132 *Ibid* 43.

133 *Supra* n 4.

134 [1955] AC 491, 508, 510.

135 Reported in [1955] AC 516. In that case, a liquidator, appointed by a Scots Court at the suit of the Scots revenue, wished to sue McVey, who was now a resident of Eire. McVey had

the non-enforcement principle rested. Justice Kingsmill Moore found that the whole purpose of the action before him was to collect Scots' tax.[136] Such a tax claim, like other governmental claims, was the "offspring of political considerations and political necessity".[137] His Lordship stated that all foreign claims of a "governmental" nature must be rejected or there were grave risks of "embarassing the executive in its foreign relations ...".[138] The blanket rule was necessary because the courts had, in normal private litigation, reserved to themselves the right to reject a foreign law if it was contrary to their public policy. The danger of embarassment would arise if a forum court assessed individual foreign governmental claims to determine if they were inconsistent with its public policy.

As the majority of the High Court acknowledged in *Spycatcher*,[139] Kingsmill Moore J based his judgment and reasoning on the concurring judgment of Learned Hand J in *Moore v Mitchell*.[140] These judgments have had a major influence in the treatment of foreign governmental claims by forum courts in the common law world.[141] This might strike one as a little surprising as both cases were appealed to higher courts where the reasoning of the respective lower courts was not endorsed. The Supreme Court of Eire, for example, did not find it necessary to consider the origin of the rule, and also considered that it might, in certain circumstances, be appropriate to enforce a foreign revenue law. Chief Justice Maguire said

> I agree that if the payment of the revenue claim was only incidental and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance to bring assets under the control of the liquidator.[142]

The United States Supreme Court decided *Moore v Mitchell*[143] on different grounds from Learned Hand J and did not even express an *obiter* opinion on that judgment. The decision of the Supreme Court will be considered below, in section 3B.

Irrespective of the above, the High Court has clearly laid down a principle that a forum court should not entertain a claim involving foreign governmental interests because of the potential embarassment which might be caused to the forum's executive. This principle, when applied to the claims of another country, has been subjected to much criticism, both as to its scope[144] and the

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been a director of the Scots company which the liquidator now controlled. The company owed substantial sums to the Scots revenue.

136 *Ibid* 529-30.

137 *Ibid* 529.

138 *Ibid.* This passage was cited by the High Court in *Spycatcher*, *supra* n 4, 44.

139 *Supra* n 4, 43.

140 (1929) 30 F 2d 600.

141 As can be seen by their citation in *Spycatcher*, *supra* n 4, and *Government of India v Taylor*, *supra* n 134.

142 [1954] Ir R 108, 117, [1955] AC n 530, 533.

143 (1930) 218 US 18.

144 See P B Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984) 55 British Year Book of International Law 111; P B Carter, "Transnational Recognition and Enforcement of Foreign Public Laws" (1989) 48 Cambridge LJ 417; J Castel, "Foreign Tax Claims and Judgments in Canadian Courts" (1964) 42 Canadian Bar Review 277; R E Goldman (ed), "International Enforcement of Tax Claims" (1950) 50 Columbia L Rev 490; *Ralli Bros v Compania Naviera Sota Y Aznar* [1920] 2 KB 287; *Banco Frances E Brasileiro SA v Doe* (1975) 36 NY 2d 592, 331 NE 2d 502.

mode of its application.[145] For the purposes of this paper, however, this principle and its supporting rationale will be accepted as being good law.

C Should the Non-Enforcement Principle be Applied Within Australia?

There are two objections, it is submitted, to the non-enforcement principle being applied within Australia. The first, which emerges most clearly from a number of cases, which are considered below, is that American or Australian states, or Canadian provinces, are not separate sovereigns *inter se*. Hence, the principle, which is designed to apply to laws or interests belonging to a sovereign different from that of the forum court, is not applicable. This objection can be seen to derive support from the majority of the High Court in *Breavington*,[146] but must be questioned in the light of the majority decision in *McKain*.[147] The second objection, which follows from the first, is that the rationale for the principle offered by the High Court in *Spycatcher*[148] is inapplicable to a federation. This objection is seen most clearly in the volley of criticisms levelled by academic commentators at the rationale, in an interstate context, offered by Learned Hand J in *Moore v Mitchell*.[149]

The first case in the United States, in which the first objection was made, was *Milwaukee County v ME White Co*,[150] although this was not the first case to allow another state's revenue claim.[151] In *Milwaukee County*,[152] the Wisconsin local authority commenced an action in an Illinois court to recover on a judgment which had been rendered by a Wisconsin court. The judgment was for taxes levied by a Wisconsin local authority. The Supreme Court noted that it was an open question in that Court as to whether a state could refuse to enforce a tax claim which had not been reduced to a judgment.[153] Without deciding this question, the Court concluded that the Wisconsin judgment was able to be sued on in Illinois, because the Constitution required that full faith and credit be given to it.[154] Justice Stone for the Court said:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties ... and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin ... no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established ....[155]

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145 M Howard, *supra* n 5.
146 *Supra* n 13.
147 *Supra* n 14.
148 *Supra* n 4.
149 *Supra* n 140.
150 (1935) 296 US 268.
151 The first case in which another state's revenue law was enforced was *J A Holshouser Co v Gold Hill Copper Co* (1905) 138 NC 248, 50 SE 650 . In that case, New Jersey was held to be able to prove a debt against a company which was in receivership under the control of the Supreme Court of North Carolina. The debt arose under a New Jersey statute which had imposed a business tax upon the company. The North Carolina Court treated the claim of New Jersey in the same way as any other debt which a creditor might try to prove in the receivership. It should be noted, however, that the non-enforcement principle was not considered by the Court, nor raised by those opposing the New Jersey claim.
152 *Supra* n 150, 275. The Supreme Court had left the question open in *Moore v Mitchell*, *supra* n 143.
153 *Supra* n 150, 279.
154 *Ibid* US 279, L ed 229.
155 *Ibid* US 276-7, L ed 228.

Subsequent United States' decisons went further than *Milwaukee County*[156] in that they held that a claim for another state's taxes could be enforced in a state court without it first being reduced to a judgment.[157] This trend was not uniform across the United States.[158] In the cases which did allow a state to sue for its taxes in another state, the Courts rejected the applicabilty of the non-enforcement principle to interstate situations. They did so without regard to the full faith and credit provision of the United States Constitution, as they were influenced by broader, federal considerations. Hence, it was said in *State ex rel Oklahoma Tax Commission v Rodgers*, that the rule against the enforcement of foreign revenue laws

> was the product of the commercial world, and arose at a time when there was great commercial rivalry and international suspicion. It was applied as between wholly sovereign states. It has no place in a union of states such as the United States ....[159]

These broader, federal considerations also struck a chord in Canada, another common law federation not disimilar from Australia. In *Weir v Lohr*,[160] the Manitoba Queen's Bench held that it would have enforced a revenue claim.[161] Chief Justice Tritschler noted that whether the rule against the enforcement of foreign revenue laws applied within a federation had been left open in the leading case of *Government of India v Taylor*.[162] The Court then, after citing *Rodgers*[163] and *Neely*,[164] said

> [i]n Manitoba the Province of Saskatchewan is not to be regarded as a foreign State. Her Majesty in the right of the Province of Saskatchewan is not a foreign Sovereign in Her Majesty's Court of the Queen's Bench for Manitoba. On the interprovincial level [the rule aginst the enforcement of foreign revenue claims] should be rejected.[165]

A similar result was reached in the only Australian case to consider whether another state's tax claim could be enforced in its courts. In *Permanent Trustee Co (Canberra) Ltd v Finlayson & Ors*[166] the Supreme Court of the Australian Capital Territory held that New South Wales could enforce a claim for death

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156 *Supra* n 150.

157 *State, ex rel Oklahoma Tax Commission v Rodgers* (1946) 193 SW 2d 919; *State of Oklahoma, ex rel Oklahoma Tax Commission v Neely* (1955) 282 SW 2d 150; *State of Ohio, ex rel Duffy (A-G) v Arnett* (1950) 234 SW 2d 722 .

158 For example in both *City of Detroit v Proctor* (1948) 61 A 2d 412 and *Wayne County v American Steel Export Co* (1950) 101 NYS 2d 522 suits for one state's taxes were held to be unenforceable in another state's courts. These cases are consistent with earlier authority such as *State of Maryland v Turner* (1911) 132 NYS 173.

159 (1946) 193 SW 2d 919 at 924 *per* Anderson J.

160 (1968) 65 DLR (2d) 717.

161 In this case a Saskatchewan resident was injured in a car accident in Manitoba and was hospitalised in that province. Saskatchewan had a compulsory health insurance scheme and the plaintiff's Manitoba hospital bill was paid pursuant to this by the Saskatchewan insurance scheme. The plaintiff nevertheless claimed from the defendant his hospital expenses, as under the Saskatchewan Act the plaintiff was able to recover such expenses and remit them to the Saskatchewan insurance fund. The Manitoba defendant claimed that such a claim by the plaintiff was only to benefit the revenue of Saskatchewan and was unenforceable. The Court held that this claim was not of a "revenue" nature: (1968) 65 DLR (2d) 717, 720. The obiter of the Court, cited in the text, represented a departure from the earlier Canadian authority of City of *Regina v McVey* (1922) 23 OWN 32.

162 *Ibid* 721, citing from the speech of Lord Keith of Avonholm.

163 *Supra* n 159.

164 *Supra* n 157.

165 *Supra* n 160, 723.

166 (1967) 9 FLR 424. See M Pryles and P Hanks, *supra* n 98, 101-2.

duties against a Territory executor. After noting that the question had been left open by the House of Lords, Dunphy J said

> I feel certain that the ordinary Australian citizen would be startled at the proposition that any State of the Australian federation was a "foreign" State for the purpose of this "rule" ....[167]

Justice Dunphy cited, and approved of, the United States authorities against the application of the rule between American states. In contrast to most of those decisions, his Honour made reference to the Constitutional requirement of full faith and credit. His Honour said:

> It seems to me that the "full faith and credit" provision of the Australian legislation is not limited and not exclusive ... as the [New South Wales Act] is very much a public Act I cannot see how full faith and credit can be given to it if its provisions were held to be unenforceable [due to the non-enforcement rule].[168]

The High Court, on the appeal of this decision,[169] did not, in a judgment reminiscent of the United States Supreme Court in *Moore v Mitchell*,[170] find it necessary to consider this proposition. The High Court decision will be further considered below, in section 3B. Some support for the view of Dunphy J can be found in an *obiter dictum* of the High Court in the case of *Miller v Teale*.[171] In the context of an interstate marriage conflict, the Court alluded to the non-enforcement of another state's penal laws and said "[o]f course in Australia what s. 118 of the Constitution has to say to this might have to be considered."[172]

There is no shortage of academic opinion to support these authorities.[173] Indeed, this writer is not aware of any academic writing in favour of the application of the non- enforcement of foreign revenue laws within a federation.

The cases cited above in support of the first objection have focussed on the rule against the enforcement of foreign revenue laws. Of course, after *Spycatcher*,[174] Australia has a non-enforcement principle which extends beyond foreign revenue laws and which is supported by the desire to avoid the "grave risks of embarassing the executive in its foreign relations and even of provoking international complications."[175]

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167 *Ibid* 436.

168 *Ibid* 439.

169 (1968) 122 CLR 338. See M Pryles and P Hanks, *supra* n 98, 102 where the High Court's decision was criticised.

170 *Supra* n 143.

171 (1954) 92 CLR 406.

172 *Ibid*, 415 *per* Dixon CJ, McTiernan, Fullagar and Taylor JJ.

173 C J A Hazelwood, "Full Faith and Credit Clause as Applied to Enforcement of Tax Judgments" (1934-5) 19 Marquette L Rev 10; R A Leflar, *supra* n 116; J Castel, *supra* n 144; B Trott, "Conflict of Laws - Enforcing Tax Laws of Sister States" (1949) 47 Michigan L Rev 796; W Friedman (ed), "Extra-Territorial Collection of State Inheritance Taxes" (1929) 29 Columbia L Rev 782; M McElroy, "The Enforcement of Foreign Tax Claims" (1960) 38 U Detroit LJ 1; A Ehrenzweig, *supra* n 3.

174 *Supra* n 4.

175 *Peter Buchanan Ltd v McVey*, *supra* n 135 as cited by the High Court in *Spycatcher*, *supra* n 4, 44.

The rationale of Learned Hand J in *Moore v Mitchell*,[176] which was so important in the *Peter Buchanan*[177] and *Spycatcher*[178] cases, has been criticised as being "unhelpful" in international situations,[179] and as being inapplicable to interstate situations.[180] This is more than a little ironic as it will be remembered that Learned Hand J formulated the rationale in an interstate case.

The most telling criticisms, suggested so far, of the applicability of the "Learned Hand rationale" to interstate situations, are:

(a) "there is no public policy objection to collecting taxes due under sister state statutes, unless we adopt the absurd conclusion that each state has a policy against the collection of taxes levied by any other state;"[181]

(b) the state bringing the action should not be embarrassed by the way the forum state deals with its claim, nor claim that the forum state is interfering with its prerogatives, as the claimant state is responsible for the suit being brought;[182]

(c) an outright refusal to entertain another state's claim is as offensive to that state as the forum state considering that claim and then perhaps rejecting it;[183]

(d) "one sovereign's reluctance to inquire into another's system of law or to risk affront by denial of a sovereign's demand" does not apply between the component parts of a federation; and[184]

(e) the claimant state's relationship with its citizens would not be embarrassed because the same defences will be available in the forum state.[185]

It is submitted that the above throw serious doubt on the applicability of the "Learned Hand rationale", and by extension the *Spycatcher*[186] non-enforcement principle, to interstate situations.

The High Court in *Breavington*,[187] had, arguably, begun to develop a notion of the Australian federal system, in which application of the non-enforcement principle between the states would not be appropriate. This trend can be seen as the majority of judges in *Breavington*[188] moved away from the idea that the

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176 *Supra* n 140.

177 *Supra* n 135.

178 *Supra* n 4.

179 B Trott, *supra* n 173, 799 said "It is suggested that Judge Hand's statement that one state should not pass on provisions for the public order of another is too ambiguous to be useful. All state statutes are to some degree provisions for the public order, and certainly it was not intended that the forum should refuse to take notice of all foreign statutes." J Castel, *supra* n 144, 296, 15 years later used remarkably similar language before describing the rationalisation as being "not very helpful".

180 Many of the articles which have argued against the applicability of the non-enforcement principle to this situation are cited in nn 181-185 below.

181 B Trott, *supra* n 173, 799; J Castel, *supra* n 144, 297; J Beach, "Uniform Interstate Enforcement of Vested Rights" (1917-8) 27 Yale LJ 656, 662; J Freeze, "Extraterritorial Enforcement of Revenue Laws" (1938) 23 Washington Uni LQ 321, 333.

182 B Trott, *supra* n 173, 800; J Castel, *supra* n 144, 296; M McElroy, *supra* n 173, 3; *Rodgers*, *supra* n 159, 926.

183 J Castel, *supra* n 144, 296; *Rodgers*, *supra* n 159, 926; J Freeze, *supra* n 181, 333.

184 J Castel, *supra* n 144, 296.

185 M McElroy, *supra* n 173, 3.

186 *Supra* n 4.

187 *Supra* n 13.

188 *Id.*

states were sovereignties *inter se*. This approach did not come from the express words of the Constitution, as can be seen from the fact that the Court did not see s 118 as directly relevant. Rather, the majority relied on the federal nature of the Australian system. Chief Justice Mason said "[w]hen an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction".[189] Justices Wilson and Gaudron said "Chapter V [of the Constitution] expressly recognises that upon and after federation, the States would exist as States ... but within a body politic [established by the Constitution]".[190] Justice Deane said

> [t]he purpose of those fundamental provisions [of the Constitution] was to federate the former Colonies into a single nation .... It is reasonable to infer that it was intended that valid Commonwealth and State substantive laws, made or continued under the federal compact, would be integrated in the sense that they were internally consistent or reconcilable. The inference of such an intention to create a unitary system is confirmed by other aspects of the Constitution.[191]

The notion that the component parts of a federation should operate as though they are part of the one nation, and enforce each other statutes, while under-developed, is not new. For example, Beach said earlier this century, in the context of considering a different rule of law:

> I believe that the uniform interstate enforcement of vested rights is bound to come, not only as a matter of justice, but as a logical corollary of the national unity of the several states ....[192]

The trend discernible in the majority judgments of the High Court in *Breavington*,[193] has been halted, if not stopped dead in its tracks by the judgment of the majority of the Court in *McKain*.[194] Should the High Court follow that majority judgment and treat the states as being largely sovereign *inter se*, then the objection set out in (d) above would be considerably weakened. However, the other objections set out would seem to remain with equal force.

D The Impact of the Cross-Vesting Scheme on the Application of the Non-Enforcement Principle

The cross-vesting scheme, which is now operative and contained in complementary Commonwealth and State legislation, has had a significant impact on all aspects of interstate conflicts in Australia. Having said that, it is not entirely clear how the cross-vesting scheme impacts upon the application of the non-enforcement principle within Australia. It should be noted at the outset that the non-enforcement principle from *Spycatcher*,[195] (as explained in section 2A), applies to a wide range of actions, including criminal actions. The cross-vesting scheme does not apply to criminal proceedings[196] and thus will not have a uniform effect on those actions caught by the non-enforcement principle. The second thing that should be noted is that it is only the

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189 *Supra* n 13, 78.
190 *Ibid* 97.
191 *Ibid* 121-2.
192 Beach, *supra* n 181, 657.
193 *Supra* n 13.
194 *Supra* n 14.
195 *Supra* n 4.
196 This is achieved by the definition given to a "proceeding" in s 3(1) of the respective Acts; *eg* Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) and Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic).

jurisdiction of superior courts in Australia which are cross-vested by the scheme; consequently the cross-vesting scheme would have no impact if a state commenced in the lower courts of another state to recover taxes or the such like. This part of the paper will not consider actions commenced in lower courts.

The main point of uncertainty in the impact of the cross-vesting legislation upon the non-enforcement principle is in the classification of the principle itself. Simply put, "Is it a jurisdictional rule or not?" The importance of this can be illustrated by a hypothetical revenue action by the State of Victoria against a resident of New South Wales, commenced in the Supreme Court of New South Wales.[197] In this action assume the New South Wales judge was unpersuaded by the arguments advanced in section 2C above and was minded not to entertain the Victorian action on the basis of the non-enforcement principle. If the principle meant that the New South Wales Court did not have jurisdiction to entertain the action then the cross-vesting scheme would provide the necessary jurisdiction to the New South Wales court.[198] Further the New South Wales court would have to apply Victoria's "written and unwritten law" to the action because it would be exercising cross-vested jurisdiction.[199]

As mentioned, this is premised on the basis that the non-enforcement principle denies the New South Wales court jurisdiction over the Victorian action. However, it is by no means clear that the non-enforcement principle is one of jurisdiction. Dicey and Morris[200] state the principle in terms of jurisdiction, but the High Court in *Spycatcher*[201] was by no means as clear on the issue. The Court said that the principle had

> traditionally been expressed as a bar to jurisdiction, although the rule might now be more correctly described as one rendering a claim uneforceable.[202]

If the non-enforcement principle merely renders a claim "unenforceable", rather than denying the forum court jurisdiction, then the impact of the cross-

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197 For the purposes of this article the writer will assume that no issue as to the validity of the service of the writ upon the New South Wales resident arises. For a discussion of the effect of the cross-vesting scheme upon personal service see K Mason and J Crawford, "The Cross-vesting Scheme" (1988) 62 ALJ 328, 335-6 and Griffith et al "Further Aspects of the Cross-vesting Scheme" (1988) 62 ALJ 1016, 1022-3.

198 This would be achieved by a combination of s 4(3) of the Victorian Act (which vests the New South Wales Court with jurisdiction over Victorian state matters) and s 9 of the New South Wales Act (which in effect allows the New South Wales to "accept" the jurisdiction vested by the Victorian Act). However, it should be noted that in this circumstance, the action might be transferred back to the Victorian Supreme Court pursuant to s 5(2)(b)(ii)(A) of the cross-vesting Acts. This provides, in effect, that if a court is exercising jurisdiction only pursuant to cross-vesting legislation, then that action is liable to be transferred to a court which would have had non-cross-vested jurisdiction over the matter.

199 Section 11(1)(b) of the cross-vesting legislation provides relevantly that "Where it appears to a court that the court will, or will be likely to, in determining a matter for determination in a proceeding, be exercising jurisdiction conferred by this Act or by a law of the Commonwealth or a State relating to cross-vesting of jurisdiction -... if that matter is a right of of action arising under a written law of another State or Territory, the court shall, in determining that matter, apply the written and unwritten law of that other State or Territory ...".

200 *Supra* n 2.

201 *Supra* n 4.

202 *Ibid*, 41. The decision of the United States Supreme Court in *Milwaukee County v M E White*, *supra* n 150, 272 also suggested the non-enforcement rule was not one of jurisdiction.

vesting scheme becomes more difficult to assess. In this situation the New South Wales Court would have jurisdiction (at common law) over the hypothetical Victorian action, but would decline to exercise it because of the non-enforcement principle. What effect the cross-vesting scheme then has, is dependent on the view one takes of the scope of the scheme. If one accepts the view that the scheme vests in the New South Wales court only that jurisdiction which it does not have at common law,[203] then one would conclude that the cross-vesting scheme would have no impact on the Victorian action discussed, and the non-enforcement principle generally. This is because the New South Wales court would have the jurisdiction over the action but refuses to exercise it due to the non-enforcement principle.

However, a different result is reached if one adopts the view that the cross-vesting scheme vests the New South Wales court in question with all of the Victorian Supreme Court's jurisdiction, alongside of its normal common law jurisdiction.[204] On this view, the scheme would allow the New South Wales court to hear the Victorian action in its cross-vested jurisdiction, even though the action was unenforceable in its New South Wales jurisdiction by virtue of the non-enforcement principle.

One might conclude then, that if the non-enforcement principle is not a rule of jurisdiction and a narrow view is taken of the effect of the cross-vesting scheme, the scheme will have no impact on the applicability of the non-enforcement principle within Australia. If these two conditions are not made out, then whether or not the non-enforcement principle is a rule of jurisdiction, and irrespective of whether the principle is inappropriate within a federation, the cross-vesting scheme will have a most significant impact on the non-enforcement principle within Australia.

3 SOME REMAINING ISSUES

A The Enforcement of Criminal Laws Between Australian States

A criminal law would be within the range of laws to which the non-enforcement principle set down by the High Court in *Spycatcher*[205] applies. As mentioned such a law is beyond the scope of the cross-vesting scheme. From

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[203] This was called the narrow view by D Kelly and J Crawford, "Choice of Law Under the Cross-vesting Legislation" (1988) 62 ALJ 589, 597. They argued that this was the most defensible view to adopt of the scope of the scheme although they conceded that it was contrary to the express words of s 4 of the state acts. They argued, however, that such a view was more consistent with the broad thrust of the whole scheme.

[204] The cross-vested jurisdiction on this view was described as "cumulative" on the New South Wales normal common law jurisdiction by G Griffith et al, "Choice of Law in Cross-vested Jurisdiction: A Reply to Kelly and Crawford" (1988) 62 ALJ 698, 701. They argued that this was the proper manner in which to view the effect of the scheme. Kelly and Crawford had rejected this view, arguing "[w]ithin a single legal system, there cannot exist two valid rules leading to conflicting results on the same set of facts. The principle of non-contradiction prevents it. One or other of the rules must be invalid or misstated": *supra* n 203, 599. Griffith et al countered: "[t]he unacceptability of the words of the Kelly-Crawford approach lies, it is suggested, in their words "Within a single legal system". There is no "single" legal system involved, but two legal systems. If the Supreme Court of South Australia were to give judgment in favour of the Plaintiff on the basis of the Victorian statute ... there would be no inconsistency between this and a judgment ... rejecting the claim in the ordinary South Australian jurisdiction. The cross-vesting legislation simply brings the potentially separate court proceedings together in one forum": (1988) 62 ALJ 698, 705.

[205] *Supra* n 4.

the above, it is submitted that the rationale in that case does not support the non-enforcement of one state's criminal laws in another state. In this section, the "enforcement" of a state's criminal laws means that the state concerned would be able to prosecute a breach of its criminal laws in another state. "Enforcement" in this section does not include the mere enforcement in one state of a punishment imposed in another state for a breach of criminal laws.[206]

This does not necessarily lead to the conclusion that one Australian state should enforce the criminal laws of another. What the argument does suggest, however, is that if criminal laws are not to be enforced in another Australian state then some explanation or rationale must be found which does not owe anything to the non-enforcement principle set down by the High Court.

It is beyond the scope of this paper to consider at length whether it is justifiable for one state to not allow the enforcement of the criminal laws of another. Without wanting to concede that there is a good explanation for the non-enforcement of a sister state's criminal laws, the following is offered as a slightly ironic suggestion. An Australian explanation of why one state will not allow the enforcement of another's criminal laws might be based on the old authority[207] that criminal laws are local. There are statements in *Breavington*[208] to the effect that the states in the federation have *prima facie* power to legislate over their territory; although it has to be noted that this by itself does not fully explain why enforcement of those laws could not take place in another state. The irony is that it is the collision of the older authority (that criminal laws are local) with another strain of authority relating to revenue laws[209] which arguably produced the authorities which preceded *Spycatcher*[210] in the area of the non-enforcement of foreign penal and revenue laws.

B The Territoriality of State Laws

As argued in section 2C above, the non-enforcement principle provides no justification for one state to not enforce the "public" or "governmental interests" laws of another state. However, this may not overcome all the barriers to the enforcement of one state's laws of this kind in another state. For example, in both the High Court case of *Permanent Trustee Co (Canberra) Ltd v Finalyson*[211] and the United States Supreme Court case of *Moore v Mitchell*[212] one state's tax laws were not enforced in another state without the invocation of the non-enforcement principle.

In *Finalyson*,[213] the High Court read down the New South Wales taxing statute as only applying to New South Wales administrations. The Court said

> [n]othing is or could be validly be provided by the New South Wales Act to place the Territory executor under a corresponding liability to make a payment out of the Territory property ....[214]

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206 *Folliott v Ogden* (1789) 1 H Bl 123; 126 ER 75; The Antelope (1825) 10 Wheat 66, 6 L ed 268; see also Estabrook, *supra* n 18, 209-210.

207 In this connexion see R Fox and A Frieberg, *Sentencing - State and Federal law in Victoria* (1985) 29-30, 174-7.

208 *Supra* n 13.

209 Starting with the cases of *Holman v Johnson* (1775) 1 Cowp. 341, 98 ER 1120 and *Planche v Fletcher* (1779) 1 Dougl 251, 99 ER 164.

210 *Supra* n 4.

211 *Supra* n 169.

212 *Supra* n 143.

213 *Supra* n 169.

214 *Ibid* 344-5.

It should be remembered that there was in *Finlayson*[215] one will in New South Wales and one in the Australian Capital Territory, each applying to the property within that jurisdiction. Hence, this objection is that the taxing state does not have sufficient nexus with the property to levy it with taxation. If the objection is valid, it would not defeat a state tax which had been levied over property or a legal entity within the state, even if that property or legal entity was later removed from the state. The High Court was perhaps aware of this when it said, in the same case

> if the New South Wales executor had been also the executor in the Territory the duty might perhaps have been payable out of the general mass of assets, regardless of their local situation at the death of the deceased ....[216]

In any event the objection seems to have fallen away as a result of the Australia Act 1986 (UK) and the Australia Act 1986 (Cth), which provide that a state legislature may legislate extraterritorially.[217]

Another pre-Australia Acts impediment to the enforcement of one state's "public" or "governmental interests" laws in another state was expressed by the United States Supreme Court in *Moore v Mitchell*.[218] In that case the Court held that the action by the Treasurer of Grant County, Indiana failed because the Treasurer had no power to bring the suit in New York. The Court said:

> Indiana is powerless to give any force or effect beyond her own limits to the Act of 1927 purporting to authorize this suit or to other statutes empowering and prescribing the duties of its officers in respect of the levy and collection of taxes.[219]

If this view is taken in interstate proceedings then an action by a state's representative to enforce one of their state's "public" or "governmental interests" laws would always be liable to be defeated. This obstacle also seems to have been done away with by the Australia Acts empowering a state, if the power did not exist before, to legislate extraterritorially. But, as was noted above they would not be altogether free to prescribe the circumstances in which their law would apply.[220]

4 CONCLUSION

It has been argued above that the non-enforcement principle should not be applied within Australia. The most straightforward reason which can be given

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215 *Ibid.*

216 *Ibid* 344.

217 See M Moshinsky, "State Extraterritorial Legislation and the Australia Acts 1986" (1987) 61 ALJ 779; M Moshinsky, "State Extraterritorial Legislation - Further Developments" (1990) 64 ALJ 42. Moshinsky argues that a state now has no limitation at all upon its power to legislate. As noted in the latter of the articles, this view has been challenged by P M Griffin, "Division 30 of the Stamp Duties Act - Territoriality and the Australia Acts 1986" (1988) 17 Australian Tax Review 142, and H P Lee "The Australia Act 1986 - Some Legal Conundrums" (1988) 14 Mon U L Rev 298. It is beyond the scope of this paper to consider this controversy in detail. However, even if the broader view of Moshinsky is not accepted, each case would have to be considered separately to see if the law was within a state's legislative competence, even if it operates outside of the state's territory, *eg Union Steamship Co v King* (1988) 166 CLR 1. It is submitted therefore that even without a broad view of the Australia Acts, the question will not be as simple as whether the law has any operation outside of a state's territory.

218 *Supra* n 143.

219 *Ibid* 23-4.

220 M Pryles and P Hanks, *supra* n 98, 91.

for such a conclusion is the cross-vesting legislation, which was considered in 2*D* above.

However, certain actions which *prima facie* fall within the non-enforcement principle are not covered by the cross-vesting scheme. Criminal, as opposed to penal, laws are the best example of these; although, there may be more actions outside of the scope of the cross-vesting scheme depending on the view which is taken of the scope of the scheme. For these actions, if not for other actions, it is still relevant to argue that the non-enforcement principle should not be applied within Australia.

An earlier draft of this paper, after *Breavington*[221] was decided, suggested that the decision in *McKain*[222] would have to be awaited before one would be able to comment confidently on whether the High Court had made an important change in its approach to Australian interstate conflicts law. The writer thought that if the trends present in the judgments of Deane, Wilson and Gaudron JJ, and to a lesser extent Mason CJ, were continued then a clear distinction would be created between interstate conflicts and international conflicts.

It is clear that thoughts along that line are premature after the majority decision in *McKain*.[223] Nevertheless there is a significant bloc within the present High Court which would favour such a distinction being drawn generally. It would be fair to say that the general issue cannot be regarded as being finally settled.

Notwithstanding the view of a present majority of the High Court in *McKain*[224] as to the general application of the rules of private international law, it is perhaps more helpful, as expressed in 2. above, to discuss the issue in the context of specific rules of private international law.

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221 *Supra* n 13.
222 *Supra* n 14.
223 *Id.*
224 *Id.*