

# ANTI-SUIT INJUNCTIONS IN AUSTRALIA

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*The anti-suit injunction operates to restrain a person amenable to the court's jurisdiction from commencing or continuing proceedings in a foreign jurisdiction. For reasons of comity, the anti-suit injunction is not awarded lightly. The anti-suit injunction indirectly interferes with proceedings in foreign courts, and so arguably it is an unjustifiably parochial, forum-centric remedy. This article argues against such criticism and explores Australian courts' jurisdiction to award anti-suit injunctions. Courts have broad powers to award the remedy, which recent experience suggests they are willing to utilise. It is argued that the anti-suit injunction performs a valuable role in transnational litigation, particularly in a commercial context.*

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## I INTRODUCTION

The anti-suit injunction is a remedy that suits the current mood of global politics. The rise of support for isolationist policies in developed nations, sensationally reflected in the Brexit vote, challenges efforts towards greater international engagement and cooperation. In relation to private law, those efforts have produced a trend towards legal harmonisation.<sup>1</sup> In private international law, the normative justification for international engagement has a counterpart in 'comity'. Comity is an elusive concept which touches on ideas of international politeness or civility.<sup>2</sup> It has been described as 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'<sup>3</sup>

For reasons of comity, the anti-suit injunction is not awarded lightly.<sup>4</sup> It is one of the 'more aggressive' remedies at a court's disposal,<sup>5</sup> operating to

<sup>1</sup> See, eg, José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) 14 *Uniform Law Review* 5.

<sup>2</sup> See *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, 363 [90] (Gummow and Hayne JJ); Justice James Edelman, 'Comity and Civility between Courts' (2016) 90 *Australian Law Journal* 147. See generally Joel R Paul, 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 1; Justice James Allsop, 'Comity and Commerce' [2015] *Federal Judicial Scholarship* 27 (online) <[www.austlii.edu.au/au/journals/FedJSchol/2015/27.html](http://www.austlii.edu.au/au/journals/FedJSchol/2015/27.html)>, archived at <<https://perma.cc/2YKJ-4J95>>.

<sup>3</sup> *Hilton v Guyot*, 159 US 113, 164 (1895), quoted in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 396 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>4</sup> *CSR* (n 3) 396.

restrain a person amenable to the court's jurisdiction from commencing or continuing proceedings in a foreign jurisdiction.<sup>6</sup> The remedy is relevant to the 'three-dimensional chess' of transnational litigation,<sup>7</sup> where parties 'litigate in order to determine where they shall litigate'.<sup>8</sup> It might be seen as a counterpart to the stay of proceedings on *forum non conveniens* grounds, which involves distinct but related principles and can also resolve a dispute as to where rights should be litigated.<sup>9</sup>

Although the anti-suit injunction operates *in personam*, it would be a mistake to overlook the tension between the remedy and the ends of comity.<sup>10</sup> On a functionalist view, the anti-suit injunction is effectively an encroachment upon the exercise of jurisdiction by foreign courts.<sup>11</sup> To stress this point may offend those who emphasise the equitable origins of the remedy, but it goes some way to explain why anti-suit injunctions are generally not awarded in the European Community,<sup>12</sup> and are generally not directed across the Tasman<sup>13</sup> or within the Federation.<sup>14</sup> Anti-suit injunctions are inconsistent with

<sup>5</sup> *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897, 912 (Sopinka J).

<sup>6</sup> CSR (n 3) 390.

<sup>7</sup> Malcolm R Wilkey, 'Transnational Adjudication: A View from the Bench' (1984) 18 *International Lawyer* 541, 543, quoted in Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) 1 ('*Forum Shopping*').

<sup>8</sup> *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 464 (Lord Templeman), quoted in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 201 (Wilson and Toohey JJ).

<sup>9</sup> CSR (n 3) 389–90.

<sup>10</sup> Cf *CSR Ltd v New Zealand Insurance Co Ltd* (1994) 36 NSWLR 138, 153, 162–5 (Rofe J); Andrew S Bell and Justin Gleeson, 'The Anti-Suit Injunction' (1997) 71 *Australian Law Journal* 955, 958, 968.

<sup>11</sup> 'Caution is however necessary because such an injunction represents, indirectly, an interference with the process of the foreign court in that it forbids resort to the jurisdiction of that court although, of course, the operation of the order is only upon the litigant in personam': *National Australia Bank Ltd v Idoport Pty Ltd* [2002] NSWSC 623, [14] (Barrett J) ('*Idoport*'). See also *Apple Corps Ltd v Apple Computer Inc* [1992] RPC 70, 79 (Hoffman J); *Amchem* (n 5) 913. Cf Richard Fentiman, 'Anti-Suit Injunctions: Comity Redux?' (2012) 71 *Cambridge Law Journal* 273, 273.

<sup>12</sup> *Turner v Grovit* (C-159/02) [2004] ECR I-3565 ('*Turner (ECJ)*'); *Allianz SpA v West Tankers Inc* (C-185/07) [2009] ECR I-663 ('*West Tankers*'). Cf arbitral anti-suit injunctions: *Re Gazprom OAO* (C-536/13) [2015] 1 WLR 4937. See also Chukwudi Paschal Ojiegbe, 'From *West Tankers* to *Gazprom*: Anti-Suit Injunctions, Arbitral Anti-Suit Orders and the Brussels I Recast' (2015) 11 *Journal of Private International Law* 267.

<sup>13</sup> Note that s 22 of the *Trans-Tasman Proceedings Act 2010* (Cth) prohibits anti-suit injunctions that would be granted on the basis that the New Zealand court is not the appropriate forum for the proceeding.

the stronger species of comity which is of the essence of a free economic zone and which is antithetical to nationalistic isolationism.

In light of these themes, it is worth considering: what is the future of the anti-suit injunction? This article considers that question in relation to Australian courts.<sup>15</sup> The future of the remedy is tied to the jurisdiction of our courts, and the evolving exercise of that jurisdiction. This article examines that jurisdiction, and argues that courts have broad powers to award the remedy, which recent experience suggests they are willing to utilise. It is argued that anti-suit injunctions are an important feature of our legal tradition: restraining individuals pursuing foreign proceedings is not necessarily a parochial or provincial move; rather, it is a legitimate means by which the forum can do justice in the case before it.<sup>16</sup>

## II JURISDICTION TO AWARD ANTI-SUIT INJUNCTIONS

A court's jurisdiction is its authority to decide.<sup>17</sup> In many, if not most cases before Australian courts, the authority of the court will not be in issue. Cases with a foreign element are different. Authority to decide is a central issue in private international law.<sup>18</sup> In light of the extraordinary nature of the anti-suit injunction, and the extra-territorial impact that it can have, the question of the authority to award the remedy is an important one.

<sup>14</sup> '[C]onstitutional considerations dictate that only in the rarest circumstances should a party within the jurisdiction of one state of Australia be restrained from continuing proceedings in another state of Australia': JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2015) 728 [21-165]. Note that the Cross-Vesting Acts make anti-suit injunctions largely unnecessary between state supreme courts: cf *Pegasus Leasing Ltd v Cadoroll Pty Ltd* (1996) 59 FCR 152. See also *Service and Execution of Process Act 1992* (Cth) s 21.

<sup>15</sup> Note that the Australian approach to anti-suit injunctions is distinct from other common law countries: see Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Thomson Reuters, 2009) 1025 [16.120]. This article focuses on Australia, with some consideration of UK authority.

<sup>16</sup> Cf recent comments on characterisation of a 'maritime lien' in light of the *lex fori*: *The Sam Hawk* (2016) 246 FCR 337, 361 [85] (Allsop CJ and Edelman J). See also Michael Douglas, 'Characterisation of a Foreign Maritime Lien by the *Lex Fori*' (2017) 17 *Oxford University Commonwealth Law Journal* (forthcoming).

<sup>17</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 569–70 [62]; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 21 [51]. See generally Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012).

<sup>18</sup> See generally Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2014) pt II.

In *CSR*, the High Court majority identified two distinct jurisdictional bases for the award of an anti-suit injunction.<sup>19</sup> First, the remedy is available in equity to restrain unconscionable conduct or the unconscientious exercise of legal rights. Second, anti-suit injunctions are available in exercise of a court's inherent jurisdiction, when the administration of justice demands, to protect the court's processes.

### A Equitable Jurisdiction

The anti-suit injunction was originally a creature of equity:<sup>20</sup> Chancery's common injunction restrained litigants from obtaining relief before common law courts contrary to equity.<sup>21</sup> The common injunction would operate *in personam*, binding the party pursuing proceedings at common law rather than binding the common law court itself.<sup>22</sup> In *Airbus Industrie GIE v Patel*, Lord Goff explained that, in the course of the 19<sup>th</sup> century, injunctions were employed to restrain the pursuit of proceedings outside of the United Kingdom.<sup>23</sup> That trend continues today: equity will intercede in matters relating to property or acts located overseas, including the commencement or continuation of foreign proceedings, in appropriate circumstances.<sup>24</sup>

The equitable jurisdiction to restrain the pursuit of foreign litigation is an illustration of the broader theme of equitable intervention to avoid unconscionability.<sup>25</sup> There are two ways in which equity can intervene to grant an anti-suit injunction to avoid unconscionability.<sup>26</sup> Firstly, an equitable anti-suit injunction can aid legal rights, and secondly, an equitable anti-suit injunction can protect the administration of justice by restraining proceedings that are

<sup>19</sup> *CSR* (n 3) 391–2.

<sup>20</sup> Bell describes the equitable jurisdiction as 'of ancient pedigree': Bell, *Forum Shopping* (n 7) 172 [4.85]. See, eg, *Bushby v Munday* (1821) 5 Madd 297; 56 ER 908.

<sup>21</sup> *CSR* (n 3) 390; *SK Foods LP v SK Foods Australia Pty Ltd (in liq) [No 3]* (2013) 214 FCR 543, 566 [67] (Flick J); Thomas Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008) 41–2 [2.02].

<sup>22</sup> Davies, Bell and Brereton (n 18) 219 [9.2].

<sup>23</sup> [1999] 1 AC 119, 133.

<sup>24</sup> ICF Spry, *The Principles of Equitable Remedies* (Lawbook, 9<sup>th</sup> ed, 2014) 38.

<sup>25</sup> *CSR* (n 3) 372 (Brennan CJ), 392 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 72–3 [42] (Gummow and Hayne JJ).

<sup>26</sup> The following taxonomy follows the approach of Nygh: Davies, Bell and Brereton (n 18) 227–34.

‘vexatious [or] oppressive’ in the relevant sense.<sup>27</sup> This bifurcation is not a neat one; as will be seen, an anti-suit injunction might protect legal rights (like an exclusive jurisdiction agreement) while also preventing pursuit of foreign proceedings that are vexatious or oppressive.<sup>28</sup> The power to award anti-suit injunctions in equity is not limited by such divisions, but only by ‘the dictates of equity and good conscience.’<sup>29</sup>

### 1 *Anti-Suit Injunctions in Aid of Legal Rights*

Anti-suit injunctions are available in equity’s auxiliary jurisdiction to restrain ‘unconscionable or otherwise improper exercise of legal rights.’<sup>30</sup> For example, in *CSR*, the legal rights that were relied on by the parties who sought an anti-suit injunction derived from a purported agreement not to sue.<sup>31</sup> More recently, in *Rectron Australia BV v Lu*, an anti-suit injunction was granted by the Supreme Court of New South Wales to restrain a breach of contract.<sup>32</sup> The contract in question was a deed of release made in the settlement of an earlier set of proceedings. Contrary to the terms of the deed, the defendant continued proceedings in Taiwan. A mandatory injunction was awarded to discontinue the Taiwanese proceedings in exercise of the Court’s discretion ‘to restrain a breach of an implied negative stipulation.’<sup>33</sup>

In the context of cross-border commercial activity, a jurisdiction agreement is an important source of common law rights that might justify an award of an anti-suit injunction in equity. In *Ace Insurance*, the plaintiff sought an anti-suit injunction in respect of proceedings that had been brought in California despite the existence of the jurisdiction clause and an express choice of Australian law. In those circumstances, the invocation of Californian jurisdiction was ‘unconscionable’, and the injunction was granted.<sup>34</sup>

Another notable example is *Akai Pty Ltd v People’s Insurance Co Ltd*,<sup>35</sup> where the English Commercial Court considered an application for an anti-suit injunction after the High Court of Australia delivered its important

<sup>27</sup> See Heydon, Leeming and Turner (n 14) 727 [21-165].

<sup>28</sup> See, eg, *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724.

<sup>29</sup> *CSR* (n 3) 394.

<sup>30</sup> *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1989) 22 FCR 209, 232 (Gummow J) (*‘Sentry’*).

<sup>31</sup> *CSR* (n 3) 392.

<sup>32</sup> [2014] NSWSC 1367.

<sup>33</sup> *Ibid* [57] (Lindsay J).

<sup>34</sup> *Ace Insurance* (n 28) [78] (Brereton J).

<sup>35</sup> [1998] 1 Lloyd’s Rep 90 (*‘Akai (QB)’*).

judgment<sup>36</sup> on the impact of forum policy on choice of law and choice of jurisdiction. The High Court had construed the *Insurance Contracts Act 1984* (Cth) and held that Australian proceedings should not be stayed despite an exclusive choice of English jurisdiction to the contrary.<sup>37</sup> The Commercial Court subsequently granted an injunction to restrain the continuation of the Australian proceedings, giving effect to the original bargain.<sup>38</sup> It is notable that the Court recognised the importance of comity, but held that comity did not require it to give effect to Australian law and policy.<sup>39</sup>

If proceedings are brought in contravention of an arbitration agreement, the court should stay the proceedings to give effect to the bargain.<sup>40</sup> Alternatively, a party to an arbitration agreement can apply for an anti-suit injunction to restrain contravention of that agreement by pursuit of some other proceedings.<sup>41</sup> An injunction to give effect to an arbitration agreement would be available in exercise of equity's auxiliary jurisdiction. In *The Angelic Grace*, Millet LJ held that the principles applicable to an application for an anti-suit injunction to uphold an arbitration agreement are the same as those that govern anti-suit injunctions to uphold exclusive jurisdiction clauses.<sup>42</sup> In the wake of the *West Tankers* litigation,<sup>43</sup> those principles probably no longer apply in Europe,<sup>44</sup> but they still apply in Australia.<sup>45</sup> Thus, in *Alkimos Shipping*

<sup>36</sup> *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418 ('*Akai* (HCA)').

<sup>37</sup> *Ibid* 446–8 (Toohey, Gaudron and Gummow JJ).

<sup>38</sup> *Akai* (QB) (n 35) 108 (Thomas J).

<sup>39</sup> *Ibid* 100.

<sup>40</sup> *International Arbitration Act 1974* (Cth) s 7(2). See *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332; *Great Southern Loans Pty Ltd v Locator Group Pty Ltd* [2005] NSWSC 438, [40].

<sup>41</sup> See generally Geoffrey Fisher, 'Anti-Suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement' (2010) 22(1) *Bond Law Review* 1. Cf the position in Europe: *West Tankers* (n 12). See also Adrian Briggs, 'Fear and Loathing in Syracuse and Luxembourg' [2009] *Lloyd's Maritime and Commercial Law Quarterly* 161.

<sup>42</sup> *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87, 96 ('*The Angelic Grace*'). See also *Bankers Trust Co v PT Jakarta International Hotels and Development* [1999] 1 All ER (Comm) 785.

<sup>43</sup> *West Tankers* (n 12).

<sup>44</sup> See Patrizio Santomauro, 'Sense and Sensibility: Reviewing *West Tankers* and Dealing with Its Implications in the Wake of the Reform of EC Regulation 44/2001' (2010) 6 *Journal of Private International Law* 281. Cf *Gazprom* (n 12). See also Ojiegbe (n 12).

<sup>45</sup> Justice Rares observes that 'England's loss may be Australia's gain. Australia faces none of the same obstacles to the grant of anti-suit injunctions to restrain a breach of an arbitration clause. Indeed, all things being pre-*[West Tankers]*-equal it is likely that Australian courts will be called on to deploy the important remedy of anti-suit injunctions to complement and uphold international traders' bargains providing for arbitration': Justice Steven

*Co v Hind Lever Chemicals Corporation Ltd*, Allsop J considered that an anti-suit injunction would be justifiable provided that the relevant arbitration clause formed part of the contract.<sup>46</sup>

Anti-suit injunctions that enforce agreements are conceptually justified as an expression of equity's auxiliary jurisdiction.<sup>47</sup> As Mason P explained in *Harris v Digital Pulse Pty Ltd*, '[w]ithin its auxiliary jurisdiction, equity intervenes because of the deficiencies and inadequacies of the common law.'<sup>48</sup> Anti-suit injunctions awarded in equity's auxiliary jurisdiction allow parties to realise the benefit of agreements as to forum — a benefit which might not otherwise receive adequate protection at law. However, in some other cases in which anti-suit injunctions are sought, there is no legal right to provide the foundation for the exercise of that jurisdiction.

## 2 Anti-Suit Injunctions Restraining Oppressive or Vexatious Foreign Proceedings

Even in the absence of a relevant legal right, equity can provide an anti-suit injunction to avoid the 'the fruitless multiplication of litigation.'<sup>49</sup> In *CSR* the majority stated:

One well established category of case in which an injunction may be granted in the exercise of equitable jurisdiction is that involving proceedings in another court, including in a foreign court, which are, according to the principles of equity, vexatious or oppressive.<sup>50</sup>

The terms 'vexatious' and 'oppressive' are significant in Australian private international law. They are fundamental to the Australian test of whether proceedings should be stayed because the court is a 'clearly inappropriate

Rares, 'The Role of Courts in Arbitration' [2012] *Federal Judicial Scholarship* 12 (online) [23] <[www.austlii.edu.au/au/journals/FedJSchol/2012/12.html](http://www.austlii.edu.au/au/journals/FedJSchol/2012/12.html)>, archived at <<https://perma.cc/L385-YEPY>>. It is unclear what the impact of Brexit will be: Andrew Dickinson, 'Back to the Future: The UK's EU Exit and the Conflict of Laws' (2016) 12 *Journal of Private International Law* 195.

<sup>46</sup> [2004] FCA 969, [25].

<sup>47</sup> Statutory rights might also be aided by the auxiliary jurisdiction. The authors of *Nygh* identify rights under statutory compensation schemes as potentially justifying anti-suit relief: Davies, Bell and Brereton (n 18) 229 [9.24]. See also Bell, *Forum Shopping* (n 7) 201–2 [4.148].

<sup>48</sup> (2003) 56 NSWLR 298, 341 [224] (emphasis in original).

<sup>49</sup> Heydon, Leeming and Turner (n 14) 702 [21-030].

<sup>50</sup> *CSR* (n 3) 393 (citations omitted).



forum.<sup>51</sup> The terms were deployed by Deane J in *Oceanic Sun*,<sup>52</sup> and then adopted by the majority in *Voth*.<sup>53</sup> In the context of *forum non conveniens*, ‘oppressive’ means ‘seriously and unfairly burdensome, prejudicial or damaging’, and ‘vexatious’ means ‘productive of serious and unjustified trouble and harassment’.<sup>54</sup>

However, it is clear that the principles applicable to an application for an anti-suit injunction are not the same as those applicable to an application for a stay on *forum non conveniens* grounds.<sup>55</sup> For example, if a court finds itself to be a clearly inappropriate forum, it does not follow that an anti-suit injunction should be granted in respect of parallel foreign proceedings.<sup>56</sup> As distinct from the English ‘more appropriate forum’ test for *forum non conveniens*,<sup>57</sup> the Australian test focuses solely on whether the forum is clearly inappropriate.<sup>58</sup> In exercising its discretion, the court determines whether the forum proceedings are vexatious or oppressive. In the context of an application for an anti-suit injunction, the focus is instead on the foreign proceedings, and whether those proceedings are vexatious or oppressive from the forum perspective. More precisely, the focus is on the conduct of the party pursuing the foreign proceedings, and the impact on the other litigant, as explained by Lindgren J in *Allstate Life Insurance Co v ANZ Banking Group Ltd* [No 2]:

[A]pplications for a stay on the ground of *forum non conveniens* and applications for anti-suit relief are governed by different principles and are determined from different standpoints. ...

[T]he in personam nature of an application for an anti-suit injunction focuses attention on the conduct of the party sought to be enjoined and the consequences of that conduct, particularly within the domestic litigation. That line

<sup>51</sup> See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Regie Nationale Renault v Zhang* (2002) 210 CLR 491 (‘Zhang’).

<sup>52</sup> *Oceanic Sun* (n 8) 242.

<sup>53</sup> *Voth* (n 51) 559 (Mason CJ, Deane, Dawson and Gaudron JJ).

<sup>54</sup> *Ibid* 555, citing *Oceanic Sun* (n 8) 247 (Deane J).

<sup>55</sup> CSR (n 3) 390. See also *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871, 896 (‘Aerospatiale’). Cf *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (a case characterised as a ‘mis-step’: Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 203 [6.23]).

<sup>56</sup> *TS Production LLC v Drew Pictures Pty Ltd* (2008) 172 FCR 433, 447 [52] (Gordon J, Stone J agreeing) (‘Drew’).

<sup>57</sup> See *Spiliada* (n 8).

<sup>58</sup> *The Chou Shan* [2014] FCA 74, affd (2014) 224 FCR 384, 398 [57] (Allsop CJ, Besanko and Pagone JJ).

of inquiry is at least unfamiliar, if not irrelevant, in the more general forum non conveniens context.<sup>59</sup>

When will foreign proceedings be vexatious or oppressive? The mere presence of parallel proceedings will not justify the award of an anti-suit injunction.<sup>60</sup> In *Carron Iron Co v Maclaren*, Lord Cranworth LC held that

[w]here [there is] pending a litigation here, in which complete relief may be had, [and] a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings.<sup>61</sup>

It may not be oppressive to bring foreign proceedings, notwithstanding the coexistence of litigation in the forum, if the foreign court can award remedies not available in the forum court.<sup>62</sup> Thus, in *CSR* the majority cited Robert Goff LJ in *Bank of Tokyo Ltd v Karoon*<sup>63</sup> and held ‘that foreign proceedings are to be viewed as vexatious or oppressive only if there is nothing which can be gained by them over and above what may be gained in local proceedings.’<sup>64</sup> The Victorian Court of Appeal considered this dictum in *Sunland Waterfront (BVI) Ltd v Prudential Investments Pty Ltd*, and in particular, the significance of the term ‘only’.<sup>65</sup> The Court read down the absolute language and held that it did not provide a strict rule. Rather, given the equitable jurisdiction, the overlap of subject matter between the proceedings is a matter to be weighed in the exercise of the discretion to award an anti-suit injunction. The Court held that ‘[t]his requires that both the injustice to [Party A] if [Party B] is allowed to pursue the foreign proceedings, and the injustice to [Party B] if it is not allowed to do so, be taken into account.’<sup>66</sup> The assessment will be carried out according to the forum’s notions of equity and conscience.<sup>67</sup>

<sup>59</sup> (1996) 64 FCR 44, 52, quoted in Bell and Gleeson (n 10) 959.

<sup>60</sup> *Airbus* (n 23) 132.

<sup>61</sup> (1855) 5 HL Cas 416, 437; 10 ER 961, 970, quoted in *CSR* (n 3) 393.

<sup>62</sup> *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225, 234; *Aerospatiale* (n 55) 896.

<sup>63</sup> [1987] 1 AC 45 (*‘Karoon’*).

<sup>64</sup> *CSR* (n 3) 393.

<sup>65</sup> [2013] VSCA 237, [442] (Warren CJ, Osborn JA and Macaulay AJA).

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

<sup>67</sup> Bell and Gleeson (n 10) 959.

Here, the jurisdictional focus of anti-suit injunction applications intersects with aspects of the choice of law inquiry.<sup>68</sup> The prospect of ‘something more’ being gained in foreign proceedings will likely be rooted in a conflict of laws. In *CSR*, the foreign court could award treble damages under the *Clayton Act*.<sup>69</sup> Treble damages were not available under Australian law, so the High Court held that the trial judge had erred in granting the anti-suit injunctions. The same American legislation was the foundation of the foreign proceedings in *British Airways Board v Laker Airways Ltd*, where an anti-suit injunction was refused.<sup>70</sup> In contrast, in the *Sunland* case, although foreign proceedings in Dubai provided procedural and evidential advantages, these were ‘insubstantial and of little significance.’<sup>71</sup> There, the Court granted the injunction.

The motivation behind the bringing of the foreign proceedings can be relevant to the exercise of discretion. In *TS Production LLC v Drew Pictures Pty Ltd*, Gordon J recognised that foreign proceedings brought merely to prevent continuation of the forum proceedings could be vexatious or oppressive.<sup>72</sup> (The additional cost and inefficiency of dealing with two sets of litigation, although burdensome, was not enough to justify the injunction.)<sup>73</sup> The same principle applies to domestic proceedings: the central purpose of the respondents in the *CSR* case was to prevent the continuation of US proceedings where treble damages were available. This conduct was characterised as oppressive in the *Voth* sense.<sup>74</sup>

Bad faith on the part of the party bringing the foreign proceedings can be decisive. In *Laker*, Lord Diplock said that the inclusion of an English company as defendant in a US proceeding was vexatious when it was done ‘mala fide for the sole purpose of laying an ostensible foundation for American jurisdiction for the claim against the English company.’<sup>75</sup> In *Turner v Grovit*, Laws LJ described proceedings brought ‘in bad faith in order to vex the plaintiff’ as ‘abusive.’<sup>76</sup> In their interrogation of these principles, Bell and Gleeson write:

<sup>68</sup> On the intersection of anti-suit injunctions and choice of law, see Raphael (n 21) 83–7 [4.04]–[4.09]; Cameron Sim, ‘Choice of Law and Anti-Suit Injunctions: Relocating Comity’ (2013) 62 *International and Comparative Law Quarterly* 703.

<sup>69</sup> 15 USC § 15 (2012).

<sup>70</sup> [1985] 1 AC 58 (‘*Laker*’).

<sup>71</sup> *Sunland* (n 65) [492]; see also at [478]–[481].

<sup>72</sup> *Drew* (n 56) 447 [53].

<sup>73</sup> *Ibid* 448–9 [57]–[60].

<sup>74</sup> *CSR* (n 3) 401.

<sup>75</sup> *Laker* (n 70) 86, citing *Smith Kline & French Laboratories v Bloch* [1983] 1 WLR 730.

<sup>76</sup> [2000] 1 QB 345, 362.

Foreign proceedings may be vexatious or oppressive either because of the subjective intention of the plaintiff in those proceedings or because the objective effect of those proceedings on the applicant for relief is vexatious or oppressive, or for both reasons.<sup>77</sup>

Despite equity's obvious link to matters of conscience, the 'subjective intention' of litigants should be less important to awards of anti-suit injunctions made on the basis of vexation and oppression. Litigation does not exist in a commercial vacuum; it always involves the exertion of pressure by one party on another. Litigation will always vex the litigants. We should not criticise litigants who properly invoke the jurisdiction of foreign courts in pursuit of their self-interest, unless that course has some objectively ascertainable effect on forum proceedings, or the other litigant, that is contrary to our public policy.<sup>78</sup> A focus on the objective effect on the forum proceedings would be more consistent with the analysis of 'vexatious' and 'oppressive' by Deane J in *Oceanic Sun*, in the context of *forum non conveniens*.<sup>79</sup> As a majority of the High Court observed in *Batistatos v Roads and Traffic Authority of New South Wales*, Deane J in *Oceanic Sun* 'emphasised that there was no "requirement that the continuance of the action would involve moral delinquency on the part of the plaintiff"; what was decisive was the objective effect of the continuation of the action.'<sup>80</sup> Courts' interests in preventing injustice and protecting their processes is a more persuasive justification for the jurisdiction to enjoin foreign litigation. 'Protective' anti-suit injunctions, motivated by a desire to protect the jurisdiction of the forum,<sup>81</sup> disclose a more compelling basis for injunctive relief.<sup>82</sup>

In any event, and as in other areas where intent is decisive, courts will face a practical difficulty in the task of identifying subjective intent after the fact. A finding of *mala fides* will involve an undesirable speculative extrapolation from a chronology of events.<sup>83</sup> In contrast, the objective effect of foreign proceedings on a litigant in the forum is easier to ascertain. Equity has a

<sup>77</sup> Bell and Gleeson (n 10) 959.

<sup>78</sup> Cf *SK Foods* (n 21) 570–1 [78]–[84] (Flick J).

<sup>79</sup> *Oceanic Sun* (n 8) 246–7.

<sup>80</sup> (2006) 226 CLR 256, 281 [70] (Gleeson CJ, Gummow, Hayne and Crennan JJ), quoting *ibid* 247.

<sup>81</sup> *Karoon* (n 63) 60.

<sup>82</sup> See also Bell, *Forum Shopping* (n 7) 190 [4.125].

<sup>83</sup> The authors of *Nygh* recognise a finding of *mala fides* 'will often be a matter of inference': Davies, Bell and Brereton (n 18) 233 [9.31].

valuable role to play in remedying the objective effect of foreign proceedings on applicants.

### 3 *Why Equity Matters*

There are at least four (admittedly overlapping) reasons why the equitable jurisdiction to award an anti-suit injunction is significant.

First, anti-suit injunctions will be awarded in equity in accordance with the technique of equity.<sup>84</sup> This point might be overlooked because, as Gummow J observed in *Sentry*, ‘the juridical root of this well established jurisdiction has perhaps not been appreciated as well as it might have been in the recent British decisions.’<sup>85</sup> The remedy is discretionary, like other equitable remedies.<sup>86</sup> It is granted when the ends of justice require it.<sup>87</sup> Courts should have regard to comity and only exercise their discretion with caution.<sup>88</sup> The weight that will be attached to comity will depend on the basis for which the injunction is sought; for example, comity may be less important to the exercise of discretion if an anti-suit injunction is sought to protect the bargain of an exclusive jurisdiction agreement or an arbitration agreement.<sup>89</sup> Further, although it is not necessary that an applicant for an anti-suit injunction first seek a stay of the foreign proceedings,<sup>90</sup> the availability of that course may impact the exercise of the court’s discretion.<sup>91</sup> Another important factor relevant to the court’s discretion is whether damages would be an adequate remedy. This is considered further below.

Second, as an extension of the discretionary nature of the remedy, and in accordance with general principles of equity, equitable anti-suit injunctions will be subject to equitable defences.<sup>92</sup> For example, in *Royal Bank of Scotland plc v Highland Financial Partners LP*, the lack of clean hands on the part of the bank resulted in the discharge of anti-suit injunctions obtained ex parte.<sup>93</sup>

<sup>84</sup> See generally Spry (n 24) ch 1.

<sup>85</sup> *Sentry* (n 30) 232.

<sup>86</sup> *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559.

<sup>87</sup> *Aerospatiale* (n 55) 892.

<sup>88</sup> *Ibid.*

<sup>89</sup> *The Angelic Grace* (n 42) 96.

<sup>90</sup> CSR (n 3), 396–7. But see *Amchem* (n 5) 914.

<sup>91</sup> *Alkimos* (n 46) [25]; *Great Southern Loans* (n 40) [46]–[49]. Cf the Canadian position: *Amchem* (n 5) 914.

<sup>92</sup> Cf *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 2 HKLRD 866, 887 [46] (Godfrey Lam J).

<sup>93</sup> [2012] 2 CLC 109.

Other equitable maxims could also affect whether the remedy is available; for example, ‘that equity assists the diligent, not the dozy’<sup>94</sup> could mean that an anti-suit injunction will not be made if the applicant does not make the application in a timely manner.<sup>95</sup> This was observed by Millett LJ in *The Angelic Grace*, who held that a court should feel no diffidence in granting an anti-suit injunction ‘provided that it is sought promptly and before the foreign proceedings are too far advanced’.<sup>96</sup> Recently, in *The Kishore*, the High Court of England and Wales refused an anti-suit injunction due to delay.<sup>97</sup>

Third, and as another illustration of the technique of equity, a court must first consider whether it is a *forum non conveniens* before awarding an anti-suit injunction in equity. When the equitable jurisdiction is invoked, the ‘central question’ is the appropriate forum for determination of the relevant issue.<sup>98</sup> If instead an anti-suit injunction is sought in exercise of the court’s inherent jurisdiction to protect the proceedings or processes of the court, then this threshold issue does not arise. This is because the forum ‘is the only court with any interest in the matter’.<sup>99</sup>

Fourth, not all courts have equitable jurisdiction. This point has recently proved to be significant, and is explored further below.

### B *Inherent Jurisdiction*

In the absence of some statutory provision to the same effect, every court has the inherent or implied power<sup>100</sup> to prevent its processes being abused and to protect the integrity of those processes once set in motion.<sup>101</sup> In *Zhang*, the majority held that courts can stay their proceedings on *forum non conveniens*

<sup>94</sup> Or ‘*vigilantibus, non dormientibus, aequitas subvenit*’: Briggs, *Agreements on Jurisdiction and Choice of Law* (n 55) 224 [6.58].

<sup>95</sup> See, eg, *Akai (QB)* (n 35) 107.

<sup>96</sup> *The Angelic Grace* (n 42) 96.

<sup>97</sup> *Essar Shipping Ltd v Bank of China Ltd* [2016] 1 Lloyd’s Rep 427 (*‘The Kishore’*).

<sup>98</sup> CSR (n 3) 397.

<sup>99</sup> *Ibid* 398.

<sup>100</sup> This article uses the terms ‘power’ and ‘jurisdiction’ interchangeably, but more precisely, jurisdiction might be understood as the *authority* to exercise power: *NH v DPP (SA)* (2016) 334 ALR 191, 211–12 [67]–[68]. For more on the nuances of the distinction between these terms in this context, see Raphael (n 21) 61–2 [3.02]; Leeming (n 17) 14 [1.7].

<sup>101</sup> CSR (n 3) 391.

grounds in exercise of that power.<sup>102</sup> Previously, in *CSR*, the majority confirmed that the power could be exercised to issue an anti-suit injunction.<sup>103</sup>

The nature of ‘inherent jurisdiction’ was recently considered by the High Court in *NH v Director of Public Prosecutions (SA)*, in the context of a question whether the Supreme Court of South Australia had the jurisdiction to quash a not guilty verdict after a murder trial.<sup>104</sup> In answering the question in the negative, the majority explored the inherent jurisdiction of the Supreme Court:

The statute which vested in the Supreme Court the like jurisdiction of the courts of common law and chancery conveyed with that vesting ‘inherent jurisdiction’. ... [T]he inherent jurisdiction is a power described generically as ‘the inherent power necessary to the effective exercise of the jurisdiction granted’. It is a power or collection of powers that comes with the status of the Supreme Court of a State as a superior court of record. ... [I]nherent jurisdiction is not a ‘separate head of jurisdiction’.<sup>105</sup>

Their Honours went on to identify the power to award injunctions as a species of inherent power. Their Honours also cited an article by Jacob<sup>106</sup> in acknowledging the inherent power ‘to maintain the authority of the court and to prevent its processes from being obstructed and abused’.<sup>107</sup> The power to stay proceedings to prevent the abuse of the court’s processes was identified as an aspect of that same power. Thus, in light of majority judgment in *CSR*,<sup>108</sup> the majority’s dictum in *NH* can be taken as an accurate statement of the inherent jurisdiction which can underpin an award of an anti-suit injunction.

In *PT Bayan Resources* the majority recognised that all state supreme courts are superior courts of record administering law and equity, and that this status alone implies that they possess inherent jurisdiction.<sup>109</sup> Accordingly, it is clear that state supreme courts possess the inherent jurisdiction to award anti-suit injunctions.<sup>110</sup>

<sup>102</sup> *Zhang* (n 51) 503 [25].

<sup>103</sup> *CSR* (n 3) 391–2.

<sup>104</sup> *NH* (n 100). See also *PT Bayan Resources* (n 17).

<sup>105</sup> *NH* (n 100) 211 [67] (French CJ, Kiefel and Bell JJ) (citations omitted).

<sup>106</sup> IH Jacob, ‘The Inherent Jurisdiction of the Court’ (1970) 23 *Current Legal Problems* 23, 27.

<sup>107</sup> *NH* (n 100) 212 [69].

<sup>108</sup> *CSR* (n 3) 391–2.

<sup>109</sup> *PT Bayan Resources* (n 17) 17 [37].

<sup>110</sup> For example, the Supreme Court of New South Wales recently awarded an anti-suit injunction in *Rectron* (n 32).

### 1 Does Every Court Possess ‘Inherent Jurisdiction’?

Can courts other than state supreme courts award anti-suit injunctions in exercise of their ‘inherent jurisdiction’? This question turns on the broader issue of whether other courts possess inherent jurisdiction to prevent abuse of their processes.<sup>111</sup> This was considered in *Jackson v Sterling Industries Ltd*, where Wilson and Dawson JJ considered the power of the Federal Court of Australia to grant a Mareva injunction.<sup>112</sup> Their Honours identified that the Court could award the injunction in its ‘inherent or, more correctly, implied power as well as [under] s 23 of the *Federal Court of Australia Act*’.<sup>113</sup> Their Honours discussed the jurisdictional limitations of the Federal Court in light of the *Commonwealth Constitution*:

Notwithstanding that the Federal Court is declared by s 5(2) of the *Federal Court of Australia Act* to be a superior court of record and a court of law and equity, there are limits upon its functions which differentiate it from other Australian superior courts. ... [F]ederal courts differ from the supreme courts of the States which, although of statutory origin, are truly designated superior courts because they are invested with general jurisdiction by reference to the jurisdiction of the courts at Westminster. Nor does s 32(1) of the *Federal Court of Australia Act* confer any general jurisdiction. That section, to the extent that the *Constitution* permits, confers jurisdiction on the Federal Court in respect of matters that are associated with matters in which the jurisdiction of the Court is invoked.<sup>114</sup>

Subject to the constitutional and statutory framework in which it exists, the Federal Court does possess the *implied power*, rather than inherent power, to award anti-suit injunctions to prevent abuses of its processes. Thus, it was never questioned in *Drew* that the Federal Court could award an anti-suit injunction in exercise of its ‘inherent’ power if the administration of justice demanded it.<sup>115</sup>

<sup>111</sup> Alternatively, it might be argued that other courts possess inherent jurisdiction, or more appropriately, implied jurisdiction to protect their processes, but that such inherent jurisdiction does not support an *inherent power* to award an anti-suit injunction: see *Grassby v The Queen* (1989) 168 CLR 1, 16–17 (Dawson J).

<sup>112</sup> (1987) 162 CLR 612.

<sup>113</sup> *Ibid* 618.

<sup>114</sup> *Ibid*.

<sup>115</sup> *Drew* (n 56) 447 [52]. See also *Jones v Treasury Wine Estates Ltd* (2016) 241 FCR 111.



Other statutory courts possess the same implied jurisdiction which roughly corresponds to the inherent jurisdiction of state supreme courts.<sup>116</sup> In *Perdaman Chemicals and Fertilisers Pty Ltd v The Griffin Coal Mining Co Pty Ltd*, the Western Australian Court of Appeal held that it could grant an injunction ‘as an implied incident of [its] substantive appellate jurisdiction.’<sup>117</sup> That implied incidental power was said to take ‘the place of inherent jurisdiction.’<sup>118</sup> Similarly, in *DJL v The Central Authority*, the High Court held that the Full Court of the Family Court of Australia lacked the inherent powers corresponding to the Westminster courts, but did possess ‘incidental’ power by virtue of its statutory pedigree under the *Family Law Act 1975* (Cth).<sup>119</sup> Recently, in *Teo v Guan*, the Full Court of the Family Court of Australia held that ‘there is strong authority for the proposition that an anti-suit injunction may be granted by the Family Court of Australia in the exercise of its inherent or, more correctly, its implied powers.’<sup>120</sup>

Inferior courts have also been held to possess implied jurisdiction.<sup>121</sup> For example, in *TKWJ v The Queen*, Gaudron J recognised that the District Court of New South Wales, as a court whose powers are defined by statute, has ‘an implied power to do that which is required for the effective exercise of its jurisdiction.’<sup>122</sup> In *Basha v Basha*, the Queensland Court of Appeal held that the District Court of Queensland possessed an implied power to prevent abuse of that court’s processes.<sup>123</sup>

These decisions might be read in light of the following passage by Jacob, extracted from the article which was cited with approval by the High Court majority in the *NH* case:

[T]he jurisdiction to exercise [the power to prevent abuse of process] was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called ‘inherent.’ ... [T]he essential character of a superior court of law necessarily in-

<sup>116</sup> These principles were explored in Michael Douglas, ‘The Media’s Standing to Challenge Departures from Open Justice’ (2016) 37 *Adelaide Law Review* 69, 89–91.

<sup>117</sup> [2011] WASCA 188, [4] (Pullin JA).

<sup>118</sup> *Ibid.*

<sup>119</sup> (2000) 201 CLR 226, 240–1 [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>120</sup> (2015) 53 Fam LR 248, 261 [67] (May, Thackray and Crisford JJ).

<sup>121</sup> See, eg, *Grassby* (n 111) 16–17; *R v Mosely* (1992) 28 NSWLR 735, 739. See also *Rowe v Stoltze* (2013) 45 WAR 116, special leave refused: Transcript of Proceedings, *Rowe v Stoltze* [2013] HCATrans 221.

<sup>122</sup> (2002) 212 CLR 124, 138 [44].

<sup>123</sup> [2010] QCA 123, [23], quoted in *Uzsoki v McArthur* [2011] QDC 60, [4].

volves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. ... The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.<sup>124</sup>

These comments can be transposed to Australian courts exercising statutory jurisdiction, including inferior courts, with reference to the concept of ‘incidental’ or ‘implied’ power recognised by the High Court in cases like *DJL*. This is because all courts perform a judicial function, and so must carry the powers necessary to perform that function. Accordingly, it is arguable that, in the absence of statutory provisions to the contrary, all courts possess the inherent *or implied* power to award anti-suit injunctions to avoid an abuse of their processes.<sup>125</sup> This conclusion is consistent with the proposition articulated in *CSR*:

[T]he power to stay proceedings on grounds of forum non conveniens is an aspect of the inherent or implied power which, in the absence of some statutory provision to the same effect, every court must have to prevent its own processes being used to bring about injustice.<sup>126</sup>

This argument deserves two significant qualifications. First, the caveat, ‘in the absence of some statutory provision’, is important. An express, or perhaps even implied, ousting of this power in legislation would mean that the relevant court cannot award the remedy in exercise of any incidental jurisdiction. It may be contrary to public policy to permit anti-suit injunctions by inferior courts in their implied jurisdiction, given the established practice of awarding the remedy in state supreme courts and the Federal Court. As observed by Toohey, Gaudron and Gummow JJ in *Akai v The People’s Insurance Co Ltd*,

<sup>124</sup> *Jacob* (n 106) 27–8 (citations omitted), cited in *NH* (n 100) 212 [69].

<sup>125</sup> Against this, see comments on the jurisdiction of the District Court in respect of service out of the jurisdiction in *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268, [17]. Further, in *Carantinos v Magafas* (2008) 6 ABC(NS) 587, 589 [9], Branson J expressed the view that it would be inappropriate to make an application for an anti-suit injunction in what was then the Federal Magistrates Court. This case was quoted in *Birch v Wesco Electrics (1966) Pty Ltd* (2012) 218 IR 67, 86–7 [52]. See also *Valana Pty Ltd v Clipmaster Enterprises Pty Ltd* [2007] WADC 109, [35].

<sup>126</sup> *CSR* (n 3) 391.

considerations of public policy present in an Australian court may flow from, even if not expressly mandated by the terms of, the *Constitution* or statute in force in the Australian forum. Thus, courts may disregard or refuse effect to contractual obligations which, whilst not directly contrary to any express or implied statutory prohibition, nevertheless contravene 'the policy of the law' as discerned from a consideration of the scope and purpose of the particular statute.<sup>127</sup>

Second, in practice, this sort of issue will be a very rare event; if a dispute is significant enough to justify transnational litigation then it is unlikely to come within the jurisdictional limit of an inferior court.<sup>128</sup>

## 2 *Anti-Suit Injunctions in the Absence of Equity*

In one recent case the issue of whether the court possessed the implied power to award an anti-suit injunction was critical. In *Teo*, the Family Court of Australia considered an appeal from a decision of the Family Court of Western Australia ('FCWA') to restrain the husband from pursuing proceedings in Singapore.<sup>129</sup>

The FCWA holds a unique position in the Australian judicial system. In a very Western Australian fashion, it is the only state-based dedicated family court in Australia. Whereas the Family Court of Australia is a 'superior court of record' under s 21(2) of the *Family Law Act 1975* (Cth), the FCWA is a 'court of record' under s 9(2) of the *Family Court Act 1997* (WA). The appeal picked up on this distinction, and the apparent inferior position of the FCWA, in the course of an argument that the FCWA lacked the authority to restrain the Singapore proceedings. The appellant argued more broadly that the FCWA lacks the authority to award anti-suit injunctions.

In a thoughtful judgment, the Full Court rejected the appeal and considered several of the issues canvassed in this article.<sup>130</sup> The Court cited *DJL*, amongst other authorities, to accept the proposition that the Family Court of Australia has the implied power to award an anti-suit injunction.<sup>131</sup> The Court then construed the relevant legislation and held that it was intended that the

<sup>127</sup> *Akai (HCA)* (n 36) 447 (citations omitted).

<sup>128</sup> Further, if the subject matter of the litigation is real property of some sentimental value, then the forum court would lack subject matter jurisdiction under the rule in *Moçambique: The British South Africa Co v Companhia de Moçambique* [1893] AC 602.

<sup>129</sup> *Teo* (n 120).

<sup>130</sup> See especially *ibid* 255–8 [30]–[46].

<sup>131</sup> *Ibid* 261 [67].

FCWA have the same powers in the exercise of federal jurisdiction as the Family Court of Australia. Through this syllogism the Court held that the FCWA also has the power to award an anti-suit injunction.<sup>132</sup>

The most interesting aspect of this decision, at least from a private international law perspective, is the fact that the FCWA lacks equitable jurisdiction:

[T]he FCWA is a statutory court and therefore cannot grant equitable relief unless authorised by statute. As an equitable jurisdiction has not been conferred by statute, it has long been accepted that the FCWA cannot exercise the powers of a court of equity ...<sup>133</sup>

The successful wife had argued that the foreign proceedings were ‘vexatious’. Although this language is consonant with that of equity’s exclusive jurisdiction, it also corresponds to the inherent power that superior courts possess and from which they can either stay their proceedings or enjoin foreign proceedings.<sup>134</sup> The Full Court held that the FCWA had the implied jurisdiction to restrain the vexatious foreign proceedings, even in light of that court’s lack of equitable jurisdiction.<sup>135</sup>

Not all the courts of Australia possess jurisdiction corresponding to that of Westminster courts. Depending on the relevant statute, an inferior court might not possess the equitable jurisdiction to award an injunction.<sup>136</sup> In these circumstances, following *Teo*, such courts might still possess the implied or incidental jurisdiction to award an anti-suit injunction, provided that such a power would be necessary for the administration of justice to prevent abuse of the courts’ processes.<sup>137</sup> Whether that power would be ‘necessary’ is questionable.

### 3 Protective Anti-Suit Injunctions

In *CSR* the majority explained that courts will exercise their inherent power to restrain foreign proceedings ‘when necessary for the protection of the court’s

<sup>132</sup> Ibid 264 [81].

<sup>133</sup> Ibid 267 [103] (citations omitted).

<sup>134</sup> *CSR* (n 3) 391–2; *Zhang* (n 51) 503 [25].

<sup>135</sup> *Teo* (n 120) 267–8 [104]–[105].

<sup>136</sup> See *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435; *Valana* (n 125) [35]. Cf the Federal Circuit Court, which ‘is a court of record and is a court of law and equity’: *Federal Circuit Court of Australia Act 1999* (Cth) s 8(3). Although not expressly a ‘superior’ court, it is not an ‘inferior’ court either.

<sup>137</sup> See, eg, *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590 [64] (Gleeson CJ, Gaudron and Gummow JJ), quoting *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J).

own proceedings or processes.<sup>138</sup> The meaning of ‘necessary’ in the context of an exercise of inherent or implied jurisdiction was considered in *Pelechowski*, where a majority of the High Court relied on the decision of Dawson J in *Grassby v The Queen*.<sup>139</sup> The majority held that ‘the term “necessary” does not have the meaning of “essential”; rather it is to be “subjected to the touchstone of reasonableness”’.<sup>140</sup>

What is reasonably necessary will depend on the circumstances of the case, and the nature of the prospective abuse of process. What amounts to an abuse of process cannot be identified with reference to closed categories; rather, it depends on what the administration of justice demands.<sup>141</sup> The question is whether foreign proceedings interfere with, or have a tendency to interfere with, the forum proceedings.<sup>142</sup> *Jones v Treasury Wine Estates Ltd* is a recent decision of the Full Court of the Federal Court that provides an illustration of what can amount to interference.<sup>143</sup> The broader dispute was a class action which involved allegations of misleading or deceptive conduct and contraventions of continuous disclosure obligations. Jones and others in the class commenced proceedings in the US seeking to depose persons on matters relevant to the Australian litigation. In issuing an injunction, the Court relied on its inherent power to protect its proceedings once set in motion. It emphasised the importance of judicial case management, and commented that ‘the overarching purpose of the civil practice and procedure regime is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible’.<sup>144</sup> The Court held that its case management regime would be undermined, together with its recently reformed discovery procedure, unless an injunction was granted.<sup>145</sup>

<sup>138</sup> CSR (n 3) 392.

<sup>139</sup> *Pelechowski* (n 136) 451–2 [50] (Gaudron, Gummow and Callinan JJ), citing *Grassby* (n 111) 16–17.

<sup>140</sup> *Ibid* 452 [51], quoting *State Drug Crime Commission (NSW) v Chapman* (1987) 12 NSWLR 447, 452 (Allen J).

<sup>141</sup> CSR (n 3) 392.

<sup>142</sup> See *Sentry* (n 30) 232.

<sup>143</sup> *Jones* (n 115).

<sup>144</sup> *Ibid* 115 [23] (Gilmour, Foster and Beach JJ).

<sup>145</sup> *Ibid* 119 [49].

### C Comparing the Inherent Jurisdiction to the Equitable Jurisdiction

It may be apparent that there is a significant overlap between anti-suit injunctions in exercise of inherent jurisdiction to prevent abuse of processes and anti-suit injunctions in exercise of equitable jurisdiction to restrain vexatious or oppressive foreign proceedings. In each case, foreign proceedings are involved, and courts may not clearly distinguish these sources of authority. In his monograph *The Anti-Suit Injunction*, Raphael notes that there is a subtle but important distinction.<sup>146</sup> In the equitable jurisdiction, the focus is on the effect of the foreign proceedings on the litigant seeking the award. The adjectives 'vexed' and 'oppressed' describe a person: a party to the forum litigation. In contrast, when the court's inherent jurisdiction is invoked, the focus is on the disruption caused to the proceedings from the point of view of the court.

These different viewpoints impact what the court should consider in exercising its discretion. In the case of injunctions in exercise of inherent jurisdiction, 'issues of public policy are necessarily engaged', while they are not as important if the focus is on vexation and oppression.<sup>147</sup> As noted above, *forum non conveniens* is not relevant to injunctions in the inherent jurisdiction as the forum court is the only court with an interest in protecting the forum court's own processes.<sup>148</sup>

Another important difference is how an advantage in the foreign place impacts the exercise of discretion. It was explained above that an equitable anti-suit injunction should not be made if nothing can be gained by pursuit of the foreign proceedings.<sup>149</sup> Thus, a conflict of laws is a reason why an anti-suit injunction *might* be awarded in equity: a conflict of laws opens the door to something more being gained in the foreign proceedings. In contrast, when the inherent jurisdiction is invoked, a conflict of laws might work the other way, at least indirectly, and militate against the award of an injunction. This point is made in *Nygh*:

Whereas, as shall be seen in the case of vexatious or oppressive conduct, proceedings are restrained because no legitimate or just advantage can be said to lie for a plaintiff in proceeding in a particular foreign forum, it is the very existence of an advantage outside the forum which may justify injunctive relief

<sup>146</sup> Raphael (n 21) 103–4 [4.33].

<sup>147</sup> Ibid 104 [4.33], citing *Arab Monetary Fund v Hashim [No 6]*, *The Times*, 24 July 1992.

<sup>148</sup> CSR (n 3) 398.

<sup>149</sup> Ibid 393–4.

in cases where a plaintiff is considered to be evading the forum's important public policies.<sup>150</sup>

So for example, in *Jones*, the availability of deposition procedures which were not available in Australia was taken into account in justifying the award of the injunction in exercise of inherent jurisdiction.<sup>151</sup> But a mere difference between the foreign law and the *lex fori* is not enough. Importantly, in the *Jones* case, those foreign laws were sought to be utilised in a way that disrupted forum proceedings that were already on foot. In *The Xin Tai Hai*, Rares J held 'that the proper balance between the rights of each party is best maintained by protecting the integrity of the current processes of [the Federal Court] that have been set in motion.'<sup>152</sup> The anti-suit injunction restrained proceedings before a Chinese maritime court that sought delivery up of a letter of undertaking, which in the circumstances of the case was essential to the Federal Court of Australia's *in rem* jurisdiction. The injunction operated to protect the forum proceedings that had already progressed.

These subtle distinctions can be difficult to identify. The difficulty is pronounced because courts might not precisely identify the source of their authority. In *CSR* it was recognised that cases rarely 'make a clear distinction between injunctions granted in exercise of the inherent power and those granted in the exercise of equitable jurisdiction.'<sup>153</sup> Further, they would rarely interrogate the different kinds of equitable jurisdiction. The *Ace Insurance* case provides an illustration. On the one hand, the court was dealing with contractual rights in the form of jurisdiction and choice of law clauses, and so equity's auxiliary jurisdiction was invoked. On the other hand, the court construed the Californian proceedings as 'unconscionable, vexatious and oppressive', and so the defendant was restrained from taking further steps in them.<sup>154</sup> As explained below, this evokes the language of the exclusive jurisdiction. Although it is clear the court had jurisdiction to award the injunction, the precise identity of that jurisdiction is less clear.

Courts possess broad power to award anti-suit injunctions in exercise of either equitable, inherent or implied jurisdiction. That courts have such power should be uncontroversial; the real issue is the way they utilise it. Going forward, it would be desirable for courts to identify the precise jurisdictional

<sup>150</sup> Davies, Bell and Brereton (n 18) 225–6 [9.17], citing *Karoon* (n 63) 60.

<sup>151</sup> *Jones* (n 115) 115–16 [27]–[29].

<sup>152</sup> (2012) 291 ALR 795, 805 [40].

<sup>153</sup> *CSR* (n 3) 394.

<sup>154</sup> *Ace Insurance* (n 28) [84] (Brereton J).

bases of awards of anti-suit injunctions, as the issue could impact the proper principles that should govern the exercise of discretion.

### III THE VALUE OF THE REMEDY

In *Spiliada*, Lord Templeman began his speech with the following: ‘[I]n these proceedings parties to a dispute have chosen to litigate in order to determine where they shall litigate.’<sup>155</sup> In *Oceanic Sun*, Wilson and Toohey JJ described their case as an ‘unfortunate example’ of the kind of meta-litigation described by Lord Templeman.<sup>156</sup> Anti-suit injunctions might be looked down upon as a part of that phenomenon. Professor Briggs provides a contrary perspective:

Though sometimes disparaged as ‘litigation about where to litigate’, the truth is that a quick and early fight over jurisdiction frequently saves the parties, and the court, from having to litigate the substantive dispute. The consequent saving of cost and judicial time may be immense.<sup>157</sup>

Is the anti-suit injunction a valuable part of our legal tradition, as Briggs might suggest? Or is it an overly parochial device that unjustifiably favours the forum — a device which is unsuited to an emerging global society? This Part argues that anti-suit injunctions perform a valuable role in transnational litigation, particularly in a commercial context. It considers damages as an alternative remedy, the merits of discretion, and the future ideal represented by recent developments at the Hague Conference on Private International Law.

#### A Damages as an Alternative Remedy

The anti-suit injunction is just one remedy of a suite of others that may be relevant to transnational litigation. Some scholars have argued that damages could provide a suitable alternative to anti-suit relief.<sup>158</sup> The value of the anti-suit injunction should be considered in that context.

<sup>155</sup> *Spiliada* (n 8) 464.

<sup>156</sup> *Oceanic Sun* (n 8) 201.

<sup>157</sup> Briggs, *Agreements on Jurisdiction and Choice of Law* (n 55) 202 [6.21] (citations omitted).

<sup>158</sup> See, eg, *ibid* ch 8; Daniel Tan, ‘Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation’ (2005) 40 *Texas International Law Journal* 623; Albert Dinelli, ‘The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law’ (2015) 38 *Melbourne University Law Review* 1023. See also Edwin Peel, ‘Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws’ [1998] *Lloyd’s Maritime and Commercial Law Quar-*



### 1 Damages as an Alternative to an Anti-Suit Injunction in Aid of Legal Rights

This argument is most relevant to a forum dispute involving a jurisdiction agreement. Dinelli identifies authorities that support the proposition that a damages award could be a suitable remedy in a transnational dispute that would be subject to an exclusive jurisdiction clause.<sup>159</sup> An Australian example is *Compagnie des Messageries Maritimes v Wilson*, where Fullagar J held that ‘if one party proceeded before a tribunal other than the designated tribunal, [an English court] would entertain an action for damages at the suit of the other party’.<sup>160</sup> According to this view, a party would breach a jurisdiction agreement by bringing proceedings in any place other than that selected in the agreement. Costs incurred in litigating in a foreign place, in circumstances where there is an exclusive jurisdiction agreement in favour of the forum, might be recovered as damages if they cannot be recovered in the foreign litigation.<sup>161</sup> Arguably, the value of monetary remedies that are awarded in the foreign proceedings against the ‘innocent’ party relying on the jurisdiction agreement might also be recovered in the forum by way of damages.<sup>162</sup>

Generally, Australian courts have not embraced the prospect of a damages award for breach of a jurisdiction agreement.<sup>163</sup> A rare recent example is *Commonwealth Bank of Australia v White [No 2]*, where Mandie J held that it was ‘arguable’ that damages might be available as a remedy for breach of an exclusive jurisdiction clause by commencing proceedings in a jurisdiction other than that chosen.<sup>164</sup> Such cases challenge the older English view, seen in *Continental Bank NA v Aeakos Compania Naviera SA*, that an anti-suit injunction is the only appropriate remedy for breach of a jurisdiction agreement.<sup>165</sup> The English pivoted away from that position,<sup>166</sup> essentially out of

*terly* 182, 224–6; Gilles Cuniberti and Marta Requejo, ‘La sanction des clauses d’éllection de par par l’octroi de dommages et intérêts’ (University of Luxembourg Law Working Paper No 2010-2, 18 February 2010) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1689417](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689417)>.

<sup>159</sup> Dinelli (n 158). See, eg, *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] 1 All ER 590 (*‘The Alexandros T’*). See also *Mantovani v Carapelli SpA* [1978] 2 Lloyd’s Rep 63, cited in Bell, *Forum Shopping* (n 7) 202 [4.149].

<sup>160</sup> (1954) 94 CLR 577, 587.

<sup>161</sup> See *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517, 1524 [18] (Schiemann LJ).

<sup>162</sup> *Donohue v Armco Inc* [2002] 1 All ER 749, 765 [36] (Lord Bingham), 769 [48] (Lord Hobhouse), 774–5 [75] (Lord Scott); Dinelli (n 158) 1030–1.

<sup>163</sup> Dinelli (n 158) 1025.

<sup>164</sup> [2004] VSC 268, [5]. See also Richard Garnett, ‘Jurisdiction Clauses since Akai’ (2013) 87 *Australian Law Journal* 134, 148–9.

<sup>165</sup> [1994] 1 WLR 588, 598 (Steyn LJ) (*‘Aeakos’*).

<sup>166</sup> *Union Discount* (n 161).

necessity, once it was determined that anti-suit injunctions were inappropriate under the *Brussels I Regulation*.<sup>167</sup> It should be noted that the future of the English position is uncertain, as is the UK's future relationship with Europe.<sup>168</sup>

Conceptually, an award of damages for breach of a jurisdiction agreement coheres with the broader principle that an award of damages is the ordinary remedy for breach of contract.<sup>169</sup> Perhaps a damages award has the advantage of being more consistent with comity: a damages award provides no indirect interference with the process of the foreign court, as the judgment debtor may still resort to the jurisdiction of the foreign court.<sup>170</sup> Further, damages awards might deter forum shopping.<sup>171</sup> On the other hand, the prospect of a damages award to compensate for a substantive remedy awarded by a foreign court might also offend foreign sensibilities, while going against the grain of *res judicata*. The availability of damages may give rise to the prospect of mutually unenforceable, inconsistent money judgments. It has also been held that damages are not an adequate remedy in this context.<sup>172</sup>

If it is accepted that damages are available for breach of a jurisdiction agreement, then conceptually, they should also be available for breach of an arbitration agreement. *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* is relevant here.<sup>173</sup> Martin CJ accepted ATCO's argument that the plaintiff pay ATCO's costs on an indemnity basis following a stay of proceedings brought in contravention of an arbitration agreement. Although not a direct example of damages in lieu of an anti-suit injunction, the decision is consistent with the proposition that an award of damages is an effective remedy for breach of an arbitration or exclusive jurisdiction agreement.

In the absence of a legal right, it is not clear that damages would be available as an alternative to anti-suit relief. This is a jurisdictional issue the resolution of which requires further consideration.

<sup>167</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1. See, eg, *Turner (ECJ)* (n 12).

<sup>168</sup> See *Dickinson* (n 45).

<sup>169</sup> *Bowen v Blair* [1933] VLR 398; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849 (Lord Diplock).

<sup>170</sup> Cf *Idoport* (n 11) [14] (Barrett J).

<sup>171</sup> *Dinelli* (n 158) 1033.

<sup>172</sup> See, eg, *Apple* (n 11) 74 (Hoffman J).

<sup>173</sup> [2014] WASC 10 (S).

## 2 Damages in Equity? Dissecting the Equitable Jurisdiction

If an anti-suit injunction is awarded in equity but in the absence of a legal right, then it will be awarded to restrain vexatious or oppressive foreign proceedings. This kind of injunction provokes an issue of taxonomy: the distinction between the auxiliary jurisdiction and the exclusive jurisdiction of equity.<sup>174</sup> *Meagher, Gummow and Lehane* identifies that a practical reason for distinguishing between equitable injunctions granted in the exclusive jurisdiction from those granted in the auxiliary jurisdiction is that the question of whether damages would be a sufficient remedy does not arise if the court's exclusive jurisdiction is properly invoked.<sup>175</sup>

This proposition is relevant to the future of anti-suit injunctions. If the exclusive jurisdiction is invoked on the basis that foreign proceedings are vexatious or oppressive, then an argument that a damages award is a suitable alternative to anti-suit injunction might be harder to maintain. The question, then, is whether equitable anti-suit injunctions granted to restrain oppressive or vexatious proceedings are granted in the exclusive or auxiliary jurisdiction of equity.<sup>176</sup> Authorities suggest the former. For example, in *Sentry*, Gummow J held that

foreign proceedings which have a tendency to interfere with the due process of the domestic court may, in the circumstances of a particular case, generate the necessary equity to enjoin those foreign proceedings as vexatious or oppressive ...<sup>177</sup>

In *Laker*, Lord Diplock used the language of 'equitable right[s]' in the context of discussion of the authority to award an anti-suit injunction.<sup>178</sup> According to Raphael, it is arguable

that in order for equity to grant a non-contractual anti-suit injunction it must be responding to a substantive equitable right not to be subjected to vexatious and oppressive litigation, or not to be affected by unconscionable conduct in

<sup>174</sup> See Heydon, Leeming and Turner (n 14) 11–12 [1-090]–[1-110].

<sup>175</sup> Ibid 701 [21-015].

<sup>176</sup> *Meagher, Gummow and Lehane* categorises this kind of case under the heading of 'Injunctions in Aid of Certain Non-Statutory Rights': ibid 712–28.

<sup>177</sup> *Sentry* (n 30) 232 (citations omitted).

<sup>178</sup> *Laker* (n 70) 81.

the pursuit of legal proceedings. This analysis removes the conceptual problem of having a substantive claim without a substantive right.<sup>179</sup>

Similarly, Briggs has described an injunction to restrain vexatious or oppressive conduct as an injunction to restrain ‘conduct which constituted an equitable wrong’, and writes of ‘an equitable right not to be vexed or oppressed’.<sup>180</sup> However, in his monograph on forum shopping, Bell observed that the term ‘equitable rights’ has caused some difficulty in this area.<sup>181</sup> If the term ‘equitable rights’ has any weight behind it, then an anti-suit injunction awarded to protect an equitable right would be awarded in the exclusive jurisdiction of equity; it would be a matter in which a court of equity alone would have jurisdiction to grant relief.<sup>182</sup>

In an earlier piece co-authored with Gleeson, Bell considered vexatious and oppressive foreign proceedings under the heading ‘Anti-Suit Injunctions in the Exclusive Jurisdiction’.<sup>183</sup> This article respectfully adopts their approach to taxonomy. It is most consistent with the leading authorities, including *CSR*, which describe the equitable jurisdiction to award injunctions in terms of Chancery’s power to restrain unconscionable conduct.<sup>184</sup> Therefore, when an anti-suit injunction is issued to restrain the continuation of foreign proceedings in the absence of a contract or some other source of legal right, the court must rely on its exclusive jurisdiction in equity, if it is to rely on equitable jurisdiction at all.

In the case of state supreme courts, the problems posed by the auxiliary/exclusive jurisdiction distinction may be overcome by old legislation. *Lord Cairns’ Act*,<sup>185</sup> and its modern equivalents,<sup>186</sup> gave courts of equity the power to award damages in addition to or in substitution of injunctive relief. Note, however, that the relevant provisions are not uniform throughout Australia. Compare the New South Wales and Victorian provisions. Section 68 of the *Supreme Court Act 1970* (NSW) provides:

<sup>179</sup> Raphael (n 21) 68 [3.10] (citations omitted).

<sup>180</sup> Briggs, *Agreements on Jurisdiction and Choice of Law* (n 55) 204 [6.23].

<sup>181</sup> Bell, *Forum Shopping* (n 7) 200 [4.146].

<sup>182</sup> Heydon, Leeming and Turner (n 14) 11 [1-090].

<sup>183</sup> Bell and Gleeson (n 10) 958.

<sup>184</sup> *CSR* (n 3) 392. See also the authorities cited in Raphael (n 21) 68–9 [3.10] nn 31–2.

<sup>185</sup> *Chancery Amendment Act 1858*, 21 & 22 Vict c 27.

<sup>186</sup> See, eg, *Supreme Court Act 1935* (WA) s 25(10).

Where the Court has power:

- (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or
- (b) to order the specific performance of any covenant, contract or agreement,

the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.

Section 38 of the *Supreme Court Act 1986* (Vic) provides:

If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

In *Giller v Procopets*, Ashley JA and Neave JA held that the modern Victorian expression of *Lord Cairns' Act* would extend to allow damages in lieu of an injunction as a remedy for breach of a purely equitable obligation.<sup>187</sup> Further, in *Wentworth v Woollahra Municipal Council [No 2]*, the High Court commented in obiter that '[a]n incidental object of [*Lord Cairns' Act*] was to enable the Court to award damages in lieu of an injunction or specific performance, even in the case of a purely equitable claim'.<sup>188</sup> Thus, the term 'wrong' in the New South Wales provision and its equivalents can extend to allow damages awards in respect of purely equitable obligations.<sup>189</sup>

These authorities make out the proposition that courts of equity have the jurisdiction to award damages in addition to or in substitution for an injunction for breach of a purely equitable right under the relevant *Lord Cairns' Act* provisions. This means that, even if there are no legal rights in issue and an anti-suit injunction is contemplated in equity's exclusive jurisdiction, a court of equity will have the power to award damages in lieu of an anti-suit injunction.

<sup>187</sup> (2008) 24 VR 1, 30 [136] (Ashley JA), 94–5 [398]–[403] (Neave JA). See also the subsequent orders as to costs: *Giller v Procopets [No 2]* (2008) 24 VR 1, 128 [37] (Maxwell ACJ, Ashley and Neave JJA).

<sup>188</sup> (1982) 149 CLR 672, 676 (Gibbs CJ, Mason, Murphy and Brennan JJ).

<sup>189</sup> *Wilson v Ferguson* [2015] WASC 15, [73]–[89] (Mitchell J). Cf Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 765 [19.11].

### 3 Damages in Lieu of an Anti-Suit Injunction in Exercise of Inherent Jurisdiction?

A court will invoke its inherent jurisdiction to award an anti-suit injunction to prevent abuse of its processes. Although those processes are for the benefit of the litigants, the purpose of the jurisdiction is directed towards the impact of the foreign proceedings on the court itself. Unlike anti-suit injunctions in equity, it is not clear here that a legal or equitable right of the plaintiff is in issue. If that is the case, then arguably the *Lord Cairns' Act* provisions would not be engaged: the injunction is not directed against the breach of a contractual right or the commission or continuance of an 'equitable wrong'.

If every wrong has a remedy,<sup>190</sup> then does every remedy have a wrong?<sup>191</sup> Whatever the answer to that question, it should be remembered that the term 'injunction' has no fixed definition. Legal usage of the term 'decides which court orders are to be identified as injunctions'.<sup>192</sup> With this in mind, anti-suit injunctions in exercise of inherent jurisdiction might not be conceptualised as remedies at all but rather as a means by which courts can regulate their procedure in the absence of any rights of the parties being in issue.<sup>193</sup> On the other hand, US courts have the power to award damages in lieu of injunctions to protect the integrity of US proceedings.<sup>194</sup>

Even if courts do have the power to award damages in lieu of (or in addition to) an anti-suit injunction that would otherwise be made in exercise of inherent jurisdiction, then it is hard to identify a scenario in which a court would elect to exercise that power. Damages will not prevent an abuse of a court's processes or provide an effective remedy once the processes are interfered with. Further, this issue could only arise in those rare cases in which a court lacks equitable jurisdiction. Otherwise, the equitable jurisdiction to restrain conduct causing vexation and oppression would be the appropriate touchstone for an alternative award of damages.

<sup>190</sup> Or 'where there is a right, there is a remedy': '*ubi jus ibi remedium*'.

<sup>191</sup> In the context of equitable remedies, this kind of thinking fails to recognise the unique role of discretion: see Patricia Loughlan, 'No Right to the Remedy? An Analysis of Judicial Discretion in the Imposition of Equitable Remedies' (1989) 17 *Melbourne University Law Review* 132.

<sup>192</sup> CSR (n 3) 390.

<sup>193</sup> An analogy may be drawn with directions made in an interlocutory hearing.

<sup>194</sup> Tan (n 158) 659.

#### 4 *When Damages Would be a Suitable Alternative, or Addition, to an Anti-Suit Injunction*

If a court has the power to award damages in lieu of an anti-suit injunction, then it should only exercise that power in rare cases. The same considerations of comity which mean that anti-suit injunctions must only be issued after the exercise of great caution<sup>195</sup> should also apply here.<sup>196</sup>

Although an award of damages makes sense in the European context where anti-suit injunctions are thought to be not available,<sup>197</sup> in Australia, the rationale is less compelling. Unlike an award of damages, injunctive relief means judicial time is not wasted. Although meta-litigation is undesirable, if it must happen at all, then it is desirable for it to occur efficiently in a single jurisdiction.

Further, although an award of damages in lieu of an injunction is a matter of discretion under *Lord Cairns' Act*, it may be less appropriate for courts to exercise that discretion in this context. Traditionally, damages may be an appropriate substitute for an injunction if four criteria are satisfied: first, 'the injury to the plaintiff's rights is small'; second, the injury 'is capable of being estimated in money'; third, the injury 'can be adequately compensated by a small payment'; and fourth, 'it would be oppressive to the defendant to grant an injunction'.<sup>198</sup> Arguably, if an anti-suit injunction could be granted such that a damages award is contemplated in lieu, then the injunction would not be oppressive to a defendant.

An award of damages might be more appropriate as an addition to, rather than substitute for, an anti-suit injunction. For example, damages might be awarded in respect of the costs incurred in litigating in the foreign place, rather than compensating for substantive relief provided in foreign proceedings. In *A v B [No 2]*, which was recently relied on by Martin CJ in the *Pipeline* case, Colman J recognised that an award of damages might be coupled with an award of an anti-suit injunction to compensate the innocent party for the reasonably-incurred legal costs of defending the foreign proceedings.<sup>199</sup>

<sup>195</sup> *CSR* (n 3) 395–6.

<sup>196</sup> *Tan* (n 158) 657.

<sup>197</sup> See *The Alexandros T* (n 159).

<sup>198</sup> *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322–3 (AL Smith LJ).

<sup>199</sup> [2007] 1 All ER (Comm) 633, 636–7 [9]–[11], cited in *Pipeline* (n 173) [17]–[25].

Arguably, this kind of damages award would be more sympathetic to voices in favour of comity.<sup>200</sup>

Although damages might provide a suitable remedy in some cases with a foreign element, they will rarely be a suitable replacement for the time and expense saved by an anti-suit injunction.

## B *The Merits of Discretion*

### 1 *The Injunction Is a Discretionary Remedy*

The technique of equity governs anti-suit injunctions issued in equity. Discretion is an important part of that technique. Yet even when the equitable jurisdiction is not invoked, the issue of the anti-suit injunction is a matter of discretion. As Raphael explains, ‘the injunction always remains a discretionary remedy’.<sup>201</sup> Spry writes on the role of discretion in awarding injunctions at common law, as opposed to in equity:

[I]t has been assumed in the material authorities that common law injunctions are ordinarily granted or refused according to the same discretionary considerations, such as hardship or unfairness, that move courts of equity in analogous applications, and generally there is no difference between what appears to be just according to established equitable doctrines and what appears to be just according to more general conceptions.<sup>202</sup>

Further, in *Mayfair Trading Co Pty Ltd v Dreyer*, Dixon CJ commented on the effect of the *Judicature Act* provisions and held that ‘no general desertion of the true principles of equity has been considered allowable in granting injunctions’ even when the equitable jurisdiction is not invoked.<sup>203</sup>

In the *Airbus* case, Lord Goff stated that ‘[t]he broad principle underlying the jurisdiction is that it is to be exercised when the ends of justice require it’.<sup>204</sup> In *CSR*, the majority referred to this idea in the course of discussion of anti-suit injunctions in exercise of inherent jurisdiction.<sup>205</sup> The proposition that this jurisdiction is invoked when reasonably necessary to protect the

<sup>200</sup> Tan also argues that damages might be limited to compensation for reliance loss resulting from breach of a jurisdiction agreement: Tan (n 158) 658–9.

<sup>201</sup> Raphael (n 21) 88 [4.10].

<sup>202</sup> Spry (n 24) 336 (citations omitted).

<sup>203</sup> (1958) 101 CLR 428, 454.

<sup>204</sup> *Airbus* (n 23) 133.

<sup>205</sup> *CSR* (n 3) 392.



court's processes corresponds to the same idea. Whatever the source of the authority to issue an anti-suit injunction, the exercise of the power will be a matter of discretion, guided by the ends of justice.

Lord Goff's 'ends of justice criterion' is given colour by concepts like 'un-conscionability', 'vexatiousness', 'oppression', and 'abuse of processes'. Thus, the exercise of discretion is framed by principle.<sup>206</sup> The preceding pages explain that those principles depend on the jurisdiction which is sought to be invoked. Generally, however, courts will balance the injustice to the injunction-plaintiff if the injunction is not granted against the injustice to the injunction-defendant if the injunction is granted.<sup>207</sup>

## 2 *The Place of Comity in the Exercise of Discretion*

Comity is an important consideration informing the exercise of discretion. Comity has recently been described as 'one of the cornerstones of English private international law'.<sup>208</sup> The same can be said for Australian private international law. In *CSR*, the majority considered comity when warning that caution should be exercised by courts contemplating an anti-suit injunction, 'whether the injunction is sought in the exercise of the inherent or equitable jurisdiction'.<sup>209</sup> This is seen in the idea that the inherent jurisdiction is engaged when 'reasonably necessary' to protect the court's processes.<sup>210</sup> The jurisdiction should not be engaged, even if the injunction would protect the court's processes, if the injunction is not a necessary condition of achieving that outcome.

The importance of comity will depend on the context in which the injunction is sought. For example, comity will be less relevant when an anti-suit injunction is pursued in exercise of the court's inherent jurisdiction.<sup>211</sup> In the equitable jurisdiction, the importance of comity may depend on whether the parties have agreed to a jurisdiction or arbitration agreement. Recently, in *Cole v Abati*, Thackray, Stephen and Murphy JJ said:

<sup>206</sup> Raphael (n 21) 87–8 [4.10].

<sup>207</sup> See *Aerospatiale* (n 55); Fentiman (n 11) 275. If the inherent jurisdiction is invoked, the primary consideration is the court's interest in protecting its processes.

<sup>208</sup> Felix WH Chan, 'Anti-Suit Injunctions and the Doctrine of Comity' (2016) 79 *Modern Law Review* 341, 354.

<sup>209</sup> *CSR* (n 3) 396.

<sup>210</sup> See *Grassby* (n 111) 16–17.

<sup>211</sup> See *Jones* (n 115) 119 [51].

We do not accept that comity issues arise only where there are already proceedings overseas; however, we accept that there is little scope for the application of principles of comity in cases such as the present, where one party threatens to engage in conduct which is in clear breach of contract ...<sup>212</sup>

Similarly, in *Apple*, Hoffman J held that ‘in a case like this in which a party has expressly contracted not to sue, the argument that the order merely operates *in personam* is at its strongest.<sup>213</sup> In other kinds of cases, comity may be the overriding consideration.<sup>214</sup>

However, even if comity is important, it is just one factor that informs the exercise of discretion. In *Sunland*, ‘[c]onsiderations of comity, though important, [were] not decisive.<sup>215</sup> In the circumstances of the case, the vexatious and oppressive nature of the Dubai proceedings outweighed the interests of comity. Comity is a mutual obligation;<sup>216</sup> if anything, comity weighed in favour of the Australian court protecting the exercise of its jurisdiction through an anti-suit injunction, and the Dubai court respecting the Australian proceedings.<sup>217</sup>

The importance that courts attribute to comity in exercising their discretion to award an anti-suit injunction is key to the future of the remedy. It means that courts will not exercise their jurisdiction without a good reason.<sup>218</sup> When the remedy is deployed, it will be serving a valuable objective.

### 3 *The Value of the ‘Ends of Justice’ Principle*

The commitment of common law jurisdictions to the anti-suit injunction in spite of the protest of European voices<sup>219</sup> reveals the pragmatic nature of the remedy. As Raphael says, the commitment to the anti-suit injunction ‘reflects a perception that it can be a vital tool for achieving practical justice.<sup>220</sup> This is not just a perception; in some cases with a foreign element, the anti-suit

<sup>212</sup> (2016) 55 Fam LR 329, 342 [67] (citations omitted).

<sup>213</sup> *Apple* (n 11) 79.

<sup>214</sup> Fentiman (n 11) 275.

<sup>215</sup> *Sunland* (n 65) [519].

<sup>216</sup> Raphael (n 21) 117 [4.49].

<sup>217</sup> *Sunland* (n 65) [519].

<sup>218</sup> Raphael (n 21) 8 [1.12].

<sup>219</sup> See Ojiegbe (n 12).

<sup>220</sup> Raphael (n 21) 12 [1.18].

injunction is a vital tool for achieving practical justice.<sup>221</sup> In light of the caution that must be exercised in this area, the injunction will not be issued unless it is vital, or at least reasonably necessary, to ensure that justice is done. For example, in *Daiwa Can Co v Barokes Pty Ltd*, the plaintiff company sought to restrain a Japanese patent infringement proceeding and the commencement of any other proceedings relating to alleged intellectual property infringement.<sup>222</sup> It submitted that granting the injunction carried the lower risk of injustice to the parties; the foreign proceedings created a risk of damage to the plaintiff's reputation and business and risked insolvency for one of its subsidiaries.<sup>223</sup> In granting a temporary anti-suit injunction restraining the Japanese proceeding, Sifris J noted that there was no real risk of injustice for the first defendant, and that '[t]he lowest risk of injustice clearly favour[ed] the grant of the injunction.'<sup>224</sup>

The underlying 'ends of justice' will be assessed by the court in which the injunction is sought. The court will make that assessment in accordance with its own conception of equity and conscience.<sup>225</sup> Of course, foreign courts will employ their own versions of those concepts and their own conception of justice. It might be argued that, by denying foreign courts the opportunity to pursue justice, the anti-suit injunction is an unjustifiably parochial, forum-centric remedy. This theme comes through in the Canadian *Amchem* case, where Sopinka J held that

[t]he parochial attitude exemplified by *Bushby v Munday*, that '[t]he substantial ends of justice would require that this Court should pursue its own better means of determining both the law and the fact of the case' is no longer appropriate.<sup>226</sup>

Recently, in *The Sam Hawk*, the Full Court of the Federal Court considered the character of a maritime lien. In doing so, it engaged in a task common to choice of law in private international law: characterisation. Allsop CJ and Edelman J (Kenny and Besanko JJ substantially agreeing) proceeded to characterise the relevant rights in accordance with Australian law. In proceed-

<sup>221</sup> Raphael identifies an excellent example in *Aeakos* (n 165), where 'it was impossible to make a jurisdictional challenge without filing an expensive defence to the action at the same time': *ibid* 12 [1.18] n 65.

<sup>222</sup> [2015] VSC 502.

<sup>223</sup> *Ibid* [40]–[42].

<sup>224</sup> *Ibid* [61].

<sup>225</sup> *CSR* (n 3) 394.

<sup>226</sup> *Amchem* (n 5) 912, quoting *Bushby* (n 20) Madd 308; ER 913.

ing in that way, Allsop CJ and Edelman J commented that ‘to choose the *lex fori* for a task is not necessarily a choice that is parochial and provincial — it is the forum’s approach to the expression of the law that governs or regulates inherently international activity.’<sup>227</sup>

The same sort of appeal can be made here. Accepting that an Australian court has personal jurisdiction over a defendant in proceedings, it is entirely appropriate that the court can make orders binding that defendant to ensure that justice is carried out in the proceedings. The ‘ends of justice’ principle underlying the grant of any anti-suit injunction in Australia means that an award of an anti-suit injunction is not a parochial move; rather, it is a legitimate means by which the forum can do justice in the case before it.<sup>228</sup> The key point is that this underlying principle does not mandate an outcome: it guides the exercise of discretion. In this area, Justice Gummow’s comments on the value of equity are apposite:

If the administration of equitable relief in these and other cases is inherently more ‘uncertain’ than, say, the quantum of compensatory or exemplary damages, then so be it. All are manifestations of the ‘rule of law.’<sup>229</sup>

That the anti-suit injunction is a discretionary remedy is a good thing, and an important reason why anti-suit injunctions will continue to perform a valuable role in Australia.

### C *The Future Ideal: Comity in Transnational Commercial Litigation*

In an ideal world the anti-suit injunction would not be necessary. If the approaches of courts to the exercise of their jurisdiction were harmonised in the appropriate way, then an unnatural forum would stay its own proceedings in the exercise of its discretion. In Australia, that idealism is reflected in the system of mandatory transfer of proceedings effected by the Cross-Vesting Acts.<sup>230</sup> It is also seen in Australia’s relationship with New Zealand, as ex-

<sup>227</sup> *The Sam Hawk* (n 16) 361 [85].

<sup>228</sup> Cf *ibid*.

<sup>229</sup> Justice WMC Gummow, ‘Equity: Too Successful?’ (2003) 77 *Australian Law Journal* 30, 42.

<sup>230</sup> *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NT) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (SA) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Tas) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA) s 5. See *BHP Billiton Ltd v Schultz* (2004) 221

pressed in the *Trans-Tasman Proceedings Act 2010* (Cth).<sup>231</sup> Recent developments provide some hope for broader international cooperation in this context.

The Hague Conference on Private International Law is an organisation that works towards the progressive unification of private international law rules. The Hague Conference promulgates conventions, protocols and principles that purport to harmonise various aspects of domestic private international law.<sup>232</sup> Of relevance to the present thesis is the Hague Conference's *Convention on Choice of Court Agreements*, which came into force on 1 October 2015.<sup>233</sup> The *Convention* applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters.<sup>234</sup> Article 6 deals with obligations of a court not chosen under an exclusive jurisdiction agreement:

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless —

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case.

By requiring courts to suspend or dismiss proceedings, this art 6 may remove the need for some anti-suit injunctions that would otherwise be made to enforce exclusive jurisdiction agreements. However, it will not remove that need completely. The *Akai* litigation provides an illustration. Australia's approach to exclusive jurisdiction agreements largely aligns to the provisions

CLR 400. Cf stays of proceedings brought in inferior courts under a 'more appropriate forum' test and s 20 of the *Service and Execution of Process Act 1992* (Cth).

<sup>231</sup> *Trans-Tasman Proceedings Act 2010* (Cth) ss 17, 19, 20.

<sup>232</sup> See 'Conventions, Protocols and Principles', *HCCCH* (Web Page) <[www.hcch.net/en/instruments/conventions](http://www.hcch.net/en/instruments/conventions)>, archived at <<https://perma.cc/6V7F-3ECP>>.

<sup>233</sup> *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015).

<sup>234</sup> *Ibid* art 1(1).

of art 6, so that in the *Akai* decision of the High Court, an exclusive jurisdiction clause was avoided by operation of Australian public policy, as expressed in the *Insurance Contracts Act 1984* (Cth).<sup>235</sup> Thus, arguably, even if the *Convention* was expressed in Australian law at that time, the High Court would not have stayed the proceedings.<sup>236</sup> If so, the subsequent decision of the English Commercial Court to issue the anti-suit injunction and restrain the Australian proceedings would have still occurred. Against this, the Explanatory Report on the *Convention* provides the following:

The phrase ‘manifestly contrary to the public policy of the State of the court seised’ is intended to set a high threshold. It refers to basic norms or principles of that State; it does not permit the court seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised. As in the case of manifest injustice, the standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.<sup>237</sup>

Garnett considered the scope of art 6(c) in light of this report, and questioned whether all mandatory forum laws would be excluded.<sup>238</sup> What amounts to a ‘technical’ violation of public policy is not clear. Would s 52 of the *Insurance Contracts Act 1984* (Cth) be covered? Would s 11(2) of the *Carriage of Goods by Sea Act 1991* (Cth)? Importantly, would s 18 of the *Australian Consumer Law*?<sup>239</sup> What is the scope of the public policy exception?

These are important questions for Australia. The Attorney-General’s Department recently recommended that Australia accede to the *Convention* through an ‘International Civil Law Act’.<sup>240</sup> In November 2016, Parliament’s

<sup>235</sup> *Akai* (HCA) (n 36) 447–8. Sections 8 and 52 of the *Insurance Contracts Act 1984* (Cth) are identified as an example of provisions that would be covered by the exception in art 6(c): *National Interest Analysis: Australia’s Accession to the Convention on Choice of Court Agreements* [2016] ATNIA 7, [25] n 1.

<sup>236</sup> It may be argued that the word ‘manifestly’ would produce a different result under the *Convention*: see Michael Douglas, ‘Choice of Court Agreements under an International Civil Law Act’ (2017) 34 *Journal of Contract Law* (forthcoming).

<sup>237</sup> Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements* (Explanatory Report, Hague Conference on Private International Law, 2005) 821 [153] (citations omitted) <[www.hcch.net/en/publications-and-studies/details4/?pid=3959](http://www.hcch.net/en/publications-and-studies/details4/?pid=3959)>, archived at <<https://perma.cc/78FG-USSP>>.

<sup>238</sup> Richard Garnett, ‘The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?’ (2009) 5 *Journal of Private International Law* 161, 166.

<sup>239</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 18. See also *ibid* 166–7.

<sup>240</sup> *National Interest Analysis* (n 235) [21]–[28].

Joint Standing Committee on Treaties recommended that Australia accede to the *Convention*.<sup>241</sup> The provisions of the *Convention* are scheduled to become law in 2017.<sup>242</sup> This is a good thing. In 2009, Chief Justice Spigelman wrote extra-judicially on the merits of the *Convention* as a means to reducing transaction costs surrounding international trade and investment.<sup>243</sup> Anti-suit injunctions were identified as a transaction cost that would discourage trade and investment.<sup>244</sup>

The proposed International Civil Law Act is likely to be politically unpalatable unless 'public policy' is given a wide interpretation to align with the law expressed in *Akai*. The art 6 exceptions mean that the anti-suit injunction would still be an important remedy even if every country in the world were a contracting state. Nevertheless, the *Convention* is a step in the right direction. The exceptions represent a pragmatic compromise to secure support; signatories include the United States of America and the European Union.<sup>245</sup> This early support is somewhat encouraging in light of the failure of the Hague Conference's *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*.<sup>246</sup>

Differing approaches to public policy go to the heart of why anti-suit injunctions will continue to be essential in Australia. Even allied nations can have fundamental disagreements about justice which would preclude harmonisation of laws. For example, a dispute between Yahoo! Inc and La Ligue contre le Racisme et l'Antisémitisme identified the normative chasm between the United States and France.<sup>247</sup> Yahoo's websites offered Nazi memorabilia for

<sup>241</sup> Joint Standing Committee on Treaties, Parliament of Australia, *Implementation Procedures for Airworthiness — USA; Convention on Choice of Courts — Accession; GATT Schedule of Concessions — Amendment; Radio Regulations — Practical Revision* (Report No 166, November 2016) 23 [3.21].

<sup>242</sup> An International Civil Law Bill may be introduced in 2017. See generally Douglas, 'Choice of Court Agreements under an International Civil Law Act' (n 236).

<sup>243</sup> JJ Spigelman, 'The Hague Choice of Court Convention and International Commercial Litigation' (2009) 83 *Australian Law Journal* 386.

<sup>244</sup> *Ibid* 388.

<sup>245</sup> 'Status Table: 37 — Convention of 30 June 2005 on Choice of Court Agreements', *HCCH* (Web Page, 2 June 2016) <[www.hcch.net/en/instruments/conventions/status-table/?cid=98](http://www.hcch.net/en/instruments/conventions/status-table/?cid=98)>, archived at <<https://perma.cc/HUJ4-YRCN>>.

<sup>246</sup> See 'Status Table: 16 — Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters', *HCCH* (Web Page, 10 November 2010) <[www.hcch.net/en/instruments/conventions/status-table/?cid=78](http://www.hcch.net/en/instruments/conventions/status-table/?cid=78)>, archived at <<https://perma.cc/4GK4-HD34>>.

<sup>247</sup> Catherine Kessedjian, 'Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society' (2005) 29 *Melbourne University Law Review* 765, 790–1.

auction online, which was prohibited in France but constitutionally protected in America. The result was inconsistent judgments which could not be enforced in either jurisdiction.<sup>248</sup>

In an ideal world, forum shopping would be redundant; legal systems would provide uniform solutions to private disputes.<sup>249</sup> We do not live in an ideal world. Diverse values are transposed to diverse legal systems. Conflicts of laws emerge. Forum shopping is the understandable consequence of lawyers seeking to exploit conflicts in order to maximise their clients' chances of success in litigation.<sup>250</sup> Disparate approaches to policy will result in conflicting exercises of jurisdiction, and so provide an ongoing role for anti-suit injunctions in Australia.

#### IV CONCLUSION

This article has argued that courts possess a variety of powers to award anti-suit injunctions. Although the remedy has equitable origins, it is not limited to courts of equity. Courts will use the anti-suit injunction when the proper administration of justice requires it. The value of the remedy is in the ends that it is used to achieve. Although comity is an important consideration in this context, it is not the only consideration, and courts might legitimately interfere with foreign proceedings by issuing anti-suit injunctions to achieve practical justice. The anti-suit injunction is a valuable part of a court's arsenal, and it will continue to play an important role in Australia for the foreseeable future.

<sup>248</sup> See, eg, *Amicale des déportés d'Auschwitz et des camps de Haute Silésie c Timothy Koogle*, Tribunal de Grande Instance de Paris, 11 February 2003, Recueil Dalloz, 2003, informations rapides, 603; *Yahoo! Inc v La Ligue contre le Racisme et l'Antisémitisme*, 399 F 3d 1010 (9<sup>th</sup> Cir, 2005).

<sup>249</sup> Andrew S Bell, 'The Why and Wherefore of Transnational Forum Shopping' (1995) 69 *Australian Law Journal* 124, 124.

<sup>250</sup> *Ibid* 125.