HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

BARRY THOMAS BLUNDEN PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA DEFENDANT

Blunden v Commonwealth of Australia
[2003] HCA 73
10 December 2003
C6/2003

ORDER

Answer the questions reserved in the Case Stated as follows:

On the basis of the Statement of Agreed Facts, to the extent that the plaintiff alleges negligence on the part of servants or agents of the defendant in international waters:

Question (a)

Is the plaintiff's action subject (by operation of ss 56, 79, 80 and 80A of the Judiciary Act *1903 (Cth) or otherwise) to the statutory limitation period prescribed by s 3 of 21 Jac I c 16 (as it applied in the ACT) or alternatively by s 11 of the* Limitation Act *1985 (ACT), as alleged in par 7 of the defendant's amended defence dated 14 December 2001, filed in the Supreme Court of the Australian Capital Territory in proceedings SC 324 of 1998 ("the amended defence")?*

Answer

The plaintiff's action is subject to the provisions of the Limitation Act *1985 (ACT).*

Question (b)

Is the plaintiff's action subject (by operation of ss 56, 79, 80 and 80A of the Judiciary Act *1903 (Cth) or otherwise) to the statutory limitation period prescribed by s 3 of 21 Jac I c 16 (as it applied in NSW) or alternatively s 14(1) and/or s 63(1) of the* Limitation Act *1969 (NSW), as alleged in pars 7 and 8 of the amended defence?*

Answer

No.

Question (c)

Is the plaintiff's action subject to none of the statutory limitation periods pleaded in pars 7 and 8 of the amended defence, as alleged in par 2 of the plaintiff's reply dated 8 February 2002 filed in the Supreme Court of the Australian Capital Territory in proceedings SC 324 of 1998?

Answer

Does not arise.

Representation:

G F Little SC with E J Techera for the plaintiff (instructed by Pamela Coward & Associates)

D M J Bennett QC, Solicitor-General of the Commonwealth with A W Street SC, P J Hanks QC and T M Howe for the defendant (instructed by Australian Government Solicitor)

Interveners:

M G Sexton SC, Solicitor-General for the State of New South Wales with M J Leeming for the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with N D Charlesworth intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office (South Australia))

CATCHWORDS

Blunden v Commonwealth of Australia

Federal jurisdiction – Tort – Negligence – Accident on high seas – Action commenced by plaintiff in Supreme Court of Australian Capital Territory – Limitation law – Application of s 80, *Judiciary Act* 1903 (Cth) – Whether limitation law of Australian Capital Territory applies – Whether "laws of the Commonwealth" include common law of Australia unmodified by statute law in force in forum – Whether scope for adoption of additional common law choice of law rule.

Constitution, s 75(iii).

Judiciary Act 1903 (Cth), ss 56, 79, 80.
Limitation Act 1985 (ACT), ss 11, 36, 56.
Navigation Act 1912 (Cth), ss 260, 261, 261A.

Limitation Act 1623 (21 Jac I c 16), s 3.

1 GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ. At night on 10 February 1964, two ships of the Royal Australian Navy came into collision on the high seas some 18 miles off the Australian coast. The ships were the aircraft carrier HMAS *Melbourne* and the destroyer HMAS *Voyager*. The ships were exercising together. They had sailed to the exercise area from Jervis Bay. The *Melbourne* struck the *Voyager* and the *Voyager* sank. The litigation, an element of which is before the Full Court on a Case Stated by a single Justice, arises from those events. At the time of the collision, the plaintiff, Mr Blunden, was serving as an Able Seaman on the *Melbourne*.

The Supreme Court action

2 On 14 May 1998, long after the events of 10 February 1964, Mr Blunden instituted an action in the Supreme Court of the Australian Capital Territory ("the Territory") against the Commonwealth of Australia. He seeks damages for injuries and disabilities suffered by reason of the responsibility of the Commonwealth for negligent acts and omissions with respect to the collision between the *Melbourne* and the *Voyager*. The injuries and disabilities specified are:

> "Chronic post-traumatic stress disorder
> Major depressive disorder
> Alcohol abuse
> Shock and sequelae".

3 By order made 11 March 2003, there was removed into this Court pursuant to s 40(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"):

> "[t]he part of the cause involving the question of what, if any, limitation law applies to the plaintiff's claim for damages, in so far as it relates to any negligent acts or omissions by servants or agents of the Commonwealth in international waters".

The Case Stated poses questions designed to resolve that issue by identification of the applicable limitation statute law, if there be any.

4 The events of 10 February 1964 gave rise to earlier litigation in this Court. *Parker v The Commonwealth*[1] was an action brought in the original jurisdiction by the dependants of a member of the company of the *Voyager* who lost his life

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1 (1965) 112 CLR 295.

at sea. Mr Parker was on the ship in a purely civil capacity and thus was not disqualified under the law, as it then was understood[2], from bringing an action for negligence[3]. The action was heard in 1965 by Windeyer J, sitting in Melbourne. His Honour applied the law of Victoria[4]. The issues which arise in this case did not fall for decision in *Parker*.

5 By its defence to Mr Blunden's action, the Commonwealth pleads in the alternative that the action was barred or extinguished or was not maintainable by reason of the law with respect to limitation of actions in force in the Territory or in force in New South Wales.

6 In that regard, nothing turns upon the classification once given to limitation laws as procedural in nature. Section 56 of the *Limitation Act* 1985 (ACT) ("the Limitation Act") states:

> "If the substantive law of another place being a State, another Territory or New Zealand, is to govern a claim before a court of the Territory, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly by the court."

7 At the relevant time, the expression "limitation law" was defined in s 55 as meaning:

> "a law that provides for the limitation or exclusion of any liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on, or the arbitration of, the claim is commenced".

The statute law of New South Wales and elsewhere now make similar provision[5].

8 In their operation with respect to the limitation laws of other States and Territories, ss 55 and 56 of the Limitation Act reflect what subsequently in *John Pfeiffer Pty Ltd v Rogerson* was recognised by all members of the Court as the common law in Australia[6].

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2 cf *Groves v The Commonwealth* (1982) 150 CLR 113.

3 *Parker v The Commonwealth* (1965) 112 CLR 295 at 301-305.

4 (1965) 112 CLR 295 at 306-307.

5 *Choice of Law (Limitation Periods) Act* 1993 (NSW).

6 (2000) 203 CLR 503 at 542-544 [97]-[100], 563 [161], 574 [193].

The jurisdiction of the Supreme Court

9 Section 56 of the Judiciary Act provides, among other things, that a person making a claim against the Commonwealth in tort may bring suit against the Commonwealth, where the claim did not arise in a State or Territory, in the Supreme Court of any State or Territory (s 56(1)(c)). All process in that suit which is required to be served upon the Commonwealth shall be served upon the Attorney-General or upon some other person appointed to receive service (s 63). It is accepted by the parties that the jurisdiction invoked by the institution of the action in the Supreme Court of the Australian Capital Territory was federal jurisdiction. The relevant head of federal jurisdiction was that in s 75(iii) of the Constitution, and thus was attracted by the identity of a party, namely the Commonwealth, as the defendant[7]. It is established by *The Commonwealth v Mewett*[8] that the liability of the Commonwealth in tort is created by the common law and that s 75(iii) of the Constitution denies any operation to doctrines of Crown or Executive immunity which otherwise might be pleaded in an action to recover damages in respect of a common law cause of action.

The applicable law

10 The question then becomes one of identification of the applicable body of law by which the controversy is to be resolved through the exercise of judicial power. That inquiry as to the applicable law in federal jurisdiction is distinct from, though it may involve, the identification of choice of law rules. The distinction was emphasised in the joint judgment in *Pfeiffer*[9]. It has significance for the present case. The Commonwealth in its submissions contends for the recognition of a common law choice of law rule in terms which would render it curially applicable only in the exercise of a particular species of federal jurisdiction.

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7 *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 653.

8 (1997) 191 CLR 471. See also *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136 at 157 [59]; *Smith v ANL Ltd* (2000) 204 CLR 493 at 502 [16]; and *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566; 200 ALR 403.

9 (2000) 203 CLR 503 at 527-528 [43], 530-531 [53]-[54].

11 For his part, the plaintiff founds upon the reasoning in the following passage from the judgment of Gaudron and Gummow JJ in *Smith v ANL Ltd*[10]:

> "There was no law of the Commonwealth which enacted a limitation regime of general operation to civil actions pursued in federal jurisdiction. That meant that, *unless and until the operation of the [Judiciary Act] was enlivened*, the common law applied and there was no limitation period which operated in respect of Mr Smith's causes of action[11]." (emphasis added)

The substance of the submissions for the plaintiff is that, whilst there has been attracted the provisions of that statute providing for the jurisdiction of the Supreme Court in his action against the Commonwealth, there has not been attracted those provisions, in particular s 80 of the Judiciary Act, which would apply in that action modifications made by the statute law of the Territory to the common law with respect to limitations.

Preliminary matters

12 There are preliminary matters to be noted before dealing with the case presented by the plaintiff. Actions in tort for negligence are classified as transitory actions. Of those actions, it was said in the joint judgment in *Lipohar v The Queen*[12]:

> "Transitory actions (i) may be sued upon in the forum if it has jurisdiction over the person of the defendant; (ii) this is so regardless of the 'law area' where the facts creating the cause of action happened to occur; but (iii) one or more issues may be determined by the court of the forum by reference to a 'choice' it makes, under its common law rules, of the law of another 'law area' as the lex causae." (footnote omitted)

That passage makes the point later developed in *Pfeiffer* that questions of jurisdiction, in the sense of authority to decide, are logically distinct, and better kept separate, from choice of law questions[13].

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10 (2000) 204 CLR 493 at 503 [17].

11 See *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 301, 312.

12 (1999) 200 CLR 485 at 527 [105].

13 (2000) 203 CLR 503 at 521-522 [25]-[28].

13 What was said in *Lipohar* and *Pfeiffer* is to be read with the later rejection in *The Commonwealth v Yarmirr*[14] of the submission that the common law in Australia does not "extend", "apply" or "operate" beyond low-water mark and the rejection of the corollary that, absent statute, no rights deriving from events occurring beyond that limit may be enforced in Australian courts. That body of common law includes what sometimes has been called the general principles of maritime law or the maritime law of the world. The point was explained, with particular reference to England, by Lord Diplock in *The Tojo Maru*[15]. His Lordship said[16]:

> "Outside the special field of 'prize' in times of hostilities there is no 'maritime law of the world,' as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject-matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a 'maritime law of the world' and not from the internal municipal law of a particular sovereign state."

14 In the present action, the Supreme Court of the Territory had the necessary jurisdiction over the transitory action by reason of s 56 of the Judiciary Act and the amenability of the Commonwealth to service of the process of the Supreme Court in accordance with s 63 of that Act. The Supreme Court had the necessary federal jurisdiction by reason of the identity of the defendant.

15 It should be mentioned here that Mr Blunden did not seek to invoke the jurisdiction conferred upon the Supreme Court of the Territory by ss 9 and 39 of the *Admiralty Act* 1988 (Cth) ("the Admiralty Act") in respect of proceedings

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14 (2001) 208 CLR 1 at 45-46 [34]-[35].

15 [1972] AC 242.

16 [1972] AC 242 at 290-291. See also *Moragne v States Marine Lines Inc* 398 US 375 at 386-388 (1970).

commenced as actions *in personam* on a maritime claim[17]. The critical events pre-dated the commencement of the Admiralty Act by many years. That makes it unnecessary to consider the construction of the limitation provision in s 37 of that Act. Nor is there any occasion to consider the basis upon which under earlier Imperial legislation English courts of Admiralty entertained actions in respect of damage sustained on the high seas and arising out of the operation of Royal Navy ships[18]. Nor do questions arise respecting the doctrine of laches as developed in courts of Admiralty[19]. Rather, the general position with respect to actions on the case such as that for negligence is that, statute apart, there is no limitation bar at common law.

Section 80 of the Judiciary Act

16 What then is the applicable law in the action commenced by Mr Blunden? That inquiry directs attention, in the first instance, to s 80 of the Judiciary Act. This states:

> "*So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment*, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters." (emphasis added)

It will be convenient later in these reasons to refer further to the emphasised passage in s 80; it is this to which the submissions for the plaintiff direct particular attention.

17 The next step, if it is necessary to take it to provide an answer to the particular question that arises, is provided by s 79 of the Judiciary Act. That states:

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17 Rule 5 of the Admiralty Rules 1988 prescribes a particular form for documents filed in proceedings under the principal Act.

18 *HMS Sans Pareil* [1900] P 267; *The Hero* [1911] P 128; affd [1912] AC 300. See also *HMS Inflexible* (1856) Swab 32 [166 ER 1003].

19 See *Moragne v States Marine Lines Inc* 398 US 375 at 406 (1970).

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, *except as otherwise provided by* the Constitution or *the laws of the Commonwealth*, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable." (emphasis added)

18 In *The Commonwealth v Mewett*[20], Gaudron J emphasised that (i) s 80 is one of the "laws of the Commonwealth" to which s 79 is expressly subjected and (ii) the application, in the exercise of federal jurisdiction, of the common law rules for choice of law is directed by s 80. To proposition (ii), two points should be added. The first is that the application of any rules of the common law will, in the terms of s 80, be subjected to any modification, in the present case, by the statute law in force in the Territory. The second is that, if there is no common law choice of law rule relevant to the issues in the litigation, but the common law rule as to the absence of time bars is modified by Territory law, then s 80 applies that modification, and this furnishes the limitation law which governs the action.

19 Counsel for Mr Blunden submitted that Territory law could not be brought into play in this way because to do so would be to "enlarge the reach" of the Limitation Act. That submission should be rejected. The Limitation Act plainly applies to actions instituted in the Supreme Court. That institution in the Territory court supplies the connecting link with the Territory statute. It is not to the point that the events giving rise to the cause of action upon which the plaintiff relies occurred on the high seas.

20 In its submissions, the Commonwealth correctly emphasised that the issues reflected in the order for removal into this Court were left open in *Regie Nationale des Usines Renault SA v Zhang*[21]. In the joint judgment of five members of the Court in *Renault*[22], the following passage appears:

> "The submission by the Renault companies is that the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the lex loci delicti should be extended to *foreign torts*, despite the absence of the significant factor of federal considerations, and that this should be without

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20 (1997) 191 CLR 471 at 522.

21 (2002) 210 CLR 491.

22 (2002) 210 CLR 491 at 520 [75]-[76].

> the addition of any 'flexible exception'. That submission should be accepted. [emphasis added]
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> To that outcome, several caveats should be entered. In *Pfeiffer*, reference is made to the difficulty in identifying a unifying principle which assists in making the distinction, in this universe of discourse, between questions of substance and those of procedure. The conclusion was reached that the application of limitation periods should continue to be governed by the lex loci delicti and, secondly, that[23]: '*all* questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti.' (Original emphasis.) We would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort. We also would reserve for further consideration in an appropriate case the *Moçambique* rule[24] and the standing of *Potter v Broken Hill Proprietary Co Ltd*[25]. *Special considerations also apply to maritime torts* and what Dicey calls 'aerial' torts[26]." (emphasis added)

21 Three points are to be made here.

22 First, some care is needed with the expression "foreign tort". What it identifies is a foreign system of law in force at the *locus delicti*. It is that foreign legal system for which allowance is made by the common law rules of choice of law in the particular forum.

23 Secondly, where, as in this case, the relevant events giving rise to a "maritime tort" occurred on the high seas, one asks what body of law other than that in force in the forum has any better claim to be regarded by the forum as the body of law dispositive of the action litigated in the forum?[27]

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23 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 544 [100].

24 After *British South Africa Co v Companhia de Moçambique* [1893] AC 602.

25 (1906) 3 CLR 479.

26 Collins (ed), *Dicey and Morris on The Conflict of Laws*, 13th ed (2000), vol 2 at 1541-1543.

27 cf Foote, *A Concise Treatise on Private International Law*, 5th ed (1925) at 524.

24 Thirdly, as is implicit in posing the issue in that way, there is no scope here for the application of what has been called the "vested rights theory" or "obligation theory". This would treat the law in force at the place of the wrongful act as the only possible source of the obligation Mr Blunden seeks to enforce and this would determine both the existence of the obligation and its extent. The theory, associated with the judgment of Willes J in *Phillips v Eyre*[28] and Holmes J in *Slater v Mexican National Railroad Co*[29], was rejected in *Koop v Bebb*[30] and that rejection was affirmed in *Pfeiffer*[31]. In any event, the facts of the present case illustrate the deficiencies of the theory, there being no foreign legal system operative at the *locus delicti* to provide the source of the obligation[32]. The "floating island" metaphor upon which the plaintiff relies for one branch of the argument is an unsuccessful attempt to accommodate the vested rights theory to the facts. It will be necessary to return to that aspect of the submissions.

25 It should be stressed that this case does not present any issues that may appear in other cases of tort actions arising on the high seas. Various questions may arise in those actions. They may include the significance to the forum of the interest of the law of the flag of a foreign vessel in its "internal economy"[33] or the interest of the law of the place in a federal nation where a relevant ship is registered[34]. In the case of proceedings not brought in Admiralty, but arising out

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28 (1870) LR 6 QB 1 at 28.

29 194 US 120 (1904).

30 (1951) 84 CLR 629 at 644.

31 (2000) 203 CLR 503 at 526-527 [39]-[40]. See also *Pozniak v Smith* (1982) 151 CLR 38 at 52-53, and cf the references to the judgment of Willes J in *Phillips v Eyre* by Lord Scott of Foscote in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1119-1120, 1123.

32 cf Hancock, *Torts in the Conflict of Laws*, (1982) at 271-272; Finlayson, "Shipboard torts and the conflict of laws", (1986) 16 *Victoria University of Wellington Law Review* 119 at 143.

33 cf *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 77 ALJR 1497 at 1506-1507 [49]-[54]; 200 ALR 39 at 51-53.

34 cf *Canadian National Steamships Company Ltd v Watson* [1939] SCR 11; *Cotter v Huddart Parker Ltd* (1941) 42 SR (NSW) 33 at 46; revd on other grounds (1942) 66 CLR 624; Tetley, "Choice of Law – Tort and Delict – Common Law/Civil Law/Maritime Law – Maritime Torts", (1993) 1 *Tort Law Review* 42; Dicey and

(Footnote continues on next page)

of a collision between vessels of different flags, they may include consideration of whether there is any reason not to apply the law of the forum[35].

26 The Commonwealth emphasised that the ships of the Royal Australian Navy, in 1964 and at present, do not have a port or place of registration in the sense of that seen in statutes such as Pt V of the *Shipping Registration Act* 1981 (Cth). Nor, in 1964, did the Royal Australian Navy recognise for its ships the concept of a "home port".

The plaintiff's submissions

27 As already noted, the plaintiff maintains that the common law applies in its pristine form, without modification by any applicable statute. That consequence is said to flow from a particular construction placed upon the opening words of s 80.

28 Those opening words condition the operation of the balance of s 80 upon two circumstances. The first is that "the laws of the Commonwealth" are not applicable. The second is that the provisions of "the laws of the Commonwealth" are insufficient to carry them into effect or to provide adequate remedies or punishment. The submission for the plaintiff is that the expression "the laws of the Commonwealth" includes the common law in Australia and is not confined to statute law. The phrase "the laws of the Commonwealth" appears elsewhere than in s 80. In *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*[36], Knox CJ and Gavan Duffy J said[37]:

> "The phrase 'the laws of the Commonwealth' is found in [covering cl 5] of the *Commonwealth of Australia Constitution Act* and in various places in the Constitution itself. In every case it probably means Acts of the Parliament of the Commonwealth."

Morris, *The Conflict of Laws*, 13th ed (2000), vol 2, §35-066-§35-070. See also as to the territorial sea *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690 at 730-733, 735-736.

35 cf *Lloyd v Guibert* (1865) LR 1 QB 115; *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Co* (1883) LR 10 QBD 521.

36 (1922) 31 CLR 421.

37 (1922) 31 CLR 421 at 431. See also *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 397 [25], 414-415 [77].

29 Here, the expression is to be read with the section in which it appears, taken as a whole. The text of s 80 speaks on the one hand of the common law in Australia and on the other hand of the modification thereof by the Constitution and statute law. The phrase "the laws of the Commonwealth" in the opening words of s 80 plainly identify statute law.

30 The plaintiff from this false basis sought to develop the argument that the Australian common law was not insufficient in any way and that it supplied the *lex loci delicti*. Therefore, it was said, the balance of s 80 was not applicable and the Limitation Act did not enter the picture. This argument also should be rejected. One asked, so the submission ran, where the tort occurred on the high seas, what was the law applying to the place of the tort and the answer was that it was the Australian common law because the tort occurred on an Australian ship "carrying its Australian law".

31 Involved in that approach to the matter is the long discredited "floating island" theory. In 1883, Lindley LJ described the analogy whereby ships were identified with the territory of the states to which they belong as a "fruitful source of error" and as "more often misleading than the reverse"[38]. Later, Lord Atkin, in giving the decision of the Privy Council in *Chung Chi Cheung v The King*, said[39]:

> "However the doctrine of extraterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore."

32 Moreover, the attempt to invoke the "floating island" theory was misplaced. In the present case, the two ships were Royal Australian Navy ships and the action is brought in an Australian court. The theory, as *Chung Chi Cheung* illustrates, treated men of war and public ships of a foreign state as part of the territory of that foreign state, with the consequence that the jurisdiction of the forum court would be excluded for certain purposes, in particular in respect of acts done or persons found on the foreign ship. The present case concerns

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38 *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Co* (1883) 10 QBD 521 at 544-545.

39 [1939] AC 160 at 174. See also *Cunard v Steamship Co v Mellon* 262 US 100 at 123 (1923); O'Connell, *The International Law of the Sea*, (1984), vol 2 at 735-737.

neither a foreign ship nor the jurisdiction of the Supreme Court of the Territory but the identification of the applicable law in the exercise of federal jurisdiction which has properly been invoked.

33 The plaintiff also submitted, again upon the foundation of the particular construction he seeks to give to the opening words of s 80, that it is the common law, in its form modified by the *Navigation Act* 1912 (Cth) ("the Navigation Act"), which is adequate to provide remedies with procedures to carry them into effect. The consequence, again, is said to be that there is no occasion for the operation of the balance of s 80 to attract the operation of the Australian common law as modified, relevantly, by the Limitation Act. That submission should not be accepted.

34 The particular provisions in the Navigation Act to which reference was made are ss 260 and 261. They appear in Div 11 of Pt V of the Act, the Division being headed "Collisions, loss and damage". The sections are stated by s 261A[40] to "apply in the case of ships belonging to the Australian Navy as they apply in the case of other ships". Section 260 provides for the liability of the owners of ships to be joint and several:

> "[w]here loss of life or personal injuries are suffered by any person on board a ship owing to the fault of that ship and of any other ship or ships".

It does not speak to Mr Blunden's claim. In the unusual circumstances of this case, both ships were in the same ownership. Nor does s 261. That provides a right of contribution in the circumstances where s 260 operates.

35 In any event, the fundamental point remains that, to Mr Blunden's claim, the provisions of the federal statute law, s 80 itself apart, would be insufficient to provide him with any adequate remedies. It is necessary for him to look to the common law in Australia to provide the liability of the Commonwealth in tort and for s 75(iii) of the Constitution to deny any immunity the Commonwealth might otherwise have enjoyed. The applicable law in the exercise of the necessary federal jurisdiction is by s 80 directed to be the common law in Australia as modified, for Mr Blunden's action, by the statute law in force in the Territory. It is not possible for Mr Blunden to fashion a case whereby in the adjudication of his claim there is applied by s 80 the common law in its pristine form.

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40 Added by the *Navigation Act* 1958 (Cth) and amended by the *Navigation Amendment Act* 1979 (Cth) and the *Navigation Amendment Act* 1980 (Cth).

The Commonwealth's submissions

36 The preferred submission for the Commonwealth is that, in the circumstances of the present case, there should be recognised as an appendix to the common law choice of law rules in Australia a proposition as follows:

> "Where the events giving rise to the Commonwealth's liability occur in international waters and involve ships that carry the flag of a federal nation but which (unlike merchant vessels) do not have a port of registration, the *locus delicti* is that law area within Australia with which the events have the closest relevant connection."

It is then said that in the case of the collision between the *Melbourne* and the *Voyager* on 10 February 1964, that place was the Territory as the seat of the administration and operation of the Royal Australian Navy. A secondary submission is based upon observations by Gaudron J in *Mewett*[41] that the events in question there had their closest connection with the last port of the ship on which the plaintiffs were injured. The submission now made is that on the facts of the present case the closest relevant connection was with New South Wales, thereby engaging the limitation law of that State. The Jervis Bay area was said to extend beyond the Territory bearing that name and into New South Wales.

37 The Commonwealth submissions then proceed by recourse to s 80 of the Judiciary Act. It is submitted that, within the meaning of that section, the common law in Australia provides as stated above and that in this respect the common law is not modified by the Constitution or (on the primary submission) by the statute law in force in the Territory. The outcome of that process would be to treat as applicable the provisions of the Limitation Act. It will be necessary later in these reasons to refer further to those provisions.

38 Before doing so, it is convenient to consider the outcome which would follow if s 80 were applied, but on the footing that the common law choice of law rules did not include the modification or addition for which the Commonwealth contends and thus did not speak to this case. If s 80 be read in that way, the result is directly achieved that the common law in Australia with respect to absence of time limitations of personal actions is modified with respect to the Territory by the Limitation Act, and that statute speaks to actions such as the present instituted in the courts of the Territory. The result then is that the

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41 (1997) 191 CLR 471 at 527.

Commonwealth properly pleaded that the relevant limitation regime is that found in the Territory statute.

39 That result, in our view, is the correct outcome of the identification of the applicable law as required by s 80 of the Judiciary Act. The submissions for the Commonwealth may lead to the same outcome in the present litigation. However, that would not necessarily be so where the forum was a court of another Territory or of a State. Hence the necessity to distinguish between the two paths of reasoning.

The proper law of the tort?

40 In *Pfeiffer* the claims of the *lex fori* were deferred to those of the *lex loci delicti*. Here there is no "law area" to be found on the high seas which can provide the *lex loci delicti*. The question then becomes whether there is any other legal system which has a better claim than the forum which is to be treated by the forum as the body of law by which the action is to be decided. The phrase "body of law", in this context, identifies the statute law in force in some other State or Territory. This is because the issue removed into this Court has been limited to the liability of the Commonwealth in respect of certain negligent acts or omissions, and the Commonwealth can, in this case, be sued in the Supreme Court of any State or Territory or in any other court of competent jurisdiction in any State or Territory. The possibility of an external "body of law" being selected as the "proper law" may be discounted. Moreover, given the identity of the Commonwealth, the occasion for the curial operation of the proposed rule always would arise in a court identified in s 56 of the Judiciary Act and in the exercise of a particular head of federal jurisdiction and not otherwise.

41 The reasoning in *Pfeiffer* considered the claims of what might be called the proper law of the tort. It is to that theory that the Commonwealth appeals, in substance, in its submissions in this case. However, of that theory, it was said in *Pfeiffer*[42]:

> "What emerges very clearly from the United States experience in those States where the proper law of the tort theory has been adopted is that it has led to very great uncertainty. That can only increase the cost to parties, insurers and society at large."

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42 (2000) 203 CLR 503 at 538 [79].

Of further significance for the present case is the additional observation[43]:

> "Moreover, it might be thought that, often enough, the search for the proper law of the tort has led, in the United States, to the application of the law of the forum simply because the plaintiff chose to institute the proceedings in that place."

42 The Commonwealth urges in favour of its submissions the opportunity provided to "forum shopping" by allowing the applicable law to remain that of the forum. It refers to the differences between the different limitations statutes in force in the various States and Territories. Views may vary as to the evil of choice of law rules which, in the absence of a body of law operative at the *locus delicti*, permit plaintiffs to select the forum with the limitation regime most favourable to them. However, the present litigation concerns a limited category within the class of maritime torts. In argument the Solicitor-General of the Commonwealth sought to expand the possible content of that category of Commonwealth liability in respect of negligent conduct in the navigation of ships of the Royal Australian Navy on the high seas by reference to various examples. But these by their fanciful nature served only to emphasise the point just made respecting the limited nature of the category for which there is proposed a "proper law of the tort" supplemental to the common law choice of law rules.

43 In addition, the proposed rule would place the Commonwealth in a position peculiar to itself. The relevant policy of the law is exemplified in the denial by s 75(iii) of the Constitution to the Commonwealth of any immunity in tort which it otherwise might have enjoyed. The policy also is reflected in the provisions of s 64 of the Judiciary Act, which has stood without relevant amendment since 1903. Section 64 states:

> "In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

One strand of the reasoning in *British American Tobacco Australia Ltd v Western Australia*[44] concerned s 64. Importance was attached to the consideration that s 64 was designed, within certain limits, to place the Commonwealth and other

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43 (2000) 203 CLR 503 at 538 [78].

44 (2003) 77 ALJR 1566; 200 ALR 403.

litigants upon the same footing, not to protect or advance any special position to be occupied by the Commonwealth.

44 Further, the situation with which this case is concerned is but a further illustration of the consequences of the failure of the Commonwealth for more than a century to enact a limitation regime of comprehensive application to civil actions pursued in federal jurisdiction. The remedy, if there need be one, for long has lain in the hands of the Parliament itself.

Conclusions

45 For these reasons the preferred submission put by the Commonwealth should not be accepted. Rather, the applicable law is to be identified by proceeding directly through s 80 to the modification of the common law respecting limitation of actions which is effected by the relevant statute law of the Territory, namely the Limitation Act.

46 The Limitation Act was enacted long after the events giving rise to Mr Blunden's cause of action. However, it applies to certain causes of action which accrued before, as well as after, the commencement of the statute. At the relevant time, Pt III (ss 30-42) was headed "Postponement of the Bar". Division 3.2 (ss 35-42) was headed "Personal injuries, latent damage to property and economic loss". The effect of ss 35 and 36(1) is that Div 3.2 applies in relation to actions for damages where the damages claimed consists of or includes damages in respect of personal injuries and the cause of action accrued before the commencement of the Limitation Act. These provisions in Div 3.2 qualify the general provisions for periods of limitation made in Pt II (ss 9-29). In particular, the six year limitation period specified in s 11 is, by s 9, subjected to the provisions of Pt III.

47 At the relevant time, s 36 empowered the Supreme Court to order that the period within which an action may be brought is extended "for such period as it determines" (s 36(2)). This is not an occasion for this Court to enter upon the application of s 36(2) to Mr Blunden's action. An application by him under that provision was declined in the Supreme Court but an appeal to the Full Court of the Federal Court was allowed[45]. The Commonwealth applied to this Court for special leave to appeal. It was pointed out on the hearing of that application that the Full Court had made no orders consequential on its allowing the appeal. The application for special leave was stood over and the parties were invited to

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45 *Blunden v Commonwealth of Australia* [2000] FCA 1581.

approach the Full Court of the Federal Court to seek a complete disposition of the appeal to that Court[46].

48 Mr Blunden's counsel stated that the issue of extension of time remained unresolved. This was said to be because from the order of the Full Court it was not clear whether the Full Court was to be understood, in addition to allowing the appeal, to have itself gone on to grant leave under the Limitation Act or to have done no more than set aside the decision of the primary judge and send the matter back for further determination in the Supreme Court.

49 These will be matters for attention on the further progress of Mr Blunden's action consequent upon the determination now provided of the issue respecting the applicable limitation law.

Orders

50 The questions in the Case Stated should be answered as follows:

(a) The plaintiff's action is subject to the provisions of the *Limitation Act* 1985 (ACT).
(b) No.
(c) Does not arise.

51 It will be for a single Justice to remit to the Supreme Court that part of the cause removed into this Court and for the Supreme Court to give effect to the answers provided to the Case Stated.

52 The costs of the Case Stated should be the costs of the cause in this Court. It will be for the Justice making the order for remitter to the Supreme Court to deal with that question of costs in this Court.

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46 *The Commonwealth v Blunden*, unreported, 12 October 2001.

53 KIRBY J. This is a Case Stated[47] in which questions have been reserved for the Full Court in respect of part of a cause removed into this Court from the Supreme Court of the Australian Capital Territory ("the Supreme Court"). The questions concern whether proceedings brought in that Court by Mr Barry Blunden ("the plaintiff") against the Commonwealth of Australia ("the Commonwealth") are subject to a defence based on a statute of limitations.

54 The submissions on the Case Stated oblige this Court to consider an issue arising in relation to the choice of law rules that are to be applied by Australian courts in respect of proceedings that have an arguable connection with more than one Australian jurisdiction and which arise out of an event occurring in international waters, on the high seas.

55 In *John Pfeiffer Pty Ltd v Rogerson*[48] this Court, in relation to an *intra*-national tort connected to more than one Australian jurisdiction, decided that questions of substantive law were governed by the law of the place of the wrong within Australia (the *lex loci delicti*)[49]. In *Regie Nationale des Usines Renault SA v Zhang*[50], in respect of an *inter*-national tort involving acts or omissions that occurred outside Australia, sued for in an Australian court, the Court concluded that the same rule applied. The law governing the determination of the rights of the plaintiff and the liability of a defendant in such a case was that of the law of the place of the wrong[51].

56 Now, a new problem has presented. It concerns the law to be applied in respect of a tort that occurs on the "high seas", that is, beyond the geographical territory of Australia and beyond any internal waters or any waters which Australian law treats as territorial waters. Specifically, it concerns the substantive law to be applied in determining the liability of the Commonwealth for negligent acts and omissions alleged to have occurred in the control and operation of a naval vessel belonging to the Commonwealth, HMAS *Voyager*, when it collided with another such vessel, HMAS *Melbourne*, allegedly causing injuries and damage to the plaintiff.

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47 By order of Gummow J dated 1 May 2003.

48 (2000) 203 CLR 503.

49 (2000) 203 CLR 503 at 542-544 [97]-[100], 563 [161], 574 [193].

50 (2002) 210 CLR 491 at 520 [75]-[76], 535 [123].

51 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 520 [75], 535 [123].

57 To recover damages in respect of the injuries and damage that he claims he sustained as a result of the collision, the plaintiff instituted an action in the Supreme Court. In its defence, pleaded in answer to that claim, the Commonwealth relied upon three statutes of limitations, expressed in the alternative. These were the Imperial Act that first so provided[52], the Act of the Australian Capital Territory[53] or the Act of the State of New South Wales[54]. The Commonwealth did not plead any alleged limitation principle of the common law. Specifically, it did not plead any principle of laches developed by the English courts of Admiralty which might have been received as part of the law of Australia in colonial times[55].

58 Neither *Pfeiffer* nor *Zhang* resolves the point in contest between the plaintiff and the Commonwealth. Unless the vessels of the Royal Australian Navy ("RAN") were to be regarded, by a legal fiction, as part of the territory of Australia, a kind of floating island of Australian jurisdiction (thereby constituting the tort for which the plaintiff sued an *intra*-Australian one in accordance with *Pfeiffer*), the issue presented identifies an apparent gap in the statement of principles contained in *Pfeiffer* and *Zhang*. It involves neither an *intra*-Australian tort nor a tort where the place of the alleged wrong was the jurisdiction of a nation state other than Australia and hence an *inter*-national tort.

59 It falls to this Court to fill any such gap. To do so, the Court must consider in the normal way whether any valid and applicable written law provides the answer. No party suggested that any provision of, or inference from, the Constitution was relevant to the resolution of the question[56]. If no ordinary legislation is found to be relevant, the common law of Australia must be developed, by analogous reasoning extending the principles stated in *Pfeiffer* and *Zhang*. Ultimately, in our legal system, there is never a legal lacuna. Where the Constitution, statute law and previously expressed common law are silent, it remains for the courts, ultimately this Court, to state the applicable rule.

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52 *Limitation Act* 1623 (21 Jac I c 16), s 3.

53 *Limitation Act* 1985 (ACT), s 11.

54 *Limitation Act* 1969 (NSW), ss 14, 63(1).

55 *The Key City* 81 US 653 at 660 (1871); *The Kong Magnus* [1891] P 223 at 228; *The "Alletta"* [1974] 1 Lloyd's Rep 40 at 44-46; cf *Erlanger v New Sombrero Phosphate Company* (1878) 3 App Cas 1218 at 1279. See also *Moragne v States Marine Lines Inc* 398 US 375 at 406 (1970).

56 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 557 [140]; Juenger, "Tort Choice of Law in a Federal System", (1997) 19 *Sydney Law Review* 529 at 534-548.

The facts and arguments of the parties

60 The relevant facts are contained in the reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ ("the joint reasons")[57]. The tort for which the plaintiff sued the Commonwealth occurred in 1964. The action which the plaintiff began to recover damages was not commenced until 1998. The action was thus brought more than 34 years after the alleged wrong. Stated generally, the purpose of limitation statutes is to relieve parties of vexation by other parties complaining of legal wrongs many years after those wrongs are alleged to have happened.

61 Although in some circumstances courts of Chancery[58] afforded relief against belated claims and courts of Admiralty sometimes gave analogous relief within their jurisdiction[59], the common law did not develop a general principle to oblige the commencement of proceedings within a given time. It was to repair the perceived injustice of the common law in this respect that legislation was first enacted in England providing for the limitation of actions[60]. The *Limitation Act* 1623 imposed a time limit of six years on the bringing of personal actions, including in respect of actions on the case, of which the tort of negligence upon which the plaintiff sues is an example[61].

62 In this Court, the plaintiff endeavoured to show that, because of the peculiar place where the wrong to him had occurred (on the high seas), there was no applicable Australian statute law providing for the application to his action of

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57 Joint reasons at [1]-[5].

58 This occurred both under the doctrines of equity and by virtue of statute: eg *Real Property Limitation Act* 1833 (3 & 4 Will IV c 27), s 2; *Civil Procedure Act* 1833 (3 & 4 Will IV c 42), ss 2 and 3; *Trustee Act* 1888 (51 & 52 Vict c 59), s 8. Equity applied the *Limitation Act* 1623 (21 Jac I c 16) "by analogy": *Knox v Gye* (1872) LR 5 HL 656 at 674. See also Meagher et al, *Equity Doctrines and Remedies*, 4th ed (2002) at 1031 [36-005].

59 *The Key City* 81 US 653 at 660 (1871); *The Kong Magnus* [1891] P 223 at 228; *The "Alletta"* [1974] 1 Lloyd's Rep 40 at 44-46; *Moragne v States Marine Lines Inc* 398 US 375 at 406 (1970).

60 In its terms, the *Limitation Act* 1623 (21 Jac I c 16) (with subsequent modifications) applied to nominated proceedings and before 1833 did not, either in the United Kingdom or any part of Australia, explicitly bar a suit in equity. See Meagher et al, *Equity Doctrines and Remedies*, 4th ed (2002) at 1009 [34-005]-[34-010].

61 21 Jac I c 16, s 3.

a limitation period. From this, the plaintiff's argument proceeded that, in effect, the original common law applied to his claim in tort unmodified by any limitation statute. There was thus no limitation period applicable to the commencement of his action. Whilst this might seem anomalous, it was simply a consequence of the unique place of the wrong in his case.

63 The plaintiff submitted that the Federal Parliament could have enacted a general statute of limitations which, subject to the Constitution[62], restricted the time within which a person, such as the plaintiff, could sue the Commonwealth in respect of alleged acts or omissions of negligence for which the Commonwealth was otherwise liable. Alternatively, subject to the Constitution, the Federal Parliament could have enacted a special limitation period applicable to actions of tort brought against the Commonwealth by defence force personnel or in respect of negligence occurring on the high seas on a vessel of the RAN such as HMAS *Melbourne* or HMAS *Voyager*. It had done none of these things.

64 The foregoing omissions were, it was suggested, more significant when the position arising out of the collision relevant to the plaintiff's case was contrasted with cases of maritime collisions expressly provided for by federal law, notably a collision between ships of different ownership[63]. In this connection, it is also relevant to notice the *Crimes at Sea Act* 2000 (Cth)[64]. By that Act it is provided (s 6(1)) that the substantive criminal law of a nominated Australian territory (the Jervis Bay Territory[65]) applies to, and in relation to, Australian ships, as if the act in question had been committed in a State or Territory of Australia. Provision is also made for the application of Australian criminal laws to Australian citizens travelling on foreign ships in certain circumstances (s 6(2)). The Act recognises the controlling force of "jurisdiction … recognised under principles of international law" (s 6(5) and (9)). Although such provisions have no applicability to the present case, concerned as it is with the law of tort, they demonstrate the fact that, where there is a will, the Federal Parliament can enact specific laws governing the consequences under Australian

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62 eg Constitution, s 75(iii). See *The Commonwealth v Mewett* (1997) 191 CLR 471.

63 *Navigation Act* 1912 (Cth), ss 260, 261. The Act governs shipowners' liability for loss of life or personal injury, providing that it is to be joint and several. It does not withdraw defences arising independently of s 260.

64 The *Crimes at Sea Act* 2000 (Cth) was preceded by the *Crimes at Sea Act* 1979 (Cth), relevantly in like terms.

65 Under the *Jervis Bay Territory Acceptance Act* 1915 (Cth), s 4A, the laws in force in the Australian Capital Territory are, so far as applicable, in force in the Jervis Bay Territory.

municipal law of events having an Australian connection although actually occurring on the high seas, that is, in international waters.

65 The foregoing statutory provisions had no application to the plaintiff's case. There was no general or particular federal legislation directed (as it might have been) to the consequences, including for the limitation of actions, against the Commonwealth of torts happening on the high seas involving naval vessels of the Commonwealth and arising out of collisions between such vessels.

66 For more than a century, for a reason that is elusive, the Federal Parliament has failed to enact a limitation statute applicable to federal proceedings[66]. It has relied upon the applicable law (if any) of the relevant State or Territory as a kind of surrogate law[67]. Perhaps the task of drawing such a statute has been regarded as too difficult. Perhaps it has been overtaken by other, more urgent, priorities. Perhaps the Commonwealth has found the current arrangements satisfactory.

67 The Commonwealth's primary submission was that the correct approach to the ascertainment of a limitations period applicable to the plaintiff's action involved the acceptance, and extension, of the fundamental principle endorsed by this Court in both *Pfeiffer* and *Zhang*. For a cause of action arising on the high seas involving ships flying the flag of Australia, this meant, so it was argued, the identification of the jurisdiction within Australia with which the events, giving rise to the alleged wrong, had the "closest connection". The Commonwealth submitted that this was the way by which the substantive law applicable to such a case would be discovered (including any applicable statute of limitations). It would produce a solution to the present case that most closely conformed to the approach adopted by this Court in *Pfeiffer* and *Zhang*.

68 In short, if the law applicable to an action of negligence brought in an Australian court, with jurisdiction to decide it, for *intra*-Australian and *non*-Australian torts, was the law of the place of the wrong, some adaptation was necessary where the place of the wrong was the high seas, having no applicable limitations law as such. To find the applicable law, analogous reasoning would point the court to the Australian jurisdiction with the "closest connection" to the relevant facts. The difficulties that might follow in respect of wrongs allegedly arising out of the control and conduct of vessels flying a foreign flag (or in respect of a collision between naval and civilian vessels or naval vessels of different flags) did not arise in this case. It was clear that an Australian court must apply Australian law. But in choosing between the applicable laws of the

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66 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 552.

67 Under the *Judiciary Act* 1903 (Cth), ss 79, 80.

several Australian jurisdictions, the one to be applied was not that of the forum chosen by the plaintiff. It was the law of the jurisdiction within Australia having the "closest connection" with the alleged wrong.

69 The Commonwealth submitted that, as the wrong alleged by the plaintiff had involved the control and direction of an Australian naval vessel, the appropriate search was for the relevant Australian jurisdiction having the closest connection to the control and direction of that vessel at the time of the alleged wrong. According to the Commonwealth[68], this was either the Australian Capital Territory (as the principal seat of the administration and operations of the RAN), or New South Wales (as the Australian State with the last port of the vessel on the journey on which the plaintiff was injured)[69]. The Imperial Act, although nominated in the Commonwealth's defence, was not supported by any viable argument.

The context of international law

70 The high seas are not a law-free zone. They are subject to international law, expressed both in treaties to which Australia is a party[70] and in customary international law[71]. In discovering Australia's municipal law on the subject before the Court in these proceedings, it is appropriate to begin the task (and to resolve any uncertainties), so far as possible, in accordance with the principles of the international law applicable to the high seas.

71 It was not submitted by any party or intervener that international law provided a clear principle to resolve the search for the rule of municipal law to be applied to decide the dispute between the plaintiff and the Commonwealth on the limitations issue in the Case Stated. Of its nature, it is unlikely that international law would concern itself in the civil liability of a nation state to an employee of the Executive Government of that state claiming damages in respect of injuries which, although suffered on the high seas, allegedly arose as a consequence of

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68 See also joint reasons at [36]-[37] where the alternative submissions are set out.

69 Applying *The Commonwealth v Mewett* (1997) 191 CLR 471 at 527 per Gaudron J.

70 Convention on the High Seas done at Geneva on 29 April 1958, 1963 *Australia Treaty Series* 12 (entered into force for Australia on 13 June 1963), the "high seas" being all parts of the sea not included in the territorial sea or internal waters of a state. See also United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982, 1994 *Australia Treaty Series* 31 (entered into force for Australia on 16 November 1994), which defines the "high seas" differently but in respects immaterial to this discussion.

71 *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 121-126 [272]-[282].

negligence solely attributable to the control and direction of a naval vessel or vessels flying the flag of that state.

72 In so far as there is an applicable principle of public international law, it is that extra-territorial acts may only be rendered subject to the exercise of jurisdiction by national courts applying domestic law if certain rules are observed. One of these rules is that there must be a substantial and bona fide connection between the subject matter and the source of the jurisdiction relied upon[72].

73 In *Zhang*[73] I observed:

> "[C]ourts ordinarily confine the assertion and exercise of their jurisdiction to matters arising in relation to the territory over which the polity that has established the court enjoys legal authority. The principle of public international law requiring a substantial and bona fide connection between the subject matter and the source of jurisdiction[74] affords a reason for restraint in the exercise of judicial power beyond that territory. That reason is ultimately based upon notions of comity, reciprocity, and mutual respect between different legal jurisdictions. Those considerations tend to advance the just and efficient administration of the law and the avoidance of conflict caused by excessive assertions of jurisdiction."

74 The rule of international law that "a State may not exercise its authority on the territory of another State" gives effect to the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations"[75]. It is for this reason that, notwithstanding the possible establishment of jurisdiction, in the sense of power over a defendant which is liable to be sued, an Australian court might, in a given case, in circumstances different from the present, refrain from exercising that jurisdiction in respect of a wrong allegedly occurring on the high seas. For example, if the wrong occurred on the high seas in conditions of armed conflict, hostilities between nations or collisions between vessels flying different flags, questions of justiciability, sovereign immunity, convenient forum and

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72 Brownlie, *Principles of Public International Law*, 5th ed (1998) at 313. See *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 527 [102].

73 (2002) 210 CLR 491 at 528 [105].

74 *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 496-497; *Tolofson v Jensen* [1994] 3 SCR 1022 at 1047.

75 *Democratic Republic of the Congo v Belgium* [2002] ICJ 1 at [1]; 41 ILM 536 at 538 (2002).

ascertainment of any applicable law could arise. Such questions would be resolved by an Australian court with due regard to the principle of international law that ordinarily restricts the exercise of the authority of municipal courts to their own geographical territory, to any internal or proximate territorial waters and to events or things having relevant connections with the state concerned.

75 In the present case no such difficulties arise. The Commonwealth is present everywhere in the Australian nation. It is thus present in the Australian Capital Territory, where the plaintiff has brought his action. Its liability to the plaintiff in respect of the control and direction of naval vessels flying the Australian flag is clearly, and probably only, an Australian legal question, susceptible, in the event of dispute, to resolution by an Australian court. No rule of public international law provides, or suggests the need for, an exception, modification or adaptation of Australian law as applicable to the Commonwealth for the negligence for which it is alleged to be liable to the plaintiff.

76 Some of the arguments before this Court proceeded as if there were no relevant context of public international law. In the end, that was a correct conclusion because of the substantial and bona fide connection between the subject matter of the plaintiff's action and the source of the Australian jurisdictions relied upon. However, given the place of the wrong alleged by the plaintiff, it is important that this first step in reasoning should be taken. In other circumstances, that step could control, or certainly affect, the ascertainment of the rule applicable in an Australian court otherwise having jurisdiction over the parties. In this case, for Australian law and an Australian court to apply its domestic prescriptions to events happening on the high seas, either by applying the provisions of a statute or a principle of the common law of Australia, would offend no rule of public international law.

Finding the applicable law: the "closest connection" principle

77 It is therefore necessary to decide what the applicable Australian law is and whether any statute of limitations received into Australian law from English law, any enacted Australian statute or any principle of the common law applies to the plaintiff's action to present a time bar.

78 The facts in the Case Stated make it clear that, as national naval vessels of Australia, neither HMAS *Melbourne* nor HMAS *Voyager* was registered in any port or had a home port as such. For electoral purposes, the City of Melbourne was taken to be the home port of members of the crew on both ships but only where such crew members did not have a bona fide place of living onshore. Shortly before the subject collision, HMAS *Melbourne* sailed from Sydney and anchored in naval waters in New South Wales. It did so before setting out for the rendezvous with HMAS *Voyager*. The nearest landfall was the Jervis Bay Territory. HMAS *Voyager* left Sydney and anchored in Jervis Bay before sailing for the naval exercise area where the collision occurred at 8.56 pm on

10 February 1964. The impact happened on the high seas some 18.4 nautical miles from Cape St George. That cape is part of Jervis Bay Territory but the foreshore near the Cape, between low and high water, is part of the State of New South Wales.

79 Under the *Naval Defence Act* 1910 (Cth) and Naval Forces Regulations made under that Act, the RAN was controlled and administered in 1964 by the Naval Board. That body was located in the Australian Capital Territory. It was accountable to the Minister for the Navy or the Minister of whatever designation having equivalent responsibility. At the time of the collision, the flag officer commanding the naval exercise in which the plaintiff was injured was physically present in Canberra, in the Australian Capital Territory. Although he had departed HMAS *Melbourne* on the day prior to the collision, he retained operational control of the Australian fleet and, specifically, of the naval exercise in which the two vessels were engaged. Those vessels had departed Australian territorial waters on the morning of the collision. They were scheduled to return to those waters that evening.

80 The foregoing were the facts upon which the Commonwealth relied for its assertion that the law of the place of the wrong applicable to the plaintiff's action was either the Australian Capital Territory (as the Australian jurisdiction having the "closest connection" with the wrong) or New South Wales (as the Australian jurisdiction from whose waters the two vessels had departed and to which they were to return). In the Commonwealth's submission, this represented the accurate application of this Court's insistence in *Pfeiffer* and *Zhang* upon the operation of the law of the place of the wrong both to *intra*-national torts and torts having an *inter*-national character, with a connection with some other national jurisdiction.

81 The present is not the first case in which a question concerning the applicable law has arisen in respect of an alleged maritime tort happening on the high seas. Where a tort is committed in international waters and only one ship is involved, the traditional approach of the English common law, in respect of actions brought in an English court, has been to apply the choice of law rules for a foreign tort as explained in *Phillips v Eyre*[76]. Where, however, the flag of that ship is a federal state, the relevant law area has conventionally been regarded as that of the place where the ship is registered[77]. Where a tort is committed on the

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76 (1870) LR 6 QB 1 at 28-30.

77 Collins (ed), *Dicey and Morris on The Conflict of Laws*, 13th ed (2000) vol 2 at 1537. See also North and Fawcett (eds), *Cheshire and North's Private International Law*, 13th ed (1999) at 663 citing *Canadian National Steamships Co v Watson* [1939] 1 DLR 273.

high seas, involving another ship (as in the case of collision between two ships of different flags or a common foreign flag) English courts have applied English law for the determination of such maritime disputes[78].

82 Having regard to the decisions of this Court[79] overruling in other contexts the approach taken in *Phillips v Eyre*, it would be anomalous to return to that principle for the solution of the present problem. The approach of the English courts does not determine the common law of Australia. Still less does English law have anything to say to the application of Australian legislation to a case before an Australian court. Least of all can English law govern the way in which an Australian court must exercise federal jurisdiction, which is enlivened in this case by the identity of the defendant sued by the plaintiff, namely the Commonwealth[80].

83 These considerations led the Commonwealth to urge a distinct Australian approach to the ascertainment of the law of the place of the wrong in the present circumstances. Because neither HMAS *Melbourne* nor HMAS *Voyager* had a port of registration or home port as such, the Commonwealth argued that the federal puzzle in the case should be resolved by determining the Australian jurisdiction with which the wrong had the "closest connection". This, in the Commonwealth's primary submission, was the Australian Capital Territory, as the seat of the Naval Board[81] and the place of ultimate control and direction of the manoeuvres[82] and the location of those with the ultimate capacity to control and direct the operation of the vessels for whose acts and omissions the Commonwealth was vicariously liable. Alternatively, it was New South Wales, being the place of the last port of call of the two ships; their expected port of destination at the end of the manoeuvres; the place most proximate to their last anchorage points; and the place in Australia with closest proximity to the point of collision.

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78 See Collins (ed), *Dicey and Morris on The Conflict of Laws*, 13th ed (2000) vol 2 at 1539-1540; North and Fawcett (eds), *Cheshire and North's Private International Law*, 13th ed (1999) at 663-664.

79 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

80 Constitution, s 75(iii).

81 cf *The Admiralty v Owners of the Steamship Divina (The Truculent)* [1952] P 1; *Western Australia v Watson* [1990] WAR 248 at 270.

82 cf *Burk v The Commonwealth* [2002] VSC 453 at [2].

84 The fundamental objection of the Commonwealth to the adoption of any other approach to the ascertainment of the law of the place of the wrong was that, effectively, it surrendered the determination of that place to the election of a plaintiff. It did so by reference to the plaintiff's conduct in commencing proceedings in a court of a particular Australian jurisdiction. Because it was suggested a plaintiff should not enjoy the privilege to determine, or influence, in any way, the substantive law applicable to the resolution of his or her claim, it was argued that the applicable law existed prior to, and independently of, the plaintiff's selection of the venue of the proceedings. It existed by operation of law. In the present case, because the wrong had not occurred within the geographical boundaries either of an Australian jurisdiction or a foreign jurisdiction, a new rule was necessary. The "closest connection" principle was therefore propounded as the best available rule to fulfil that need. I have explained this argument in some detail because it has obvious logical attractions.

Finding the applicable law: federal legislation

85 Rules of the common law are stated by judges to apply in the spaces left by the operation of the written law, whether expressed in the Constitution or in, or under, valid legislation. Where statute law applies and is constitutionally valid, it is the first duty of courts in a municipal legal system to give them effect[83]. In the case of ambiguity, the requirements of statute law may sometimes be adapted to conform so far as possible to the international obligations of the state[84], as for example to comply in that way with any applicable principles of international human rights law[85]. Moreover, there is an inevitable interaction between the provisions of statute law and the decisions of judge-made law[86], just as equity also developed its approach to the law of limitations by analogy with

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83 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 543-544 [144]-[147].

84 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed (2001) at 57-58 [3.8]; cf *The Paquete Habana* 175 US 677 at 700 (1900).

85 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 417-418 [166]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 151-152 [69]; *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 462 [30]; 195 ALR 24 at 34; *Attorney-General (WA) v Marquet* (2003) 202 ALR 233 at 277 [180].

86 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25-27 [80]-[83], 46-47 [129]-[130].

the statutes of limitations[87]. However, in an Australian court whose jurisdiction is validly invoked, the primary step is to ascertain the requirements of any applicable statute law. If such law exists, is valid, relevant, clear and applicable, it must be applied in conformity with the requirements of the Constitution[88]. It cannot be ignored. Nor can it be overridden by any suggested choice of law doctrine of the common law.

86 The plaintiff, having commenced proceedings in the Supreme Court of the Australian Capital Territory, invoked the jurisdiction of a court within the Australian Judicature[89]. The first question to be decided is, therefore, whether that Court has jurisdiction over the matter. As this Court has repeatedly emphasised, that question is distinct, and separate from, the question of the applicable law. Jurisdiction concerns the amenability of the parties to a court's orders and a court's competence in respect of a claim[90]. Because here the Commonwealth is a party, present everywhere throughout the nation, the jurisdictional requirement was clearly fulfilled in the plaintiff's proceedings.

87 Nor was there any suggestion that the proceedings should be stayed or dismissed on the ground that the forum was inconvenient[91]. No one argued that this was a case where the claim was procedurally unenforceable, as might have been the case had a specific federal law confined claims such as the plaintiff's to a specialised tribunal or particular procedures[92]. Clearly, it was established that the Supreme Court had jurisdiction. But this left to be ascertained the law that would govern any rights that the plaintiff had against the Commonwealth, and specifically, whether the applicable law included any statute of limitations and, if so, its terms.

88 The Commonwealth of Australia is created by the Constitution. As such, it is only liable to be sued in accordance with any relevant constitutional

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87 Meagher et al, *Equity Doctrines and Remedies*, 4th ed (2002) at 1015-1016 [34-075].

88 Constitution, covering cl 5.

89 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

90 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 562 [154].

91 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 562 [154]; cf *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 545-551 [152]-[170].

92 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 548-549 [116].

prescription or any liability validly imposed by other law. Without such a legal entitlement to sue, the plaintiff could not sue the Commonwealth for the wrong allegedly done to him in 1964, as if the Commonwealth were amenable to a common law claim as a natural person might be.

89 By making the Commonwealth a party to his action, the plaintiff invoked the exercise of federal jurisdiction by the Supreme Court[93]. Within that jurisdiction, the Commonwealth was not liable, as such, to the written law of a territory (such as the Australian Capital Territory). To render such law applicable to the Commonwealth, it was necessary for that consequence to be imposed on it by a law duly enacted by the only legislature to which the Commonwealth is amenable, namely by or under federal legislation[94]. To make good his claim against the Commonwealth, therefore, the plaintiff needed such a federal law. He could not pick and choose: taking the federal laws he liked and rejecting those he disliked. He was bound by the law applying to his action against the Commonwealth, both facultative and restrictive.

90 The Commonwealth could not claim immunity from liability to the plaintiff in tort. To the extent that Crown or Executive immunity applies to the States provided for in the Constitution[95], the Commonwealth is in a different position by reason of the provisions of s 75(iii) of the Constitution[96]. However, the amenability of the Commonwealth to the jurisdiction of an Australian court and the absence of immunity, only takes a person in the position of the plaintiff so far. To succeed in his claim, the plaintiff still needs a federal law that renders the Commonwealth liable to him for negligence. Just as he needed a federal law to render the written law applicable to the Commonwealth, the plaintiff must rely on federal legislation to attract the unwritten law, specifically that establishing the liability of the Commonwealth to him in tort[97].

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93 *Northern Territory v GPAO* (1999) 196 CLR 553 at 591 [91], 605 [132], 649 [248], 650 [254].

94 *Solomons v District Court of New South Wales* (2002) 211 CLR 119 at 136 [28], 147 [62], 151-152 [81]-[82]; *R v Gee* (2003) 77 ALJR 812 at 828 [100]; 196 ALR 282 at 304.

95 A question referred to in *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566 at 1592-1593 [138]-[144]; 200 ALR 403 at 438-440.

96 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 545-552.

97 In federal jurisdiction, a court's power with respect to the unwritten law comes from federal legislation. Section 80 of the *Judiciary Act* 1903 (Cth) directs a court to apply the "common law in Australia" and it is by such means that the common

(Footnote continues on next page)

91 That law is found in the *Judiciary Act* 1903 (Cth), relevantly ss 79 and 80[98]. By s 80 the "common law in Australia as modified … by the statute law in force in the … Territory in which … the jurisdiction is exercised … shall … govern all Courts exercising federal jurisdiction … in civil … matters". It is by this means, and by s 64 of the same Act that, in the proceedings brought by the plaintiff, the Commonwealth is rendered liable to him as it otherwise would be in a suit between the plaintiff and a natural person. The common law, modified by the applicable statute in force in the Territory, applies to fill the gaps in the written law. I agree with the joint reasons that the opening words of s 80 of the *Judiciary Act* refer only to statute law[99]. They do not refer to the common law absent limitation statutes.

92 The result of this conclusion is that, because there is no relevant provision in the Constitution or federal statute law inconsistent with this consequence, the laws (relevantly) of the Australian Capital Territory are binding on a court "exercising federal jurisdiction" in that Territory. The only condition is that the case must be one to which such laws are "applicable".

93 On what footing could it be said that the *Limitation Act* 1985 ("the Act") of the Australian Capital Territory, as part of the "statute law in force in the … Territory in which … the jurisdiction is exercised", is not "applicable" to the case brought by the plaintiff? Three propositions need to be considered.

94 First, it cannot be said that the Act is not "applicable" by reason of the fact that the cause of action arose outside the Australian Capital Territory. In its terms, the Act is addressed to proceedings commenced in a Territory court. Indeed, although the Act was enacted after the plaintiff's cause of action arose, I agree with the joint reasons that its effect[100] is that it applies to actions of the kind brought by the plaintiff, whenever the events out of which it arose occurred[101]. On the face of things, therefore, and by its terms, the Act attaches to the

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law may be applied to render the Commonwealth liable in tort: *The Commonwealth v Mewett* (1997) 191 CLR 471 at 522, 525-526, 554.

98 The sections are set out in the joint reasons at [16]-[17].

99 Joint reasons at [28]-[29] applying *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431.

100 The Act, ss 35, 36.

101 Joint reasons at [46].

plaintiff's action. In this sense, it is "applicable" to his case in federal jurisdiction[102].

95 Secondly, the Act is not inapplicable because limitation laws are classified as being of a procedural character. In Australia, statutes of limitations are no longer treated as "procedural" laws; they are "substantive" laws[103]. As well, by legislation in common form throughout Australia, such statutes have been declared to be "part of that substantive law [to be] applied accordingly by the court"[104]. I pass by the fact that this statutory alteration itself occurred after the plaintiff's claim accrued. I will assume that, by its terms, the legislation applies in this respect to the action brought by the plaintiff. However, there remains a potential problem in this statutory realignment of the character of statutes of limitations. The legislation so providing is conditioned in its operation upon the existence of specified circumstances. It applies only[105]:

> "If the substantive law of another place *being a State, another Territory or New Zealand*, is to govern a claim before a court of the Territory".

96 According to the argument of the plaintiff, the substantive law applicable to his case was, and was only, that of the place of the wrong. It was therefore the law applicable with respect to the Australian vessels on the high seas. It was not the substantive law of "another place" within the geographical area of Australia (or New Zealand) as defined. It was on this basis that the plaintiff argued that no statute of limitations was picked up and applied to his action as a surrogate law made applicable in federal jurisdiction[106].

97 The flaw in this argument is that it overlooks the language of s 80 of the *Judiciary Act*. It is that section that renders the common law in Australia applicable to the Supreme Court in its exercise of federal jurisdiction in the plaintiff's case against the Commonwealth[107]. That application comes at a price.

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102 *Judiciary Act* 1903 (Cth), ss 79 and 80.

103 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 542-544 [97]-[100], 563 [161], 574 [193]. See joint reasons at [6].

104 The Act, s 56. There are like provisions in the limitation laws of other Australian jurisdictions. See joint reasons at [7]-[8].

105 The Act, s 56. The provision is set out in the joint reasons at [6].

106 The expression "surrogate law" appears to be derived from *Maguire v Simpson* (1977) 139 CLR 362 at 408 per Murphy J: see *Solomons v District Court of New South Wales* (2000) 49 NSWLR 321 at 324 [10].

107 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 522, 525-526, 554.

The common law applicable is that "as modified … by the statute law *in force* in the … Territory in which the Court in which the jurisdiction is exercised is held". The selfsame provision that the plaintiff needs to render the Commonwealth liable to him at common law imports the "modification" of its terms by the Act. By such provision, that statute is given effect to govern the Supreme Court exercising federal jurisdiction in the plaintiff's civil matter. The plaintiff cannot accept the provisions of s 80 of the *Judiciary Act*, rendering the common law applicable to his claim against the Commonwealth, but reject the "modification" enacted by the same provision, subjecting that common law claim to the limitations statute of the Australian Capital Territory. By the terms of s 80, the two go together.

98 Thirdly, it could be argued that the Act is inapplicable because the only law "applicable" to the plaintiff's claim is, in accordance with *Pfeiffer* and *Zhang*, that of the place of the wrong, that is, the high seas, where there was no applicable limitations law. However, this is just another way of expressing the second argument. It is subject to the same defect. To the extent that the plaintiff, in suing the Commonwealth, needs s 80 of the *Judiciary Act* to provide the applicable substantive common law, he attracts the benefits and burdens of that section. He thereby renders the Commonwealth liable to the common law of Australia. However, it is only such common law "as modified … by the statute law in force in the … Territory". And that includes the Act with its applicable limitation requirements.

Conclusion: the limitations law of the Territory applies

99 The foregoing result is unsurprising in a case having no relevant non-Australian legal features. It conforms to the constitutional postulate that denies the operation of any immunity of the Commonwealth, with the effect that liability may attach to the Commonwealth at common law[108]. It also conforms to the principle in the *Judiciary Act* subsuming such liability on the part of the Commonwealth to a position analogous to that of a natural person sued in equivalent proceedings[109]. In such proceedings a natural person could invoke the applicable statute of limitations. By the terms of federal law, so can the Commonwealth when sued in an Australian court exercising federal jurisdiction.

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108 Constitution, s 75(iii). See *The Commonwealth v Mewett* (1997) 191 CLR 471 at 491, 531, 545-552; cf *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 217; Castles, "The elusive common law and Section 80 of the Judiciary Act 1903 (Cth)", (1989) 63 *Australian Law Journal* 490 at 492; Selway, "The Source and Nature of the Liability in Tort of Australian Governments", (2002) 10 *Tort Law Review* 14 at 26.

109 *Judiciary Act* 1903 (Cth), s 64.

If this renders the Commonwealth liable to the limitations law of the Australian jurisdiction in which the plaintiff commences the proceedings, it is simply a

consequence of the federal statute applicable to the case[110]. The Federal Parliament might have applied uniformly a more objective approach, indifferent to the venue of the proceedings chosen by the plaintiff. So far it has not done so.

100 This reasoning makes it unnecessary to resolve the arguments advanced for the Commonwealth concerning the identification of the law of the place of the wrong having the "closest connection" with the wrong for which the plaintiff sues. Such an issue might need to be resolved in a claim arising out of events on the high seas involving different parties, having factual connections with several jurisdictions, in and out of Australia[111]. In some circumstances, it might be debatable as to precisely *where* an alleged "wrong" occurred[112]. That factual problem is not presented in the present case. Nor is there a competition here between an Australian jurisdiction and a foreign jurisdiction, such as arose in *Zhang*. There is no principle of public international law that restrains, or suggests modification of, the application to the case of the statute law enacted by the Federal Parliament.

101 The plaintiff, having validly invoked an available Australian jurisdiction, attracted to the determination of the applicable law federal legislation that decides the contested point concerning the limitations law relevant to this case. In an Australian court no principle of the common law concerning choice of law could override such a statutory prescription. The statute must be given effect. It requires the application to the plaintiff's action of the *Limitation Act* of the Australian Capital Territory. This is so because that Act modifies the common law in the Territory in terms that are applicable to the case. It therefore has effect on the rights and obligations of the parties by force of the federal statute picking up and applying the Australian Capital Territory Act.

Orders

102 I agree in the disposition of the Commonwealth's application for special leave as explained in the joint reasons[113]. The questions in the Case Stated should be answered in the terms proposed in the joint reasons. The orders proposed there should be made.

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110 Kirk, "Conflicts and Choice of Law within the Australian Constitutional Context", (2003) 31 *Federal Law Review* 247 at 273.

111 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 561 [150.10].

112 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 539 [133].

113 Joint reasons at [47]-[49].

103 CALLINAN J. Next to waging war, preparing for it, by training in conditions simulating it, is one of the most dangerous activities that humankind can undertake. Accidents are bound to happen, and because they do, it is to be hoped that the nation will make generous provision, by way of pensions, medical treatment and otherwise, for those service people who fall victim to them.

104 It was in the course of such a training exercise that two warships of the Royal Australian Navy came into collision on the high seas some 18 or so miles off the Australian coast on 10 February 1964. The plaintiff who was a seaman on one of the ships claims to have suffered personal injuries as a result of the collision. He has sued the defendant for damages in the Supreme Court of the Australian Capital Territory.

105 No question arises at this stage as to the application and binding force of the reasons and decision of this Court in *Groves v The Commonwealth*[114] in which the narrow question, whether an injured serviceman who was engaged in assisting in the carriage on an air force aeroplane of civilian passengers when he suffered injuries as a result of an act of negligence unrelated to hostilities or training for them, could maintain an action against the Commonwealth, was answered affirmatively. The only question which does arise, again a relatively narrow one, is:

> "what, if any, limitation law applies to the plaintiff's claim for damages, in so far as it relates to any negligent acts or omissions by servants or agents of the Commonwealth in international waters".

106 In the circumstances of this unique case, three possible answers to the question were canvassed in argument: by the plaintiff, that no limitation law applied; and, by the defendant, either the limitation laws of New South Wales being the law area in Australia closest to the place of the tort, the negligently caused collision; or, the limitation laws of the forum selected by the plaintiff, the Australian Capital Territory.

107 As is pointed out in the joint judgment, if the substantive law of New South Wales were the law applicable to the case, s 56 of the *Limitation Act* 1985 (ACT) would have the effect of applying the limitation law of that State to the plaintiff's action. And because the plaintiff's claim did not arise in a State or Territory of the Commonwealth s 56 of the *Judiciary Act* 1903 (Cth) enabled the

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114 (1982) 150 CLR 113. *Feres v United States* (1950) 340 US 135 is not cited in *Groves*. It appears to reject categorically any liability, whether in peacetime or otherwise, in respect of injuries sustained by service people in carrying out any of their duties. See also Keeton et al, *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 1036-1038.

plaintiff to sue in any Supreme Court of the country, including the Supreme Court of the Australian Capital Territory.

108 I agree, for the reasons set out in the joint judgment, that neither the *Admiralty Act* 1988 (Cth) nor the *Navigation Act* 1912 (Cth) applies to this case. I agree with their Honours' construction of s 80 of the *Judiciary Act* and that[115]:

> "the provisions of the federal statute law, s 80 itself apart, would be insufficient to provide [the plaintiff] with any adequate remedies."

Further, in view of the Commonwealth's abstention from enacting a limitations act of general and detailed application to suits against it, complaints of forum shopping, as undesirable in my opinion as that may be, have somewhat of a hollow ring to them.

109 I agree with the joint judgment that there is no other legal system having a better claim than the Australian Capital Territory, the law of which is to be treated as the body of law by which the plaintiff's action is to be decided. Their Honours' conclusion, that the applicable law is to be identified by reference to s 80 of the *Judiciary Act*, which has the effect of modifying any common law respecting limitation of actions, by applying to it, the relevant statute law of the Australian Capital Territory which includes the *Limitation Act*, is in my respectful opinion the correct one. Its effect is fully stated in the joint judgment.

110 I agree with the answers which their Honours give to the questions in the Case Stated and to the orders that they propose.

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115 Judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ at [35].