Choice of law in federal jurisdiction after *Rizeq v Western Australia*

James Stellios[*]

This article considers the impact of the High Court's decision in ***Rizeq v Western Australia*** *on choice of law in federal jurisdiction. Section 79(1) of the Judiciary Act 1903 (Cth), along with s 80 of that Act, have been seen as central to choice of law when a court exercises federal jurisdiction. The High Court's decision in* ***Rizeq*** *has reconceptualised the operation of s 79(1) and, while* ***Rizeq*** *was not a choice of law case, the High Court's decision undoubtedly has choice of law implications.*

Introduction

In *John Pfeiffer Pty Ltd v Rogerson*[1] five members of the High Court stated that:

> strictly the question that arises in matters of federal jurisdiction does not involve any choice between laws of competing jurisdictions, but identification of the applicable law in accordance with ss 79 and 80 of the *Judiciary Act* [*1903* (Cth)].[2]

This statement reflected two significant developments, accepted in *Pfeiffer v Rogerson,* for choice of law in federal jurisdiction: first, the recognition that federal jurisdiction coincided with a federal or national 'law area';[3] and second, that within that federal law area, the applicable law was to be identified in accordance with ss 79 and 80 of the *Judiciary Act 1903* (Cth). With respect to the second development, the Court's decision settled conflicting views about the relationship between ss 79 and 80, and their relevance to the choice of law enquiry.

The High Court's decision in *Rizeq v Western Australia*[4] has reconceptualised the purpose and operation of s 79(1) of the *Judiciary Act*. In light of the *Rizeq* decision, the statement in *Pfeiffer v Rogerson*, and perhaps the decision more broadly, requires revisiting. This article will explore the impact of the decision in *Rizeq* on choice of law in federal jurisdiction.

Choice of law and federal jurisdiction in Australia

The States as law areas for choice of law purposes

The rules of private international law have needed adaptation to the system of government created by the *Constitution*. The *Constitution* establishes a federal

* Professor, ANU Law School; Barrister, NSW Bar. The author was junior counsel for the appellant in *Rizeq v Western Australia* (2017) 344 ALR 421.

1 (2000) 203 CLR 503 ('*Pfeiffer v Rogerson*').

2 Ibid 530 [53]. See also *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 258 [8] ('*Agtrack*').

3 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 514 [2].

4 (2017) 344 ALR 421 ('*Rizeq*').

system of government along two axes: the horizontal and the vertical. Along the horizontal axis are the States.[5] For much of the 20th century, the States were conceptualised, for private international law purposes, as separate sovereign states. For example, as late as 1991, a majority of the High Court said in *McKain v RW Miller & Co (South Australia) Pty Ltd* that:

> To describe the States, as Windeyer J once described them,[6] as 'separate countries in private international law' may sound anachronistic. Yet it is of the nature of the federation created by the *Constitution* that the States be distinct law areas whose laws may govern any subject matter subject to constitutional restrictions and qualifications.[7]

Under this conception, the selection of the applicable law depended upon the common law choice of law rules applicable to foreign countries. Importantly, the identification of the applicable choice of law rule was not directed by any constitutional imperative, including the full, faith and credit command in s 118 of the *Constitution.*[8]

The decision of the Court in *Pfeiffer v Rogerson* radically affected this private international law framework in two relevant respects. First, while the States are to be understood as separate law areas for choice of law purposes, it was said that they must be understood within the constitutional framework:

> while the phrases 'law area' and 'lex fori', adapted from the lexicon of private international law, may be used to identify each of the States and Territories which comprise the geographical area of Australia, these expressions are to be understood in the Australian federal context. Thus, each law area, if it be a State, is a component of the federation and, if it be a Territory, is a Territory of the federation.[9]

As component parts of the federation, the States share sovereign power, and s 118 indicates that they are not 'foreign powers as are nation states for the purposes of international law'.[10]

Second, in addition to the horizontal axis of law areas, there is also the vertical axis. The *Constitution* creates the Commonwealth of Australia, and the Court in *Pfeiffer v Rogerson* accommodated this federal tier of government within the private international law framework by identifying it as a separate 'law area'. This vertical dimension requires some further elaboration.

The Commonwealth as a law area for choice of law purposes

Chapter III of the *Constitution* establishes the federal judicature. Section 71 identifies and vests the judicial power of the Commonwealth in the High Court, lower federal courts and 'such other courts as it invests with federal jurisdiction'. Importantly, the 'other courts' are State courts that have been

5 Of course, the Territories also appear across the horizontal axis. However, for simplicity, I will refer only to the States.
6 *Pedersen v Young* (1964) 110 CLR 162, 170.
7 (1991) 174 CLR 1, 36 ('*McKain*').
8 As had been suggested by other members of the Court at the time: eg, *Breavington v Godleman* (1988) 169 CLR 41, 98 (Wilson and Gaudron JJ), 130 (Deane J) ('*Breavington*').
9 *Pfeiffer v Rogerson* (2000) 203 CLR 503, 514 [2].
10 Ibid 534 [65].

invested with federal jurisdiction. The nine matters in relation to which federal jurisdiction may be, and substantially has been, vested in State courts are identified in ss 75 and 76 of the *Constitution*. Even from a cursory glance at those provisions, it can be seen readily that choice of law cases may arise in a State court when that court is exercising federal jurisdiction. For example:[11]

- where the Commonwealth Government is a party to the claim, as was the case in *Blunden v Commonwealth*,[12] the matter to be determined arises under s 75(iii) of the *Constitution*;[13]
- where the parties are residents of different States, or if one party is a resident of one State and the other party is the government of another State (as was the case in *Sweedman v Transport Accident Commission*),[14] the matter to be determined arises under the diversity jurisdiction of s 75(iv) of the *Constitution*;[15]
- where a constitutional claim is made in the course of litigation, as was the case in *Pfeiffer v Rogerson* itself, the matter to be determined arises under s 76(i) of the *Constitution*;[16] and
- where the litigation involves the determination of a claim arising under a federal statute, as was the case in *Agtrack (NT) Pty Ltd v Hatfield,*[17] the matter to be determined arises under s 76(ii) of the *Constitution*.[18]

In each of these cases, the choice of law exercise took place within federal jurisdiction. And, importantly, the Court in *Pfeiffer v Rogerson* said that 'with respect to matters that fall within federal jurisdiction, the Commonwealth of Australia is, itself, a law area'.[19] Thus, when exercising federal jurisdiction, a State court transcends its State law area and, instead, exercises jurisdiction in this federal or national law area for choice of law purposes.

Choice of law in the federal law area

There is a clear hierarchy of sources of Australian law to be applied to resolve a dispute in an Australian court:

- the *Constitution* applies by virtue of covering cl 5 to the *Constitution,* and prevails over inconsistent Commonwealth, State and Territory statutes. The common law must conform with constitutional

11 More extensive examples are provided by the Court in *Pfeiffer v Rogerson* (2000) 203 CLR 503, 518–19 [18].
12 (2003) 218 CLR 330 ('*Blunden*').
13 Federal jurisdiction to determine the claim in *Blunden* was conferred on the ACT Supreme Court by s 56 of the *Judiciary Act*.
14 (2006) 226 CLR 362 ('*Sweedman*').
15 Federal jurisdiction to determine the claim in *Sweedman* was conferred on the Victorian County Court by s 39(2) of the *Judiciary Act*.
16 It was not clear from the judgment in *Pfeiffer v Rogerson* which provision conferred federal jurisdiction on the ACT Supreme Court to determine the constitutional claim in that case in federal jurisdiction.
17 (2005) 223 CLR 251.
18 Federal jurisdiction to determine the claim in *Agtrack* was conferred on the Victorian Supreme Court by s 39(2) of the *Judiciary Act.*
19 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 514 [2].

requirements and, thus, there is no scope for conflicting rules between the *Constitution* and the common law;[20]
- Commonwealth legislation also applies by virtue of covering cl 5 to the *Constitution,* and prevails over inconsistent State[21] and Territory[22] statutes, and the common law; and
- there is one common law in Australia and, consequently, there cannot be differing common law rules.[23]

Thus, a choice of law can only arise between Australian sources of law where the statute of one State modifies the common law, or two State legislatures have enacted differing statutory rules. Where a State court is not exercising federal jurisdiction, the first step for a court in selecting the applicable law is to apply common law choice of law methodology.[24] A court of the forum State law area will apply common law choice of law rules to the characterised issue in question unless those rules have been modified by statute applicable in the forum.

However, when the State court is exercising federal jurisdiction, that court transcends its State law area to become the forum court of a different (federal) law area. As already indicated, in *Pfeiffer v Rogerson*, the Court said that the applicable law is to be identified 'in accordance with ss 79 and 80 of the *Judiciary Act*'. Those sections provide:

Section 79(1):

> 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.

Section 80:

> 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.

There has been considerable uncertainty as to how ss 79(1) and 80 operate to identify the applicable law in federal jurisdiction.[25] As Professor Lindell has said, 'the precise relationship between the provisions ... has been difficult to

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20 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

21 By application of s 109 of the *Constitution*.

22 By application of repugnancy principles: see *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

23 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Lipohar v The Queen* (1999) 200 CLR 485.

24 See the discussion of *Sweedman* (2006) 226 CLR 362, 398–9 [19] in Justice Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 211. Depending on the reach of conflicting State laws, there may be a need for additional analysis to resolve the statutory conflict: see *Sweedman* (2006) 226 CLR 362, 405–7 [45]–[52].

25 See, eg, Peter Nygh, 'Choice of Law in Federal and Cross-vested Jurisdiction' in Brian R

discern'.[26] Prior to its amendment in 1988, s 80 referred to the 'common law of England'. Understandably, in that form, s 80 was eschewed in favour of s 79 for determining the applicable law.[27] Thus, the 'traditional view' placed emphasis on s 79 as picking up the State laws of the forum to the dispute in question.[28] This raised a range of difficulties. Did s 79 apply to *all* State laws, substantive and procedural?[29] Was it limited to statute, or did it also include common law rules? If it applied to common law rules, did it also pick up common law choice of law rules?[30] Different views were expressed about these matters with no clear majority position emerging.

The amendment of s 80 in 1988 to refer to 'the common law in Australia', and the acceptance that there was a single common law of Australia, provided a platform for a shift in the understanding of the relationship between ss 79 and 80: s 79 could be limited to statutes, with s 80 applying the common law, perhaps including the common law choice of law rules.

However, this gave rise to difficult questions of sequencing. If s 79 were applied first to forum statutes, then the forum State court would apply the legislation of that forum State within the national law area. Substantive outcomes would differ according to the forum court in which the proceedings were litigated.[31] Even if s 80 were applied first, if the reference to the 'common law in Australia' were read as a reference to the substantive or dispositive common law, then, again, statutory modifications to the common law operating in the forum would be applied. Substantive outcomes would again depend on the choice of forum.

It was only if:

(i) s 80 were applied first;
(ii) the reference to the 'common law in Australia' in s 80 were read as referring to the common law choice of law rules; and
(iii) forum neutral choice of law rules were adopted,

that uniformity of outcome across forum courts would be achieved in most cases. The shift to this approach came in Gaudron J's judgment in *Commonwealth v Mewett*, where her Honour favoured turning first to s 80 to

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Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 338–46; Australian Law Reform Commission ('ALRC'), *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation,* Report No 92 (2001) 603–6.

26 Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 357.

27 See *Commonwealth v Mewett* (1997) 191 CLR 471, 525 (Gaudron J) ('*Mewett*').

28 Nygh, above n 25, 339; see also ALRC, above n 25, 603–4.

29 In *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168, 170, Dixon CJ seemed to suggest that it applied to all State laws and, prior to *Rizeq*, that view seemed to have been generally assumed. However, this view was not universally held. In *Mewett* (1997) 191 CLR 471, 492, Brennan CJ seemed to take the view that s 79 was limited to procedural laws (statute or common law, and including choice of law rules), with s 80 then picking up 'the general common law'.

30 This appears to have been the assumed position in *Mewett* (1997) 191 CLR 471, 492 (Brennan CJ), 554 (Gummow and Kirby JJ). See also *Musgrave v Commonwealth* (1937) 57 CLR 514, 532 (Latham CJ), cf 547–8 (Dixon J), 550–1 (Evatt and McTiernan JJ).

31 Cf Graeme Hill and Andrew Beech SC, '"Picking up" State and Territory laws under s 79 of the *Judiciary Act* — three questions' (2005) 27 *Australian Bar Review* 25, 40–1.

pick up common law choice of law rules.[32] In a joint judgment, Gummow and Kirby JJ also favoured that approach.[33] The High Court in *Pfeiffer v Rogerson* adopted, as a general rule, the position of Gaudron J from *Mewett*, and that position was made clear by the Court in *Blunden*.[34] Section 79 would pick up State laws as 'surrogate Commonwealth laws'[35] only if needed where s 80 was insufficient to identify the applicable State laws to determine the dispute.[36]

The approach accepted in *Pfeiffer v Rogerson* and *Blunden* was not a panacea for all the difficulties of accommodating choice of law rules to federal jurisdiction. Sections 79 and 80 operated as 'application laws'[37] and, as Justice Leeming has written extra-curially, 'application laws are complex, and there is no reason to expect that their interrelationship with federal jurisdiction and choice of law will be simple'.[38] While the broad frame of the *Pfeiffer v Rogerson* methodology was clear, uncertainties remained about the precise scope of s 79 to supplement the operation of s 80.[39] The approach also carried the baggage of the common law choice of law methodology: 'choice of law rules have never coped particularly well with statutory rights',[40] particularly where State statutes depart from the territorial reach assumed by most choice of law rules.[41] Thus, conceptual difficulties remained following *Pfeiffer v Rogerson* and *Blunden.*

Nonetheless, the conceptual achievement of *Pfeiffer v Rogerson* within the common law choice of law methodology was substantial. Drawing from Gaudron J's earlier reasoning in *Mewett*, the decision did much to translate traditional common law choice of law concepts to the creation of federal jurisdiction by ch III of the *Constitution* and to align choice of law in federal and non-federal jurisdiction. The establishment of the Commonwealth of Australia was seen as superimposing a new 'law area' on the existing State law areas. Sections 79 and 80 of the *Judiciary Act*, and their sequencing in reverse order, were used to accommodate common law choice of law rules to a judicial structure that permitted the exercise of federal jurisdiction by State courts. In that way, State statutes could be applied by State courts in their transcendental role in the national 'law area', and the substantive outcomes could be largely synchronised to those in non-federal jurisdiction.

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32 (1997) 191 CLR 471, 522, 525.

33 Ibid 554.

34 *Blunden v Commonwealth* (2003) 218 CLR 330, 339 [18]; see also *Sweedman* (2006) 226 CLR 362, 402–3 [33]; *Agtrack* (2005) 223 CLR 251, 258 [8].

35 *Mewett* (1997) 191 CLR 471, 554 (Gummow and Kirby JJ).

36 See ibid 522 (Gaudron J). See also the operation of s 79(1) in *Agtrack* (2005) 223 CLR 251 where no common law choice of the law was applicable.

37 That is, laws 'whose purpose is to make *other* laws applicable to courts in certain classes of case when courts are exercising federal jurisdiction': Justice Mark Leeming, 'Constitutional Aspects of Commonwealth and State Application Laws (with special attention to ss 79 and 80 of the *Judiciary Act 1903* (Cth))' (Paper presented to New South Wales Bar Association Public Law Section, 27 July 2015) 10.

38 Ibid 14.

39 See ibid 11–14; Hill and Beech, above n 31, 40–1.

40 Leeming, 'Constitutional Aspects of Commonwealth and State Application Laws', above n 37, 5.

41 See James Stellios, 'Choice of Law and the *Australian Constitution*: Locating the Debate' (2005) 33 *Federal Law Review* 7, 34–7.

In *Pfeiffer v Rogerson,* these developments combined with the emergence of a majority, multilateralist preference for achieving certainty, uniformity and predictability in multi-jurisdictional disputes,[42] and the derivation of constitutional support (perhaps even a constitutional imperative) for the achievement of such choice of law policies.[43] In short, matters arising from the constitutional text and structure — including the integrated judicial system, the existence of federal jurisdiction and s 118 of the *Constitution* — favoured the adoption of the *lex loci delicti* as the choice of law rule for torts.[44]

The work done by ss 79(1) and 80 in choice of law

At least following *Pfeiffer v Rogerson* (if not earlier), there appeared to be three important assumptions about how these provisions operated. First, it seemed to be assumed that both sections had something to say about the *identification* of the applicable law in federal jurisdiction. In other words, each provision played a choice of law role: s 80 utilised common law choice of law rules to select the *lex causae* to determine the substantive issue in question, while, to the extent necessary, s 79(1) selected *forum* statute law to apply to the dispute.[45]

Second, the 'conventional understanding'[46] was that s 79(1) applied to *all* State laws — whether substantive or procedural as those classifications are understood in choice of law. Writing prior to the decision in *Pfeiffer v Rogerson,* Professor Nygh said that limiting s 79 to procedural laws was 'inconsistent with the hitherto accepted basis that it is s 79 that primarily does the "picking up" of state laws whether procedural or not'.[47] Of course, *Pfeiffer v Rogerson* reduced the need for s 79(1) to pick up substantive laws, instead relying on s 80 and the common law choice of law rules to identify the applicable substantive law. However, the Court's decision did not disturb that 'hitherto accepted' position.

Third, it appeared to be assumed that no State Act could apply in federal jurisdiction without Commonwealth authorisation. That was said to be a consequence of an absence of State constitutional power. Sections 79(1) and 80 gave the forum court federal authority to apply State law. Within a private international law framework, this is readily understandable, and seemed to follow from the identification of the Commonwealth as a separate law area in *Pfeiffer v Rogerson*. In choice of law terms, it is forum law that authorises a court to apply non-forum law and, in the federal law area, ss 79(1) and 80 were seen as performing that role.

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42 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 528 [44], 540 [87] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 550–1 [123] (Kirby J).

43 Ibid 535 [70].

44 Ibid 534–5 [67]–[70].

45 See Hill and Beech, above n 31, 33. These forum laws might have included forum procedural laws or statutory choice of law rules: see Nygh, above n 25, 340–1, 344; Leeming, 'Constitutional Aspects of Commonwealth and State Application Laws', above n 37, 10.

46 Leeming, 'Constitutional Aspects of Commonwealth and State Application Laws', above n 37, 1.

47 Nygh, above n 25, 340. See also Lindell, above n 26, 357: 'the modern view has been to accept that s 79 covers both *procedural* and *substantive* matters'. See further Hill and Beech, above n 31.

The decision in *Rizeq*

The facts of *Rizeq* were a long way from a choice of law context. However, the Court's decision has significant implications for choice of law analysis in federal jurisdiction. The background to the case can be stated briefly. Mr Rizeq was a resident of New South Wales. He had been prosecuted in the District Court of Western Australia for offences against s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA). Because his prosecution involved a matter between a State and a resident of another State, Mr Rizeq's prosecution was heard by the District Court of Western Australia in federal jurisdiction.[48] He was convicted by a majority jury verdict in accordance with s 114(2) of the *Criminal Procedure Act 2004* (WA). If it had been a prosecution on indictment for a federal offence, s 80 of the *Constitution* would have required a unanimous jury verdict, and s 114(2) could not have applied to authorise a majority verdict.[49]

However, it was argued that since the prosecution was heard in federal jurisdiction, the offence provision in s 6(1)(a) could only apply as a 'surrogate Commonwealth law' by virtue of s 79(1) of the *Judiciary Act*. As there was a trial on indictment of a surrogate Commonwealth offence, it was contended that s 80 was enlivened. Consequently, s 114(2) could not be applied by s 79(1) to authorise a majority verdict.

A unanimous Court rejected the challenge and, in the course of doing so, reconceptualised the operation of s 79(1) of the *Judiciary Act*: a provision the interpretation of which was described by the plurality as 'plagued at various turns by metaphor and obscurity of language'.[50] The relevant conclusions and observations from *Rizeq* are as follows.

First, the decision confirms what was accepted in *Pfeiffer v Rogerson* that, with the acceptance of one common law in Australia, s 79(1) 'can only meaningfully encompass the statutory laws of each State. There is no common law of a State on which the section could operate'.[51]

Second, s 79(1) does not apply to *all* State statutory laws. It *only applies* to State laws that 'affect [or regulate[52] or govern[53]] the exercise of federal jurisdiction by a State court',[54] 'command a State court as to the manner of its exercise of federal jurisdiction'[55] or, in the words of the Chief Justice, 'regulate matters coming before [courts exercising federal jurisdiction] and to provide those courts with powers necessary for the hearing or determination of those matters'[56] or are 'directed to State courts and their powers'.[57] Section 79(1) was needed to operate on these laws because the State Parliaments lack the constitutional power or capacity to enact them. As the

48 That jurisdiction having been conferred by s 39(2) of the *Judiciary Act*.
49 That position was established in *Cheatle v The Queen* (1993) 177 CLR 541.
50 *Rizeq* (2017) 344 ALR 421, 439 [77].
51 Ibid 439 [78].
52 Ibid 434 [59].
53 Ibid 435 [63].
54 Ibid 434 [58].
55 Ibid 435 [61]–[62].
56 Ibid 426 [20]. See also laws that 'provide a court with powers it may exercise in the hearing and determination of a matter, and in otherwise regulating the proceedings before it': 425 [11]; 'laws directed to those courts respecting the matters which might be commenced in

plurality judgment of Bell, Gageler, Keane, Nettle and Gordon JJ said:

> The section fills that gap by picking up the text of a State law governing the exercise of State jurisdiction and applying that text as a Commonwealth law to govern the manner of exercise of federal jurisdiction. The section has no broader operation.[58]

By contrast, s 79(1) *does not apply* to laws that apply 'independently of anything done by a court'[59] or which are 'directed to the rights and duties of persons'.[60] Those laws apply of their own force and are not picked up by s 79(1). The plurality judgment explained that a State Parliament is 'sustained as part of the constitution of the State by s 106 [of the *Constitution*], and powers of a State Parliament to make laws are sustained by s 107'.[61] Consequently, their Honours said, 'laws made by the Parliament of the Commonwealth and laws made by the Parliaments of the States form "a single though composite body of law"'.[62] While ch III of the *Constitution* makes provision for an 'integrated national court system', it:

> does nothing to undermine the singularity or integrity of the composite body of Commonwealth and State law for which Chs I [which contains the source of Commonwealth legislative power] and V [which preserves State legislative power] and s 122 of the Constitution [the territories power] make principal provision.[63]

Their Honours observed:

> The simple constitutional truth is that State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction in the same way, and for the same reason, as they form part of the same single composite body of law that is applicable to cases determined in the exercise of State jurisdiction — because they are laws.[64]

Mr Rizeq's submissions were premised on the incapacity of State Parliaments to prescribe the laws to be applied in federal jurisdiction. The Court accepted that there is a State constitutional incapacity, but it only extends to the enactment of laws that affect the exercise of federal jurisdiction. Section 79(1) operates to fill the gap of that narrower incapacity of State constitutional power.

Third, the operation of s 79(1) is not to be defined by reference to the choice of law distinction between substantive and procedural laws.[65] Indeed, the plurality said that '[i]t would be wrong ... to seek to delimit the scope of the section's operation by invoking the difficult and sometimes elusive distinction

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them, the processes to be applied in hearing them and orders made in determination of them': 425 [13]; 'law governing when and how a court exercising federal jurisdiction is to hear and determine a matter': 426 [17].

57 Ibid 428 [28].

58 Ibid 435 [63]. See also ibid 442–3 [90]–[92] (Bell, Gageler, Keane, Nettle and Gordon JJ), 425 [15] (Kiefel CJ). In a separate judgment, Edelman J preferred a different interpretation of s 79(1) to that adopted by the other judges. I will return to that view briefly below.

59 Ibid 446 [105].

60 Ibid 426 [20].

61 Ibid 431 [47]. Except to the extent that such powers are given exclusively to the Commonwealth or withdrawn from the States.

62 Ibid 431 [48].

63 Ibid 431 [49].

64 Ibid 433 [56].

65 Ibid.

between "substance" and "procedure"'.[66] I will return to this point below.

Fourth, the scope of s 80 of the *Judiciary Act*, and its relationship to s 79(1), were questions left open by the Court.[67]

For Mr Rizeq, the consequence was that s 6(1)(a) of the *Misuse of Drugs Act* operated of its own force in federal jurisdiction and, thus, s 80 of the *Constitution* was not enlivened. Consequently, s 114(2) of the *Criminal Procedure Act* was not affected in this case by the requirements of s 80. Since it was a provision that affected the exercise of federal jurisdiction, its application required the operation of s 79(1) of the *Judiciary Act.*

Implications of *Rizeq* for choice of law

The full implications for choice of law in federal jurisdiction are not easy to see. Most clearly, s 79(1) is no longer to play a role in the *identification* of the law to be applied in federal jurisdiction. To that extent, the statement of five judges in *Pfeiffer v Rogerson* has been qualified. It now operates to fill the lacuna in constitutional power for forum State legislatures to regulate the exercise of federal jurisdiction. However, this shift in the understanding of the role of s 79(1) creates some difficulties for choice of law analysis in federal jurisdiction and the relationship between ss 79(1) and 80 that was established in *Pfeiffer v Rogerson*.

Difficulties created by rejection of substance vs procedure distinction

As already indicated, the pre-*Rizeq* position appeared to be that s 79(1) operated on *all* State laws (whether substantive or procedural). However, in a choice of law context, s 79(1) largely (although not exclusively) operated to pick up State laws that applied to issues characterised as *procedural* in character.[68] In choice of law analysis, a law's application to an issue depends upon its characterisation as substantive or procedural. In *Pfeiffer v Rogerson*, the Court modernised the approach to substance vs procedure: *substantive* matters are those that 'affect the existence, extent or enforceability of the rights or duties of the parties to an action';[69] whereas *procedural* matters are those 'which are directed to governing or regulating the mode or conduct of court proceedings'.[70]

Prior to *Rizeq*, the position seemed to be that the law applicable to substantive issues was determined in federal jurisdiction, through the operation of s 80, by identifying the choice of law rule applicable to the category or classification of the issue in question. Where there was no applicable choice of law rule, then s 79(1) directed the application of forum law. Thus, procedural questions, which the Court in *Pfeiffer v Rogerson* accepted 'were not the subject of choice of law rules',[71] would be dealt with by s 79(1) identifying and picking up forum law.

66 Ibid 441 [83]. See also ibid 426 [19] (Kiefel CJ).
67 Ibid 425 [14] (Kiefel CJ), 439 [79] (Bell, Gageler, Keane, Nettle and Gordon JJ).
68 See, eg, Nygh, above n 25, 340–1, 344; Lindell, above n 26, 357.
69 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 543 [99].
70 Ibid 543–4 [99], quoting Mason CJ in *McKain* (1991) 174 CLR 1, 26–7.
71 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 528 [46].

However, as already indicated, the Court in *Rizeq* has disapproved of discerning the scope of s 79(1) by using the substance/procedure distinction. As has been explained, s 79(1) only operates on State laws that 'affect the exercise of federal jurisdiction by a State court': it does not apply to State laws that apply 'independently of anything done by a court'. In identifying the type of laws that would be covered by s 79(1), the plurality said that it was 'more useful'[72] to consider the distinction between 'jurisdiction' and 'power': s 79(1) would apply to laws conferring 'powers' on a court to be exercised within the court's 'jurisdiction'.[73] For example, the plurality referred to a power conferred by State legislation on a State court to make civil penalty orders as a provision that required the operation of s 79(1).[74] The plurality continued:

> Other examples derived from the cases of laws within the purview of s 79 of the *Judiciary Act* include laws: which regulate the procedure of the court; which limit the court's powers to compel production of documents or disclosure of information; which bar the court absolutely or conditionally by reason of effluxion of time from entertaining a claim; which require or permit the court to stay a proceeding where there has been a submission to arbitration; and which confer authority on the court in specified circumstances to make orders conferring or declaring or altering rights or status. That list is indicative, not exhaustive.[75]

Other examples referred to included:

- State court powers to make orders concerning the welfare and custody of children;[76]
- State laws governing the assessment and apportionment of compensation;[77]
- State court powers to make remedial orders;[78] and
- State provisions entitling a tortfeasor to recover contribution from another tortfeasor in an amount which was determined by a court to be 'just and equitable'.[79]

What is important, for present purposes, is to recognise that many of these issues would be identified, within a choice of law analysis, as substantive in character. For example, statutes of limitation and provisions capping the assessment of damages were considered in *Pfeiffer v Rogerson* to be substantive.[80] Through s 80 of the *Judiciary Act*, common law choice of law rules would identify the law to be applied. However, since those provisions are likely to be seen as regulating the exercise of jurisdiction, the State Parliaments would lack the capacity to enact such laws for federal jurisdiction: s 79(1) would be required. If the choice of law rule identified forum law as

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72 *Rizeq* (2017) 344 ALR 421, 441 [84].
73 Ibid 441–2 [84]–[87].
74 In this respect, the plurality referred to *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 90–1 [112].
75 *Rizeq* (2017) 344 ALR 421, 442 [89] (citations omitted).
76 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323.
77 *Parker v Commonwealth* (1965) 112 CLR 295.
78 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.
79 *Austral Pacific Group Ltd v Airservices Australia* (2000) 203 CLR 136 ('*Austral Pacific*').
80 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 544 [100].

applicable, then s 79(1) could operate, complementarily, to pick up the forum law regulating jurisdiction. But, if the choice of law rule identified a non-forum law, then s 79(1) can offer no assistance. It cannot operate to pick up non-forum law, and since it would not be a case to which forum law was 'applicable', then s 79(1), by its own terms, could not pick up forum law.

This, in fact, presents a problem for the choice of law outcome in *Pfeiffer v Rogerson*. The question in that case was whether the damages caps in the *Workers Compensation Act 1987* (NSW) were to be applied by the ACT Supreme Court to a tort claim in circumstances where the tort occurred in New South Wales. Questions about the amount of damages were held to be 'substantive issues governed by the lex loci delicti',[81] and s 80 obliged the Supreme Court to apply the NSW provisions.[82] But, the NSW provisions provided that '[a] court may not award damages to a person contrary to the Division' and other provisions gave 'content' to that prohibition by prescribing the way in which damages were to be quantified.[83] The NSW statute was read as if it were addressed to the ACT Supreme Court.[84] Under a *Rizeq* analysis, such provisions would regulate the exercise of federal jurisdiction and, to operate in federal jurisdiction, would need to be given life by s 79(1). Indeed, the Court in *Pfeiffer v Rogerson* considered that s 79(1) would operate to pick up those provisions if they were being applied by a NSW court exercising federal jurisdiction or a federal court.[85] But, in *Pfeiffer v Rogerson*, the relevant court was an ACT court and the choice of law rules picked up by s 80 identified the NSW provision as applicable. Since non-forum law was involved, s 79(1) could not apply to those provisions.

Other fact patterns also demonstrate this difficulty, for example, if, having applied a choice of law rule under s 80, a forum court looks to a non-forum law area only to find a statutory rejection of its application to the dispute in question. Take, for example, a variation of the legislative provisions considered by the High Court in *Akai Pty Ltd v People's Insurance Co Ltd*.[86] The question in that case was whether the *Insurance Contracts Act 1984* (Cth) applied to an insurance policy containing a choice of law clause providing that '[t]his policy shall be governed by the laws of England'. Section 8(1) of the *Insurance Contracts Act* provided that:

> the application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.

However, to avoid circumvention of the *Insurance Contracts Act*, s 8(2) provided that:

> where the proper law of a contract or proposed contract would, but for an express provision to the contrary included ... in the contract ... be the law of a State or of a

81 Ibid.
82 Ibid 544 [103].
83 Ibid 516 [11].
84 Cf as to a choice of law clause in a voluntary settlement in *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245, 259 (Walsh J).
85 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 516 [11].
86 (1996) 188 CLR 418.

> Territory in which this Act applies ... then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory.

Assume that s 8 was a non-forum State provision (State A) and that the forum State (State B) had no such provision. Assume further that, in determining a dispute about the insurance contract, a State B court, applying s 80, gives effect to a choice of law clause selecting the law of State A. But, in effect, the statute law of State A would operate (where the proper law of contract would be State B if not for the choice of law clause) to modify the outcome of applying the forum choice of law rule. If the non-forum law of State A displacing the operation of the common law choice of law rule were characterised as regulating the jurisdiction of the State A court, how is it to be picked up? Arguably, such a law could not apply of its own force and, since it is not a forum law, s 79(1) would provide no assistance. Indeed, this hypothetical could arise in relation to State insurance contracts. New South Wales has applied the *Insurance Contracts Act* to State insurance contracts.[87] However, Victoria has not. Thus, the hypothetical could arise if a Victorian court were the forum court considering a claim under a State insurance policy which selected NSW law as the applicable law but, in relation to which, the proper law of contract would be Victoria but for the choice of law clause.

These difficulties have been created because of the discordance between the substance/procedure distinction which controls the operation of s 80, and the new *Rizeq* distinction that controls the operation of s 79(1).

Difficulties created at the margin of the new *Rizeq* distinction for the operation of s 79(1)

These difficulties are amplified when dealing with non-forum provisions that straddle the new *Rizeq* distinction. The conferral of a power on a court to create a right is a common drafting technique. A Commonwealth provision containing such a function is rationalised alongside the Commonwealth separation of judicial power principles by reading those provisions as simultaneously creating a right and conferring a power on a court to determine the existence of that right.[88] On the *Rizeq* analysis, a non-forum State law of that kind could not apply of its own force and, as has been discussed, s 79(1) could not pick it up as a federal law.

The difficulty extends further to separate provisions which, respectively, create a right and confer a power on a court. This was made clear in the *Rizeq* Court's analysis of *Austral Pacific Group Ltd v Airservices Australia.*[89] That case considered whether the defendant to claims for tort and under the *Trade Practices Act 1974* (Cth) in the District Court of Queensland could claim a right of contribution under ss 6 and 7 of the *Law Reform Act 1995* (Qld). While *Austral Pacific* was not a choice of law case, it was a case in federal jurisdiction since the third party against whom contribution was sought, Airservices Australia, was considered to be the Commonwealth for the

87 See *Insurance (Application of Laws) Act 1986* (NSW).

88 See, recently, James Stellios, 'The Masking of Judicial Power Values: Historical Analogies and Double Function Provisions' (2017) 28 *Public Law Review* 138.

89 (2000) 203 CLR 136.

purposes of s 75(iii) of the *Constitution*.[90] Consequently, it was assumed by the High Court in *Austral Pacific* that the recovery provisions in the Queensland Act would have to be picked up by s 79(1). Section 6 of the Queensland Act created the right to recover contribution from a joint tortfeasor and s 7 conferred a power on a court to determine the amount of contribution that was 'just and equitable'. Both were considered by the High Court in *Austral Pacific* to require the operation of s 79(1) even though s 6, on its face, looked like a provision that created a right. The High Court in *Rizeq* explained this result in the following way:

> The s 6 right is inseparable from the s 7 power. Neither is therefore capable of applying in federal jurisdiction as State law. Both are within the field of operation of s 79 of the *Judiciary Act*.[91]

But, as has already been explained, in a choice of law context, that outcome creates difficulties when such State laws are substantive non-forum laws that have been identified through choice of law rules under s 80. They cannot operate of their own force, but cannot be picked up by s 79(1). The point can be made further by returning to *Pfeiffer v Rogerson*, where the NSW provisions placed an obligation on a court not to assess damages contrary to the Act *and* gave 'content' to that prohibition by prescribing the way in which damages were to be quantified. These too are likely to be seen as 'inseparable', in which case how were any of the applicable NSW provisions picked up to regulate the ACT Supreme Court's exercise of federal jurisdiction?

It was, in part, because of these kinds of difficulties that Edelman J in *Rizeq* preferred a construction that:

> the laws to which s 79(1) refers are only those statutory laws which *govern* or *regulate* the powers that a court (in this case, a State court) exercises as part of its authority to decide.[92]

Difficulties where there are extra-territorial non-forum laws

Difficulties also arise where a non-forum law, which is capable of applying by its own force, operates extra-jurisdictionally within the forum State. A variation of the fact pattern in *Sweedman*[93] illustrates this point. The question that arose in *Sweedman* was the identification of the law to be applied to the enforcement of a statutory indemnity created under s 104(1) of the *Transport Accident Act 1986* (Vic). Because the Court was exercising federal jurisdiction, that characterisation process had to be undertaken through the lens of s 80 of the *Judiciary Act*. The statutory indemnity arose under the statutory compensation scheme established by the *Transport Accident Act.* The entitlement to indemnity accrued following the payment by the Transport Accident Commission from the statutory fund to the owners of a Victorian registered vehicle (the Suttons) involved in an accident in New South Wales.

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90 The District Court having been invested with federal jurisdiction to determine a claim of that type under s 39(2) of the *Judiciary Act*.

91 *Rizeq v Western Australia* (2017) 344 ALR 421, 445 [100].

92 Ibid 449 [120]. See also ibid 447–8 [111], 448–9 [116]–[118], 469–70 [193]–[197].

93 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

What is relevant for present purposes is that, instead of the claim for statutory compensation under the Victorian scheme, the Suttons might have claimed tort damages in a NSW court. If they had, the NSW court, again in federal jurisdiction as the plaintiffs and defendant were residents of different States, would have applied the *lex loci delicti* through s 80 of the *Judiciary Act*. Prima facie, the common law of negligence (subject to NSW statutory modifications), which was applicable in New South Wales, would have applied to the dispute since the accident occurred in New South Wales.

However, following *Rizeq*, the position becomes more complicated. It is likely that the compensation provisions in the Victorian Act, which formed part of an administrative payment scheme, would have operated 'independently of anything done by a court' and, following *Rizeq*, would have applied of their own force in federal jurisdiction. The Victorian compensation statute would be 'in force' in New South Wales for the purposes of s 80 and, arguably, would displace the operation of the common law choice of law rule for tort in relation to accidents occurring in New South Wales involving a car registered in Victoria.[94]

Difficulties where there are no choice of law rules

There are also difficulties where s 80 does not operate because there is no common law choice of law rule. Following *Rizeq*, there will be difficulties in those circumstances in choosing between competing State statutes. Take, for example, revenue and penal laws in relation to which 'the common law has never derived a choice of law rule'.[95] Section 80 could not supply a connecting rule to identify the applicable law.

Prior to *Rizeq*, s 79(1) identified forum revenue or penal law as applicable and operated to pick up those laws in federal jurisdiction. After *Rizeq*, depending on their form, such laws may not regulate the jurisdiction of a court: typically they might apply 'independently of anything done by a court'. Such laws are now to apply in federal jurisdiction of their own force. However, if there is more than one such law potentially applicable, how would a State court choose between them? Section 79(1) is no longer seen as performing a choice of law function.

Constitutional difficulties for the operation of s 79(1) in a choice of law context

The new *Rizeq* conception of s 79(1) may create constitutional difficulties under s 118 of the *Constitution*. As explained, by its terms, s 79(1) only operates to provide federal authority for courts, State and federal, to pick up *forum* State jurisdictional provisions. Such an operation may fail to give *non-forum* laws, that are otherwise applicable, full, faith and credit as required by s 118. These difficulties largely were avoided when s 79(1) operated, in a choice of law context, primarily to pick up procedural laws. However, as explained, the *Rizeq* distinction for the operation of s 79(1) now catches a range of provisions that deal with substantive issues.

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94 For a similar point, see Lindell, above n 26, 380.

95 Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 205.

A more fundamental challenge to the *Pfeiffer v Rogerson* methodology for choice of law

Lurking within the Court's reasoning in *Rizeq* might be a more fundamental challenge to the very foundation of the *Pfeiffer v Rogerson* choice of law methodology. As already mentioned, in *Pfeiffer v Rogerson*, it was said that, 'with respect to matters that fall within federal jurisdiction, the Commonwealth of Australia is, itself, a law area'.[96] The question of what laws were to be applied within that national law area involved 'the identification of the applicable law', rather than a 'choice between laws of competing jurisdictions', and the identification of the applicable law was to proceed by way of ss 79 and 80.[97] As also indicated, in *Rizeq*, the plurality said that the *Constitution* itself provides for Commonwealth and State laws forming 'a single though composite body of *law*', and that nothing in ch III undermines 'the singularity or integrity of [that] composite body ... of *law*'.[98]

While these observations in *Rizeq* are not inconsistent with the recognition in *Pfeiffer v Rogerson* of separate law areas, including a superimposed Commonwealth law area, those law areas are no longer defined by reference to the laws of the respective State legislatures of those law areas. Instead, the State laws that fall outside s 79(1) form part of a composite body of 'law' that is applied, by operation of the *Constitution*, across law areas.

Arguably, the entire enterprise of connecting legal disputes to law areas to identify the applicable law, the very purpose of applying common law choice of law rules, comes under challenge. Just as a uniform common law applies across law areas without the need for choice of law, a composite body of 'law' may be seen as operating in the same way. And, in the case of State statutes outside s 79(1), the *Rizeq* Court has indicated that they are applicable of their own force in federal jurisdiction by operation of the *Constitution*: s 80 is not necessary as federal authority for courts to apply State laws in federal jurisdiction. Indeed, such a fundamental challenge to the choice of law framework would extend beyond federal jurisdiction to non-federal choice of law contexts involving the choice of one State statute over another.

Of course, a court — whether exercising federal or non-federal jurisdiction — would still need to identify which State statute should be applied over another, and choice of law rules might operate to inform that exercise. However, they need not. Other methods for the identification of applicable State laws might focus on the reach of the respective statutes that comprise this composite body of 'law'.[99] In familiar choice of law language, a unilateralist approach to choice of law which looks to the reach of State statutes over the dispute can operate instead of a multilateralist approach of connecting the dispute to a law area.

The Court did not go this far: it was not a choice of law case. However, the

96 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 514 [2].

97 Ibid 530 [53].

98 *Rizeq v Western Australia* (2017) 344 ALR 421, 431 [48]–[49] (emphasis added).

99 See, eg, Stephen Gageler, 'Private Intra-national Law: Choice or Conflict, Common Law or Constitution?' (2003) 23 *Australian Bar Review* 184; Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247; Stellios, 'Choice of Law and the *Australian Constitution*', above n 41.

shift to the idea of a composite body of 'law' applying of its own force by operation of the overarching constitutional framework does sit uncomfortably with the common law private international law framework which is premised on different sources of law applying in separate law areas. Two final comments may be made in this respect. First, the shift to a constitutional foundation to explain the application of non-forum State law might reflect a concern that choice of law in federal jurisdiction should not depend on the Commonwealth Parliament enacting statutory provisions. Second, the full, faith and credit command in s 118 may yet have some further role to play in that constitutional foundation.[100] It might provide a clearer conceptual basis for why State laws apply of their own force across federal and State jurisdictions.

Conclusion

While *Rizeq* was not a choice of law case, undoubtedly it has choice of law implications.[101] Those implications might be limited to the reconfiguration of s 79(1) in choice of law cases heard in federal jurisdiction. The gaps that have been created may well require a judicial reconfiguration of s 80 or the common law choice of law rules that are applied by s 80, and/or legislative reform to the way in which s 79(1) is now seen as operating. However, *Rizeq* may present a more fundamental challenge to the entire common law choice of law enterprise. If so, then *Pfeiffer v Rogerson* will need to be reconsidered.

Of course, the common law method of choice of law rules cannot be discarded entirely. There will remain questions about the application of foreign law to a dispute litigated in an Australian court. That will be so even if the dispute is litigated in federal jurisdiction. There are many contexts in which choice of law disputes in federal jurisdiction will have connections with a foreign law area. To take one example, *Habib v Commonwealth*,[102] had it proceeded to trial, would have involved an action against the Commonwealth alleging tortious conduct by Commonwealth officers in a foreign jurisdiction. At least to that extent, s 80 of the *Judiciary Act* will need to have continuing operation in the application of the common law choice of law framework in federal jurisdiction. If *Rizeq* represents a shift in the conceptual basis for the resolution of choice of law in intra-national disputes, choice of law analysis in Australia will be splintered depending upon whether the law in question is a State law or a foreign law.

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100 Ibid.

101 As Justice Leeming has said, 'A moment's thought makes it clear that choice of law cannot be put to one side when considering ss 79 and 80': Leeming, 'Constitutional Aspects of Commonwealth and State Application Laws', above n 37, 10.

102 (2010) 183 FCR 62.