



# LAWS5057

## Conflict of Laws

Session 2, Online-scheduled-weekday 2022

*Macquarie Law School*

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### Disclaimer

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## General Information

Unit convenor and teaching staff Unit Convenor Dr. Harry Melkonian <a href="mailto:harry.melkonian@mq.edu.au">harry.melkonian@mq.edu.au</a> Contact via students must use private iLEarn communication Online Via iLearn Communication
Credit points 10
Prerequisites 80cp in LAW or LAWS units
Corequisites
Co-badged status
Unit description This unit deals with rules for resolving difficulties when a private legal problem has an international element. Such difficulties fall into three categories: first, do our courts have jurisdiction to decide a matter that has connections with another country; second, which law should our courts use to decide the dispute, our law or the law of some other country; and third, if a matter has been decided by a foreign court, should our courts recognise and enforce the foreign judgment? Therefore this unit spans many related topics, including tort, contract, succession and family law.

## Important Academic Dates

Information about important academic dates including deadlines for withdrawing from units are available at <https://www.mq.edu.au/study/calendar-of-dates>

## Learning Outcomes

On successful completion of this unit, you will be able to:

- ULO1:** Critically analyse the common law and statutory rules governing conflict of laws.
- ULO2:** Critically analyse key international agreements and jurisdictional concepts that may apply to conflict situations.
- ULO3:** Evaluate the mechanics and controversy regarding anti-suit injunctions with respect to foreign legal proceedings.

**ULO4:** Explain how choice of law and choice of forum apply in commercial, contractual, or tort disputes.

**ULO5:** Examine the doctrine of international comity as it relates to protection of local judicial process and the implications of enforcement of foreign judgments within Australia and Australian judgments in other countries.

**ULO6:** Critically analyse challenges posed by the internet in general and social media in particular in situations involving contract and tort disputes, including commercial transactions, privacy, defamation, and local suppression orders.

## General Assessment Information

### ***Late Assessment Submission Penalty***

*Unless a Special Consideration request has been submitted and approved, a 5% penalty (of the total possible mark) will be applied each day a written assessment is not submitted, up until the 7th day (including weekends). After the 7th day, a mark of '0' (zero) will be awarded even if the assessment is submitted. Submission time for all written assessments is set at 11.55pm. A 1-hour grace period is provided to students who experience a technical issue.*

*This late penalty will apply to non-timed sensitive assessment (incl essays, reports, posters, portfolios, journals, recordings etc). **Late submission of time sensitive tasks** (such as tests/exams, performance assessments/presentations, scheduled practical assessments/labs etc) **will only be addressed by the unit convenor in a Special consideration application. Special Consideration outcome may result in a new question or topic.***

*Time sensitive tasks (including tests, exams and oral presentations) must be submitted at the time specified unless Special Consideration has been granted*

Word limits will be strictly applied and work exceeding the word limit will not be graded. Citations should conform to the current version of the AGLC

All assessments in this unit are to be submitted electronically. Plagiarism detection software is used in this unit.

With respect to moderation, detailed rubrics will be made available on iLearn. All fail papers are double-marked by the Unit Convenor

## Assessment Tasks

Name	Weighting	Hurdle	Due
<u>Formative Quizzes</u>	0%	No	13/08/2022
<u>Essay</u>	30%	No	08/10/2022
<u>Mid-Semester Test</u>	30%	No	01/10/2022
<u>VIVA Voce</u>	40%	No	09:00 5/11/2022 - 17:00 09/11/2022 By Appointment

### Formative Quizzes

Assessment Type <sup>1</sup>: Quiz/Test

Indicative Time on Task <sup>2</sup>: 6 hours

Due: **13/08/2022**

Weighting: **0%**

These are open book multiple choice quizzes. These will not count for final grade, but used to assess understanding across semester.

On successful completion you will be able to:

- Evaluate the mechanics and controversy regarding anti-suit injunctions with respect to foreign legal proceedings.

### Essay

Assessment Type <sup>1</sup>: Essay

Indicative Time on Task <sup>2</sup>: 30 hours

Due: **08/10/2022**

Weighting: **30%**

All students must write an essay in response to a set question or problem that will be based on a current issue encompassed within conflict of laws.

On successful completion you will be able to:

- Critically analyse key international agreements and jurisdictional concepts that may apply to conflict situations.
- Critically analyse challenges posed by the internet in general and social media in particular in situations involving contract and tort disputes, including commercial

transactions, privacy, defamation, and local suppression orders.

## Mid-Semester Test

Assessment Type <sup>1</sup>: Quiz/Test

Indicative Time on Task <sup>2</sup>: 25 hours

Due: **01/10/2022**

Weighting: **30%**

This will be a mid-semester test.

On successful completion you will be able to:

- Critically analyse the common law and statutory rules governing conflict of laws.
- Critically analyse key international agreements and jurisdictional concepts that may apply to conflict situations.
- Evaluate the mechanics and controversy regarding anti-suit injunctions with respect to foreign legal proceedings.

## VIVA Voce

Assessment Type <sup>1</sup>: Viva/oral examination

Indicative Time on Task <sup>2</sup>: 25 hours

Due: **09:00 5/11/2022 - 17:00 09/11/2022 By Appointment**

Weighting: **40%**

Individual VIVA Voce Questioning relating to Essay submission.

On successful completion you will be able to:

- Critically analyse the common law and statutory rules governing conflict of laws.
- Critically analyse key international agreements and jurisdictional concepts that may apply to conflict situations.
- Evaluate the mechanics and controversy regarding anti-suit injunctions with respect to foreign legal proceedings.
- Explain how choice of law and choice of forum apply in commercial, contractual, or tort disputes.
- Examine the doctrine of international comity as it relates to protection of local judicial process and the implications of enforcement of foreign judgments within Australia and Australian judgments in other countries.
- Critically analyse challenges posed by the internet in general and social media in

particular in situations involving contract and tort disputes, including commercial transactions, privacy, defamation, and local suppression orders.

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<sup>1</sup> If you need help with your assignment, please contact:

- the academic teaching staff in your unit for guidance in understanding or completing this type of assessment
- the [Writing Centre](#) for academic skills support.

<sup>2</sup> Indicative time-on-task is an estimate of the time required for completion of the assessment task and is subject to individual variation

## Delivery and Resources

This unit is taught through a combination of lectures and tutorials. The lectures are offered in iLearn on the Echo360 System and tutorials will be offered via Zoom and on-campus

The prescribed casebook is Nygh's Conflict of Laws 10th Ed (2020). Please do not rely on access to e-copies in the Macquarie Library because those copies are limited and you will likely want access to the casebook during timed assessments and frequently all copies are in use. If students feel that they would also benefit from a textbook, Private International Law in Australia by Reid Mortensen et al 4th Edition (2019) may be helpful but will not be referred to in the course and is not required.

In addition to the casebook, we will have substantial recourse to other materials, including recently decided cases, journal articles and book chapters. These materials will be listed in iLearn by respective topic. Some of these materials will be available through Leganto. Very recent cases will be available through online library resources.

**Attendance at tutorials is an essential element of this course because exercises are conducted during tutorials and these exercises are directly relevant to questions raised in the assessments. The techniques addressed in the tutorials are expected to be utilised in responding to exam questions.** In effect class participation is rolled into the assessments because if you do not engage in the tutorials, you will be unable to complete the assessments.

**If you cannot regularly attend Tutorials, you should not enroll in this course as exam topics frequently rely on tutorials as well as lectures.** An attendance role will be taken at each tutorial session. Students may, from time to time, attend tutorial sessions other than the one in which they are enrolled, including the Zoom session.

As part of the art of lawyering, conflict of laws issues are best addressed through problem solving. Success in the examinations is invariably associated with active participation in the tutorials. During the tutorials, we will review current cases that are not in the casebook and students will attempt to solve conflict of laws problems. While participation is essential for satisfactory completion of the course, tutorial work is not independently graded - it is an opportunity to see how the doctrines actually work to solve problems. It is a time for students to support each other as we work through challenging real-life situations based on recent

Australian, UK, Canadian, EU and US case decisions.

**It is also anticipated that our class will engage in drafting a public submission and this will be a group activity. Engagement in this project will equip you for completing the assessments.**

**Students who are not prepared to attend and participate in tutorials should not enroll in this course as this course is based on real-world problem solving and that will be taught in the tutorials.**

## Unit Schedule

The following is a general and somewhat idealised version of what we will cover. The current version will be available on iLearn and will be subject to modification.

The study of conflict of laws has never been more essential than it is now. As Australian lawmakers struggle to deal with international media problems, the key issues of jurisdiction, forum non conveniens, anti-suit injunctions, choice of law, and enforcement or recognition of judgments become essential tools of the lawyer and lawmaker. These subjects constitute Conflict of Laws.

We will focus on the application of law to such matters as defamation, online commercial transactions and privacy abuses where there is frequently an element of multinational activity.

Conflict of laws is sometimes called private international law. However, in Australia, Canada and the United States, conflict of laws is a more apt title because the conflict situations are typically domestic as opposed to international. This, however, is changing, as Australia attempts to enforce its domestic laws against multi-national corporations.

Conflict of laws issues are central to the actual practice of law. Essentially conflicts, as it is commonly known, deals with many aspects of procedural law - some of which may be outcome determinative. The most well-known aspect of this subject is the subject of choice of law. This is the doctrine that enables a lawyer to advise the court as to the state or national body of law that is to be applied to a dispute. The subject also deals with jurisdiction, injunctions in aid of jurisdiction, restraints on local proceedings and enforcement of judgments. Conflicts may be unique among law courses because it is perhaps the only subject in which non-lawyers rarely have any knowledge or even awareness of the concept's existence. It is not unfair to say the conflict of laws is a subject known only to the legal profession and is essential to the lawyer's art. While frequently addressed in terms of disputes (litigation), conflict of laws is also an essential body of law for legal practitioners who draft agreements because many conflicts issues are subject to party agreement.

Conflicts is not just a matter of following rules. Rather, knowledge of conflicts guides skilled practitioners in obtaining better outcomes for their clients. While based on legal theory, in practice, conflicts permits lawyers to attempt to utilise the most desirable venues and bodies of law to benefit their clients' interests. Conflict of laws is somewhat of a misnomer; the actual focus is on personal jurisdiction, choice of law or forum selection and this unit will examine essential concepts relating to these issues.

Using a problem-based approach, this course will examine a variety of circumstances to see how conflicts theory can be strategically applied to influence the ultimate outcome of a dispute. Perhaps the centrality of a working knowledge of conflict of laws is exemplified by the following examples:

A client believes that she has been defamed by a posting on a social media website. The individual who made the posting is unknown (but known to the website operator). The corporation that owns the social media website is located in the United States and does not have any offices in Australia but does have a local subsidiary.

The client wants you to file suit against the American social media company in NSW. Does the court have (1) in personam jurisdiction (jurisdiction over the person of the defendant), (2) which state's (nation's) laws of defamation would apply, and (3) how could any judgment in your client's favour be enforced?

Or, in a more mundane situation -

An independent contractor called Alan resides in Victoria. He is assigned projects by Apex Corporation. Apex trained him in Victoria and required him to purchase various specified equipment including a stepladder manufactured by Bosco Specialties in Brisbane, Queensland. Most of the work performed by Alan for Apex is in Victoria. While working on a project for Apex just across the border in New South Wales, Alan fell from the stepladder and sustained extremely serious injuries. Alan believes that he fell because the ladder was defectively designed and manufactured. Alan's claim against Apex has been resolved through Workers' Compensation and is not in issue.

Alan presents himself to you at your law office in Victoria. A decision is made to proceed by way of litigation in the Supreme Court of Victoria against Bosco Specialties. The plaintiff was tardy coming to you for advice but you ascertain that the statute of limitations for pursuing an action in tort is not time barred under Victorian law. But, you also note that under both NSW and Queensland laws, the action appears to be time-barred. If the action is commenced in Victoria, will it likely be time-barred?

While the common law of tort is uniform across Australia; statutes of limitation vary among the States. Here, the correct statute of limitation may be outcome determinative. While this seems like a rather mundane personal injury matter, it presents classic conflict of laws issues that will likely decide whether the matter may proceed or will be time-barred.

In both of these situations, conflict of laws provides the tools necessary to reach the correct results

**Tentative Weekly Schedule - Readings will also include materials listed on iLearn and available through Leganto. recent court decisions will be made available through iLearn. The schedule is subject to change in the event of new developments.**



<b>Week 1</b>	<p><b>Introduction to the Unit – Why conflict of laws is central to the practice of law? In Personam Jurisdiction</b></p> <p>Casebook Ch. 1 and 3</p> <p>Casebook refers to <i>Nygh's Conflict of Laws</i> 10th edition (2020)</p> <p>Mark Leeming, <i>Authority to Decide - The Law of Jurisdiction in Australia</i> 2d ed (2020), Chapter 1 [available on Leganto]</p>
<b>Week 2</b>	<p><b>In Personam Jurisdiction and the Internet, Stare Decisis in Australia</b></p> <p><i>Facebook v Australian Information Commissioner</i> [2022] FCAFC 9</p> <p>Tobias Lutzi, <i>Private International Law Online</i> (2020) Ch 2, §§2.01 2.83</p> <p>Horatio Watt et al, <i>Global Private International Law</i> 2019) Ch 19</p> <p>[texts available on Leganto]</p>
<b>Week 3</b>	<p><b>Enforcement of Judgments at Common Law and By Statute</b></p> <p>Casebook Chapters 40 and 41</p> <p>Ferrari et al, <i>Private International Law</i> Ch 14</p> <p>Tang et al, <i>Conflict of Laws in the People's Republic of China</i> Ch 6, p 140-173 [optional reading]</p> <p>[available on Leganto]</p> <p><b>Formative Quiz is available this week on iLearn</b></p>
<b>Week 4</b>	<p><b>Enforcement of Judgments and the Internet</b></p> <p><i>Barilaro v Google LLC</i> [2022] FCA 650</p> <p>Harry Melkonian, <i>Defamation, Libel Tourism, and The Speech Act of 2010</i> Ch 4 [leganto]</p>
<b>Week 5</b>	<p><b>Choice of Law Theory - I</b></p> <p>Casebook: Chapters 12, 13 (13 - not emphasised) &amp; 14</p> <p>Franco Ferrari &amp; Diego Arroyo, <i>Private International Law</i> (2019) Ch 1 [available on Leganto]</p>
<b>Week 6</b>	<p><b>Choice of Law Theory (Part 2) - Including Renvoi</b></p> <p>Casebook Chapters 15, 16 &amp; 17 (17 not emphasised)</p> <p>Cuniberti, <i>Conflict of Laws</i> Ch 3 p 94-112</p>
<b>Week 7</b>	<p><b>Contracts Choice of Law</b></p> <p>Casebook: Ch.19</p> <p>Michael Douglas et al, <i>Commercial Issues in Private International Law</i> (2019) Ch 12 [available on Leganto]</p> <p>Alex Mills, <i>Party Autonomy in Private International Law</i> (2018) Ch 7 [available on Leganto]</p> <p>Pedro Asencio, <i>Conflict of Laws and the Internet</i> (2020) Ch 6, §§6.135-6.211 [EU law] [available on Leganto]</p> <p><b>Research Essay Assignment Distributed</b></p>

<p><b>Week 8</b></p>	<p><b>Choice of Law – Torts</b></p> <p>Casebook: Ch. 20</p> <p>Cuniberti, <i>Conflicts of Law</i> Ch 10 [available on Leganto]</p> <p><b>Mid-Term Test on Saturday 2 October 1PM - 3:00 PM (includes reading time)</b></p>
<p><b>Week 9</b></p>	<p><b>Exclusion of Foreign Law and Doctrine of Depechage</b></p> <p>Casebook Ch. 18</p> <p>Somerset's Case</p> <p>Christopher Stevenson, 'Depechage: Embracing Complexity to Solve Choice of Law Issues' 37 <i>Indiana Law Review</i> 303 (2003)</p> <p>Willis Reese, 'Depechage: A Common Phenomenon in Choice of Law' 73 <i>Columbia Law Review</i> 58 (1973)</p> <p>The Stevenson and Reese articles are of limited value because they are entirely American-centric</p> <p>Rataplan P/L v Commissioner of Taxation [2004] FCA 920</p> <p>Hebrew University v General Motors, 903 F.Supp.2d 932 (CD Cal. 2012)</p> <p>Chen v. L.A. Truck Centers, 22 July 2019 - Supreme Court of California</p> <p><b>Papers Due on Saturday 8 October</b></p>
<p><b>Week 10</b></p>	<p><b>Cross-Vesting and Forum Non Conveniens</b></p> <p>Casebook: Ch 6 and 8</p> <p>Ronald Brand &amp; Scott Jablonski, <i>Forum Non Conveniens - History, Global Practice and Future</i> (2007), Chapter 6 [Available on Leganto]</p>
<p><b>Week 11</b></p>	<p><b>Forum Selection Agreements - Internet Contracts (Party Autonomy)</b></p> <p>Casebook: Ch. 7</p>
<p><b>Week 12</b></p>	<p><b>Anti-Suit Injunctions and Comity - doctrines at odds with each other</b></p> <p>Casebook: Ch. 9</p> <p>Giles Cuniberti, <i>Conflict of Laws - A Comparative Approach</i> (2017) Ch 4 [available on Leganto]</p> <p><i>X v Twitter</i> [2017] NSWSC 1300</p> <p><i>Animal Science Products v Hebei Welcome</i>, 585 US __ (2018)</p> <p><i>Google v Equustek</i></p> <p>[all available on Leganto]</p>

<b>Week 13</b>	<b>Federal Jurisdiction, North American Tribal Law and Courts</b>  Casebook: Ch. 5 §§ 5.1 - 5.6, 5.16 - 5.23  Mark Leeming, <i>Authority to Decide - The Law of Jurisdiction in Australia</i> 2d ed (2020), Chapter 7 [available on Leganto]  Tribal law materials presented in lecture  Please note that during the Week 13 Tutorial we will be putting it all together:  Jurisdiction - Forum Non Conveniens - Cross Vesting - Injunctions - Choice of Law - Enforcement of Judgments - The Internet Wrap-Up: Reflection, Confusion, Exam Readiness  <b>VIVA Sessions at conclusion of Week 13 - Final Assessment</b>
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## Policies and Procedures

Macquarie University policies and procedures are accessible from [Policy Central](https://policies.mq.edu.au) (<https://policies.mq.edu.au>). Students should be aware of the following policies in particular with regard to Learning and Teaching:

- [Academic Appeals Policy](#)
- [Academic Integrity Policy](#)
- [Academic Progression Policy](#)
- [Assessment Policy](#)
- [Fitness to Practice Procedure](#)
- [Assessment Procedure](#)
- [Complaints Resolution Procedure for Students and Members of the Public](#)
- [Special Consideration Policy](#)

Students seeking more policy resources can visit [Student Policies](https://students.mq.edu.au/support/study/policies) (<https://students.mq.edu.au/support/study/policies>). It is your one-stop-shop for the key policies you need to know about throughout your undergraduate student journey.

To find other policies relating to Teaching and Learning, visit [Policy Central](https://policies.mq.edu.au) (<https://policies.mq.edu.au>) and use the [search tool](#).

## Student Code of Conduct

Macquarie University students have a responsibility to be familiar with the Student Code of Conduct: <https://students.mq.edu.au/admin/other-resources/student-conduct>

## Results

Results published on platform other than [eStudent](#), (eg. iLearn, Coursera etc.) or released directly by your Unit Convenor, are not confirmed as they are subject to final approval by the University. Once approved, final results will be sent to your student email address and will be made available in [eStudent](#). For more information visit [ask.mq.edu.au](https://ask.mq.edu.au) or if you are a Global MBA

student contact [globalmba.support@mq.edu.au](mailto:globalmba.support@mq.edu.au)

## Academic Integrity

At Macquarie, we believe [academic integrity](#) – honesty, respect, trust, responsibility, fairness and courage – is at the core of learning, teaching and research. We recognise that meeting the expectations required to complete your assessments can be challenging. So, we offer you a range of resources and services to help you reach your potential, including free [online writing and maths support](#), [academic skills development](#) and [wellbeing consultations](#).

## Student Support

Macquarie University provides a range of support services for students. For details, visit <http://students.mq.edu.au/support/>

## The Writing Centre

[The Writing Centre](#) provides resources to develop your English language proficiency, academic writing, and communication skills.

- [Workshops](#)
- [Chat with a WriteWISE peer writing leader](#)
- [Access StudyWISE](#)
- [Upload an assignment to Studiosity](#)
- [Complete the Academic Integrity Module](#)

The Library provides online and face to face support to help you find and use relevant information resources.

- [Subject and Research Guides](#)
- [Ask a Librarian](#)

## Student Services and Support

Macquarie University offers a range of [Student Support Services](#) including:

- [IT Support](#)
- [Accessibility and disability support](#) with study
- Mental health [support](#)
- [Safety support](#) to respond to bullying, harassment, sexual harassment and sexual assault
- [Social support including information about finances, tenancy and legal issues](#)

## Student Enquiries

Got a question? Ask us via [AskMQ](#), or contact [Service Connect](#).

## IT Help

For help with University computer systems and technology, visit [http://www.mq.edu.au/about\\_us/offices\\_and\\_units/information\\_technology/help/](http://www.mq.edu.au/about_us/offices_and_units/information_technology/help/).

When using the University's IT, you must adhere to the [Acceptable Use of IT Resources Policy](#). The policy applies to all who connect to the MQ network including students.

## Changes from Previous Offering

The order of subjects has been substantially revised from prior offerings. In light of recent Australian judicial decisions, there will be a focus on internet jurisdiction and enforcement of judgments. The seminal subject of choice of law will be addressed earlier in the course and, based on student feedback, there will be less emphasis on cross-vesting.

The Mid-Term Quiz/Test will be in Multiple Choice Format. As in the prior offering, the research essay and the final Viva Voce assessment are linked. After submitting the Research essay on 8 October 2022, students will schedule individual sessions on Zoom in the period 4 November through 7 November in which the student will be questioned with respect to the Research Essay and how it relates to subjects covered in this course. Further guidance and instructions will be provided in iLearn