

## Legal Profession Admission Board

September 2013

Conflict of Laws

Examiner's comments

This is a guide to the issues and primary materials relevant to answering the questions in the examination. Overall, candidates displayed a sound understanding of the principles of conflict of laws and the application of those principles to the questions.

### Question 1

Aerial tort? Place of the tort? *Distillers Co (Biochemicals) v. Thompson* [1971] AC 458. The rule in *Phillips v. Eyre* (1870) LR 6 QB 1, the requirement of “double actionability” and the *lex fori* as the applicable substantive law. Modern Australian law: the *lex loci delicti* as the applicable substantive law: *John Pfeiffer v. Rogerson* (2000) 203 CLR 503; *Regie Nationale des Usines Renault v. Zhang* (2002) 187 ALR 1. Renvoi doctrine as explained in *Neilson v. Overseas Projects Corp of Victoria* (2005) 221 ALR 213.

Rationale of the distinction between substance and procedure and characterisation by the *lex fori*. See *Hamilton v. Merck & Co* (2006) 230 ALR 156. Traditional distinction between substantive and procedural limitation laws. Statutory reform in respect of intranational limitation laws. Query limitation laws of countries outside Australia (and New Zealand). See *Fleming v. Marshall* (2011) 279 ALR 737. *Kindsor* heads of damage/amount of damages as substantive issues; query international torts.

Role of expert evidence and the “presumption of similarity” in the proof of foreign law. Co-existence of common law and statutory methods of proof. Evidence Act 1995 (NSW) ss 174, 175.

### Question 2

Territorial jurisdiction based on the defendant's presence. See *Laurie v. Carroll* (1958) 98 CLR 310; *HRH Maharanee of Baroda v. Wildenstein* [1972] 2 QB 283.

What constitutes a voluntary submission? See *Vertzyas v. Singapore Airlines* (2000) 50 NSWLR 1.

Service out of the jurisdiction under Uniform Civil Procedure Rules 2005 (NSW) Part 11 Schedule 6. *Lewis Construction Co v. M Tichauer* [1966] VR 341; *Buttidgeig v. Universal Terminal & Stevedoring Corp* [1972] VR 626.

**Question 3**

Choice of law in contract. Identification of the proper law of the contract. In the absence of an express or inferred choice, the proper law of the contract is the legal system with which the contract has its closest and most real connection.

Substantive issues: capacity to contract; formation of contract; and illegality. Which legal system governs capacity to contract? The *lex domicilii*, the *lex loci contractus* or the objective proper law? With regard to formation of contract, *consensus ad idem* is governed by the *lex fori*: *Oceanic Sun Line Special Shipping Co v. Fay* (1988) 165 CLR 197. With regard to illegality, note the respective roles of the proper law of the contract, the *lex fori* and the law of the place of performance. *Fullerton Nominees v. Darmago* [2000] WASCA 4.

**Question 4**

The role of the *lex situs* and the foreign act of state doctrine may be explained by reference to decided cases from the Russian revolution (1917) and the Cuban revolution (1959). See, e.g., *Princess Paley Olga v. Weisz* [1929] 1 KB 718; *Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964). Public policy exceptions: gross violation of human rights; penal expropriation?; breach of public international law; property stolen by foreign government outside its territory. *Oppenheimer v. Cattermole (Inspector of Taxes)* [1976] AC 249; *Anglo-Iranian Oil Co v. Jaffrate (The Rose Mary)* [1953] 1 WLR 246; *Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.

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