

HIGH COURT OF AUSTRALIA

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

EDWARD LIPOHAR

APPELLANT

AND

THE QUEEN

RESPONDENT

Lipohar v The Queen [1999] HCA 65
9 December 1999
A14/1999

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation:

M F Gray QC with G P G Mead for the appellant (instructed by Legal Services Commission of South Australia)

B M Selway QC, Solicitor-General for South Australia with M T Boylan for the respondent (instructed by Director of Public Prosecutions (South Australia))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

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

MARK JEFFREY WINFIELD

APPELLANT

AND

THE QUEEN

RESPONDENT

Winfield v The Queen
9 December 1999
A15/1999

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation:

M F Gray QC with G P G Mead for the appellant (instructed by Legal Services Commission of South Australia)

B M Selway QC, Solicitor-General for South Australia with M T Boylan for the respondent (instructed by Director of Public Prosecutions (South Australia))

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CATCHWORDS

Lipohar v The Queen **Winfield v The Queen**

Criminal law – Jurisdiction – Conspiracy – Conspiracy to defraud at common law – Whether offence triable in a State where substantive elements of offence took place in other States and abroad – Whether offence triable in a State other than the State where the conspiracy was formed – Whether sufficient connection between subject matter of offence and State of trial.

Common law – Nature – Whether common law of Australia or individual States – Criminal law – Whether considerations of comity arise between States – Relevance of Australian Constitution – Conspiracy to defraud – Whether offence against common law of South Australia or "laws of that State".

Courts and judges – Supreme Court of South Australia – Jurisdiction – Criminal law – Conspiracy to defraud at common law.

Words and phrases – "overt act" – "crime is local" – "comity" – "jurisdiction" – "venue" – "law area" – "law district".

Criminal Law Consolidation Act 1935 (SA), ss 5C, 270(2).
Supreme Court Act 1935 (SA), s 17(2)(a).

1 GLEESON CJ. These appeals raise questions concerning the operation, within
the Australian Federation, of common law principles of territoriality in relation to
the crime of conspiracy to defraud.

The issue

2 The appellants, one a resident of Queensland, and the other a resident of
Victoria, were tried before Lander J, sitting without a jury, in the Supreme Court
of South Australia, on a charge of conspiracy to defraud. They were convicted and
sentenced to terms of imprisonment. At the commencement of the trial, Lander J
considered and rejected an application to quash the indictment, or to grant a
permanent stay of proceedings, upon the grounds that the alleged conduct of the
appellants, even if it occurred, did not constitute an offence against the law of
South Australia, and that the issue raised by the indictment was not justiciable in
South Australia¹. The appellants appealed against their convictions, raising the
same arguments as had been rejected by Lander J. Their appeals were dismissed
by the Court of Criminal Appeal (Millhouse, Perry and Bleby JJ)².

3 The relevant count in the indictment commenced as follows:

"Conspiracy to Defraud. (Common Law and Section 270(2) of the Criminal
Law Consolidation Act, 1935)".

4 There followed certain particulars of the offence.

5 In South Australia, conspiracy to defraud is a common law offence. The
penalty for the offence is prescribed by s 270(2) of the *Criminal Law Consolidation
Act 1935* (SA) ("the Act") which, so far as material, provides:

"270(2) Any person convicted of any of the following common law offences,
that is to say, any conspiracy to cheat or defraud ... shall be liable to be
imprisoned for a term not exceeding seven years."

6 The appellants were sentenced pursuant to that provision.

7 In brief, the appellants were tried in a South Australian court, convicted of a
common law offence, and sentenced under a South Australian statute, in relation
to conduct which, they contend, did not constitute an offence that was punishable
under the law of the forum. It is that contention which is central to the present
appeal.

1 *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121.

2 *R v Winfield & Lipohar* (1997) 70 SASR 300.

The facts

8 The particulars in the indictment identified the intended victim of the conspiracy as Collins Street Properties Pty Ltd ("the company"). The company was incorporated in South Australia, where it had its registered office. Its principal executive officer, the joint secretaries, and four of the six directors, resided in South Australia. It was a wholly owned subsidiary of SGIC Pty Ltd, another South Australian company. SGIC Pty Ltd was, in turn, a wholly owned subsidiary of a South Australian body corporate, the State Government Insurance Commission (SGIC), which was under the control and direction of the South Australian government. The company's central control and management was located in South Australia. In relation to the transaction in question, it was advised by Adelaide solicitors. It was in South Australia that the decision to make the payment which was the commercial objective of the intended fraud would need to be taken.

9 The company owned an office building in Melbourne, Victoria, and was looking for tenants. The letting agents for the building were in Melbourne. At the relevant time, it was common practice for owners of commercial premises to offer substantial inducement payments in order to attract suitable tenants to occupy their buildings³.

10 The appellants and others devised a fraudulent scheme, the object of which was to induce the company to make a large incentive payment to a sham tenant. The scheme involved activity, or supposed activity, in Indonesia, Thailand, Queensland, Victoria, and, in respects that will appear, South Australia. The appellants and others agreed to form a Queensland company which was represented to be associated with an Indonesian company. They negotiated with the letting agents of the company for a lease of part of the Collins Street premises, seeking to obtain a cash incentive ultimately agreed at \$6.5 million. They were made aware that any such payment would require the approval of the SGIC Board in Adelaide. They were required to provide security for the obligations of the proposed lessee. They falsely represented that the Krung Thai Bank would provide such security in the form of a promissory note. (In truth the bank had no knowledge of the transaction.) There was a meeting in Brisbane between representatives of the SGIC and the conspirators to discuss the proposed security. Following that meeting, a document was sent by facsimile transmission from Thailand to the office of the company's solicitors in Adelaide. The document, which was a sham, purported to confirm that the bank would provide a promissory note, in a certain form, as security for the tenant's obligations under the lease. Clearly, this was for the purpose of procuring advice to be given, in Adelaide, to the SGIC Board, and a decision to be made, in Adelaide, approving the lease incentive payment. The circumstance that the facsimile was sent to Adelaide was

3 See *Federal Commissioner of Taxation v Montgomery* (1999) 73 ALJR 1160; 164 ALR 435.

3.

no mere accidental, or incidental, feature of the events. It reflected a fact which is of more fundamental importance. The central control and management of the intended corporate victim of the fraud was in South Australia, and it was there that the decisions necessary for the effectuation of the fraud were to be taken.

- 11 The conspiracy went no further. Some people involved in dealings with the bank were arrested, and, when news of that came out, the negotiations for the lease and the incentive payment were terminated. Subsequently the South Australian authorities prosecuted the appellants.

The alleged crime

- 12 Lord Diplock, in *R v Bhagwan*⁴, said of the role of criminal conspiracy in the common law:

"The least systematic, the most irrational branch of English penal law, it still rests upon the legal fiction that the offence lies not in the overt acts themselves which are injurious to the common weal but in an inferred anterior agreement to commit them."

- 13 As has been pointed out by other judges, however, there may be very good reasons why the law would wish to punish people who make some agreements without waiting for the agreements to be performed⁵.

- 14 The elements of a common law conspiracy to defraud were considered in *Peters v The Queen*⁶, where McHugh J said⁷ that, in most cases, a conspiracy to defraud arises when two or more persons agree to use dishonest means with the intention of obtaining, making use of or prejudicing another person's economic right or interest, or inducing another person to act or refrain from acting to his or her economic detriment. To that proposition, in its application to the present case, there should be added a significant rider. The fact that an offence of conspiracy is complete does not mean that it has come to an end⁸. Parties can join, or leave, a conspiracy after it has been formed, and acts done in furtherance of a conspiracy will constitute continuing performance, as well as evidence, of the unlawful agreement. An agreement formed in one territorial area may be aimed at people in another area or other areas, or may reach into such other area or areas in the

4 [1972] AC 60 at 79.

5 eg *Liangsiriprasert v United States* [1991] 1 AC 225.

6 (1998) 192 CLR 493.

7 (1998) 192 CLR 493 at 525.

8 *R v Doot* [1973] AC 807 at 827 per Lord Pearson.

course of its performance. It is this aspect of criminal conspiracy that has made it difficult to relate to the theory of territoriality which has had so much influence upon common law rules concerning the administration of criminal justice.

The territorial theory of crime

- 15 Lord Halsbury's famous, and dogmatic, assertions that "(a)ll crime is local", and that jurisdiction over a crime belongs to the country where the crime was committed⁹, were made in a case about the reach of a statute enacted by a colonial legislature, but they reflected the territorial focus of the common law of crime, and they embodied a presumption of the common law which applied to the interpretation of statutes of all parliaments, including the parliament of the United Kingdom, whether or not their legislative competence was limited territorially. Considerations of international comity were influential in the development of this focus. Dixon CJ pointed this out in *The Queen v Foster; Ex parte Eastern and Australian Steamship Co Ltd*¹⁰:

"It does not follow from the adoption of the *Statute of Westminster* that Commonwealth legislation should be construed as if there were no territorial considerations affecting its interpretation. Indeed it may be fairly said that when the consequence of invalidity is removed from extra-territorial legislation it becomes more important to give effect to the presumption governing the interpretation of English legislation. That is a presumption which assumes that the legislature is expressing itself only with respect to things which internationally considered are subject to its own sovereign powers."¹¹

- 16 In *R v Treacy*¹² Lord Reid said:

"It has been recognised from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England."

- 17 One aspect of this territorial focus was the idea that most crimes have but a single location which, once established, is relevant both to the question of the jurisdiction of a court to deal with an alleged offender, and the different, although

9 *Macleod v Attorney-General for New South Wales* [1891] AC 455 at 458.

10 (1959) 103 CLR 256 at 275.

11 See also *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J.

12 [1971] AC 537 at 551.

usually related, question whether the conduct of the offender violated the law of the forum in which the offender is tried¹³. The techniques adopted by common law courts to determine that location have been criticised as artificial, and lacking coherent principle¹⁴, but they were developed as a response to problems of practical necessity, and considerations of pragmatism were probably more influential than a desire for theoretical symmetry. An example of such practical necessity is *Ward v The Queen*¹⁵. In that case a decision as to whether the unlawful homicide of a person, fatally shot whilst standing near the bank of the Murray River, occurred in New South Wales or Victoria, determined the availability of a defence of diminished responsibility, with the potential to reduce the offence from murder to manslaughter. Judgments of that kind may often appear to turn upon fine, and even artificial, distinctions, but in the administration of practical justice they are inescapable. It was the fact that New South Wales and Victoria had different laws about homicide, (a commonplace example of federalism at work), that made a territorial decision necessary.

- 18 Where a crime is created by statute, which normally describes the crime without making any particular reference to territorial locality, and where the nature of the crime is such that elements may occur in a number of territories, the resolution of questions of jurisdiction and justiciability may involve both questions of statutory construction, and the application of common law principles according to which courts decide where, out of a number of competing possibilities, a crime has been committed. An example is provided by the common law rule by which courts in England, and Australia, decide where the statutory offence of obtaining property by false pretences has been committed¹⁶. According to the preponderance of authority, the offence is committed in the place where the property is obtained, which may be different from the place or places where the deception occurred. Discussion of the rule usually proceeds upon the assumption that the offence is committed in only one place. That assumption is not a logical necessity, and whether it should be revised is a question that may be addressed in some future case.

- 19 The last mentioned assumption would be inconsistent with a rule, of common law or statute, to the effect that, in the case of a crime consisting of multiple elements, an offence was committed wherever one of those elements occurred, or a rule to the effect that the offence would be taken to be committed in any territorial area where there is a real and substantial link between the offence and the territory.

13 *Thompson v The Queen* (1989) 169 CLR 1.

14 eg Goode, "The Tortured Tale of Criminal Jurisdiction" (1997) 21 *Melbourne University Law Review* 411.

15 (1980) 142 CLR 308.

16 eg *R v Manning* [1999] QB 980; *Kron* (1995) 78 A Crim R 474.

When the Supreme Court of Canada, in *Libman v The Queen*¹⁷, decided to adopt the latter rule for Canada, involved in that decision was an abandonment of the objective of finding a single situs of a crime¹⁸.

20 In South Australia, as in a number of Australian States, there is now legislation which, in cases to which it applies, involves a similar abandonment. Section 5C of the Act provides, without derogating from any other basis on which the courts of the State may exercise criminal jurisdiction, that an offence against the law of the State is committed if all elements necessary to constitute the offence (disregarding territorial considerations) exist and a territorial nexus exists between the State and at least one element of the offence. The respondent did not place primary reliance on that section, probably for the reason given by Lord Diplock in the passage from *R v Bhagwan* quoted above. Technically, the elements of the offence of conspiracy occurred outside South Australia, and it is at least doubtful that there was a territorial nexus between an element of the offence and the State. There was a subsidiary argument based on the section but, as will appear, I find it unnecessary to deal with that argument. The point of referring to the existence of s 5C is that, like its counterparts in other Australian jurisdictions, it represents a legislative departure from the theory that crimes generally have a single situs.

21 The courts of England have declined to make such a substantial alteration to the common law¹⁹, and to do so in Australia would involve overturning established authority in this country, of the kind applied by this Court in *Thompson v The Queen*²⁰ and *Ward v The Queen*²¹. It would also involve disturbing the common law background to legislation such as s 5C of the Act. The general common law requirement of a single situs has never been absolute, and there is no reason, either in principle or in practical necessity, why it should be. Conduct which occurs within a single territory may well offend a number of laws of that territory. As the case of *Brownlie v State Pollution Control Commission*²² illustrates, conduct which occurs in one Australian State may well be affected by the laws of that State and another State as well. There is nothing new about trans-jurisdictional activity giving rise to potential breaches of the laws of a number of territories. As La Forest

17 [1985] 2 SCR 178.

18 [1985] 2 SCR 178 at 198-199.

19 eg *Board of Trade v Owen* [1957] AC 602; *R v Treacy* [1971] AC 537.

20 (1989) 169 CLR 1.

21 (1980) 142 CLR 308.

22 (1992) 27 NSWLR 78.

J pointed out in *Libman*, developments in communication by post and telegraph more than a century ago gave rise to such problems²³.

22 The implications of attempts to regulate the activities of trans-jurisdictional combinations or conspiracies, including considerations of international comity, have been explored in cases arising out of antitrust legislation. There is a discussion of such issues, in the context of the interpretation of the *Australian Industries Preservation Act* 1906 (Cth), in *Meyer Heine Pty Ltd v China Navigation Co Ltd*²⁴. That case provides an example of the extra-territorial reach of a penal statute, aimed at combinations, being affected by issues relating to international comity which were obviously taken into account by the legislature.

23 The common law offence of conspiracy which, by its nature, is capable of having trans-jurisdictional operation and effect, has not been subjected to a rigid, single-situs, rule of territoriality. Before examining the leading authorities on that subject, however, it is necessary to advert to an issue which arose in argument concerning the significance of this being a common law offence.

The common law and the statute

24 This Court, in *Lange v Australian Broadcasting Corporation*²⁵, said that "there is but one common law" in Australia, and explained what was meant by that, contrasting the position in the United States. That common law, however, recognises the States as separate jurisdictions, or law areas, where to do so is appropriate in the application of common law principles. Decisions such as *Breavington v Godleman*²⁶ and *McKain v R W Miller & Co (SA) Pty Ltd*²⁷ illustrate this.

25 When this Court, in *Ward*, and *Thompson*, set about resolving issues relevant to the situs of homicide, it did so pursuant to what Deane J, in the latter case, referred to as "a general thesis of the common law and an incident of the doctrine of sovereignty under international law that crime is essentially local or domestic"²⁸. In the former case they treated Victoria and New South Wales as relevantly separate territories. In the latter case the relevant territories were

23 [1985] 2 SCR 178 at 213-214.

24 (1966) 115 CLR 10.

25 (1997) 189 CLR 520 at 563.

26 (1988) 169 CLR 41.

27 (1991) 174 CLR 1.

28 *Thompson v The Queen* (1989) 169 CLR 1 at 33.

New South Wales and the Australian Capital Territory. No question of sovereignty under international law, or of international comity, arose as between those territories. Nevertheless, the assumption was that, for purposes of applying a common law principle concerning the reach of criminal laws, although part of the Australian Federation, they were distinct. The implications, constitutional and otherwise, of treating the States as separate law areas for various purposes associated with penal laws have not yet been fully explored. As has been observed²⁹, a case such as *Brownlie* illustrates some of the issues that may need to be resolved.

26 What is involved in the present case is not only the application of the common law. The punishment to which the appellants were subjected was prescribed by a South Australian statute. The Act, in s 270(2), establishes a penalty for the common law offence of conspiracy to defraud. Plainly there are territorial limitations upon the operation of that provision. Does it apply to a conspiracy to defraud, entered into and carried out in England, having no connection of any kind with South Australia? Surely not. Does it apply to a conspiracy to defraud, entered into and carried out in Tasmania, having no connection of any kind with South Australia? I would give a negative answer, for substantially the same reasons, which are to be found in the common law principles earlier discussed. The premise that there is but one common law in Australia, not fragmented between different States, does not require or justify the conclusion that, when a South Australian Act refers to a common law offence, it is referring to conduct occurring anywhere in Australia regardless of any connection with South Australia. If it were otherwise, in its operation within the Australian Federation, the scope of s 5C of the Act would be narrower than that of s 270(2).

27 The issue whether the conduct of the appellants constituted an offence punishable according to the law of South Australia raises questions both as to the common law principles concerning the required nexus between conduct and territory for the offence of conspiracy to defraud, and as to the meaning of s 270(2) of the Act. Both questions should be given the same answer.

Was there sufficient connection?

28 This question should be approached without any preconception that, in the case of the crime of conspiracy, there is a requirement of the common law, or a principle of statutory construction, that there can be only a single situs.

29 Leeming, "Resolving Conflicts between State Criminal Laws" (1994) 12 *Australian Bar Review* 107.

29 Conspiracies to export drugs from one jurisdiction to another have provided cases in which courts have had to address this issue³⁰.

30 In *R v Doot*³¹, Lord Wilberforce said:

"In the search for a principle, the requirement of territoriality does not, in itself, provide an answer. To many simple situations, where all relevant elements occur in this country, or, conversely, occur abroad, it may do so. But there are many 'crimes' (I use the word without prejudice at this stage) the elements of which cannot be so simply located. They may originate in one country, be continued in another, produce effects in a third."

31 In that case the House of Lords upheld convictions of conspiracy to import drugs into England even though the conspiracy had been entered into, and the offence was in that sense complete, elsewhere. By hypothesis, a crime had been committed outside England, but the conspiracy was a continuing offence, and continued into England.

32 Lord Wilberforce said³²:

"In my opinion, the key to a decision for or against the offence charged can be found in an answer to the question why the common law treats certain actions as crimes. And one answer must certainly be because the actions in question are a threat to the Queen's peace, or, as we would now perhaps say, to society. ... Conspiracies are intended to be carried into effect, and one reason why, in addition to individual prosecution of each participant, conspiracy charges are brought is because criminal action organised, and executed, in concert is more dangerous than an individual breach of the law. Why, then, refrain from prosecution where the relevant concert was, initially, formed outside the United Kingdom?"

33 Lord Pearson said³³ that the fact that the offence of conspiracy is complete when agreement is reached does not mean that it is finished, and that a conspiracy to commit a crime in England ought to be triable there if it has been wholly or partly performed there. That was sufficient to dispose of that case.

30 See, for example, *R v Fan* (1991) 24 NSWLR 60.

31 [1973] AC 807 at 817.

32 *R v Doot* [1973] AC 807 at 817-818.

33 *R v Doot* [1973] AC 807 at 827.

- 34 In *Liangsiriprasert v United States*³⁴ Lord Griffiths, speaking for the Judicial Committee of the Privy Council, went further. His Lordship said³⁵:

"Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong."

- 35 I respectfully agree with that proposition which was also accepted by the English Court of Appeal in *R v Manning*³⁶.

- 36 As the facts of the present case show, a conspiracy to defraud, unlike a conspiracy to go into another territory and there commit a discrete crime, such as robbing a bank, or supplying prohibited drugs, may involve an agreement to engage in conduct where the dishonesty is practised by trans-jurisdictional communications, and where the inducement of another person to act to his or her economic detriment operates across jurisdictional boundaries.

- 37 Trans-jurisdictional commerce and intercourse, whether within the Australian Federation or international, is now accomplished with such speed and facility, that for many purposes jurisdictional boundaries are irrelevant. They remain relevant for purposes of criminal law, but there is every reason to apply the law in a manner which accommodates the reality, especially in relation to transactions occurring within the Federation, where considerations of international comity do not inhibit such accommodation³⁷.

- 38 When the appellants and their co-conspirators set out to defraud the company, it was probably not material to them to consider where it had its central management and control, or where the money for the lease incentive payment was to come from, or where the company's legal advisers were located, although some of these facts were later made known to them. They knew that the building in respect of which the lease incentive payment was to be made was in Melbourne,

34 [1991] 1 AC 225.

35 [1991] 1 AC 225 at 251.

36 [1999] QB 980 at 1000.

37 cf *R v Treacy* [1971] AC 537 at 564.

11.

but geographical considerations beyond that were probably unimportant to them. Even so, as a matter of objective fact, there was a real connection between the conspiracy and South Australia. The intended victim of the fraud was a South Australian company, whose business was controlled from that State, and in the way in which the affairs of that company were managed, the effectuation of the fraud involved the making of a false representation to people in South Australia, and their acting on that representation. That is why the facsimile communication went to South Australia. People in South Australia were intended to act on it, to the detriment of the South Australian company.

39 I see no material difference between a conspiracy, entered into in Queensland, to bring prohibited drugs into South Australia, and a conspiracy, entered into in Queensland, to perpetrate a fraud which, by reason of the objective circumstances, involves practising a deception upon people in South Australia with a view to their acting, in South Australia, to their detriment. The conspiracy to defraud was of such a nature that its implementation involved deceiving people in South Australia, and inducing them to act to their detriment. It was, for that reason, punishable according to the law of that State.

Conclusion

40 The appeals should be dismissed.

GAUDRON, GUMMOW AND HAYNE JJ.

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I INTRODUCTION

41 These appeals are brought from the decision of the Supreme Court of South Australia sitting as the Court of Criminal Appeal (Millhouse, Perry and Bleby JJ)³⁸ which dismissed the appeals by the present appellants against a decision of the Supreme Court (Lander J)³⁹. His Honour had dismissed the applications by the present appellants and a third accused to quash and stay proceedings on an information which materially charged them with conspiracy to defraud.

38 *R v Winfield & Lipohar* (1997) 70 SASR 300.

39 *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121.

- 42 In South Australia this remains a common law offence. Its elements were propounded by this Court in *Peters v The Queen*⁴⁰. In the Court of Criminal Appeal, Perry J observed⁴¹:

"Conspiracy is an agreement to do an unlawful act, or a lawful act by unlawful means. The agreement itself constitutes the offence⁴². The peculiar characteristics of the crime of conspiracy are apt to bring the problems associated with the territorial aspects of the crime into sharp focus."

The *Criminal Law Consolidation Act* 1935 (SA) ("the Criminal Law Act") was engaged with respect not to the specification of the offence but to punishment. Section 270(2) provides a penalty of imprisonment for a term not exceeding seven years upon conviction of any conspiracy to cheat or to defraud.

The common law

- 43 To say, as it was put in some of the submissions, that the offences in question were offences "against the law of South Australia" is to conceal the true position and to provide a false starting point for analysis. The starting point is that indicated by McHugh J in *Kable v Director of Public Prosecutions (NSW)*, where his Honour said⁴³:

"Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State but is not itself the creature of any State⁴⁴. Perhaps the validity of that proposition is not as readily apparent to a State judge bound by the authority of his or her own Full Court or Court of Appeal as it is to a judge of a federal court who must apply the common law."

40 (1998) 192 CLR 493.

41 (1997) 70 SASR 300 at 314.

42 *Mulcahy v The Queen* (1868) LR 3 HL 306 at 317.

43 (1996) 189 CLR 51 at 112. See also the judgment of the Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566.

44 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 556.

His Honour added⁴⁵:

"[T]hat there is a common law of Australia as opposed to a common law of individual States is clear".

44 The common law has its source in the reasons for decisions of the courts which are reasons arrived at according to well recognised and long established judicial methods. It is a body of law created and defined by the courts. Whatever may once have been the case in England⁴⁶ the doctrine of precedent is now central to any understanding of the common law in Australia. To assert that there is more than one common law in Australia or that there is a common law of individual States is to ignore the central place which precedent has in both understanding the common law and explaining its basis.

45 This Court is placed by s 73 of the Constitution at the apex of a judicial hierarchy to give decisions upon the common law which are binding on all courts, federal, State and territorial. Different intermediate appellate courts within that hierarchy may give inconsistent rulings upon questions of common law. This disagreement will indicate that not all of these courts will have correctly applied or declared the common law. But it does not follow that there are as many bodies of common law as there are intermediate courts of appeal. The situation which arises is not materially different to that which arises where trial judges in different courts or within the same court reach different conclusions on the same point of law.

46 The ultimate foundation of precedent which binds any court to statements of principle is, as Barwick CJ put it⁴⁷, "that a court or tribunal higher in the hierarchy of the same juristic system, and thus able to reverse the lower court's judgment, has laid down that principle as part of the relevant law". Until the High Court rules on the matter, the doctrines of precedent which bind the respective courts at various levels below it in the hierarchy will provide a rule for decision. But that does not dictate the conclusion that until there is a decision of the High Court the common law of Australia does not exist, any more than before 1873 it would have been true to say that there was not one English common law on a point because the Court of King's Bench had differed from the Court of Common Pleas.

45 (1996) 189 CLR 51 at 113.

46 Simpson, "The Common Law and Legal Theory", *Oxford Essays in Jurisprudence*, 2nd Series (1973), 77 at 77-78.

47 *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 591.

47 In decisions respecting such diverse subjects as the rule in *Rylands v Fletcher*⁴⁸, corporate privilege against self-incrimination⁴⁹, the absence of a right of accused persons to the provision of counsel at public expense⁵⁰ and native title⁵¹, this Court has spoken with respect to "the common law of Australia", not the common law of the State or Territory from whose courts the appeal came to the High Court, or in which a federal court or the High Court sat in exercise of original jurisdiction.

48 In certain circumstances, or for certain purposes, it may be useful to inquire about the source of the power to enforce orders made by a court. In the case of a State Supreme Court it may be that the most immediate answer to that inquiry, in some kinds of case, is that it is a power derived from the State as a body politic or from the State Act establishing the Court or from the Constitution of that State. (Such answers might well be said to ignore the significance that should be attached to s 106⁵² of the Constitution and covering cl 5⁵³.) But that kind of inquiry (or an analysis by reference to more abstract notions of sovereignty) is apt to mislead and it does not lead to any conclusion that there is more than one common law of Australia.

48 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556.

49 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 508, 556.

50 *Dietrich v The Queen* (1992) 177 CLR 292 at 297-298, 311.

51 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15, 69-71, 109-113; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 452-453.

52 Section 106 states:

"The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

53 Covering cl 5 states:

"This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth."

49 Nor is it relevant to inquire about the powers of State legislatures to pass laws modifying or abrogating the common law any more than it is relevant to inquire about the powers of the Commonwealth Parliament to do so. Such inquiries are irrelevant because the answers to questions about how rules established by *judicial* decision may be abrogated or modified by *legislative* action say nothing about the creation of the rules or their content. So too, the converse question of whether a State legislature has abrogated or modified a common law rule is irrelevant for present purposes. The answers to such questions are silent about whether there are, or can be, rules established by judicial decision that are to remain peculiar to a particular State.

50 As indicated above, from time to time there will be decisions made by courts of record which will bind courts lower in the relevant curial hierarchy but which are not decisions made by this Court as the final appellate court for Australia. Because that is so, it is tempting, as McHugh J pointed out in *Kable*⁵⁴, for a State judge bound by the authority of his or her own Full Court or Court of Appeal to conclude that the common law for the State is fixed by that appellate decision. And inevitably there will be times when intermediate appellate courts do not speak with one voice on particular questions⁵⁵. It by no means follows, however, that a common law rule enunciated by the appellate courts of that State is a rule which is or should remain peculiar to that State. This Court is the final appellate court for the nation. When an appeal is dealt with in this Court, and its reasons are published, those reasons will form part of the common law of Australia and will bind *all* courts in the country. The Court never has and never should seek to identify some common law rule that is peculiar to one or more of the States. And yet that is the role which would be assigned to it if there were more than a single common law of Australia.

51 The federal system operates with what is now the common law of Australia. One consequence is that there do not arise in Australia, as once might have been thought⁵⁶, difficulties with the notion of a distinct "federal common law" which still are encountered in the United States after the overruling of *Swift v Tyson*⁵⁷ by

54 (1996) 189 CLR 51 at 112.

55 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.

56 *R v Kidman* (1915) 20 CLR 425 at 445, 454; *In re Usines de Melle's Patent* (1954) 91 CLR 42 at 49.

57 16 Peters 1 (1842) [41 US 1].

*Erie Railroad Company v Tompkins*⁵⁸. In *Erie*, Brandeis J, delivering the plurality opinion of the Court, said that there was "no federal general common law"⁵⁹.

52 The liability of the Commonwealth in tort and contract is created by the common law; s 75(iii) of the Constitution denies operation of what otherwise might be doctrines of Crown or executive immunity in these fields⁶⁰. The "common law" here is that of Australia, rather than a "federal common law" distinct from the common law of each of the other bodies politic in Australia.

53 The activities of the executive government of the Commonwealth which give rise to liabilities in contract and tort will, to a very significant degree, be conducted outside the seat of government and in the States. If the common law were fragmented, it would be necessary to spell out of the Australian constitutional structure principles to resolve conflicts or variances between, in particular, "federal common law" and that of the particular State in which the executive government of the Commonwealth conducted its activities. There is no textual equivalent to the mechanism which s 109 of the Constitution provides with respect to legislation. However, any conundrum is avoided once it is seen that there is but one common law, not as many as there are bodies politic.

54 It is true, as the Solicitor-General for South Australia emphasised in the submissions for the respondent, that the common law of England was received at different times and in different circumstances in various parts of what is now Australia⁶¹. Although some parts of the Province of South Australia had previously been part of the Colony of New South Wales, s 1 of the *South Australia Colonisation Act* 1834 (Imp) expressly excluded any continued application of the

58 304 US 64 (1938).

59 304 US 64 at 78 (1938). See as to the continuing uncertainty respecting the subject after *Erie*, Wright, *Law of Federal Courts*, 5th ed (1994), §60. Professor Wright concludes:

"It may be, as Justice Brandeis said, that there is no federal *general* common law, but there remains a substantial area for the application of federal common law."

60 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 491, 526-527, 542, 550-551.

61 *R v Kidman* (1915) 20 CLR 425 at 435-436; *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 466-467; Castles, "The Reception and Status of English Law in Australia", (1963) 2 *Adelaide Law Review* 1 at 2-19.

laws of that Colony, and the Province was established on 19 February 1836⁶². The common law of England was received into what were then colonies, not what are now States. Nonetheless, as Griffith CJ emphasised⁶³, the common law did not thereby "become disintegrated into six separate codes of law", one for each colony. Rather, in *Skelton v Collins*⁶⁴, Windeyer J spoke of what was inherited as both a body of doctrines and principles, and "its method and its spirit", including "the creative element in the work of courts". His Honour there identified this as having become the common law of Australia.

55 At the time of federation the English common law was treated as a single body of law, although local conditions might render a particular part of it "inapplicable". However, there was a view supported by Barton J and O'Connor J in *Delohery v Permanent Trustee Co of NSW*⁶⁵ that even then the law was "dormant" until the "occasion arises for enforcing it". In its original form, s 80 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") spoke of "the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court ... is held". This is consistent with the view of Griffith CJ set out above, not with fragmentation by reason of the erection by the Constitution of the colonies into States.

56 The uniform nature of English common law attracted the attention of the Privy Council in the practical context of the operation of the system of precedent within what was then the Empire. In 1879, their Lordships declared in an appeal from New South Wales that it was⁶⁶:

"of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same".

When this position was changed in 1967, their Lordships spoke in *Australian Consolidated Press Ltd v Uren*⁶⁷, litigation which had commenced in New South

62 *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 676-677.

63 *R v Kidman* (1915) 20 CLR 425 at 436.

64 (1966) 115 CLR 94 at 134-135. See also, as to common law and crime, the observations of Webb J in *R v Sharkey* (1949) 79 CLR 121 at 163.

65 (1904) 1 CLR 283 at 291.

66 *Trimble v Hill* (1879) 5 App Cas 342 at 345.

67 (1967) 117 CLR 221 at 241; [1969] 1 AC 590 at 644.

Wales, not of the law in that State but of the law in Australia and of the authority of this Court to change it.

57 As was emphasised in *Lange v Australian Broadcasting Corporation*⁶⁸, the development of the common law in Australia must conform with the Constitution because "[t]he common law and the requirements of the Constitution cannot be at odds"⁶⁹. The recognition of an Australian common law was essential to the reasoning in that case, particularly for the putting to one side of any question of adoption from the United States of a "constitutional privilege" against enforcement of the distinct common laws of the several States of the Union⁷⁰. However, within their respective spheres of competence, the common law may be abrogated or amended by the federal Parliament and the Parliaments of the States and legislatures of certain Territories. Laws so made may be repealed and the common law revived. The result at any given time may be that the operation of the common law upon a particular subject may vary according to the circumstances of litigation, including the identity of the forum and of the *lex causae*. For example, in one Australian forum the applicable *lex causae* may be found in a statute, enacted by its legislature, and in another Australian forum that statute would not operate to displace or vary the common law. Further, in that second forum, the common law may be displaced or varied by statute enacted by its legislature.

58 The Court was told that this is what had happened with respect to the common law offences charged here. In some States criminal codes applied, in others statute had modified or displaced the common law. But, as will appear in Section VII, this does not yield issues of the type to which the rules of private international law speak.

59 It also is important for an understanding of the issues which arise to appreciate the position had the common law been supplanted in South Australia by statute. A "remote and general connexion" between the State and the elements of the statutory offence of conspiracy would have sufficed for the valid operation of that law⁷¹.

68 (1997) 189 CLR 520 at 566.

69 See Zines, "The Common Law in Australia: Its Nature and Constitutional Significance", (1999) *Law and Policy Papers*, Paper No 13, Centre for International and Public Law, Australian National University.

70 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-565.

71 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14.

The proceedings in South Australia

60 In South Australia, all indictable offences are charged on an information. Section 275 of the Criminal Law Act permitted this to be done⁷². When the accused were arraigned and pleaded not guilty, their pleas were treated as being a denial of jurisdiction. Further, each of the accused applied pursuant to r 8 of the Supreme Court Criminal Rules 1992 (SA) ("the Rules") for an order quashing the information on the ground that the information was bad because it did not disclose an offence triable in the courts of South Australia. Also pursuant to r 8, each accused sought an order on like grounds permanently staying further proceedings upon the information⁷³.

61 With the consent of the parties, Lander J was presented with a large body of material for the purpose of determining the applications. His Honour held that the charge was "justiciable" in South Australia⁷⁴ and dismissed the applications. The accused elected for trial by judge alone pursuant to s 7 of the *Juries Act* 1927 (SA).

72 Section 275 stated:

"(1) Any person may be put upon his trial at any criminal sessions of the Supreme Court, for any offence, on an information presented to the Court in the name and by the authority of the Attorney-General.

(2) Every rule of law and enactment for the time being in force in the State relating to indictments and to the manner and form of pleading thereto and to the trial thereon, and generally to all matters subsequent to the finding of the indictment, shall apply to any information so presented."

73 Rule 8 provides that any application to quash any proceedings before the Supreme Court in its criminal jurisdiction or to stay such proceedings be made in a prescribed form and, unless a judge otherwise directs, the application shall:

- "(a) be filed in the Court and made returnable before the person committed for trial has pleaded to the charges which are to be the subject of the application;
- (b) be supported by any affidavit upon which the person committed for trial relies in support of the application, which affidavit shall be filed with the notice of the application;
- (c) be served with copies of any supporting affidavit upon all other interested parties as soon as possible after it has been filed;
- (d) be returnable before a Judge in open Court whether he is to be the Judge upon the trial of the accused or not."

74 (1995) 65 SASR 121 at 155.

The present appellants were convicted, whilst the other person accused was acquitted.

62 The issue before this Court is whether the Court of Criminal Appeal erred in rejecting the appeals from the decision of Lander J dismissing the applications under r 8 of the Rules. The appellants contend that the applications should have been successful because the conspiracy to defraud alleged against them was formed wholly outside the territorial boundaries of South Australia and was not a crime to commit an unlawful act in that State. We would reject those submissions, because they proceed from false premises as to the relevant legal foundation of the jurisdiction of the Supreme Court, and would dismiss the appeals.

63 The facts giving rise to the offences are set out in Section VIII of these reasons but it is convenient now to refer to the particulars of the offences and the object of the conspiracy by way of background to the issues in these appeals. The particulars of the offence given in the information were:

"Mark Jeffery Winfield, Ian David Chandler and Edward Lipohar between the 1st November, 1991 and the 7th March, 1992 at Adelaide and other places, conspired together and with Roosevelt Tan and Jack Samardzija to defraud Collins Street Properties Pty Ltd of an incentive payment in the sum of about \$6,500,000 by falsely representing that either P T Mecosin (Indonesia) or P T Mecosin (Australia) Ltd was an authorised representative of P T Mecosin Indonesia and that P T Mecosin (Australia) Ltd intended to comply with the terms of a lease agreement in relation to part of the property situated at 333 Collins Street, Melbourne, Victoria and that a Krung Thai Bank promissory note of an alleged value of US\$10,000,000 proffered as security was a good and valid negotiable instrument."

64 Despite the averment of conduct "at Adelaide and other places", neither appellant nor the other alleged conspirators were present at any stage in South Australia. Substantial activities in furtherance of the conspiracy were conducted in Queensland and Victoria, and it may be inferred that, at least in part, the conspiracy was formed there. Collins Street Properties Pty Ltd ("Collins Street") was incorporated in, directed from and had its registered office in Adelaide but carried on business of leasing premises at 333 Collins Street, Melbourne, of which it was the owner. Collins Street was a wholly owned subsidiary of a company which also was incorporated in South Australia. It, in turn, was owned by a statutory body corporate of that State, the State Government Insurance Commission ("SGIC"), controlled by the Government of South Australia. The object of the conspiracy was to defraud Collins Street of an incentive payment in a proposed lease of the premises.

II THE ISSUES

65 In *Strassheim v Daily*, Holmes J, delivering the opinion of the Court, said⁷⁵:

"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if [the actor] had been present at the effect".

Later, in *R v Doot*⁷⁶, whilst Lord Wilberforce reserved the question "whether a conspiracy formed abroad to do an illegal act in England, but not actually implemented [there], could be tried in the courts of [England]"⁷⁷, his Lordship declared⁷⁸:

"The truth is that, in the normal case of a conspiracy carried out, or partly carried out, in this country, the location of the formation of the agreement is irrelevant: the attack upon the laws of this country is identical wherever the conspirators happened to meet; the 'conspiracy' is a complex, formed indeed, but not separably completed, at the first meeting of the plotters."

We respectfully agree. The reference by Lord Wilberforce to the attack on the laws of England reflects his earlier statement in *Doot* that "the common law treats certain actions as crimes" on the ground that the "actions in question are a threat to the Queen's peace, or, as we would now perhaps say, to society"⁷⁹.

66 On one branch of the written submissions (which were developed in argument), the respondent advocates a similar approach, but adjusted to fit the structure of the Australian legal system. The submission is that if (a) the agreement was made, in whole or in part, and was to be performed, in whole or in part, within Australia and (b) the performance of the relevant common law conspiracy to defraud would have a real and substantial effect within a particular Australian forum, two consequences follow. First, there is an offence under the common law of Australia. Secondly, the offence may be tried in the courts of that

75 221 US 280 at 285 (1911).

76 [1973] AC 807.

77 [1973] AC 807 at 818.

78 [1973] AC 807 at 818.

79 [1973] AC 807 at 817.

particular forum. This, in substance, reflects the approach taken by Perry J in the Court of Criminal Appeal. His Honour said⁸⁰:

"[T]here would appear to be no good reason why, in a federation of States such as the Commonwealth of Australia, the ambit of the crime of conspiracy at common law should not extend to encompass a conspiracy hatched in another State or Territory, when the forum State or its citizens, stand to be the ultimate victims of it.

I add that I do not see that it is at all inconsistent with the view which I have just expressed that there may be more than one jurisdiction in which a given crime of conspiracy may be prosecuted. Where an agreement is reached, and acts which are an expression of the agreement are performed in different jurisdictions, a crime against the law of more than one jurisdiction may have been committed.

I do not think that in such circumstances, there is any question of 'comity'.

...

Here, the target of the conspiracy was a South Australian company, [Collins Street]. If the conspiracy had been successfully carried out, that company would have been induced to pay about \$6.5 million to the appellants as a result of their fraudulent representations. I do not think it matters whether one speaks in terms of 'harm', 'public mischief', disturbance of the 'Queen's peace', the 'good of society', or even 'peace, welfare and good government'. It seems to me that if the impact of the substantive offence would have been felt in South Australia, in the sense that the resulting loss would have been suffered in this State, the inchoate offence constituted by the agreement was a breach of South Australian law, that is, the common law offence of conspiracy to defraud.

The fact that the company was carrying on business at the time in Victoria, in the sense that it was offering a lease of a building in Melbourne, is not a circumstance which, in my view, detracts from the opinion which I have just expressed."

67 It is here that the significance of the present appeals is found. Perry J referred to "a breach of South Australian law" but that does not put the matter accurately. As has been indicated in Section I, the offences were against the common law of Australia and the threat, in the sense used by Lord Wilberforce, was to Australian

80 (1997) 70 SASR 300 at 319-320.

society rather than to any narrower community interest represented by a particular State. Substantial steps in furtherance of the conspiracy took place within Australia and, it may be inferred, that, at least to a significant degree, the conspiracy itself was formed within Australia.

68 Had the Supreme Court been exercising a national jurisdiction, then the case would have fallen fairly closely within the reasoning of Lord Wilberforce in *Doot*. However, the Supreme Court was not exercising a national jurisdiction as it does when exercising federal jurisdiction, for example under s 68 of the Judiciary Act in respect of prosecutions of offences against laws of the Commonwealth⁸¹.

69 It is necessary for the exercise by the Supreme Court of its authority to try and punish those accused of indictable offences that they be brought before the Supreme Court, there being no trial *in absentia* at common law in the ordinary course⁸². In the present case this was achieved by the operation of the *Service and Execution of Process Act* 1992 (Cth) ("the Service and Execution of Process Act"), apparently pursuant to the provisions of Pt 5 Div 1 (ss 81-90). However, such legislation does not expand the "subject-matter" as distinct from the "territorial" jurisdiction of the State court⁸³. Nor does it have the consequence that the State court is exercising federal jurisdiction at the trial of persons in the position of the appellants. The legislation operates "in aid of the functions of the States and does not relate to what otherwise is a function of the Commonwealth"⁸⁴.

70 Given the connections between the offences charged and the area of Australia beyond South Australia, other States had interests in the matter. Yet only South Australia moved to prosecute. The Supreme Court, as will shortly appear, had jurisdiction "in and for the State". In such a situation, where the accused are brought before the Supreme Court of a State by processes of extradition from other States under federal law, and they are charged with offences against the Australian

81 See the discussion by Gaudron J in *The Commonwealth v Mewett* (1997) 191 CLR 471 at 524-525.

82 See *Lawrence v The King* [1933] AC 699 at 708; *Athanassiadis v Government of Greece* [1971] AC 282 at 294-296 (n); *R v Jones (Robert) (No 2)* [1972] 1 WLR 887 at 890-891; [1972] 2 All ER 731 at 734-736; *Tassell v Hayes* (1987) 163 CLR 34 at 43-44; *Wiest v Director of Public Prosecutions* (1988) 86 ALR 464 at 494; *R v Hallocoglu* (1992) 29 NSWLR 67 at 71-72; *Kunnath v The State* [1993] 1 WLR 1315 at 1319-1320; [1993] 4 All ER 30 at 35-36; *R v Jones* (1998) 72 SASR 281 at 292-295; *Ebatarinja v Deland* (1998) 194 CLR 444 at 454.

83 *Flaherty v Girgis* (1987) 162 CLR 574 at 598.

84 *Aston v Irvine* (1955) 92 CLR 353 at 364.

common law, is there a further requirement of contact between those alleged offences and the forum State before it can properly be said that the Supreme Court is exercising jurisdiction "in and for" that State? Does it accord with the Australian constitutional structure, including the requirement that each State accord full faith and credit to the judicial proceedings of the other States, that the prosecution authorities of the forum State may proceed to prosecute and seek punishment in that State of offences against common law only if there be some adequate contact between the State and the particular offences charged? If so, what is the requisite nature of that contact?

71 Must it at least be as strong as those which would support the validity of State legislation which provided that an act done outside the State was a punishable offence? In that regard, it should be noted that well before the commencement of the *Australia Act* 1986 (Cth) ("the Australia Act"), it was competent for a State legislature to provide that an act done outside the State be a punishable offence if there were "elements sufficiently connected with [the State] to enable the legislature of that State to deal with them"⁸⁵.

72 First, the questions arise from the identification by its governing statute of the jurisdiction of the Supreme Court of South Australia as one "in and for the State". To give effect to the statute, upon its proper construction, is neither to sweep away settled jurisdictional rules, to ignore the division of the country into geographical and political units, nor to create new common law offences.

73 Secondly, in answering these questions respecting the authority of the Supreme Court, regard must be had to the framing by the parties of their respective submissions. This requires treatment of a number of matters which, whilst at first blush are of primary significance, in the end are not determinative. To a degree they reflect a tendency to treat the State of South Australia as if it stood on the same footing, with respect to the common law, as does England, and to translate directly the reasoning of the House of Lords in *Doot*. In short, there was a failure in some of the submissions to view the problem through Australian spectacles, which should be bifocal.

74 The distractions to which this gives rise include what in *Grannall v C Geo Kellaway and Sons Pty Ltd*⁸⁶ this Court identified as "the rule that all offences are local and territorial" and related notions of comity between nation states

85 *Grannall v C Geo Kellaway and Sons Pty Ltd* (1955) 93 CLR 36 at 52. See also *Ex parte Iskra*; *Ex parte Mercantile Transport Co Pty Limited* (1962) 63 SR (NSW) 538 at 552.

86 (1955) 93 CLR 36 at 52.

(Section VI) and of "jurisdiction" and "venue" in criminal law (Section IV). It also is appropriate to consider the significance of statute (Section V) and why the issues relating to criminal law with which this case is concerned are not resolved by reference to the rules of private international law, whether in its international or intra-Australian dimension (Section VII). With an understanding of the true significance of these matters for the appeals, it will be convenient (in Section IX) to dispose of the appeals after an appreciation of the facts (Section VIII).

III THE SUPREME COURT OF SOUTH AUSTRALIA

75 Some consideration of the constitution and authority of the Supreme Court of South Australia is necessary. The Supreme Court has vested in it by s 17(2)(a) of the *Supreme Court Act* 1935 (SA) ("the Supreme Court Act") "the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by" certain English courts. These are identified to include both the courts at Westminster which were united and consolidated by s 3 of the *Supreme Court of Judicature Act* 1873 (UK) ("the Judicature Act") to constitute the Supreme Court of Judicature, and the courts created by commissions of assize. Paragraphs (b) and (c) of s 17(2) respectively vest such other jurisdiction "as is vested in, or capable of being exercised by the court" and "as is in [the Supreme Court Act] conferred upon the court". The latter includes jurisdiction in probate (s 18) and matrimonial causes (s 19). The matrimonial causes jurisdiction is now subject to the operation given to the *Family Law Act* 1975 (Cth) by s 109 of the Constitution.

76 The phrase "in and for the State" in s 17(2)(a) indicates the federal structure into which the powers of the old English courts, which existed before the Judicature Act, were assimilated by the Supreme Court Act. This place in the federal structure is further indicated by: the established position provided for the State Supreme Courts by s 73 of the Constitution; the reach of s 77(iii) of the Constitution with respect to investment of federal jurisdiction in State courts; the reasoning in *Kable*⁸⁷; the powers of the Parliament to legislate to confer original jurisdiction on this Court in any matter "[r]elating to the same subject-matter claimed under the laws of different States" (s 76(iv)), and to legislate with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States (s 51(xxiv))⁸⁸ and

⁸⁷ (1996) 189 CLR 51.

⁸⁸ Now provided for by the Service and Execution of Process Act.

the recognition of State laws, public Acts and records and judicial proceedings (s 51(xxv))⁸⁹; and the full faith and credit directly required by s 118.

- 77 The Australian legal system, of which South Australia and its institutions of government, including the Supreme Court, are part, differs considerably from that in England in the last century. Assimilation rather than direct translation is what is achieved by the phrase in par (a) of s 17(2), "like jurisdiction, in and for the State".

IV "JURISDICTION", "VENUE" AND "CRIME IS LOCAL"

- 78 The term "jurisdiction" here, as elsewhere, gives rise to difficulty. It is a generic term, a point made by Isaacs J in *Baxter v Commissioners of Taxation (NSW)*⁹⁰. It is used in a variety of senses, some relating to geography, some to persons and procedures, others to constitutional and judicial structures and powers. Thus, "federal jurisdiction" is "the authority to adjudicate derived from the Commonwealth Constitution and laws"⁹¹ whereas the phrase "inherent jurisdiction", used in relation to such things as the granting of permanent stays for abuse of process, identifies the power of a court to make orders of a particular description⁹².
- 79 "Jurisdiction" may be used (i) to describe the amenability of a defendant to the court's writ and the geographical reach of that writ, or (ii) rather differently, to identify the subject-matter of those actions entertained by a particular court, or,

89 See *State and Territorial Laws and Records Recognition Act* 1901 (Cth) ("the Recognition Act").

90 (1907) 4 CLR (Pt 2) 1087 at 1142. In *United States v Vanness* 85 F 3d 661 at 663(n) (1996), "jurisdiction" was said to be "a word of many, too many, meanings".

91 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR (Pt 2) 1087 at 1142. See also *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Gould v Brown* (1998) 193 CLR 346 at 379.

92 *Williams v Spautz* (1992) 174 CLR 509 at 518-519; *Pelechowski v Registrar, Court of Appeal* (1999) 73 ALJR 687 at 695-696; 162 ALR 336 at 346-348.

finally (iii) to locate a particular territorial or "law area"⁹³ or "law district"⁹⁴. The distinction between (i) and (ii) was drawn by Mason ACJ, Wilson and Dawson JJ in *Flaherty v Girgis*⁹⁵. In passages in their joint judgment in *Thompson v The Queen*⁹⁶, Mason CJ and Dawson J used the term "jurisdiction" in all three of these senses.

80 The present appeals concern a variant of (ii). The law area (which here is Australia, for it is with offences against its common law that the appellants were tried and punished) operates upon a wider plane than that of the State by whose institutions the trial and punishment of the appellants were undertaken. Thus, the law area and the venue do not coincide. This disparity, in the Australian legal system, is a significant but not a determinative consideration in ascertaining the nature of the jurisdiction exercised in these prosecutions and the limitations upon it.

81 What has been identified as the refusal of common law courts to entertain prosecutions save at and by the law of the place where the offence had been committed appears to have grown out of the classification of criminal trials as local actions (as indicated below in Section VII). Conditions respecting venue thereby arose⁹⁷. Further, it was significant that, at common law, the grand jury was sworn to inquire of acts done within their vicinage, so that if a person were wounded in one vicinage but died in another, the offender was indictable in neither⁹⁸. These considerations appear also to have provided the source of the rule attributed to *British South Africa Company v Companhia de Moçambique*⁹⁹ whereby the common law courts refused to try issues respecting title to immovables located

93 An expression used by the Court in *Laurie v Carroll* (1958) 98 CLR 310 at 331, with respect to New South Wales and Victoria. See also *Breavington v Godleman* (1988) 169 CLR 41 at 77, 97, 107.

94 An expression used by Wilson and Gaudron JJ in *Breavington v Godleman* (1988) 169 CLR 41 at 87.

95 (1987) 162 CLR 574 at 598. See also *Parsons v Martin* (1984) 5 FCR 235 at 240.

96 (1989) 169 CLR 1 at 11-12.

97 Leflar, "Extrastate Enforcement of Penal and Governmental Claims", (1932) 46 *Harvard Law Review* 193 at 198.

98 Blackstone, *The Laws of England*, vol 4, §303.

99 [1893] AC 602.

outside the forum¹⁰⁰. However, venue is concerned with the place of trial whilst "jurisdiction" is aptly used here to identify the existence of authority to adjudicate a particular dispute.

- 82 The reasoning respecting the common law as to venue was expounded in decisions before the law in England was changed by s 13 of the *Juries Act* 1825 (UK). This was before the establishment of the Province of South Australia. In *R v Treacy*, Lord Diplock said that the decisions respecting what his Lordship identified as "the rules of venue" involved different questions from those which arose in the modern criminal trials. His Lordship stated¹⁰¹:

"In the venue cases, the facts alleged against the prisoner unquestionably amounted to a criminal offence in English law. The only question was whether under the technical rules of venue he was liable to be tried before a court whose jurors were drawn from one locality rather than another. The historical origin of those rules dated back to the embryonic stage of development of English trial by jury. Jurors originally combined the functions of 'know-ers' of facts as well as 'tri-ers' of facts and the prisoner was entitled to have his guilt determined by jurors drawn from an area where the inhabitants would be most likely to know the facts alleged to constitute the crime with which he was charged. The rules of venue continued to be applied long after the jury had assumed its modern function of deciding facts upon evidence adduced before it."

Lord Diplock went on to explain that, before the law was changed by statute, "jurisdiction" was involved, but in the particular sense of the competing local jurisdictions of courts in England and Wales. Lord Salmon spoke to similar effect in *Doot*¹⁰².

- 83 Difficulties arise in the application of the notion of venue to crimes the crucial element of which may be an omission, or a series of steps by a number of actors in different places, or a meeting of minds united in time but divorced in location although the actors are linked by telephone or like means. The facts of the present case emphasise the point.

100 *Dagi v The Broken Hill Proprietary Company Ltd (No 2)* [1997] 1 VR 428 at 438-439.

101 [1971] AC 537 at 559. See also George, "Extraterritorial Application of Penal Legislation", (1966) 64 *Michigan Law Review* 609 at 610.

102 [1973] AC 807 at 834.

84 In *Ward v The Queen*¹⁰³ the prosecution accepted that it was not the law area where the act of the accused was done (Victoria) but the law area where that act took effect upon its victim (New South Wales) which "determine[d] the locus of the crime [of murder] and, in turn, the courts having jurisdiction in respect of it". The consequence of the basis upon which that case was argued is that the case does not lay down any settled requirement as to what is a sufficient territorial nexus between the elements of a common law offence and the territory of the State in which it is prosecuted. However, *Ward* does indicate that it would have been within the power of the Parliament of Victoria to legislate "to provide that a crime should be justiciable by a Victorian court if the initiating act (such as the firing of a shot) was done in Victoria notwithstanding that the result occurred in New South Wales"¹⁰⁴.

85 Thus, statute may intervene. The appellant in *Thompson v The Queen*¹⁰⁵ had been charged in the Australian Capital Territory with murder. The relevant statute law¹⁰⁶ provided that, where the cause of death occurred outside the Territory (for example, in New South Wales) but the death occurred inside the Territory, the offence of murder might be dealt with in all respects as if it had been wholly committed inside the Territory. This Court was concerned to determine the standard of proof applicable to the establishment of the authority of the Supreme Court of the Australian Capital Territory to try the appellant. There was some discussion in the judgments as to the nature of the jurisdiction to try crime where some elements of the offence took place outside the law area in which the charge is laid. However, this was against the background of submissions, the effect of which would have been that neither the courts of the Territory nor of New South Wales had jurisdiction to try the appellant. Thus, like *Ward*, *Thompson* did not directly concern issues of the nature which arise here. The present case is different. Here, as has been pointed out in Section II, several States had interests in the matter, although only one moved to prosecute.

86 Following the decision in *Thompson*, what is now numbered s 5C was introduced into the Criminal Law Act¹⁰⁷. This provision was debated in the course

¹⁰³ (1980) 142 CLR 308 at 315; cf *Hazlett v Presnell* (1982) 149 CLR 107 at 111.

¹⁰⁴ (1980) 142 CLR 308 at 314.

¹⁰⁵ (1989) 169 CLR 1.

¹⁰⁶ s 25 of the *Crimes Act* 1900 (NSW), as adapted to the Australian Capital Territory.

¹⁰⁷ By s 2 of the *Criminal Law Consolidation (Application of Criminal Law) Amendment Act* 1992 (SA). Similar provision is made by the *Crimes (Application)* (Footnote continues on next page)

of argument but it "does not derogate from any other basis on which the courts of the State may exercise criminal jurisdiction" (s 5C(9)). It deals with offences against the "law of the State" (s 5C(1)), and thus not with the offences involved in these appeals. The provision was designed to provide¹⁰⁸:

"for the application of the criminal law of the State in any case where all of the elements of an offence exist and a territorial nexus exists between the State and at least one of these elements. The territorial nexus exists if the element is or includes an event occurring in the State, or the person alleged to have committed the offence was in the State at the time of the occurrence of an event that is, or is included in, an element of the offence. The existence of the territorial nexus will be presumed, and the presumption will be conclusive unless the court of trial is satisfied, on the balance of probabilities, that the necessary territorial nexus does not exist. The provision will not apply to an offence that makes the place of the commission of the offence an element of the offence, to an offence that excludes the requirement for a territorial nexus, or to an offence for a charge laid before the commencement of the section."

87 In *Thompson*, Brennan J¹⁰⁹ referred to the speech of Lord Diplock in *Treacy* and observations of Devlin J in *R v Martin*¹¹⁰, and said:

"The jurisdiction of a court to hear and determine a charge of a criminal offence and the territorial ambit of a law which creates or defines the offence charged are two distinct questions".

Accordingly, the question of "[w]hat constitutes an offence known to the law of a jurisdiction is a separate and distinct question from that of whether the law of a particular jurisdiction extends beyond the geographical borders of that jurisdiction"¹¹¹.

of Criminal Law) Amendment Act 1992 (NSW). See also ss 243B and 243C of the Australian Securities and Investments Commission Act 1989 (Cth) ("the ASIC Act").

108 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 13 October 1992 at 790.

109 (1989) 169 CLR 1 at 19.

110 [1956] 2 QB 272 at 285.

111 Hinton and Lind, "The Territorial Application of the Criminal Law – When Crime is not Local", (1999) 23 *Criminal Law Journal* 285 at 297.

88 Thus, in *Treacy*, Lord Diplock had said¹¹²:

"In view of the way in which the question is framed and the wide-ranging argument about 'jurisdiction' before your Lordships' House, I am prompted to state at the outset that the question in this appeal is not whether the Central Criminal Court had jurisdiction to try the defendant on that charge [of blackmail contrary to s 21 of the *Theft Act* 1968 (UK)] but whether the facts alleged and proved against him amounted to a criminal offence under the English Act of Parliament.

...

The fact that the appellant was arrested in Greater London and committed for trial at the Central Criminal Court unquestionably gave to that court jurisdiction to determine whether or not he was guilty of the offence for which he was indicted."

89 Recently, in *R v Manning*¹¹³, the English Court of Criminal Appeal doubted the correctness of such statements as to the sufficiency of presence to found jurisdiction. Buxton LJ said¹¹⁴:

"The English courts had jurisdiction subject to two conditions: that the defendant was physically present before the court (a matter that cannot be affected by construction of the statute) and that he had completed the crime, as defined, within England and Wales. The latter was an overriding requirement that was applied in the light of, rather than which affected the terms of, the definition of the crime charged."

90 However, the distinction drawn by Lord Diplock has attracted support in this country¹¹⁵. In the course of her reasons for judgment in *Thompson*¹¹⁶, Gaudron J observed:

112 [1971] AC 537 at 559.

113 [1999] 2 WLR 430; [1998] 4 All ER 876.

114 [1999] 2 WLR 430 at 444; [1998] 4 All ER 876 at 889.

115 *Thompson* (1989) 169 CLR 1 at 19; *McDonald v Bojkovic* [1987] VR 387 at 392; *Re Anne Hamilton-Byrne* [1995] 1 VR 129 at 138-139; *Isaac, Tajeddine & Elachi* (1996) 87 A Crim R 513 at 514.

116 (1989) 169 CLR 1 at 39.

"The issue of jurisdiction is ... a discrete issue and distinct from the issue of guilt which depends upon the elements of the offence charged being made out."

- 91 Nevertheless, to accept that distinction, as it must be, is not fully to resolve the issue in the present appeals. Nor is analysis in the present case assisted by repetition of the maxim that "crime is local" and by treating the locality here as the territory of South Australia. In *Hyde v United States*¹¹⁷, Holmes J referred to the extrapolation of rules respecting trials in particular localities in England and Wales to the level of a general principle that "crime is local". When applied to the law of conspiracy, this demonstrated to Holmes J "one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis"¹¹⁸. Professor W W Cook took up the point in his famous article published in 1924, "The Logical and Legal Bases of the Conflict of Laws"¹¹⁹. He wrote:

"We are told – the accuracy of the statement is not entirely clear – that at one period in the development of English law, a murderer could not be punished unless both the blow and the death took place in the county in which the prosecution was brought. The difficulty seems to have been connected with the fact that the early triers of fact answered of their own knowledge and without testimony of witnesses, and therefore could not know both who struck the blow and that the death had happened unless both events occurred in the county. This rule was changed, or at least the doubt as to the law settled, by statute in the reign of Edward VI so as to give jurisdiction to the county in which the death occurred. It is interesting to find this common-law rule, introduced originally apparently for purely practical reasons, later erected into an immutable 'principle' of 'jurisdiction,' based on arguments as to the territorial nature of law."

- 92 The issue here arises from the concurrent interests of several States with respect to the events founding the prosecution of the appellants in South Australia. In particular, the substantive law in question does not derive its force from the authority of the venue in which the prosecution takes place. The unified common law applies in South Australia but it is not itself the creature of any State. The

¹¹⁷ 225 US 347 (1911).

¹¹⁸ 225 US 347 at 391 (1911).

¹¹⁹ (1924) 33 *Yale Law Journal* 457 at 460-461 (footnotes omitted).

result, as indicated earlier in this Section, is that the law area and the venue do not coincide.

- 93 The presence of the present appellants before the Supreme Court of South Australia was secured by interstate rendition procedures established by federal law. The essential question is whether they were properly tried and punished in the Supreme Court of South Australia in exercise of jurisdiction vested by s 17(2) of the Supreme Court Act for offences against the common law of Australia respecting conspiracy to defraud. In the circumstances, was the Supreme Court exercising jurisdiction "in and for" that State?

V STATUTE AND CRIMINAL LAW

- 94 In modern times, with respect to crimes created by statute, where it is specified as sufficient for liability that some or all of the elements are located outside the territory of the enacting legislature, two questions arise. The first is one of construction. With respect to the United Kingdom, it was described as follows by Lord Diplock in *Treacy*¹²⁰:

"The Parliament of the United Kingdom has plenary power, if it chooses to exercise it, to empower any court in the United Kingdom to punish persons present in its territories for having done physical acts wherever the acts were done and wherever their consequences took effect. When Parliament, as in the Theft Act 1968, defines new crimes in words which, as a matter of language, do not contain any geographical limitation either as to where a person's punishable conduct took place or, when the definition requires that the conduct shall be followed by specified consequences, as to where those consequences took effect, what reason have we to suppose that Parliament intended any geographical limitation to be understood?"

- 95 His Lordship answered that question by stating, now that the technicalities of venue had long been abolished, the "only relevant reason" was to be found in the municipal rules of international comity which "in the absence of express provision to the contrary, it is presumed that Parliament did not intend to break"¹²¹. Lord Diplock added¹²²:

¹²⁰ [1971] AC 537 at 561.

¹²¹ [1971] AC 537 at 561.

¹²² [1971] AC 537 at 561.

"It would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequences there. But I can see no reason in comity for requiring any wider limitation than that upon the exercise by Parliament of its legislative power in the field of criminal law."

In delivering the judgment of the Supreme Court of Canada in *Libman v The Queen*, La Forest J reached a similar conclusion¹²³.

96 An example in South Australia of crime with "extraterritorial" elements is provided by s 206 of the Criminal Law Act. This states¹²⁴:

"Any person who commits any robbery on the high seas ... shall be guilty of an offence and liable to be imprisoned for life."

Another example is provided by federal criminal law. Section 3A of the Crimes Act states:

"This Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories."

Section 3A is intended to and does displace any presumption that a penal statute

¹²³ [1985] 2 SCR 178 at 208-214. See also his Lordship's judgment in *United States of America v Cotroni* [1989] 1 SCR 1469 at 1486-1488.

¹²⁴ Section 206 restates the common law position put by Story J in *The Marianna Flora* 11 Wheat 1 at 40-41 (1826) [24 US 1 at 38] that pirates are "the common enemies of all mankind". Provision for the punishment of acts of piracy is also made by Pt IV (ss 51-56) of the *Crimes Act* 1914 (Cth) ("the Crimes Act").

will be taken not to have extraterritorial operation¹²⁵. Further, s 3A applies to provisions of the Crimes Act such as s 86(1), which states:

"A person who conspires with another person to commit an offence against a law of the Commonwealth punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed."¹²⁶

97 The second question with respect to statute will arise if the legislature in question is one of limited competence with respect to the territorial reach of its laws. As is indicated in Section I, that is the position of the legislatures of the Australian States. Speaking in 1988, but with respect to legislation passed before the enactment of the Australia Act, the Court in *Union Steamship Co of Australia Pty Ltd v King*¹²⁷ confirmed that the words "peace, order and good government" may be a source of territorial limitation "however slight that limitation may be". The Court continued¹²⁸:

"[A]s each State Parliament in the Australian federation has power to enact laws for its State, it is appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant, notwithstanding the recent recognition in the constitutional rearrangements for Australia made in 1986 that State Parliaments have power to enact laws having an extraterritorial operation: see [Australia Act], s 2(1); *Australia Act* 1986 (UK), s 2(1). That new dispensation is, of course, subject to the provisions of the Constitution (see s 5(a) of each Act) and cannot affect territorial limitations of State legislative powers inter se which are expressed or implied in the Constitution. That being so, the new dispensation may do no more than recognize what has already been achieved in the course of judicial decisions. Be this as it may, it is sufficient for present purposes to express

125 *McDonald v Bojkovic* [1987] VR 387; cf *Australian Industries Preservation Act* 1906 (Cth), s 4(1) and *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10; *War Crimes Amendment Act* 1988 (Cth) and *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501; Crimes Act, Pt IIIA (ss 50AA-50GA); *Criminal Code Act* 1995 (Cth), Ch 8.

126 See *McDonald v Bojkovic* [1987] VR 387 at 394-395.

127 (1988) 166 CLR 1 at 13-14.

128 (1988) 166 CLR 1 at 14. See also the observations of Mason CJ, Brennan J and Deane J respectively in *War Crimes Act Case* (1991) 172 CLR 501 at 529, 550, 635-636.

our agreement with the comments of Gibbs J in *Pearce [v Florenca]*¹²⁹ where his Honour stated that the requirement for a relevant connexion between the circumstances on which the legislation operates and the State should be liberally applied and that even a remote and general connexion between the subject-matter of the legislation and the State will suffice."

Further, s 22B of the *Acts Interpretation Act* 1915 (SA) states¹³⁰:

"Each provision of an Act or statutory instrument enacted or made, or purporting to have been enacted or made, before the commencement of the Australia Acts is as valid as it would have been, and has the same effect as it would have had, if the Australia Acts had been in operation at the time of its enactment or making or purported enactment or making."

- 98 Section 22B operates upon statutes creating criminal offences. None is presently relevant. However, it also operates upon the vesting of jurisdiction in the Supreme Court by s 17(2)(a) of the Supreme Court Act, so as to give to the phrase "in and for the State" a liberal construction. It is this circumstance which, as will be indicated in Section IX, will be crucial to the outcome of these appeals.

VI THE DOCTRINE OF COMITY WITHIN AUSTRALIA

- 99 The Court was referred to various decisions in which "comity" was invoked as a significant consideration. However, it will be seen that such a doctrine or precept has no operation with respect to the issues in these appeals. Rather, the respective operations inter se of the judicial proceedings of the States are regulated by the Constitution, its text and structure.

- 100 In any event, the common law doctrine of comity is neither "a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other"¹³¹. As Story put it, in the nature of things comity cannot "be defined and fixed", but "must necessarily depend upon a variety of circumstances which cannot be reduced to any certain rule"¹³². For example, in *R v Bow Street Magistrate; Ex*

¹²⁹ (1976) 135 CLR 507 at 518.

¹³⁰ Section 22B was inserted by s 4 of the *Acts Interpretation (Australia Acts) Amendment Act* 1992 (SA).

¹³¹ *Hilton v Guyot* 159 US 113 at 163-164 (1895).

¹³² *Story on the Conflict of Laws*, 8th ed (1823), §28; approving Porter J in *Saul v His Creditors* 5 Martin (NS) 569 at 596; 16 American Decisions 212 at 225 (1827).

*parte Pinochet (No 3)*¹³³, Lord Hope of Craighead said that English common law would regard as "justiciable" in England a conspiracy to commit an offence anywhere which was triable in England as an extraterritorial offence in pursuance of an international convention, even though no act was done in England in furtherance of the conspiracy. The common law would be extended in this way, on the grounds of comity, to promote the aims of the convention. It is unnecessary to consider here the applicability of his Lordship's reasoning in this country.

- 101 Lord Hope had earlier pointed out in *Clements v HM Advocate*¹³⁴ that considerations of comity do not arise between the various component parts of the United Kingdom. In *Clements*, Lord Hope observed¹³⁵:

"I do not think that we are concerned here at all with the extra-territorial effect, if any, of the Misuse of Drugs Act 1971. All the activities in this case took place in the United Kingdom, within the jurisdiction of the United Kingdom Parliament. The problem in this case is one as to territorial limitation as between the different jurisdictions within the United Kingdom. This depends on constitutional practice, not on international comity: see [*R v Treacy*]¹³⁶. I accept that questions of comity could arise if the physical activities of the appellants had taken place outside the United Kingdom, such as were envisaged by Lord Diplock in his discussion of this topic in that case¹³⁷. But for the purposes of the present case it is, I think, sufficient to look only to the situation within the United Kingdom and to ask why the courts of one part of it should be denied jurisdiction if the activities of persons elsewhere in the United Kingdom are seen to have their harmful effects in that part."

- 102 The circumstances referred to by Story must allow for the relationships between the components of a federal structure; there, territorial conceptions of national sovereignty and of comity between nation states cannot be determinative.

133 [1999] 2 WLR 827 at 873; [1999] 2 All ER 97 at 136.

134 1991 SC 62.

135 1991 SC 62 at 69.

136 [1971] AC 537 at 564 per Lord Diplock.

137 [1971] AC 537 at 562.

Within Australia, any rationale for the common law rule respecting comity between what became the States disappeared with federation¹³⁸.

103 One consequence is that there does not apply within Australia the common law rule, based upon notions of comity and territorial sovereignty, that the courts of the forum do not assume or exercise jurisdiction to enforce the revenue laws of a foreign country¹³⁹. Again, in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*, McHugh and Gummow JJ pointed out that¹⁴⁰:

"The fundamental difference of opinion in *Breavington v Godleman*¹⁴¹ and *McKain v R W Miller & Co (SA) Pty Ltd*¹⁴² concerned the impact of the national legal structure created by or pursuant to the Constitution upon the common law choice of law rules as they exist in the various States and Territories."

However, choice of law considerations do not apply to the operation of the criminal law.

VII CRIME AND PRIVATE INTERNATIONAL LAW

104 The common law rules of private international law adopt by analogy the classification developed in the courts of England and Wales in former times between local actions and transitory actions. In the first category, venue, that is to say the place of trial in a particular county or locality, and vicinage, the area from which the jury was drawn, were essential. This was because the facts relied upon as the foundation of the plaintiff's case had a necessary connection with that county

138 See *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 577, 584-585, 591, 614-615.

139 See *R v White; Ex parte T A Field Pty Ltd* (1975) 133 CLR 113 at 117; cf *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 41; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 270-271, 293-294; *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 at 428; *R v Martin* [1956] 2 QB 272 at 286.

140 (1996) 189 CLR 253 at 285, fn 126.

141 (1988) 169 CLR 41.

142 (1991) 174 CLR 1.

or locality. There was no such requirement of a necessary connection with the second category, transitory actions¹⁴³.

105 The common law rules of private international law proceed on the footing that most civil causes of action are transitory. 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 occur¹⁴⁴; 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*.

106 Crime stands apart. Jurisdiction is founded by presence to stand trial¹⁴⁵ and the "general presumption at common law is that crime is local"¹⁴⁶ involves rejection of propositions (ii) and (iii) set out above. The result for the administration of the criminal law is that¹⁴⁷:

"the question of jurisdiction and that of governing substantive law receive the same answer. The governing law is always that of the forum state, if the forum court has jurisdiction."

107 This state of affairs reflects the difference in kind of the criminal law. It is not concerned with the adjudication of disputes as to the respective rights and obligations of parties to a particular transaction or with respect to property in particular subject-matter. The body politic by which or on whose behalf the prosecution is instituted and maintained seeks the adjudication of guilt and

143 The distinction was drawn by Lord Herschell LC in *British South Africa Company v Companhia de Moçambique* [1893] AC 602 at 618. See also Hale, *The History of the Common Law*, 5th ed (1794), vol 2 at 135-136.

144 *H C Sleight Ltd v Barry Clarke & Co Ltd* [1954] SASR 49 at 52.

145 See Brilmayer, *An Introduction to Jurisdiction in the American Federal System*, (1986) at 329.

146 *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78 at 83.

147 Leflar, McDougal and Felix, *American Conflicts Law*, 4th ed (1986) at 309. See also Leeming, "Resolving Conflicts between State Criminal Laws", (1994) 12 *Australian Bar Review* 107 at 108.

imposition of punishment by its judicial branch. Professor Brilmayer makes the point¹⁴⁸:

"In criminal cases, the state is both a party – granted standing to prosecute by statute – and the adjudicatory forum – given jurisdiction to decide criminal cases brought by the state against alleged criminals. Because one state cannot validly involve the other's interest as a party in redressing an injury, states do not enforce one another's criminal laws. Once it is determined that the criminal law of another state will be applied, the forum court dismisses the case. Dismissal is not, of course, automatic in civil cases."

108 Moreover, where the "law area" of the court of the forum is a component of a federal system, further questions arise with respect to the scope of the criminal law and its administration. Investigative and prosecution procedures may differ and the rules of evidence lack uniformity in significant respects¹⁴⁹. The crime in question may be created by federal law and the trial court be a State, Territorial or federal court. In Australia, requirements as to particular venue are imposed by s 80 of the Constitution which asks whether the federal crime was or was not "committed within any State". The Judiciary Act makes further provision¹⁵⁰.

VIII THE FACTS

109 It is convenient now to refer more fully to the facts. In the Court of Criminal Appeal, Bleby J summarised the relevant facts as follows¹⁵¹:

148 Brilmayer, *An Introduction to Jurisdiction in the American Legal System*, (1986) at 321. See also Brilmayer, *Conflict of Laws*, 2nd ed (1995) at 152.

149 See, as to the United States, Corr, "Criminal Procedure and the Conflict of Laws", (1985) 73 *Georgetown Law Journal* 1218.

150 Sections 70 and 70A of the Judiciary Act state:

"70. When an offence against the laws of the Commonwealth is begun in one State or part of the Commonwealth and completed in another, the offender may be dealt with tried and punished in either State or part in the same manner as if the offence had been actually and wholly committed therein.

70A. The trial on indictment of an offence against a law of the Commonwealth not committed within any State and not being an offence to which section 70 applies may be held in any State or Territory."

151 (1997) 70 SASR 300 at 322-324.

"[Collins Street] was the owner of a large modern office building situated at 333 Collins Street, Melbourne in the State of Victoria. The company was incorporated in South Australia, where its registered office was also situated. The principal executive officer, the joint secretaries and four of the six directors of the company were resident in South Australia. Two directors were resident in New South Wales. The company had only issued two fully paid \$1 shares which were beneficially owned by SGIC Pty Ltd, also incorporated in South Australia and having its registered office in South Australia. It had the same directors and secretaries as the company. The beneficial owner of the issued capital of SGIC Pty Ltd was State Government Insurance Commission (SGIC) which was a statutory body corporate, incorporated under the *State Government Insurance Commission Act 1970* (SA). Under that Act, SGIC was subject to the control and direction of the government of South Australia through the relevant minister. SGIC consisted of five members appointed by the governor of South Australia, and by virtue of s 14 of the *State Government Insurance Commission Act*, all real and personal property of SGIC was held by the Commission for and on behalf of the Crown in the right of the State of South Australia. It therefore followed that the shares in the company were ultimately similarly held.

The building in Collins Street was a relatively new building with relatively few tenants. At the time in question there was a surplus of good quality office space in Melbourne, and landlords were offering inducements to potential tenants by way of 'rent holidays', paying the cost of a tenant's fit-out, and in some cases paying a cash inducement to a potential tenant in order to attract tenants.

The company had appointed a Mr Apps as manager of the building and Baillieu Knight Frank in Melbourne was the company's letting agent for the building.

The appellant Winfield was a real estate agent. He and the accused Chandler were residents of Queensland. The appellant Lipohar was a resident of Victoria. P T Mecosin Indonesia was a company incorporated in Indonesia, carrying on business in Jakarta. It manufactured and distributed pharmaceutical and therapeutic products. It was a family owned company. One of its employees, the alleged co-conspirator Roosevelt Tan, who worked in Indonesia, was a close friend of one of the directors. However, he was not authorised to represent the company.

P T Mecosin (Australia) Ltd (Mecosin Australia) was a company which, according to its memorandum and articles of association, was substantially controlled by P T Mecosin Indonesia (Mecosin Indonesia). In fact, however, it was not. It was a company which had been incorporated in Queensland at

the instigation of a Mr Samardzija, another of the alleged conspirators and a business associate of the appellant Winfield. The memorandum of association contained an untrue assertion that the Indonesian company was a subscriber and shareholder. In fact, its seal and other signatures on the memorandum had been forged.

Through the agency of the accused Chandler, Baillieu Knight Frank was approached in November 1991, initially on behalf of an undisclosed tenant, seeking to negotiate the lease of a whole floor of the building. He proposed a 12 year lease, with one year rent-free and a cash incentive equivalent to three years rent, with the fit-out to be paid for by the landlord. Performance of the lease was to be secured by a mortgage over some undisclosed commercial Melbourne CBD property. Negotiations continued, and the proposed tenant was revealed as the Mecosin group, intending to commence business in Australia. Negotiations continued with the letting agent, and included the appellant Winfield, who had also been involved in the formation of Mecosin Australia. Samardzija was also involved in the negotiations. A further proposal was put to the agent in writing on 21 January 1992. This included an offer of security for the cash incentives in the form of a bank promissory note issued by the lessee's bank. By this time, it seems that Winfield and Samardzija were aware of the identity of the owner of the building and of the ultimate ownership of the company by SGIC. Indeed, Baillieu Knight Frank had made it clear that any proposals would have to be subject to the approval of SGIC.

There was some disquiet expressed on behalf of those supposedly negotiating for the Mecosin group about the length of time that negotiations were taking. Mr Apps, the manager of the building then began dealing directly with the appellant Winfield, and showed the appellant Lipohar around the building, supposedly to enable him to prepare a report about the property for the Mecosin group. On 11 February 1992 Winfield purported to accept a final offer of SGIC for the lease of the property (including a cash incentive of \$6.5 million), and on 28 February 1992 SGIC approved the transaction. A meeting in Brisbane was arranged between representatives of SGIC – Mr Rehn from Adelaide and Mr Apps, the building manager, from Melbourne – and representatives of Mecosin Australia. That meeting took place on 5 March 1992. There was discussion about the proposed promissory note, the appellant Winfield informing the SGIC representatives that the Krung Thai Bank was Mecosin Indonesia's banker, and was the bank that would be supplying the promissory note for \$US10 million by way of security. On the same day a document was faxed to the company's solicitors in Adelaide signed by a Miss Nutcharee, purporting to be sent by the Krung Thai Bank, confirming that upon instructions from Mecosin Indonesia, it was issuing a promissory note of the required amount, and setting out its terms

and conditions. Miss Nutcharee was not in fact employed by the Krung Thai Bank, and it appeared that the facsimile had been sent from a public facsimile machine in Thailand. It was at no stage authorised by the bank. On the same day it was publicly announced through Reuters newsagency that Australian police had uncovered an international fraud in Adelaide relating to forged promissory notes on the Krung Thai Bank with a face value of approximately \$14 million. By letter dated 6 March 1992 the appellant Winfield wrote to Mr Apps in Melbourne withdrawing the offer to lease the building space, owing to an alleged change of direction by Mecosin Indonesia. Accordingly, the plan to defraud the company was never brought to fruition."

110 His Honour concluded by pointing out several salient features of the facts¹⁵²:

"All the acts performed by or at the instigation of the conspirators in furtherance of the conspiracy were conducted either in Queensland, Victoria, Indonesia or Thailand. With the one exception of the facsimile sent to the company's solicitors in Adelaide, all contact with the company was through its agents in Victoria, who in turn dealt with the company's principals in Adelaide. The decision to agree to the lease proposal was made in Adelaide. The building in respect of which the defrauding was to take place was located in Victoria. It is not possible to tell where the defrauding, if it had occurred, would have taken place. Mr Jones, the former general manager of finance at SGIC said that the company's continuing operation was 'supported by, ultimately, SGIC', and it depended for its financial support upon its shareholders and those who stood behind the shareholders, namely SGIC. He said in cross-examination that Westpac Bank was the major funds provider to the company through a branch in Melbourne. One could perhaps infer, but it would be little more than an educated guess because there was no evidence on the topic, that the cheque might have been drawn on a Melbourne bank account and handed over in Melbourne. On the other hand, the company had instructed solicitors in Adelaide who were preparing the lease. It may possibly have happened there."

To this the respondent adds that the appellants knew that the decision to proceed with the transaction required the approval of the SGIC board in Adelaide and, for that purpose, that the false representations made by them would be conveyed to and considered by that board.

152 (1997) 70 SASR 300 at 324.

IX CONCLUSION

111 The present appeals concern the common law offence of conspiracy to defraud. What are the territorially fixed components of the offence under the common law of Australia? In order for the Supreme Court of South Australia to have power to try and to punish the appellants, to what degree was it necessary that components of the offence be located in South Australia, or have or be likely to have harmful consequences there?

112 Like Lord Wilberforce in *Doot*, with respect to the position in England, we would leave open the question whether a conspiracy formed abroad to do in Australia an unlawful act or a lawful act by unlawful means, but not to any degree actually implemented in this country, suffices to support a charge of a conspiracy under Australian common law. In the present case, it is not clear the degree to which the conspiracy itself was formed outside Australia. However, it is clear from the treatment of the facts by Bleby J, set out in Section VIII, that to a significant degree steps were taken in furtherance of the agreement between the conspirators inside Australia, particularly in Queensland and Victoria. That, in our view, is sufficient to support a charge of conspiracy under Australian common law, even if the conspiracy had been formed wholly outside Australia. The respondent's submission set out in Section II required that the agreement be formed at least partly in Australia. But, as indicated, we would go further. It is enough if steps were taken in Australia in furtherance of the agreement.

113 It is unnecessary to determine, as it was unnecessary in *Doot*, whether the mere suffering of the consequences of the implementation of the conspiracy would, if felt in Australia, be sufficient. Nor does any question arise here respecting conspiracies formed in Australia for implementation outside this country, or in that regard, the controversial¹⁵³ decision of the House of Lords in *Board of Trade v Owen*¹⁵⁴.

114 However, territorial nexus with the nation as a whole is not sufficient to provide an answer for the present appeals. Nor is it sufficient that the appellants were before the South Australian Court to face the charges brought against them. What, then, was the connection with South Australia that gave the South Australian court jurisdiction?

153 Goode, "Contemporary Comment – Two New Decisions on Criminal 'Jurisdiction': The Appalling Durability of Common Law", (1996) 20 *Criminal Law Journal* 267 at 270-272.

154 [1957] AC 602.

- 115 The offences charged in these appeals were common law offences and were not created by federal law¹⁵⁵. The Supreme Court was not exercising federal jurisdiction; s 73(ii) of the Constitution established the right of final appeal to this Court. At the trial, there was no departure from the traditional common law notion that the governing law, as to substance and procedure, was that in force in the South Australian forum. Three aspects of the matter may be noted: (i) the substantive offences were created by the common law of Australia (in force in the South Australian forum), not by South Australian statute having some specified or necessary nexus with that "law area"; and (ii) the conduct constituting the offences charged would, it may be assumed, have rendered the appellants liable to prosecution in the courts of other States, had they had control over the persons of the appellants, for crimes against the common law or the statute law of the States in question; and (iii) the investigative methods and procedure of police and prosecution authorities, the rules of evidence and the penalties may have differed between States. But none of these three aspects of the matter means that some question of conflict of laws or choice of laws arose. The governing law, both as to substance and procedure, was that in force in South Australia.
- 116 Each State has an interest in the exercise of jurisdiction by the courts of the other States in respect of offences against the Australian common law. The interest arises from the operation of the Constitution and federal laws such as the Service and Execution of Process Act and the Recognition Act. It is no longer true, if it ever has been true since 1901, for the courts of one State to say of the decisions of the courts of another State that they "can no more control the deliberations of our own courts than can the courts of China"¹⁵⁶.
- 117 Section 83(8) of the Service and Execution of Process Act obliges, subject to certain conditions, the magistrate to whom the interstate warrant is produced to order that the person in question be taken to a specified place in the State of issue of the warrant. The judicial proceedings which then follow in the State to which there has been this rendition attract the requirement that they be given full faith

155 Where, by statute enacted by the Parliament or by the legislature of a Territory under authority derived from such a statute of the Parliament, the Supreme Court of that Territory exercises jurisdiction with respect to common law rights and duties, the rights and duties in question ultimately depend for enforcement on that statute.

156 *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 151.

47.

and credit throughout the Commonwealth¹⁵⁷. Full faith and credit is to be given to any sentence passed by that court¹⁵⁸.

118 This supplements the position which, in any event, would follow at common law. That was explained, with reference to the position in England, by Lord Diplock in *Treacy* as follows¹⁵⁹:

"The consequence of recognising the jurisdiction of an English court to try persons who do physical acts in England which have harmful consequences abroad as well as persons who do physical acts abroad which have harmful consequences in England is not to expose the accused to double jeopardy. This is avoided by the common law doctrine of *autrefois convict* and *autrefois acquit*, a doctrine which has always applied whether the previous conviction or acquittal based on the same facts was by an English court or by a foreign court: see *R v Roche*¹⁶⁰ and for a modern instance *R v Aughet*¹⁶¹."

Statute also may make particular provision with respect to *autrefois convict* and *autrefois acquit*¹⁶².

157 *Harris v Harris* [1947] VLR 44.

158 *Censori v Holland* [1993] 1 VR 509 at 520.

159 [1971] AC 537 at 562.

160 (1775) 1 Leach 134 [168 ER 169].

161 (1918) 13 Cr App R 101.

162 For example Corporations Law, s 1310A; ASIC Act, s 243A; Crimes Act, s 4C. The last provision states:

"(1) Where an act or omission constitutes an offence:

(a) under 2 or more laws of the Commonwealth; or

(b) both under a law of the Commonwealth and at common law;

the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws of the Commonwealth or at common law, but shall not be liable to be punished twice for the same act or omission.

(Footnote continues on next page)

119 However, the point made by Ipp J in *Bond Brewing Holdings Limited v Crawford*¹⁶³ is important here. His Honour there said:

"The cases in which the full faith and credit provisions have been held to have been merely evidentiary (that is requiring the courts in one State to have regard to the laws of other States, but not displacing the common law rules of private international law) have been concerned with the domestic laws of the other States, not the judgments or orders of the courts of those States".

120 The effect is to give a constitutional footing, whether pursuant to covering cl 5 and s 109 of the Constitution (with respect to s 18 of the Recognition Act), or to s 118 itself, for the operation in other States of the doctrines of *autrefois acquit* and *autrefois convict*¹⁶⁴.

121 The constraint upon State legislative power identified in *Union Steamship* by reference to limitations expressed or implied in the Constitution applies where the criminal offence is created by statute of the State in which the trial takes place. It does so immediately by operating upon the territorial reach of the offence specified in the statute. Where, as in the present case, the offence is not created by statute, the constraint applies but by reference to the statute which specifies the jurisdiction of the State court in question. Here this is found in the specification in s 17(2)(a) of the Supreme Court Act, "jurisdiction, in and for the State". It is jurisdiction so constrained which is the "jurisdiction ... which belongs to ... the courts of the States" within the meaning of s 77(ii) of the Constitution¹⁶⁵. This yields "the

(2) Where an act or omission constitutes an offence under both:

(a) a law of the Commonwealth and a law of a State; or

(b) a law of the Commonwealth and a law of a Territory;

and the offender has been punished for that offence under the law of the State or the law of the Territory, as the case may be, the offender shall not be liable to be punished for the offence under the law of the Commonwealth.

(3) Where an act or omission constitutes an offence against a law of a Territory, the validity of that law is not affected merely because the act or omission also constitutes an offence against a law of the Commonwealth."

¹⁶³ (1989) 1 WAR 517 at 528. See also *G v G* (1986) 64 ALR 273.

¹⁶⁴ See *Pearce v The Queen* (1998) 194 CLR 610.

¹⁶⁵ See *Felton v Mulligan* (1971) 124 CLR 367 at 410-413; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 479.

judicial proceedings of every State" spoken of in s 118 and s 51(xxv) of the Constitution and the "civil and criminal process and the judgments of the courts of the States" to which the power in s 51(xxiv) applies.

- 122 In the present case, the question becomes whether the connection between the subject-matter of the charge and South Australia was sufficient. That is a search for the sufficiency of connecting factors. No question of fiction or deeming intrudes. Indeed, to adopt the comments of Wells J in *R v Hansford*, it is¹⁶⁶:

"impossible to avoid resolving issues of interpretation, characterization and constitutional power, in cases of this sort, by purporting to find, in composite acts, some inherent and supra-legal quality that limits their geographical situation to a place to which they are not naturally confined. If a decision of a court fixes a geographical situation in that way, an element of deeming has been introduced, which itself connotes the importation of a legal fiction."

In particular, the inquiry is directed to whether a particular court in Australia has jurisdiction to try an offence against the common law of Australia, not to deeming an offence against the law of one jurisdiction to be an offence against the law of another. To speak of deeming a common law offence to be an offence against the laws of another Australian jurisdiction is to deny the unity of the common law of Australia.

- 123 The requirement of nexus should be liberally applied. A real connection with the jurisdiction will suffice. The object of the conspiracy was to cheat Collins Street out of a particular receipt. In that sense the immediate victim in prospect was Collins Street. The company was incorporated in South Australia. Its legal advisers with respect to the proposed transaction were in Adelaide.

- 124 Much attention in argument was given to the circumstance that the facsimile was received on 5 March 1992 by SGIC's solicitors in Adelaide. That was a matter of some significance in the overall chain of events. This will always be so where, in furtherance of the alleged conspiracy, an unlawful act is performed in the forum or a lawful act is performed there by unlawful means. Here a conclusion as to the sufficiency of the connection also is to be reached by having regard to the commercial realities of the situation envisaged by the performance of the conspiracy and described above. Given the corporate structure which we have indicated, it would, for present purposes, be artificial to quarantine the effect sought to be obtained through the conspiracy by ignoring the real and practical

166 (1974) 8 SASR 164 at 195.

consequences for SGIC, and thus for the South Australian body politic. A connection of this character will suffice.

125 This judgment has considered the consequences of a verdict in one State where charges might have been laid concurrently in several Australian jurisdictions but were not so laid. Questions or difficulties may arise if two or more Australian jurisdictions charge an accused in respect of one course of conduct. That did not transpire in the present matter and the Court heard little argument on the subject. However, it is to be noted that the power of a court to control and supervise criminal proceedings brought in its jurisdiction "includes power to take appropriate action to prevent injustice" and "the power is not to be confined to closed categories". These expressions were used by Mason CJ in *Jago v District Court (NSW)*¹⁶⁷ and are supported by observations of Gaudron J in that case¹⁶⁸.

126 The doctrines of *autrefois acquit* and *autrefois convict* might not provide an answer, for example, to a prosecution in the courts of State B for a common law offence which was sufficiently connected with State A to make it justiciable in those courts, where there had been a prosecution in the courts of State B for a statutory offence with narrower elements than the common law offence. Generalisations in this field should be avoided in the absence of a specific case on particular facts. It is sufficient for present purposes to make three points. The first is that a similar situation may arise with successive or concurrent prosecutions for statutory offences, one against the law of State A, the other against State B. The second is that, in both categories, the principles described in the last paragraph may have an application. Finally, that circumstances of this nature may arise from time to time does not deny the validity of the reasoning which we have endeavoured to articulate in this judgment.

127 The conclusion reached by Lander J and by the Court of Criminal Appeal was correct. The appeals to this Court should be dismissed.

167 (1989) 168 CLR 23 at 25-26.

168 (1989) 168 CLR 23 at 74. See also *Ridgeway v The Queen* (1995) 184 CLR 19 at 33 per Mason CJ, Deane and Dawson JJ, 60-61 per Toohey J, 74-75 per Gaudron J.

- 128 KIRBY J. These appeals¹⁶⁹ require further consideration by this Court¹⁷⁰ of the operation within the Australian Commonwealth of the general proposition that criminal offences are local and territorial¹⁷¹. They require fresh scrutiny of the claim that "all crime is local"¹⁷² so that the courts of one legal jurisdiction may not, or will not, exercise their authority in respect of offences which are classified as having occurred in another jurisdiction.

The problem of criminal jurisdiction

- 129 For the overwhelming majority of criminal offences in Australia, the jurisdiction to try the accused presents no problem. Commonly, the offender and the victim will be, and every legal ingredient of the offence will have occurred, within the one jurisdiction of the country. In such a case, other jurisdictions, their courts and officials, will ordinarily have no interest in prosecuting the alleged offender, even if he or she comes within the jurisdiction, or by extradition¹⁷³ or analogous domestic procedures¹⁷⁴ could be brought there.

- 130 However, in a number of cases a disputed question of jurisdiction can arise. I leave aside exceptional cases such as treason¹⁷⁵ and crimes of universal jurisdiction¹⁷⁶. They raise special considerations which are not in issue here. In

169 From the Full Court of the Supreme Court of South Australia sitting as the Court of Criminal Appeal: *R v Winfield & Lipohar* (1997) 70 SASR 300.

170 Earlier cases include *Ward v The Queen* (1980) 142 CLR 308; *Thompson v The Queen* (1989) 169 CLR 1.

171 *Grannall v C Geo Kellaway and Sons Pty Ltd* (1955) 93 CLR 36 at 52.

172 *Macleod v Attorney-General for New South Wales* [1891] AC 455 at 458; cf *R v Treacy* [1971] AC 537 at 552.

173 *AB v The Queen* (1999) 73 ALJR 1385; 165 ALR 298.

174 *Service and Execution of Process Act* 1992 (Cth), ss 24 and 82. See also s 3 for the definition of "warrant" and s 5 which provides that Territories are to be regarded as States for the purposes of the Act. As to federal offences see the *Judiciary Act* 1903 (Cth), s 68(1).

175 *Joyce v Director of Public Prosecutions* [1946] AC 347. There have been a few judicial suggestions that the common law applies throughout the world: *R v Martin* [1956] 2 QB 272 at 282; cf *Liangsiriprasert v United States* [1991] 1 AC 225 at 244.

176 *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 562-566, 658-664; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 70-72, 159; cf *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* (Footnote continues on next page)

more routine circumstances, problems can be presented by the fact that the offence of which the accused is charged is said not to have occurred¹⁷⁷ (or not to have been proved as occurring¹⁷⁸) within the jurisdiction of the forum. Or important elements of an inchoate offence (such as conspiracy) will be said to have occurred wholly outside the jurisdiction¹⁷⁹. Or those elements will be said to have their entire or substantial connection with the territory of a jurisdiction other than that of the forum¹⁸⁰. The present appeals are claimed to involve cases of the last two kinds.

- 131 Given the growth of transborder travel and other transborder communications, one could be forgiven for expecting that a simple rule would long ago have been devised by the common law in Australia to resolve the issues of venue, jurisdiction and justiciability of criminal charges that fall into the problem areas. However, many of the rules that have been devised to meet particular cases were fashioned in England to respond to the perceived needs of comity as between the courts of that country and courts of foreign countries¹⁸¹. It has commonly been assumed that the rules so devised for foreign jurisdictions were applicable in relation to the several jurisdictions of Australia *inter se*. This was so despite provisions of the Australian Constitution¹⁸², ready means available under it for securing the presence of the accused to face trial before courts anywhere in the Commonwealth¹⁸³ and the integrated polity and court system which the Constitution creates.

[1998] 3 WLR 1456; [1998] 4 All ER 897; *R v Bow Street Magistrate; Ex parte Pinochet (No 3)* [1999] 2 WLR 827; [1999] 2 All ER 97.

177 *Ward v The Queen* (1980) 142 CLR 308.

178 *Thompson v The Queen* (1989) 169 CLR 1.

179 *R v Doot* [1973] AC 807.

180 *Libman v The Queen* [1985] 2 SCR 178.

181 Thus *R v Treacy* [1971] AC 537 concerned a letter sent from the Isle of Wight to West Germany. *R v Doot* [1973] AC 807 concerned a conspiracy entered either in Belgium or Morocco before the accused reached England.

182 Especially covering cl 5, s 118 and the other provisions mentioned by Gaudron J in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 55.

183 Section 51(xxiv), (xxv); *Service and Execution of Process Act*, s 82; *Judiciary Act*, s 68(1).

132 These appeals afford this Court an opportunity to consider once again the rule which is applicable to the courts of the constituent parts of the Australian Commonwealth but in the special context of criminal proceedings.

The unsatisfactory state of legal authority

133 Even in England¹⁸⁴ and in Scotland¹⁸⁵, the inadequacies and uncertainties of the present law have been recognised. Lord Reid described the state of the law as "far from satisfactory"¹⁸⁶. The English Law Commission criticised the "erratic effect" of the current rules¹⁸⁷. In Canada the judicial techniques for characterising locality in the case of offences have been castigated as falling "far short of analytic clarity" – a result ascribed to "doctrinal confusion"¹⁸⁸.

134 The decisional authority on this subject has been criticised on two main grounds. First, in so far as it has attempted to apply decisions of the English courts, it has been condemned as "an unprincipled mess of *ad hoc* decisions with no sound theoretical underpinnings ... beyond the expediency of the moment"¹⁸⁹. Some courts have been challenged for adopting "evasive reasoning"¹⁹⁰ or for selecting alternative territorial theories however flimsy, minimal or speculative in order to find a territorial nexus. Or they have been criticised for using "empty

184 *R v Treacy* [1971] AC 537.

185 *Clements v HM Advocate* 1991 SLT 388.

186 *R v Treacy* [1971] AC 537 at 551.

187 England and Wales, Law Commission, *Criminal Law: Jurisdiction Over Offences of Fraud and Dishonesty with a Foreign Element*, Law Com 180, (1989) at 6 (par 2.9) citing *R v Thompson* [1984] 1 WLR 962; [1984] 3 All ER 565.

188 Morgan, "Criminal Process, International Law, and Extraterritorial Crime", (1988) 38 *University of Toronto Law Journal* 245 at 270-271 paraphrasing *Libman v The Queen* [1985] 2 SCR 178 at 186.

189 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 411.

190 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 446.

slogans"¹⁹¹ and distorting facts to find or uphold jurisdiction¹⁹². Appellate courts have been charged with failing to provide the "coherence and predictability" that is badly needed in this area of law¹⁹³. Unfortunately, in my respectful view, there is more than a little justification for these strong criticisms.

135 The second ground of attack has been the alleged failure of the courts to re-examine the common law principles developed in England so as to make them more appropriate to the setting of the Australian Constitution, with its unified court system¹⁹⁴, the peculiar features of its common law¹⁹⁵, the long established system for returning persons to face criminal proceedings in other parts of the Commonwealth¹⁹⁶ and the command in s 118 of the Constitution requiring that "[f]ull faith and credit shall be given, throughout the Commonwealth to the laws ... and the judicial proceedings of every State"¹⁹⁷. The English decisions did not (at least until very recently) have to address the common law rules appropriate to an assertion by one jurisdiction in a single country of the legal power to prosecute, try, convict and punish a person brought physically before courts elsewhere in that country.

136 These appeals oblige this Court to address the foregoing criticisms. It is not unreasonable that police and prosecuting authorities should know what exactly

191 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 459.

192 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 422.

193 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 414.

194 *Fencott v Muller* (1983) 152 CLR 570 at 607; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96, 104, 115-116, 137-139.

195 *R v Kidman* (1915) 20 CLR 425 at 445, 454; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567; Zines, "The Common Law in Australia: Its Nature and Constitutional Significance", (1999) *Law and Policy Papers*, Paper No 13, Centre for International and Public Law, Australian National University.

196 This system dated from the *Federal Council of Australia Act* 1885 (Imp), s 15. There was no provision equivalent to s 51(xxiv) of the Australian Constitution in the Constitution of the United States or of Canada; cf *Binge v Bennett* (1988) 13 NSWLR 578 at 584.

197 cf Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 457.

they can do, accused persons what they can resist, and courts how they should judge such questions when there is a challenge.

Facts, legislation and issues

137 The facts out of which the charges brought against the appellants arose are set out in the reasons of other members of the Court. So are the procedures followed by the primary judge (Lander J), his Honour's reasons for overruling the appellants' objections to the jurisdiction of the Supreme Court of South Australia¹⁹⁸ and the separate opinions of the members of the Court of Criminal Appeal dismissing the appeal from that ruling and the orders that followed¹⁹⁹. It is unnecessary to repeat the relevant legislation: either that grounding the jurisdiction of the Supreme Court²⁰⁰ (of which the Court of Criminal Appeal is part²⁰¹), or that governing the maximum punishment applicable to persons such as the appellants convicted of the common law offences charged²⁰². Nor is it necessary for me to repeat the relevant provisions of the *Criminal Law Consolidation Act 1935* (SA)²⁰³, enacted following the decision of this Court in *Thompson v The Queen*²⁰⁴ and after negotiations in the Standing Committee of Attorneys-General²⁰⁵. The Special Committee of Solicitors-General, to whom the matter was referred, concluded that "the territorial rule of the common criminal law was too restrictive" and that new rules were needed to establish "the nature and extent of State criminal power, the burden of proof in criminal proceedings, and the transjurisdictional possibilities of all nature of crimes"²⁰⁶.

198 *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121.

199 *R v Winfield & Lipohar* (1997) 70 SASR 300.

200 *Supreme Court Act 1935* (SA), s 17(2). The terms of the section are set out in the reasons of Callinan J.

201 *Criminal Law Consolidation Act 1935* (SA), s 350 referring to the "Full Court"; cf *Director of Public Prosecutions (SA) v B* (1998) 72 ALJR 1175; 155 ALR 539.

202 *Criminal Law Consolidation Act*, s 270.

203 The terms of s 5C are set out in the reasons of Callinan J.

204 (1989) 169 CLR 1.

205 South Australia, House of Assembly, *Parliamentary Debates (Hansard)*, 13 October 1992 at 789.

206 South Australia, House of Assembly, *Parliamentary Debates (Hansard)*, 13 October 1992 at 790 quoting the Deputy Premier (The Hon F Blevins) introducing the
(Footnote continues on next page)

138 In the circumstances disclosed by the evidence (which was in relevant respects uncontested) the elements affording a territorial nexus between the offences with which the appellants were charged and the State of South Australia were comparatively few. In the Court of Criminal Appeal, Bleby J saw "only three possible relevant connections" ²⁰⁷. These were:

- (1) The transmission of the forged facsimile setting out the terms and conditions of the proposed promissory note, purportedly issued by the Krung Thai Bank in Bangkok which was received by the solicitors for Collins Street Properties Pty Ltd ("Collins Street") in Adelaide;
- (2) The fact that Collins Street was incorporated in, directed from and had its registered office in Adelaide (although its sole business appears to have been the operation of the building in Melbourne); and
- (3) The fact that the ultimate beneficial ownership of the company was vested in the Government of South Australia.

Explaining his reasons Millhouse J, in the Court of Criminal Appeal, said that the foregoing facts meant that "South Australians would have suffered a loss of \$6.5 million had the plan [of the appellants] succeeded. ... We South Australians would have been the victims."²⁰⁸

139 To these considerations the Crown, in this Court, added a further ground:

- (4) That the appellants knew that the decision to proceed with the transaction required the approval in Adelaide of the Board of the State Government Insurance Commission ("SGIC") which was the beneficial owner of Collins Street and was a statutory authority created by legislation of the Parliament of South Australia²⁰⁹.

The Crown argued that there was an irresistible inference that the appellants were aware that the false representations which they were making to Collins Street outside South Australia, in order to obtain the large cash incentive from that

Criminal Law Consolidation (Application of Criminal Law) Amendment Bill (1992) (SA).

²⁰⁷ (1997) 70 SASR 300 at 327.

²⁰⁸ (1997) 70 SASR 300 at 307.

²⁰⁹ *State Government Insurance Act 1970* (SA). See now *State Government Insurance Commission Act 1992* (SA).

company, would be conveyed to, considered by and deceive, the SGIC board in Adelaide.

140 The case for the appellants, in the courts below and in this Court, was simple. It involved three steps:

1. The several parts of the Commonwealth, the States (and Territories) of Australia are separate law areas. They represent the constituent parts of a federation, not a union²¹⁰. They have separate statutory laws relevant to criminal offences. These include different definitions, different punishments and even different ideas of what is criminal. It is a basic principle, hitherto observed, that the jurisdiction of sub-national units of the Australian federation is fundamentally territorial. A singularly vivid illustration of that presupposition is found in *Ward v The Queen*²¹¹. Accordingly, unless the Crown could successfully invoke the recent legislative attempt to enlarge the territorial jurisdiction of the Supreme Court of South Australia contained in s 5C of the *Criminal Law Consolidation Act*, it was obliged, in the case of the common law offence of conspiracy, to establish a territorial nexus between the offence charged and South Australia. Otherwise the courts of South Australia had no jurisdiction. They could not, or should not, attempt to exercise jurisdiction over the appellants.
2. The offence of conspiracy to defraud with which the appellants were charged was constituted by the agreement of the alleged conspirators, with the requisite intent at the time the agreement was formed, to prejudice the interests of another person or to imperil that other person's legal rights²¹². The essence of the conspiracy (or its "gist" or ultimate "element") was the unlawful agreement²¹³. That agreement might continue for a time. It might be manifested by conduct ("overt acts") which evidenced the existence of the accord. Of its nature, the agreement itself would ordinarily be made in secret and kept so by the parties. Although "overt acts" are now commonly particularised (eg in the process initiating a criminal charge) they are not themselves component elements of the offence. They merely evidence it. Thus, in the present case, the conspiracy, although alleged in the information

210 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 36 per Brennan, Dawson, Toohey and McHugh JJ.

211 (1980) 142 CLR 308; cf *Thompson v The Queen* (1989) 169 CLR 1 at 28 per Brennan J.

212 *Peters v The Queen* (1998) 192 CLR 493 at 505-510, 522-525.

213 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 663. The passages are cited in the reasons of Callinan J at [218].

to have taken place "at Adelaide and other places"²¹⁴ was not proved to have occurred in Adelaide at all. None of the conspirators entered South Australia at the relevant times. None was alleged to have done so. None of them even communicated with another in South Australia by telephone, a territorial connection sometimes relied on²¹⁵. The conspiracy with the requisite intent to defraud was fully formed outside South Australia. Victoria or possibly Queensland²¹⁶ had the necessary territorial connection with the offences charged; but South Australia did not. Accordingly, South Australian courts lacked jurisdiction.

3. As to the suggested connections with South Australia relied on by the Crown, the appellants argued that these were irrelevant and, in any case, inadequate. The forged facsimile transmitted from Bangkok to Adelaide was despatched well after the agreement was made constituting the offence of conspiracy charged. It was thus merely another overt act. It was not an element of the offence itself. The fact that the intended victim of the conspiracy was in South Australia was insufficient to attract the jurisdiction of the courts of that State. It will often be the case that a corporation, with branches or shareholders in foreign jurisdictions will be the target of a conspiracy to defraud. It is unthinkable that the presence of a victim alone could afford courts, having no other territorial connection with the offence, the legal authority to assume jurisdiction over the prosecution, trial, conviction and punishment of the offender. As to the contention that the respondents knew that SGIC, a statutory authority of the State of South Australia, was the subject of false representations which they intended would be acted upon, this was not pleaded as a substantive element of the offence²¹⁷. More fundamentally, it was merely another variation on the theme whereby, impermissibly, criminal jurisdiction was purportedly asserted not by reference to where the offence occurred but by reference to the residence of the victim.

141 In an international setting, the foregoing arguments of the appellants would be compelling. This would be so because of the territorial purposes of the criminal law, the territorial organisation of police and prosecutors and the comity ordinarily

214 See the counts of the information. A specimen appears in the reasons of the other members of this Court. The full details appear in *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121 at 122-123.

215 cf *R v Treacy* [1971] AC 537 at 543.

216 *Criminal Code* (Q), s 430(1). However, s 12(3A) of the Code provides a defence where a person did not intend that the act or omission should have the effect in Queensland.

217 *R v Winfield & Lipohar* (1997) 70 SASR 300 at 338 per Bleby J.

observed out of respect for the rights of foreign authorities and jurisdictions to deal with their own crimes²¹⁸. However, in the context of a State (or Territory) of the Commonwealth the arguments appear somewhat less appealing. This fact moved Millhouse J in the Court of Criminal Appeal to remark that as "no other jurisdiction has shown any interest in prosecuting these men" if they were not dealt with in South Australia they might "escape punishment for any wrong doing altogether". If that were to happen, his Honour thought, "the law really would be an ass!"²¹⁹

142 Yet the experience of the courts, including recent experience in this Court²²⁰, is that questions of criminal jurisdiction, law and procedure must be decided by the application of legal rules which sometimes have little or nothing to do with the substantive merits of the accused's case. If, then, the law is revealed as asinine, it is ordinarily for Parliament to effect any necessary reforms. The accused is entitled to take the benefit of any substantial legal defect in the prosecution case. It is a departure from fundamental principle to create new legal offences with retrospective effect or to impose by judicial *fiat* new penal liabilities which go beyond those that clearly applied at the time when it is alleged that the offence was committed²²¹.

143 No defect could be more fundamental to a criminal prosecution than one which deprives a court of jurisdiction to try, convict and punish an accused person. The appellants' objection to the jurisdiction of the courts of South Australia was not one discovered for the first time in this Court²²². It was properly signalled at the very outset of the proceedings. The appellants sought an order quashing the information on the ground that it was bad in law as not disclosing an offence triable

218 *Board of Trade v Owen* [1957] AC 602 at 634; *R v Treacy* [1971] AC 537 at 561; *Director of Public Prosecutions v Stonehouse* [1978] AC 55 at 82-83; cf *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 565-566; Hinton and Lind, "The Territorial Application of the Criminal Law – When Crime is not Local", (1999) 23 *Criminal Law Journal* 285 at 285-286.

219 (1997) 70 SASR 300 at 307.

220 *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1307-1308; 164 ALR 520 at 542-543.

221 cf *R v Kidman* (1915) 20 CLR 425 at 434, 442-443, 459-461; *Moss v Donohoe* (1915) 20 CLR 615 at 620; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 608-614 per Deane J, 686-690 per Toohey J; cf *International Covenant on Civil and Political Rights*, Art 15(1).

222 As was the case in *Giannarelli v The Queen* (1983) 154 CLR 212; cf *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1308; 164 ALR 520 at 542-543.

in the courts of South Australia²²³. It was only when that challenge was overruled and the charge against each appellant was held to be "justiciable in South Australia"²²⁴ that the appellants, whilst maintaining their objection to jurisdiction, pleaded not guilty and elected to be tried by judge alone²²⁵. They were then tried and convicted. They brought the appeals which have now found their way to this Court. Having properly reserved the point, the appellants are entitled to have its correctness determined according to law.

144 In my opinion, the appellants are right to assert that a fundamental hypothesis of the exercise of criminal jurisdiction by the courts of the several States and Territories of Australia has been the establishment of the necessary territorial connection between the offence charged and the jurisdiction asserted. They are also right in asserting that the common law offence of conspiracy is complete, as to all of its essential elements, when the agreement is reached. I agree with Callinan J that according to common law principles, the actual conspiracy in this case was not entered into in South Australia. If the criterion for the exercise of the jurisdiction of the courts of a particular State or Territory of Australia is the happening of the "gist" or "essential element" or last "terminal element" of the offence, such events occurred, in the present case, outside South Australia. The assertion of the contrary involves confusion between the components of the offence of conspiracy and overt acts which simply evidence its existence²²⁶ or signify that it continues. I also agree with the appellants (and with Bleby J in the Court of Criminal Appeal)²²⁷ that the fact that a statutory authority of South Australia was known by them to be the targeted victim of their conspiracy would not according to ordinary principles, of itself, attract the jurisdiction of the South Australian courts to try, convict and punish the appellants for the offences alleged against them.

145 These conclusions therefore raise the question: Is there merit in the other bases of jurisdiction relied on by the Crown? If this Court is to avoid the criticisms voiced about earlier decisions on criminal jurisdiction when it has been challenged in an Australian context, it is essential to respond to the appellants' submissions by reference to legal principles that are coherent and cannot be said merely to

223 *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121 at 123 (pursuant to r 8 of the Supreme Court Criminal Rules 1992 (SA)).

224 *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121 at 155.

225 *Juries Act* 1927 (SA), s 7.

226 Glanville Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 422-423.

227 *R v Winfield & Lipohar* (1997) 70 SASR 300 at 338.

represent "the expediency of the moment"²²⁸. It is also essential that those criteria should draw their content from the context afforded of the Australian Constitution and recent reformatory legislation, in which the present problem must be answered.

Common ground

146 In order to reduce the complexities of these appeals and to remove from their resolution unnecessary disputes, a number of matters of common ground between the parties may be noted.

147 First, although both parties addressed submissions to the relevance to the applicable common law of the provisions of, and implications to be derived from, the Australian Constitution, no attempt was made by the Crown to rely expressly on the provisions of the Constitution as a separate and independent foundation for the jurisdiction over the appellants asserted, and upheld, by the South Australian courts. One day it may be necessary for this Court to consider whether the Constitution itself creates or implies a special Australian legal regime having nationwide operation²²⁹. In light of the conduct of these appeals, that day has not yet arrived.

148 Secondly, the arguments of the parties in this Court concerning the effect of the *Criminal Law Consolidation Act*, s 5C were quite limited. The Crown did not assert that the jurisdiction exercised by the Supreme Court of South Australia derived from that provision. Its contention was²³⁰ that the Supreme Court secured its jurisdiction (in the sense of its power and entitlement to try, convict and sentence the appellants who were undoubtedly physically before it for the offence of conspiracy) from the operation of the common law in conjunction with the

228 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 411; cf Leeming, "Resolving Conflicts between State Criminal Laws", (1994) 12 *Australian Bar Review* 107; Nicholson, "The Concept of 'One Australia' in Constitutional Law and the Place of Territories", (1997) 25 *Federal Law Review* 281.

229 See the views of Deane J in *Thompson v The Queen* (1989) 169 CLR 1 at 33-36 and in *Breavington v Godleman* (1988) 169 CLR 41 at 120-124; cf *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 36. After judgment was reserved in the present appeals, the significance of the Constitution, particularly s 118, for civil proceedings was argued in this Court in *John Pfeiffer Pty Ltd v Rogerson* which was reserved for judgment on 2 December 1999.

230 *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121 at 153-155 per Lander J. In the Court of Criminal Appeal see *R v Winfield & Lipohar* (1997) 70 SASR 300 at 310 per Millhouse J, 341-342 per Bleby J.

general jurisdiction conferred on that court by State legislation. On ordinary principles of interpretation, such legislation would be construed to require an appropriate territorial connection between the offence charged and South Australia. The limited way in which the Crown sought to invoke s 5C was in conjunction with its submission that the receipt in South Australia of the facsimile had the effect that if the conspiracy had been performed it would have constituted an offence in South Australia of obtaining by false pretences, an offence against the laws of South Australia²³¹.

149 The appellants dismissed this relatively minor invocation of s 5C. They did so on the basis that the appellants were not charged with a conspiracy to commit a criminal offence but with a conspiracy to defraud. For their part, the appellants did not continue in this Court the attack which they had raised below upon the authority of the South Australian Parliament to enact s 5C. Although that question was argued in the South Australian courts, it did not assume importance in this Court. It is clear from the section that its purpose is to supplement, and not replace, the rules of the common law²³².

150 Thirdly, the defects in the expression of the counts of the information were accepted. Although those courts stated that the appellants (and one other) had conspired together "at Adelaide and other places", it is clear that this was never proved. Nothing turns on that fact. It was always open to the Crown to amend the counts during the trial. One such amendment was made. It is, as the appellants ultimately acknowledged, too late to rely on this defect of pleading. If there were nothing else in the appeals, such defect would clearly attract the application of the proviso²³³.

151 Fourthly, the appellants conceded that the facts found by the primary judge would constitute the offence of conspiracy against the law of Victoria. They did not contest that conspiracy was a crime of duration, in the sense that it continued so long as the agreement between the parties or the unlawful objects of that agreement lasted²³⁴. The Crown accepted for its part that, save for the receipt of the facsimile in Adelaide, all of the acts performed by or at the instigation of the appellants in furtherance of the conspiracy were conducted outside South Australia, namely in Queensland, Victoria, Indonesia, Thailand and perhaps

231 Explained in Hinton and Lind, "The Territorial Application of the Criminal Law – When Crime is not Local", (1999) 23 *Criminal Law Journal* 285 at 296.

232 *Criminal Law Consolidation Act*, s 5C(9).

233 *Criminal Law Consolidation Act*, s 353(1).

234 cf *R v Masters* (1992) 26 NSWLR 450 at 458.

other places and that none of the conspirators was within South Australia at any relevant time.

152 It is trite to say that the word "jurisdiction" is often used in legal discourse in different senses²³⁵. In one sense, jurisdiction over the appellants was certainly secured by the South Australian courts. This was because the appellants were physically present before the court. They were thus subject to its orders. But this was no more than the consequence of the statutory facility, within Australia, for the removal of a person from one jurisdiction of this country to another, there to answer criminal charges. This consideration has led some Australian judges to analyse problems of the kind now under review by reference to notions of justiciability²³⁶ rather than jurisdiction. Although this suggested distinction has itself been criticised²³⁷, nothing turns on it in these appeals. The crucial issue, in the way these proceedings developed, is whether the facts found by the primary judge constituted an offence under South Australian law. It was not contended that they were offences against any statute of the Parliament of South Australia. That Parliament had, relevantly, done no more than to provide for the punishment of the accused if they were legally convicted in South Australia of an offence at common law.

153 It is in this way, in an Australian constitutional setting, that these appeals require analysis of a common law conspiracy to defraud which was fully formed by the alleged conspirators outside South Australia but intended to injure, ultimately, victims who (as the appellants must be taken to have known) existed within South Australia where such victims received a single facsimile intended to give effect to the conspiracy, although after that conspiracy had been agreed.

The locality of crime – three developments

154 The aphorism "all crime is local"²³⁸ still carries a germ of practical truth. However, a number of developments over the century since it was first uttered

235 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR (Pt 2) 1087 at 1142. This point is developed in the reasons of Gaudron, Gummow and Hayne JJ at [78-80].

236 "Justiciable" was the expression used by Lander J: *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121 at 155; cf *Isaac, Tajeddine & Elachi* (1996) 87 A Crim R 513 at 522.

237 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 442. In *Thompson v The Queen* (1989) 169 CLR 1 at 27-28, Brennan J observed: "It matters not what terminology is used. What is critical is that the accused is not liable to conviction under the statute unless the prosecution discharges the onus of proving locality."

238 *Macleod v Attorney-General for New South Wales* [1891] AC 455 at 458.

require reconsideration of its terms and the expression of a more refined principle, at least so far as crimes happening within the Australian Commonwealth are concerned.

- 155 *Extraterritorial legislative competence:* First, the foundation for the principle in the case of a colonial legislature was the legal limitation imposed on such a legislature by imperial legislation²³⁹ and by the presumption that a subordinate legislature within the British Empire had the power to make laws only in relation to its own territory²⁴⁰. In *Morgan v White*, Isaacs J explained the "well-known doctrine that legislation is primarily territorial" in these terms²⁴¹:

"...the jurisdiction of the Imperial Parliament in the eye of a British Court extends to all persons on British territory whether foreigners or not, and to all British subjects whoever they may be; and in a British Court the meaning of an Imperial Act will be understood accordingly: *R v Earl Russell*²⁴². But the jurisdiction of the State Parliament does not extend to any person whatever his nationality outside the State Territory – though of course it may affect any property within it wherever the owner may be. And the meaning of a State Statute must be understood accordingly".

- 156 On the basis of that doctrine, this Court held that a statute of the New South Wales Parliament, attaching consequences to a prior adjudication of bankruptcy or insolvency, referred only to such an adjudication in New South Wales. It did not include an adjudication of bankruptcy in Western Australia. However, not long after the territorial principle was propounded in *Macleod v Attorney-General for New South Wales*²⁴³, the Privy Council saw the need to reformulate it so as to modify its stringency. The case concerned New Zealand legislation which gave jurisdiction to New Zealand courts over persons outside New Zealand where the jurisdiction related to a contract made in New Zealand or to be performed there. The Privy Council upheld the argument that such legislation was "for the peace, order, and good government of New Zealand"²⁴⁴. In the course of this century, this Court has likewise adopted rules of growing ambit to recognise the law-

239 *Colonial Laws Validity Act* 1865 (Imp) (28 & 29 Vict c 63), s 5.

240 *Cooke v Charles A Vogeler Co* [1901] AC 102 at 107-108.

241 (1912) 15 CLR 1 at 13.

242 [1901] AC 446.

243 [1891] AC 455.

244 *Ashbury v Ellis* [1893] AC 339 at 344.

making competence of the legislatures of States (and later self-governing Territories) extending beyond the limits of their own territory²⁴⁵.

157 To support State legislation, for example, it became sufficient that there should be a "real connexion – even a remote or general connexion – between the subject matter of the legislation and the State"²⁴⁶. Occasionally, a more stringent approach was adopted²⁴⁷. However, such decisions must now be read in the light of the *Australia Act* 1986 (Cth) and its statutory companions. By s 2 of that Act it is declared and enacted that the legislative powers of the Parliament of each State include "full power to make laws ... that have extra-territorial operation". Subject to an immaterial exception, such powers are to "include all legislative powers that the Parliament of the United Kingdom might have exercised".

158 The full implications of the *Australia Acts* have still to be considered²⁴⁸. But a strict view prohibiting extraterritorial operation of State (and Territory) legislation on the footing that such legislatures are subordinate law-making organs within the British Empire is clearly one that has been overtaken by new legal realities²⁴⁹. Law-making incompetence as such cannot, therefore, ordinarily be offered to sustain rigid control over State (and Territory) legislation. So far as the Commonwealth is concerned, this Court held in 1935 that the Australian Constitution supported the power of the Federal Parliament to enact legislation with extraterritorial effect²⁵⁰. That view of the legislative competence of dominion

245 See eg *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 358; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; cf *Commissioner of Stamp Duties (NSW) v Millar*; *Millar v Commissioner of Stamp Duties (NSW)* (1932) 48 CLR 618 at 632-633.

246 *Pearce v Florenca* (1976) 135 CLR 507 at 518.

247 eg *Robinson v Western Australian Museum* (1977) 138 CLR 283.

248 See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14; cf Gilbert, "Extraterritorial State Laws and the Australia Acts", (1987) 17 *Federal Law Review* 25; Moshinsky, "State Extraterritorial Legislation and the Australia Acts 1986", (1987) 61 *Australian Law Journal* 779. See also *Acts Interpretation Act* 1915 (SA), s 22B.

249 cf *Sue v Hill* (1999) 73 ALJR 1016 at 1026-1027; 163 ALR 648 at 662-663.

250 *Crowe v The Commonwealth* (1935) 54 CLR 69 at 85-86, 90-91; contrast *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 3]* (1920) 28 CLR 495 at 503.

parliaments was also reflected in the *Statute of Westminster* 1931 (UK), s 3²⁵¹. To that extent "the last vestiges of the doctrine" limiting Australian legislation to events happening within its own territory were "swept away"²⁵².

159 In these appeals, such limitations on legislative competence are relevant to any suggested reading down of the general powers of the Supreme Court of South Australia. If that court is to be denied jurisdiction, in the sense of legal authority to adjudicate upon the offence charged against the appellants, some basis other than a strict territorial reading of its general legislative mandate must therefore be found.

160 *Transborder crime*: Secondly, a consideration of national and international relevance is the growth of crime having connection with multiple jurisdictions. In primitive societies, with imperfect law-making institutions, police services and prosecutorial officers, it was natural that the criminal law should attend only to local offences which endangered the immediate peace and security of the society concerned. But, even by the end of the 19th century²⁵³, with the growing ease of transport and telecommunications, new problems were presented challenging the strict hypothesis of the territoriality of crime. In the course of this century the phenomenon of crime with transjurisdictional elements has been increasingly recognised. It manifests itself most clearly in the case of crimes effected by means of telecommunications originating in one legal jurisdiction but having immediate consequences in others. This development caused Lord Wilberforce in *R v Doot*²⁵⁴ to remark:

"In the search for a principle, the requirement of territoriality does not, in itself, provide an answer. To many simple situations, where all relevant elements occur in this country, or, conversely, occur abroad, it may do so. But there are many "crimes" (I use the word without prejudice at this stage) the elements of which cannot be so simply located. They may originate in one country, be continued in another, produce effects in a third. Some constituent fact, the posting or receipt of a letter, the firing of a shot, the falsification of a document, may take place in one country, the other necessary elements in another. There is no mechanical answer, either through the Latin maxim or by quotation of Lord Halsbury LC's words in

251 *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 267.

252 *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 305.

253 eg *R v Oliphant* [1905] 2 KB 67 at 72-73.

254 [1973] AC 807 at 817.

*Macleod v Attorney-General for New South Wales*²⁵⁵ or otherwise, which can solve these."

161 To the same effect are the observations of Lord Griffiths, delivering the judgment of their Lordships, in *Liangsiriprasert v United States*²⁵⁶:

"Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England."

162 Although the potential overreach of these judicial comments has been criticised²⁵⁷, the interconnection of legal jurisdictions is now an inescapable fact of life. It is recognised, internationally, by cooperative schemes involving national law enforcement bodies²⁵⁸. It suggests a need to reconsider the ambit of the strict principle of locality in criminal jurisdiction. Words written by judges in the 19th century are especially inapposite today because of the amount and speed of transjurisdictional travel and telecommunications, both of which may be relevant to the perpetration of criminal offences having connection with several jurisdictions.

163 *Crime within the federation:* Thirdly, if the foregoing considerations have international implications, the establishment of the Commonwealth by the Australian Constitution in 1901 has special consequences for the sub-national jurisdictions of Australia. The old common law rules governing the assumption of jurisdiction in respect of crimes having a territorial nexus with the forum were developed, in large part, to deal with offences having a connection with a foreign state, usually one in Europe. Yet even the courts of the United Kingdom have recently come to realise, in respect of their own sub-national regions, the apparent

255 [1891] AC 455.

256 [1991] 1 AC 225 at 251.

257 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 436; contrast England and Wales, Law Commission, *Criminal Law: Jurisdiction Over Offences of Fraud and Dishonesty with a Foreign Element*, Law Com 180, (1989) at 20-23.

258 *Libman v The Queen* [1985] 2 SCR 178 at 183-184, 214.

inappropriateness of previously expressed rules, affected as they were by considerations of international comity as between nation states²⁵⁹.

164 The police and prosecutorial authorities of one nation do not ordinarily interest themselves in offences occurring within the territory of a foreign nation²⁶⁰. Similarly, the courts of one nation ordinarily defer to the jurisdiction of the courts of another nation in which an offence is taken to have occurred. However, as between the regions of the United Kingdom the reluctance to apply the rules of restraint and deference developed for dealings with foreign states can now be observed in relation to cases concerning activities which affect not only England but also Northern Ireland²⁶¹ and Scotland²⁶². In such cases the restraints upon assuming jurisdiction derived from international comity have sometimes been held to be inapplicable. A new principle is needed to govern the practice of police, prosecuting authorities and courts and the rights of accused persons. The need for the new principle arises, within the one nation with sub-national jurisdictions, because the content of criminal offences may vary in different regions, offences may be differently defined, they may carry different punishments and they may give rise to different appellate rights. Every court whose jurisdiction is challenged must be able to determine, by reference to a clear rule, whether the offence charged is known to its law, whether jurisdiction exists over the alleged offender, and what is the punishment applicable if jurisdiction is upheld and the offender is convicted.

165 The problems recently acknowledged within the United Kingdom have an even clearer relevance to Australia. This is because the relationship between the jurisdictions of the several States (and Territories) of this country and between those jurisdictions and federal jurisdiction is one to be determined not by reference to the rules of international law or conventions of comity but by reference to the Australian Constitution. Any applicable common law on the subject must adapt itself to, and reflect, the Constitution²⁶³.

166 There are some express provisions of the Australian Constitution that may be mentioned in this connection. By covering cl 5, the Constitution is binding on the

259 *R v Treacy* [1971] AC 537 at 561, 564; *Director of Public Prosecutions v Stonehouse* [1978] AC 55 at 82-83; cf *Board of Trade v Owen* [1957] AC 602 at 634.

260 *Liangsiriprasert v United States* [1991] 1 AC 225 at 244: "it is no direct concern of English society if a crime is committed in another country".

261 *R v Baxter* [1972] 1 QB 1.

262 *Clements v HM Advocate* 1991 SLT 388 at 393. Another consideration is that there may be different rights to appeal. No appeal lies in criminal matters from the Scottish courts to the House of Lords.

263 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

courts, judges and people of every State and of every part of the Commonwealth. By s 51(xxiv) the Federal Parliament is empowered to make laws with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States. It is pursuant to that power that the *Service and Execution of Process Act* 1992 (Cth) has been enacted, in succession to the Act of the same name of 1901. The Act provides a ready means for bringing before the courts of any part of the Commonwealth a person found elsewhere in the Commonwealth who is charged before such courts with a specified offence²⁶⁴. By s 51(xxv) of the Constitution provision is made for the Federal Parliament to make laws for the recognition throughout the Commonwealth of the laws and judicial proceedings of the States. By s 51(xxviii) the Parliament is empowered to make laws with respect to the influx of criminals. In Chapter 3 of the Constitution an integrated Judicature is established. Appeals ultimately lie from courts, federal and State, to this Court²⁶⁵.

167 It is the last-mentioned feature of the Australian Constitution which gives this Court functions in relation to the content of the common law in Australia which are different from the functions of the Supreme Court of the United States of America. It is a reason why, in Australia, there can ultimately be but one unified common law. It is a common law that is constantly in the process of definition and refinement by the judges of the several courts of Australia. In its evolution, it is necessarily affected by the different statutory contexts in which the common law grows and develops in different States and Territories. It is inevitable that different statements of the common law will be made from time to time in different courts. Diversity of opinion about the content of the common law is one of the grounds upon which special leave to appeal to this Court may be²⁶⁶, and commonly is, given. However, the fundamental postulate of the Constitution is of a unified Australian common law.

168 Two other sections of the Australian Constitution may be mentioned. By s 80, express provision is made for jury trial of certain federal offences²⁶⁷. That section requires that "every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes". The section

²⁶⁴ Sections 5, 24, 82. Even where process is initiated under the *Service and Execution of Process Act*, this Court has held that the proceedings remain within State jurisdiction: *Flaherty v Girgis* (1987) 162 CLR 574 at 597-598, 603, 609.

²⁶⁵ Australian Constitution, s 73.

²⁶⁶ *Judiciary Act*, s 35A(a)(ii).

²⁶⁷ cf *Re Colina; Ex parte Torney* (1999) 166 ALR 545.

was obviously influenced by antecedents in the United States Constitution²⁶⁸. It reflects, in the case of the federal offences specified, the assumption that it is normally possible to ascertain the identify of the "State where the offence was committed". But it also allows for cases where ascertainment may not be simple, by empowering the Federal Parliament to prescribe some other venue for the trial.

169 Finally, there is the command of s 118 of the Constitution that full faith and credit be given throughout the Commonwealth to the laws and the judicial proceedings of every State. That provision is silent as to the laws and judicial proceedings of the Territories. This is presumably because it was assumed that these would be adequately governed by covering cl 5. The inferences drawn by Deane J in *Breavington v Godleman*²⁶⁹ from the language and purpose of s 118 of the Constitution have not yet attracted a majority in this Court²⁷⁰. As I have said, that matter is not an issue raised by the arguments of the parties to these appeals. However, the foregoing provisions of the Constitution, its structure and purpose, the institutions which it creates and the federal nation which it establishes, are clearly relevant to the content of the applicable common law rule. Such rule will determine whether a court in one part of Australia may, or may not, assume jurisdiction in respect of an offence having some connection with the territory of the forum but also connection with other States and Territories (and also possibly foreign jurisdictions).

170 It would be incorrect to assume that one could simply transpose, unmodified, into a jurisdiction of the Australian federation a common law rule which evolved to resolve jurisdictional issues where an offence had features that were connected with foreign states. To treat the several jurisdictions of the Australian Commonwealth, in relation to each other, as foreign states is erroneous, even absurd. It ignores the provisions and purposes of the Constitution and the federal nation which it brought into existence²⁷¹. Yet equally absurd, and alien to the Constitution, would be the mistake of ignoring the territorial divisions of the Commonwealth and the limited law-making responsibilities established for each "law area". No rule of the common law dealing with the definition of State offences or the jurisdiction of State courts could be inconsistent with the assumptions inherent in the division of Australia into territorial units called States or Territories. Nor could any such rule ignore the provision to each such State or a self-governing Territory of its own legislature with law-making powers

268 United States Constitution, Art III, s 2 and Sixth Amendment.

269 (1988) 169 CLR 41 at 132-136.

270 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 31, 36.

271 *Thompson v The Queen* (1989) 169 CLR 1 at 34 per Deane J; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 879; 163 ALR 270 at 325; cf *R v Winfield & Lipohar* (1997) 70 SASR 300 at 319.

expressed as being "for the peace, welfare, and good government of"²⁷² or "in and for"²⁷³ the State in question or for the "peace, order and good government" of the self-governing Territory concerned²⁷⁴. Those are all wide words of connection. But connection is still necessary.

- 171 The integrated character of the Australian federation suggests that a ready means should exist for the resolution of questions about the law applicable within any constituent part of the Commonwealth. So far as conflicts between laws of the Commonwealth and laws of a State are concerned, these are resolved by the application of s 109 of the Constitution²⁷⁵. An analogous rule applies to the resolution of conflicts between the laws of the Commonwealth and those of a self-governing Territory²⁷⁶. Where there is a conflict, or potential conflict, between laws of the several States, it was formerly thought that this could be resolved to yield but one applicable law by confining each State to its own constitutional remit in terms of the territory committed to its law-making power²⁷⁷. Whilst the answer to this problem must ultimately be found in the Australian Constitution, the acknowledgment of the validity of law-making by the States having extraterritorial operation necessarily implies that, in some cases, there may be an overlap of apparently valid laws of different States in respect of the same acts and omissions. This is not the occasion to address all of the questions which would then arise. But it is obviously desirable that a simple rule should be adopted to deal with such cases²⁷⁸ in order to avoid the confusion and uncertainty which would otherwise

272 *Constitution Act* 1902 (NSW), s 5; *Constitution Act* 1867 (Q), s 2; *Australian Constitutions Act* 1850 (Imp), 13 and 14 Vict c 59, s 14; *Constitution Act* 1889 (WA), s 2; cf *Constitution Act* 1934 (SA), s 5.

273 *Constitution Act* 1975 (Vic), s 16.

274 *Australian Capital Territory (Self-Government) Act* 1988 (Cth), s 22(1); *Northern Territory (Self-Government) Act* 1978 (Cth), s 6.

275 eg *The Commonwealth v Western Australia* (1999) 73 ALJR 345 at 355-357, 369-371, 376-379, 394; 160 ALR 638 at 652-654, 671-673, 680-685, 705; *Telstra Corporation Ltd v Worthing* (1999) 73 ALJR 565 at 570-572; 161 ALR 489 at 497-499.

276 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464; *Northern Territory v GPAO* (1999) 73 ALJR 470 at 509; 161 ALR 318 at 371.

277 *Thompson v The Queen* (1989) 169 CLR 1.

278 The case of overlap between a State law and the law of a Territory involves another complication. In the context of civil wrongs, Deane J suggested a resolution of these difficulties by the application of a test of "predominant territorial nexus". See (Footnote continues on next page)

exist in ascertaining the applicable law and deciding which court (or courts) within Australia has jurisdiction in relation to conduct alleged to constitute a criminal offence.

Possible solutions to transjurisdictional crime

172 *Constitutional presuppositions:* I leave aside a more radical constitutional solution which might be offered to the problem presented by these appeals²⁷⁹. No party embraced it. Five other possible solutions were propounded for the Court's consideration.

173 *Strict requirement of locality:* The first was that urged for the appellants. This was to adhere strictly to the "initiatory theory" by which jurisdiction in the case of criminal offences is exercised by courts only over those offences which, in all of their essential elements, are committed within the territory of the forum. This approach has at least three advantages. It permits a court, by reference to the elements of the offence, to know precisely whether it has jurisdiction in respect of that offence or not. Put another way, it affords the court the means of knowing whether an offence against the law of its jurisdiction exists in the particular case. Secondly, this approach would fulfil a major purpose of the criminal law. It would remove uncertainty as to whether particular conduct rendered a person liable to criminal prosecution in a particular jurisdiction. It would thus contribute to the law's object to regulate and deter behaviour on the part of potential offenders. Thirdly, adhering strictly to a territorial requirement within the Australian federation would tend to avoid the difficulties presented by overlapping State offences potentially involving competing criminal jurisdiction.

174 However, such a territorial approach also has defects. These include the inescapable connections which the facts of particular offences may often have with several jurisdictions, and the necessary interconnectedness of the several parts of the Australian federation as envisaged by the Constitution itself. Moreover, some overlap of State laws at or near the border of the States and Territories is inevitable and unsurprising. It requires resolution by a rule harmonious with the Constitution²⁸⁰.

175 *Treating conspiracy as an exception:* As a partial modification of the strict territorial rule, the Crown, drawing on English cases, propounded a different test.

Breavington v Godleman (1988) 169 CLR 41 at 129; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 53.

²⁷⁹ *Breavington v Godleman* (1988) 169 CLR 41 at 133-138 per Deane J.

²⁸⁰ *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 36; cf *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78 at 86-87.

It was one special to the crime of conspiracy to defraud with which the appellants were concerned. It urged that, if a strict territorial rule were maintained, conspiracy should be treated as an exception. Observations certainly exist in English cases which give a measure of support to this approach²⁸¹. Various rationalisations for such an exception have been offered. The most usual one is that crime is punished in a particular society in order to preserve "the Queen's peace within the realm"²⁸² from the effects of a crime originating elsewhere. Nowadays threats to "the Queen's peace" are usually described in Australia in terms of threats to that society's peace and security. If there is, in fact, a threat to the peace and security of the forum, it would ordinarily occasion no great surprise that the common law would treat the conduct concerned as a crime authorising the courts of the forum (if they can secure the presence of the accused before them) to try, convict and punish those responsible²⁸³. This exception to the general rule is also sometimes justified by the explanation that inchoate crimes (such as conspiracy) are "continuing" in their nature²⁸⁴ or contain continuing elements²⁸⁵ which justify treating that offence as one against the laws of the forum, authorising the forum's courts to try, convict and punish the offender²⁸⁶.

- 176 The difficulties with this approach (which has generally been used to claim rather than to disclaim jurisdiction)²⁸⁷ are many. First, once special exceptions are acknowledged, they subvert the fundamental principle. They suggest that the principle is itself unsound. If one exception is permitted, why not others? Secondly, in the case of conspiracy, it confuses the distinction between the "gist" or "elements" of the offence (completed at a given time) and subsequent overt acts (which may continue much later and potentially in a great many legal jurisdictions). Thirdly, the approach necessarily accepts the overlap of criminal jurisdiction but affords no clear general rule as to when the forum might assert or decline to exercise such jurisdiction. Fourthly, and partly because of these

281 *Board of Trade v Owen* [1957] AC 602 at 626; *R v Doot* [1973] AC 807 at 817-818.

282 *Board of Trade v Owen* [1957] AC 602 at 626.

283 *R v Doot* [1973] AC 807 at 817-818, 832-833.

284 *R v Doot* [1973] AC 807 at 823-825, 827.

285 *R v Ellis* [1899] 1 QB 230 at 240.

286 cf *Kron* (1995) 78 A Crim R 474 at 476.

287 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 433.

considerations, the approach has been scathingly, and in my view effectively, criticised by law reform bodies and academic critics²⁸⁸.

177 *Presence of the victim:* The Crown next propounded as one possible development of the common law affording jurisdiction to the courts of the forum, at least in relation to a conspiracy formed outside the jurisdiction of the forum, the presence within the forum of the intended victim. In favour of this view (which amounts to an attempt to place the last solution on a more acceptable foundation) is the "terminatory theory" of criminal jurisdiction. This holds that the fundamental purpose of the criminal law is to protect the public and the individual and thereby to oblige or encourage would be offenders to desist from harming them²⁸⁹.

178 This approach has many difficulties. The first is that, as argued, it was limited to the intended victim of a conspiracy. It is not plain why the victim of that particular crime should be singled out for such special legal treatment. Why exclude the presence of a victim of an offence of fraud? Or of a physical crime? It is one thing for the common law to develop from case to case. But it must do so by reference to concepts and principles; not mere expediency. The second difficulty is that adopting as a basis for jurisdiction the existence in the forum of some person damaged would potentially expose to criminal prosecution many individuals and corporations whose relevant conduct had only the most remote connection with the forum²⁹⁰. The third difficulty arises from the problem of treating a corporation as a "resident" of a particular State of Australia²⁹¹. In a still controversial holding of this Court²⁹² (yet one that has lasted a very long time and resisted several attempts to reopen it²⁹³) it has been held that artificial persons or corporations are not "residents" or "resident" in a particular State. Whilst that holding should, in my view, be confined to the particular constitutional context which was there in question (s 75(iv)), a deeper problem arises when it is suggested that the presence of a corporate victim within a jurisdiction is enough to attract

288 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 436 citing the English Law Commission.

289 Goode, "The Tortured Tale of Criminal Jurisdiction", (1997) 21 *Melbourne University Law Review* 411 at 439.

290 *Attorney-General's Reference (No 1 of 1982)* [1983] QB 751 at 757-758; cf *Re Hamilton-Byrne* [1995] 1 VR 129 at 137.

291 *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 27.

292 *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290.

293 eg *Cox v Journeaux* (1934) 52 CLR 282.

criminal jurisdiction to the courts of that jurisdiction and to apply the law of the forum to events that may have occurred far away. Many national and international corporations have a presence in numerous legal jurisdictions. The bald adoption of the intended victim theory would invite a Babel of competing criminal proceedings for the same or like offence. To prevent this, a more precise rule is necessary.

179 *The common law as a basis of jurisdiction:* It is next suggested that the solution lies in deriving from the proposition that there is but one unified common law within Australia the consequence that a common law offence is committed in every jurisdiction of Australia and so may be prosecuted in any. In *Lange v Australian Broadcasting Corporation*²⁹⁴ this Court concluded that there was but one common law in Australia, namely the law declared by this Court. However, I do not believe that this proposition sustains the invocation of the common law as a foundation for a new nationwide criminal jurisdiction capable of prosecution, trial, conviction and punishment of common law offences anywhere in Australia.

180 In *Lange*²⁹⁵, this Court emphasised that the common law in Australia may not contradict constitutional imperatives. If the provisions of a supposed common law rule are inconsistent with the Constitution, they must yield to the constitutional norm. A cardinal feature of the Australian Constitution is its federal character. The existence of a single or unified common law, ultimately discoverable from the decisions of this Court, affords a norm that must be applied by a court whose jurisdiction is lawfully invoked when it is invited to apply common law principles in relation to its territorial boundaries. But it may not deny the constitutional provisions which divide Australia into federal, State and Territory law areas, including for criminal law purposes. I do not believe that the ultimate unity of the common law in Australia affords a new legal foundation to hold that the constitutional divisions of Australia inherent in its federal character, can for this purpose be disregarded. Or that common law offences may, for that reason, be prosecuted anywhere in Australia, no matter how tenuous, remote or even nonexistent are the connections between the forum and the elements of the offence.

181 *Test of "real and substantial connection":* The final and preferred proposition of the Crown was then reached. This was that the common law in Australia had developed to the point that an offence will exist within a jurisdiction of the Commonwealth where all elements of that offence occur within that jurisdiction or (if they do not) where the Crown proves that the offence has a "real and substantial link" with the jurisdiction which it invokes.

294 (1997) 189 CLR 520 at 563.

295 (1997) 189 CLR 520 at 566.

182 The rule propounded in the Crown's submission was limited to the common law offence of conspiracy to defraud. However, potentially it would have a wider application, either to common law offences generally or to that class of such offences as are sometimes called "conduct" crimes or "inchoate" crimes²⁹⁶. This test is similar to a rule adopted by the Supreme Court of Canada in *Libman v The Queen*²⁹⁷. That case arose directly out of conduct by telephone sales personnel in Canada who induced persons in the United States to buy shares in Central American mining companies. Many people, all in the United States, were persuaded to buy such shares which were virtually worthless. The moneys procured were to be sent to associates of the accused in the Central American countries concerned. The telephone messages in the United States conformed to directions given by the accused in Canada to the telephone sales personnel. He was charged in Ontario, Canada with seven counts of fraud and one count of conspiracy to commit fraud. His application to quash the committal on the basis that the courts of Ontario had no jurisdiction over the offences failed at first instance and in the Ontario Court of Appeal. On further appeal to the Supreme Court of Canada, that Court unanimously rejected the challenge to the jurisdiction of the Canadian courts.

183 The reasons of the Supreme Court of Canada were given by La Forest J. He held that, to render an offence subject to the jurisdiction of a Canadian court, it was sufficient that a significant portion of the activities constituting the offence should have taken place in Canada, such that there was a real and substantial link between the offence and Canada²⁹⁸. La Forest J rejected the argument that such a redefinition of the common law test required legislation²⁹⁹:

"...[T]his does not require legislation. It was the courts after all that defined the manner in which the doctrine of territoriality applied, and the test proposed simply amounts to a revival of the earlier way of formulating the principle. It is in fact the test that best reconciles all the cases ... [Those] that do not fall within it ... should no longer be followed."

296 Hinton and Lind, "The Territorial Application of the Criminal Law – When Crime is not Local", (1999) 23 *Criminal Law Journal* 285 at 286.

297 [1985] 2 SCR 178.

298 [1985] 2 SCR 178 at 212-213. In Canada, no legislation such as the *Criminal Law Consolidation Act*, 5C had been enacted. The *Criminal Code*, RSC 1970 is a federal statute.

299 [1985] 2 SCR 178 at 213.

184 In the context of a crime having links with a number of foreign jurisdictions, La Forest J remarked³⁰⁰:

"Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here. The outer limits of the test may, however, well be coterminous with the requirements of international comity...

[W]e should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers."

185 The principle in *Libman* has been criticised in some Australian cases³⁰¹. In deciding the rule which this Court should adopt, it is necessary to take such criticisms into account.

Reasons for adhering to territoriality

186 For a time I was attracted to the suggestion that the test of a "real and substantial link with the jurisdiction" was one appropriate to be adopted within the Australian federation, in order to found the jurisdiction of the South Australian courts in these cases. However, I have concluded that it does not afford an acceptable solution. I say this with some regret because it is perfectly clear that within the one federal nation there ought to be simple rules governing the resolution of problems such as the present. Such simple rules might, potentially, be derived from the Constitution itself. However, the parties declined to argue that proposition. The alternative sources of such rules are therefore the legislatures of Australia (acting within their respective constitutional authorities) and the judges giving effect to the common law.

187 Clearly enough, the legislators (or some of them) have attempted to address problems of the kind that are now before this Court. The *Criminal Law Consolidation Act*, s 5C is the South Australian attempt. But it is neither an Act of universal application; nor is it a measure of complete operation. Provisions equivalent to s 5C have been enacted in New South Wales³⁰² and the Australian Capital Territory³⁰³. Similar but not identical provisions have been enacted for

300 [1985] 2 SCR 178 at 213-214.

301 *Re Hamilton-Byrne* [1995] 1 VR 129 at 139-140, 142; *Isaac, Tajeddine & Elachi* (1996) 87 A Crim R 513 at 522.

302 *Crimes Act* 1900 (NSW), s 3A.

303 *Crimes Act* 1900 (ACT), s 3A.

Tasmania³⁰⁴. No provisions have been enacted in the other States or in the Northern Territory. Specifically, the States of Victoria and Queensland, with which the conduct constituting the offences alleged against the appellants had most connection, have not enacted even the limited transjurisdictional provisions found in the South Australian statute.

188 Moreover, as the parties ultimately accepted, the incomplete ambit of s 5C of the *Criminal Law Consolidation Act* afforded no legal justification for the prosecution of the appellants in South Australia. This was because, in the undisputed facts, s 5C did not attach. It is an imperfect provision whose defects were drawn to notice by Matheson J in *R v Catanzariti*³⁰⁵. Assume that the difficulty identified in *R v Catanzariti* concerning the opening words "[a]n offence against the law of the State" could be overcome. Assume further that "all elements necessary to constitute the offence (disregarding territorial considerations)" existed in accordance with par (a) of s 5C(1). Assume as well, in this case, that "a territorial nexus exists between the State" and the offence generally, in accordance with par (b) of s 5C(1). The difficulty of applying s 5C to the case still arises from the language chosen to express the essential connection.

189 The words of s 5C(1)(b) require that "at least one element of the offence" has a "territorial nexus" with the State in question. The choice of that language is clearly deliberate. In terms of the history of criminal law and of its ordinary territorial presumptions, the choice is relatively traditional. The "element of the offence" in the case of conspiracy to defraud cannot be stretched to include the overt acts which merely manifest the existence or continuance of that offence. Therefore, in terms of s 5C(1)(b) the "territorial nexus" required to give the section operation could not be proved.

190 Nothing in s 5C(2) repairs the omissions evident from the language of par (b) of s 5C(1). Indeed, the language of the paragraphs of s 5C(2) makes it plain that the section has no application to cases such as the present. There was no "event occurring in the State [of South Australia]" which was or included "the element" of the offence of conspiracy alleged. The most that might be said of such relatively few "events" as occurred in South Australia was that they amounted to overt acts performed in furtherance of the conspiracy to defraud, the "elements" of which had already been fully formed. The agreement is the essential "element" of the offence of conspiracy. In so far as the "event occurring in the State" amounted to (or was evidence of) the intention of the accused to perform the offence, it is excluded from consideration by the meaning given to the word "event" in this context by the

304 *Criminal Law (Territorial Application) Act* 1995, (Tas) ss 5, 6. See also Hinton and Lind, "The Territorial Application of the Criminal Law – When Crime is not Local", (1999) 23 *Criminal Law Journal* 285 at 291.

305 (1995) 65 SASR 201.

definition in s 5C(10)³⁰⁶. Nor is par (b) of s 5C(2) of any help. It provides an alternative way of establishing that "a territorial nexus exists between the State and an element of an offence". But it only applies if "the element is or includes an event that occurs outside the State but while the person alleged to have committed the offence is in the State". It was common ground that none of the appellants at any relevant time was in the State of South Australia. Therefore the "territorial nexus" required by s 5C(2) could not be proved.

191 For these reasons, s 5C could play no part to afford the courts of South Australia a new statutory foundation for treating the offence alleged against the appellants as one against the law of that State. Yet if the offence was not one against the law of the State of South Australia, the fundamental question is immediately posed: by what right does the Crown in South Australia purport to prosecute the appellants for an offence against the law of South Australia? If they cannot be tried for an offence against the law of South Australia by what right do the courts of South Australia purport to try, convict and punish them?

192 Although the Crown did not in this Court contend that s 5C afforded the Supreme Court of South Australia the basis for the exercise of its jurisdiction over the appellants, I have taken the pains to examine the terms of s 5C for several reasons. First, the analysis shows the complexity of attempting to deal with offences having transjurisdictional features, even within the Australian federation. Secondly, it illustrates the care with which the legislatures of several jurisdictions of Australia have already attempted to provide for the type of problem now before this Court. Thirdly, it indicates a legislative recognition of the need for specific statutory reforms but ones expressed in terms of a defined "territorial nexus" between the "elements" of the "offence" and the forum. Fourthly, because the section has no application to the cases of the appellants, it presents a signal warning to a court against purporting to sweep away settled jurisdictional rules where the legislatures have themselves been highly particular in their enactments and where even the limited model legislation (illustrated by s 5C) has not yet been adopted in a number of the jurisdictions of this country.

193 Where legislation specifically designed to address the species of problem now before this Court is shown to afford no relief to the Crown, judges should restrain their enthusiasm to repair the omissions. A number of arguments support the wisdom of such restraint.

194 First, it is one thing for courts to fashion rules to govern the exercise of their jurisdiction where an offence clearly exists within the jurisdiction. It is quite another for courts, in respect of offences that have occurred in another jurisdiction (and are completed) to deem the latter to be an offence against their own laws.

306 s 5C(10) defines "event" as meaning "any act, omission, occurrence, circumstance or state of affairs (not including intention, knowledge or any other state of mind)".

Fictions should not be encouraged in the law. Fictions which create new criminal offences are especially objectionable. Those which do so, effectively, with retrospective operation, are particularly offensive to fundamental principle³⁰⁷. If, by a deft fiction an offence, all elements of which were completed in Victoria (or Queensland) is to be deemed to be an offence against the law of South Australia, this should only occur with legislative authority. In the business of criminal offences, the common law is past child bearing. Presumably a Parliament would provide checks and exceptions for the operation of such a fiction. The inadequacies of s 5C to respond to the problem of this case demonstrate the need for considerable caution in judicial invention in this area³⁰⁸.

195 Secondly, it is important to recognise a distinction hitherto observed in Australian law (and also reflected in s 5C itself)³⁰⁹ between the existence of different offences in different parts of the Australian federation called forth by similar or even identical facts and circumstances. The division of the Australian federation into separate geographical units called States or Territories is so fundamental to the federal character of the Constitution that it should not be swept aside by a common law invention. The common law does not challenge the Constitution's fundamental hypotheses. There are great risks in invoking a common law fiction to treat a completed "offence" in one Australian jurisdiction as an "offence" against the law of another, although Parliament in that other jurisdiction has never so expressly provided (as it might have done). This is because, even within Australia, different States and Territories have chosen to criminalise and decriminalise similar or identical activities. They have regularly provided different definitions of common offences. They have sometimes afforded different defences to the accused³¹⁰. They frequently apply different sentencing regimes, sometimes with markedly different penal consequences for the person who is convicted. If a swathe is to be cut through these complexities and a completed criminal offence in one Australian jurisdiction is now to be deemed a crime in another, at the least the foregoing disparities suggest the need for intricate legislative reform which will establish clear criteria for the operation of the fiction. Judges should walk with extreme care. This is one occasion to suppress the instinct to creativity.

307 *Welch v United Kingdom* (1995) 20 EHRR 247; *SW v United Kingdom* (1995) 21 EHRR 363.

308 cf Hinton and Lind, "The Territorial Application of the Criminal Law – When Crime is not Local", (1999) 23 *Criminal Law Journal* 285 at 298-299.

309 In the terms of s 5C(1) which is expressed by reference to the commission of an "offence against the law of the State".

310 As the Queensland Criminal Code does in this case: s 12(3A). See also *Thompson v The Queen* (1989) 169 CLR 1.

196 Thirdly, the reasons for such care are reinforced by a reflection on the consistent view which this Court has taken to the requirement of the locality of a criminal offence before an accused may be put on trial in a particular Australian jurisdiction³¹¹. An accused who stands at risk of trial – and hence of conviction and punishment – is entitled to demand of the law that the conduct which will expose him or her to such risk will be specified in advance. It should not depend upon subsequent decisions, whether of a judge or of a jury. It is one thing to say that a court, which by legal processes has procured the presence before it of the accused in a jurisdiction which arguably has a "real and substantial" connection with the accused's wrong-doing, *should* be entitled to prosecute, try, convict and punish the accused for such wrong-doing. But first, it is necessary for the forum which asserts such jurisdiction to establish that an offence against its laws *does* exist.

197 This, as it seems to me, is the fatal flaw in the Crown's case against the appellants. The Crown cannot establish that the appellants' alleged conspiracy was an offence against the law of South Australia by invoking s 5C of the *Criminal Law Consolidation Act*. It does not contend that the Constitution comes to its aid. It is therefore driven to an appeal to novel common law concepts never previously established as part of Australian law. The Crown's argument necessitates the effective creation by the courts of a new offence against the law of South Australia. The proved conduct of the appellants certainly appears to have established an offence against the laws of another Australian jurisdiction. But not South Australia. The most that was shown in the case of South Australia was that the intention to defraud carried over to include victims in South Australia. However, even if, in some way, the presence of such victims could give a court of South Australia a legitimate basis upon which to claim jurisdiction over the appellants, the fundamental problem remains. What is the law of South Australia creating the offence in that State which the appellants have breached? No one claims it is the Constitution. Certainly, it was not statute law. To hold that it is the common law is to indulge in judicial invention. None of the three or four suggested connectors to South Australia, trivial or irrelevant as they are, would warrant such a leap of creative faith.

198 Fourthly, this conclusion is still further strengthened by three additional considerations. The creation of new criminal offences, including fictional ones, is now something for a Parliament, not for a court³¹². A court should be doubly careful before succumbing to the invitation to creativity when its effect is to depart from the approach which Australian statutory and common law have observed requiring that a territorial nexus must exist between the State or Territory

311 See *Thompson v The Queen* (1989) 169 CLR 1 at 27-28 per Brennan J, 33 per Deane J.

312 cf *Isaac, Tajeddine & Elachi* (1996) 87 A Crim R 513 at 523-524.

jurisdiction in which the accused is prosecuted and tried and the elements of the offence. The ultimately uniform common law in Australia is not a proper basis for such jurisdiction. Still less is it so for the invention of a new fictional "offence". The common law merely identifies the rules to be applied if and when jurisdiction is otherwise lawfully established. That necessitates the prior existence of an offence, the jurisdiction of a court to determine and the presence of the person accused before that court. Here, only the third of these preconditions was present.

199 Fifthly, this outcome might seem annoying or puzzling to those who consider that, in the "political and geographical circumstances of the Australian Federation"³¹³ today there *should* be a way for miscreants, apprehended in one jurisdiction of Australia to be tried, convicted and sentenced before courts in another. Such a feeling is understandable; I share it. However, there are several answers that must be given. The first is that the legislatures of the several jurisdictions of Australia could expand the reach of provisions akin to s 5C to embrace circumstances such as the present. They have not chosen to do so. Some, indeed, have chosen to do nothing whatsoever. Whilst this remains the case, it is not for this Court to subvert the territorial divisions of the federation and the responsibilities for criminal law which the Constitution assigns to the several law areas that make it up. The second answer is that (subject to considerations that do not appear to be relevant in these appeals)³¹⁴, it would remain open for the appellants to be prosecuted in that Australian jurisdiction where all elements of their alleged offence occurred and where there is no apparent disqualification from the bringing of proceedings, namely Victoria. That was certainly the jurisdiction with which their alleged offence had the most "real and substantial" connection in fact and "the predominant territorial nexus". The connections with South Australia were flimsy. They occurred after the offence was complete. With respect, they take on the colour of the kind of distortion of facts used to claim jurisdiction for which courts in the past have rightly been criticised.

200 When an appeal to jurisdiction is made by persons accused of a criminal offence, courts in this country must decide such arguments by reference to legal principle. They should not over-strain themselves to invent new principles because they are convinced that the accused have acted wrongfully and should not get away with it. I see no reason why this Court should be less tender to strict legal principle

313 *Isaac, Tajeddine & Elachi* (1996) 87 A Crim R 513 at 523.

314 Such as a plea of *autrefois acquit* or *autrefois convict* or proceedings to prevent an abuse of process: *Barton v The Queen* (1980) 147 CLR 75 at 95-97; *Jago v District Court (NSW)* (1989) 168 CLR 23; *Pearce v The Queen* (1998) 194 CLR 610.

in this case than it was in a recent case where equally meritless legal arguments succeeded because they were technically correct³¹⁵.

Conclusions and orders

201 The appellants at all times reserved their objection to the jurisdiction of the South Australian courts. That objection is, in my view, sustained. It may be hoped that the issues ventilated in these appeals will cause fresh consideration to be given to the problem of territoriality of crime within the several jurisdictions of Australia. Specifically these appeals call to notice the inadequacies of the provisions of the *Criminal Law Consolidation Act*, s 5C and the equivalent statutes adopted in such jurisdictions as have so far enacted them. In the future, it may be expected, if such issues return to this Court, that fuller consideration will be given to the operation of the Constitution itself, or to any new federal legislation which may be enacted under the Constitution (by the invocation of federal jurisdiction to the full extent allowed by the Constitution) to repair some of the problems which these appeals have brought to light. But for the present the appellants are entitled to have their appeals dealt with in conformity with the requirement that, for a forum within Australia to have jurisdiction over an accused in a criminal trial, an offence against the law of that forum must be proved. No offence against the law of South Australia was shown in the appellants' cases. No legal fiction may now create one. The appellants therefore succeed in their objection to the jurisdiction of the South Australian courts.

202 The appeals should be allowed. The orders of the Full Court of the Supreme Court of South Australia should be set aside. In place of those orders it should be ordered that the appellants' appeals to the Full Court be allowed. The orders of Lander J overruling the appellants' preliminary objections to the jurisdiction of the Supreme Court of South Australia should be set aside. In lieu thereof, it should be ordered that those objections be upheld and the informations filed against the appellants quashed.

315 *Byrnes v The Queen* (1999) 73 ALJR 1292; 164 ALR 520.

- 203 CALLINAN J. These are appeals from the Court of Criminal Appeal of South Australia (Millhouse, Perry and Bleby JJ)³¹⁶ which affirmed convictions for the common law offence of conspiracy to defraud³¹⁷. The appellants, who were tried after a trial by judge alone argue that the conspiracy was not entered into in South Australia and that any connexion between that State and the conduct alleged to constitute the offence was insufficient to give the Supreme Court jurisdiction to try them.

Facts

- 204 The appellants conspired to obtain a lease incentive payment of \$6.5 million by entering into a lease of commercial premises in Collins Street Melbourne. They fraudulently represented that either P T Mecosin (Indonesia) or P T Mecosin (Australia) Ltd was an authorised representative of P T Mecosin Indonesia³¹⁸. In fact the two companies were incorporated by the second appellant without the knowledge of P T Mecosin Indonesia. The conspirators also fraudulently represented that they were acting for a client who wanted to lease the premises and that they held a US \$10 million promissory note issued by the Krung Thai Bank in Thailand. A promissory note had been brought into existence, but it was a forgery. The conspiracy was defeated at the eleventh hour when an officer of the Australian Federal Police Force publicly announced that the Force had uncovered an international fraud in Adelaide relating to forged promissory notes.
- 205 None of the conspirators was a resident of South Australia and none was present in that State when the agreement was made. The property the subject of the proposed lease was owned by Collins St Properties Pty Ltd ("Collins St"), a company incorporated and having its registered office in South Australia but carrying on business solely in Victoria. The principal executive officer, the joint secretaries and four of the six directors of Collins Street were resident in South Australia. Two directors were resident in New South Wales. The only two shares issued by Collins St were beneficially owned by the State Government Insurance Commission ("SGIC"), a corporation established by a South Australian statute, and under the control and direction of the South Australian government pursuant to s 3(3) of the *State Government Insurance Commission Act 1970* (SA). Collins St and SGIC shared the same directors and secretaries. All property of SGIC was, by its statute of incorporation, the property of the State of South

316 *R v Winfield & Lipohar* (1997) 70 SASR 300.

317 *R v Winfield, Chandler & Lipohar* (1995) 65 SASR 121.

318 (1997) 70 SASR 300 at 305.

Australia³¹⁹. The conspirators were aware at the relevant time that SGIC had ultimate control over the property.

206 The agreement was made, and, with two exceptions, all acts done in furtherance of the conspiracy, or events occurring in consequence of it, took place out of South Australia, in the course of negotiations with Collins St's real estate agent in Victoria, and in Brisbane. The negotiations for the lease and the incentive payment took place between November 1991 and March 1992. On 11 February 1992, the second appellant purported to accept a final offer from SGIC for the lease and the cash incentive³²⁰, and, on 28 February SGIC approved the transaction. On 5 March the second appellant met representatives of SGIC and informed them that a promissory note for US \$10 million would be sent by the Krung Thai Bank by way of security for the lease³²¹. On the same day, a facsimile document was sent to the solicitors for Collins St in Adelaide. The receipt of this document was one of the relevant events that occurred in South Australia. The other was the consideration which was given to the proposed lease and incentive payment by the solicitors and the officers and Boards of Collins St and SGIC in Adelaide. The facsimile document on its face appeared to come from the Krung Thai Bank and stated that the bank would issue a promissory note of US \$10 million by way of security for the lease. The reality was that the document had been sent from a public facsimile machine in Bangkok, and not on behalf of the Krung Thai Bank.

207 The appellants were charged on information with one count of conspiracy to defraud, and one count of attempting to obtain money by false pretences³²². The particulars of the first offence were as follows:

"[The appellants] between the 1st November, 1991 and the 7th March, 1992 at Adelaide and other places, conspired together and with [two others] to defraud [Collins St] of an incentive payment in the sum of about \$6,500,000 by falsely representing that either P T Mecosin (Indonesia) or P T Mecosin (Australia) Ltd was an authorised representative of P T Mecosin Indonesia and that P T Mecosin (Australia) Ltd intended to comply with the terms of a lease agreement in relation to part of the property situated at 333 Collins Street, Melbourne, Victoria and that a Krung Thai Bank promissory note of an alleged value of US\$10,000,000 proffered as security was a good and valid negotiable instrument."

319 *State Government Insurance Commission Act 1970 (SA)*, s 14.

320 (1995) 65 SASR 125 at 138.

321 (1995) 65 SASR 125 at 139.

322 (1997) 70 SASR 300 at 303.

Proceedings in the Supreme Court of South Australia

208 In the Supreme Court of South Australia, Lander J held that the Court had jurisdiction and that all of the necessary elements of the offence, as a South Australian offence, had been made out³²³. The Court of Criminal Appeal of South Australia unanimously dismissed the appellants' appeals³²⁴. Millhouse J and Perry J held that it was sufficient that, had the conspiracy been carried out, it would have been a "breach of the Queen's peace" in South Australia. Millhouse J stated³²⁵:

"Following the chain of ownership from Collins Street Properties, South Australians would have suffered a loss of \$6.5 million had the plan succeeded. This would have been a threat to the Queen's peace. We South Australians would have been the victims. So far as I know, no other jurisdiction has shown any interest in prosecuting these men. If they are not to be dealt with here, then they may escape punishment for any wrong doing altogether. Then the law really would be an ass!"

209 Millhouse J was also of the view that the receipt of the facsimile in South Australia provided a further and sufficient basis for the exercise of jurisdiction³²⁶.

210 Perry J too was of the view that the South Australian Supreme Court had jurisdiction because the conspiracy, if carried out, would have had an impact in South Australia. His Honour expressed his conclusion in broader language than that used by Millhouse J³²⁷:

"Here, the target of the conspiracy was a South Australian company, Collins Street Properties. If the conspiracy had been successfully carried out, that company would have been induced to pay about \$6.5 million to the appellants as a result of their fraudulent representations. I do not think it matters whether one speaks in terms of 'harm', 'public mischief', disturbance of the 'Queen's peace', the 'good of society', or even 'peace, welfare and good government'. It seems to me that if the impact of the substantive offence would have been felt in South Australia, in the sense that the resulting loss would have been suffered in this State, the inchoate offence constituted by

323 (1995) 65 SASR 121.

324 (1997) 70 SASR 300.

325 (1997) 70 SASR 300 at 307.

326 (1997) 70 SASR 300 at 307.

327 (1997) 70 SASR 300 at 320.

the agreement was a breach of South Australian law, that is, the common law offence of conspiracy to defraud."

211 As did Millhouse J, Perry J expressed the view that the receipt of the facsimile in South Australia could be characterised as an overt act, and that its occurrence there could found the jurisdiction of the courts of that State.

212 Bleby J considered three bases of jurisdiction: the beneficial ownership of the property by the South Australian government; the receipt of the facsimile; and the incorporation of Collins St in South Australia. His Honour was of the view that the second and third, but not the first gave the Supreme Court jurisdiction.

213 Bleby J was of the opinion that a conspiracy formed outside a State is only justiciable inside that State if, had it been carried out, it would have been a "breach of the Queen's peace" in that State. However, unlike Millhouse and Perry JJ, his Honour was of the view that the fact that beneficial ownership of Collins St resided in the South Australian government did not mean that the conspiracy, if carried out, would be a breach of the Queen's peace in South Australia. After stating that the Queen's peace is "a concept generally associated with breaches of the criminal law and the maintenance of law and order within the jurisdiction"³²⁸, his Honour went on to say³²⁹:

"If such a conspiracy were indictable in South Australia, it would mean that a conspiracy to commit a crime against or to defraud a public company in one State would be indictable in any other State provided there were shareholders in that State who might indirectly suffer loss as a result of the fraud. For these reasons it seems to me that one cannot justify the indictment in this case by reference to the ultimate beneficial ownership of the company where that is the only relevant connection ... In any event, it is to be noted that the information did not allege a conspiracy to defraud the government or the public of South Australia but a conspiracy to defraud [Collins St]."

214 However, Bleby J was of the view that the fact that Collins St was "resident" in South Australia meant that the conspiracy, if carried out, would have been a breach of the Queen's peace in South Australia³³⁰:

"[T]he preservation of the Queen's peace does operate not merely to prevent offences against it but to protect persons who are resident or lawfully going about their business within the jurisdiction. In this case [Collins St] was

328 (1997) 70 SASR 300 at 337.

329 (1997) 70 SASR 300 at 338.

330 (1997) 70 SASR 300 at 345.

plainly the intended victim of the conspiracy ... it remained a corporate resident of South Australia, and the ultimate loss would be felt there ... In those circumstances it was entitled to protection by the South Australian criminal law against conspiracies to defraud it."

215 Bleby J also accepted that the receipt of the facsimile in Adelaide was sufficient to found jurisdiction. His Honour reasoned that, if carried out, the conspiracy would have involved the commission of the common law offence of obtaining money by false pretences: the receipt of the facsimile was an element of that offence, the commission of which would have been a breach of the Queen's peace in South Australia, so as to give the South Australian Supreme Court jurisdiction to try the matter. His Honour held that this conclusion was justified by both the common law and s 5C of the *Criminal Law Consolidation Act*, which relevantly provides:

"(1) An offence against the law of the State is committed if –

- (a) all elements necessary to constitute the offence (disregarding territorial considerations) exist; and
- (b) a territorial nexus exists between the State and at least one element of the offence.

(2) A territorial nexus exists between the State and an element of an offence if –

- (a) the element is or includes an event occurring in the State; or
- (b) the element is or includes an event that occurs outside the State but while the person alleged to have committed the offence is in the State.

(3) The existence of the territorial nexus required by subsection (1)(b) (the 'necessary territorial nexus' will be presumed and the presumption is conclusive unless rebutted under subsection (4).

(4) If a person charged with an offence disputes the existence of the necessary territorial nexus, the court will proceed with the trial of the offence in the usual way and if at the conclusion of the trial the court or, in the case of a jury trial, the jury is satisfied, on the balance of probabilities, that the necessary territorial nexus does not exist, it must, subject to subsection (5), make or return a finding to that effect and the charge will be dismissed."

Appeal to this Court

216 In this Court, the appellants contend that the Supreme Court of South Australia had no jurisdiction to try them because none of the elements of the offence occurred inside South Australia. The offence with which the appellants were charged was the common law offence of conspiracy to defraud. According to the appellants, the two elements of the offence of conspiracy to defraud were, first, the making of an agreement to obtain the incentive payment, and, secondly, the intention to obtain the payment by making fraudulent representations. The argument is that the residence of the victim, the consequences for the victims in South Australia if the conspiracy had been carried out, and the receipt of the facsimile in South Australia were neither elements nor parts of the elements of the offence. The facsimile may itself, the argument went, have been a fraudulent representation: it was not however part of the making of the agreement, or of the forming of the intention to make fraudulent representations.

217 In one respect at least the appellants' submissions are correct. The particulars in the information were wrong to the extent that they alleged a conspiracy "at Adelaide and other places". There is no doubt that the offence of conspiracy is complete once the agreement has been made. It is important to keep in mind the distinction between the agreement on the one hand, and any acts done in furtherance of it. That there is a distinction between the agreement and overt acts evidentiary of it is not always fully appreciated. An analogy with the civil law may be apt. An act done in part performance of a contract will be evidentiary of that contract but is different from the contract itself unless the act of part performance is also a signification of an acceptance of an offer or an assent to a term of the contract³³¹.

218 Glanville Williams in *Criminal Law: The General Part* discusses the history of, and elements necessary to constitute the crime of conspiracy³³²:

"Conspiracy, like other inchoate crimes, was principally the invention of the Star Chamber.

The term 'conspiracy' merely means an agreement of a certain kind. 'Conspire,' said Lord Campbell, 'is nothing; agreement is the thing.' The agreement may be inferred from conduct. It was once ruled that conspiracy cannot be deduced from acts not in themselves illegal, but this is probably

331 See *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666; Treitel, *The Law of Contract*, 9th ed (1993) at 17-18; *Cheshire, Fifoot and Furmston's Law of Contract*, 13th ed (1996) at 37-38.

332 2nd ed (1961) at 663.

wrong; the legality or illegality of the acts is merely of evidentiary importance. (footnotes omitted)

There need be no overt act beyond the making of the agreement.

"The crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete it was completed when they agreed."³³³

219 It is because conspiracies are usually hatched in private and direct evidence of them will often be unavailable that the conspiracy will be provable only as a matter of inference from evidence of conduct in pursuance of it. It is for this reason that the practice has developed of including in the indictment or information particulars of the acts, that is to say, the overt acts intended to be relied upon for the drawing of the inference of conspiracy.

220 Glanville Williams in his *Textbook of Criminal Law* states this proposition³³⁴:

"The overt acts in a conspiracy charge may be acts signifying agreement, acts preparatory to offences, or the offences themselves. Such acts are, of course, only evidence of the agreement."

221 With one minor qualification I agree with that statement. The qualification relates to the first category, "acts signifying agreement". An act signifying agreement will usually form part of the agreement itself. To that extent it may be both an element of the agreement and an overt act.

222 The actual conspiracy in this case was not therefore entered into in South Australia.

223 It was submitted in argument that *R v Doot*³³⁵ was authority for a different and much more expansive view of conspiracy. In that case, the conspirators made their agreement out of the United Kingdom to import a large quantity of cannabis into the United States via the United Kingdom. They shipped two vans with cannabis concealed in them from Morocco to Southampton, where the cannabis

333 *R v Aspinall* (1876) 2 QBD 48 at 58-59 per Brett JA.

334 2nd ed (1983) at 423.

335 [1973] AC 807.

was discovered in one of the vans. The other van was subsequently traced to Liverpool. The conspirators were charged with three counts of the substantive offence of importation and one count of conspiracy to import dangerous drugs. They pleaded guilty to the substantive charges. They challenged the jurisdiction of the English court to try them on the last count on the ground that the conspiracy, if any, had been made out of the United Kingdom. They were convicted of conspiracy and appealed to the Court of Appeal. The Court of Appeal quashed the convictions, holding that the offence of conspiracy was complete when the agreement was made. The House of Lords reversed this decision, holding that although a conspiracy was complete as a crime when the agreement was made, it continued in existence so long as there were two or more parties to it, intending to carry out its design. Their Lordships pointed out that the conspiracy was still in existence when the accused were in England and that their acts sufficed to establish the continuing existence of the conspiracy.

- 224 In *Doot's* case, the conspirators were actually in the United Kingdom, and, although the vans with the cannabis in them had been brought into that country, Viscount Dilhorne was of the opinion that the purpose of the conspiracy had not yet been fully effectuated. His Lordship said³³⁶:

"... [t]hough the offence of conspiracy is complete when the agreement to do the unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of such an agreement. It continues so long as the parties to the agreement intend to carry it out. ... Proof of acts done by the accused in this country may suffice to prove that there was at the time of those acts a conspiracy in existence in this country to which they were parties and, if that is proved, then the charge of conspiracy is within the jurisdiction of the English courts, even though the initial agreement was made outside the jurisdiction."

- 225 In view of the fact that the cannabis had already been brought into the United Kingdom when the conspirators were arrested it is difficult to understand why the conspiracy should not have been regarded as fully effectuated³³⁷. The ultimate destination of the drug was the United States and there was of course a conspiracy to transport it to that country. But even though that conspiracy had not been fully effectuated, the part of it with which the United Kingdom was concerned, the importation into that country, had been. Any renewal of the conspiracy by the

336 *R v Doot* [1973] AC 807 at 825.

337 In Australia the view has been taken that conspiracy should not in general be charged if a substantive offence has been committed: see *R v Hoar* (1981) 148 CLR 32. In Queensland, for example, prosecutions for conspiracy cannot be initiated without the consent of the Attorney-General: *Criminal Code* (Q) ss 541(2), 542(2), 543(2).

conspirators once the contraband drug was actually in the United Kingdom would have been likely to have been with respect to its movement in, and export from that country to the United States. That may have been a conspiracy contrary to United Kingdom law but it could not, by that stage, have been a conspiracy to import the cannabis into the United Kingdom.

226 It is better, in my respectful opinion, to preserve the distinction between conspiracy and acts done in furtherance of it³³⁸. And, as will appear, I do not think that the maintenance of that distinction renders a State and its citizens vulnerable to a conspiracy entered into outside it.

227 In my view sub-ss (1) and (2) of s 5C of the *Criminal Law Consolidation Act* provided no basis for jurisdiction in this case. Neither any element of the offence, nor any event forming part of an element of the offence occurred in South Australia. The dispatch of the facsimile to South Australia was an act done in furtherance of the conspiracy, but it was not an element of it.

228 Nonetheless, neither the absence of any agreement within South Australia nor the fact that s 5C(1) and (2) cannot be invoked to ground jurisdiction in that State means that the South Australian courts do not have jurisdiction to try the offences and that South Australian law had not been infringed. Sub-sections (1) and (2) of s 5C are not exhaustive with respect to the "location" of an offence against the law of South Australia and the jurisdiction of the courts of that State to try offences. Sub-section (9) of s 5C preserves the common law with respect to these matters and provides as follows:

"This section is in addition to and does not derogate from any other basis on which the courts of the State may exercise criminal jurisdiction."

229 The jurisdiction of the South Australian Supreme Court is defined by s 17 of the *Supreme Court Act* 1935 (SA), sub-s (2) of which provides as follows:

"There shall be vested in the court –

(a) the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by, all or any of the courts in England, following: –

(i) The High Court of Chancery, both as a common law court and as a court of equity:

(ii) The Court of Queen's Bench:

338 cf *Hyde v United States* 225 US 347 at 389 (1912) per Holmes J.

(iii) The Court of Common Pleas at Westminster:

(iv) The Court of Exchequer both as a court of revenue and as a court of common law:

(v) The courts created by commissions of assize:

(b) such other jurisdiction, whether original or appellate, as is vested in, or capable of being exercised by the court:

(c) such other jurisdiction as is in this Act conferred upon the court."

230 As will appear, I am of the opinion that an offence contrary to the common law of South Australia has been committed, and the presence of the appellants in South Australia having been lawfully secured, they could be tried, and the charges against them were, within the jurisdiction of the South Australian courts. On the question whether the common law of South Australia is part of, or in all respects necessarily identical with the common law everywhere else in or of Australia, or that the only common law in Australia is a, and the, common law of Australia, I am of the opinion that it is not for a number of reasons.

231 The first reason is that each State is beyond doubt a polity well capable of, and frequently legislating separately and to different effect from time to time. It would be anomalous that although the law according to statute may differ from state to state, the common law (to the extent that it is unaffected by statute) must necessarily, and in respect of all matters, be the same. Secondly, the colonies which were to become the States received the common law into their jurisdictions at different times. The landscapes and conditions in the different colonies varied greatly and still do in many respects. It is not unthinkable, for example, that over time, in a state which is largely a desert state, the common law in relation to water usage and rights might evolve differently from a state in which water is much more plentiful. In other words, the creative element in the work of Supreme courts in moulding the common law may operate to provide a different result in a different state³³⁹. The separate colony of South Australia was colonised by free settlers only. The different way in which the colonies were settled might conceivably produce differences in the common law although the fact of convict settlement in New South Wales did not relevantly do so in *Dugan v Mirror Newspapers Ltd*³⁴⁰.

339 See *Skelton v Collins* (1966) 115 CLR 94 at 134 per Windeyer J.

340 (1978) 142 CLR 583.

- 232 In *State Government Insurance Commission v Trigwell*, Gibbs J referred to the situation and condition of the particular colonies and the necessity for there to be practicality of application of a law to a particular colony. His Honour said³⁴¹:

"It has never been in doubt that South Australia was a settled colony within the established rules governing the application of English law to British possessions abroad. According to the statement of Blackstone which has been frequently cited, *colonists carry with them to a settled colony 'only so much of the English law, as is applicable to their own situation and the condition of an infant colony'* (*Commentaries*, vol 1, p 107). It was held in *Delohery v Permanent Trustee Co of NSW*³⁴² that in considering whether a particular rule of law was introduced into a colony on its settlement, the question is not whether the law is a beneficial or convenient one, but whether its administration or application was practicable having regard to the conditions existing in the colony, and *Dugan v Mirror Newspapers*³⁴³ provides a recent example of this principle." (emphasis added)

- 233 In *Dugan*, Barwick CJ accepted that the suitability of a law to the conditions of a colony was a relevant consideration in determining whether the law had been received and continued as a law of the State into which the colony had been translated. His Honour said³⁴⁴:

"I have no doubt that such a law was suitable to those conditions. Understandably, its operation in the colony caused inconvenience: the consequences of its operation were sought to be avoided by various means and, indeed, were at times ignored. But the question is not whether the law was a convenient one but whether it could suitably be applied in the then conditions of the colony. At its inception, the majority of the inhabitants were prisoners under sentence. But free settlers were expected and, as Captain Arthur Phillip foresaw, a great country was like to develop. Free settlers came and were present in significant numbers by 1828. I can see no basis on which it could be said that a law which in its time was fundamental to the relationship to the community of those convicted of capital felony was not suitable to the community of the colony, both at its inception and in 1828."

341 (1979) 142 CLR 617 at 625. See also at 653 per Aickin J.

342 (1904) 1 CLR 283 at 310-311.

343 (1978) 142 CLR 583.

344 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 587.

234 Later his Honour said³⁴⁵:

"It is sufficient, in my opinion, that the common law operating in New South Wales at all times relevant to the conviction and sentence of the applicant for a capital felony, in my opinion, precluded him from bringing this action against the respondent for defamation."

235 Thirdly, I would, with respect, find it difficult to accept that a common law offence may not be committed in Australia against a State community or a State community interest rather than the broader Australian society. And whilst it must be accepted that the common law and the requirements of the Constitution cannot be at odds³⁴⁶, that proposition holds true whether there is one common law, or as many common laws as there are polities in Australia.

236 In *Public Service Board of New South Wales v Osmond*³⁴⁷, Gibbs J referred to the common law of New South Wales, recognising thereby at least implicitly that there was a common law of a State. As desirable as an integrated body of common law may seem to many to be, the Constitution does not dictate any such conclusion³⁴⁸.

237 This nation remains a federal nation. Power, legislative, executive and judicial is divided among Federal, State and Territory parliaments. The executive of each manages, appoints and controls those who are to be responsible for law enforcement within the polities. Enforcement is not the sole province of police forces. Many other arms of the executive may be involved. For example, environmental, mining, industrial, health and emergency authorities will usually have an enforcement role to play. In so doing their rights and obligations need to be clear and defined by reference to the polity to which they are accountable. It is not an opinion universally held in this country that power and authority should inexorably accrue in all, or indeed, most matters to the central organs of government.

238 In *McKain*, Brennan, Dawson, Toohey and McHugh JJ said³⁴⁹:

³⁴⁵ (1978) 142 CLR 583 at 587. See also at 589-590 per Gibbs J, 603-606 per Jacobs J.

³⁴⁶ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563.

³⁴⁷ (1986) 159 CLR 656 at 669.

³⁴⁸ But see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 112 per McHugh J.

³⁴⁹ *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 36.

"To describe the States, as Windeyer J once described them,³⁵⁰ 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. The laws of the States, though recognized throughout Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts unless a valid law of the Commonwealth overrides the relevant State laws and prescribes a uniform legal consequence. That may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union. Far from eliminating the differential operation of State laws, s 118 commands that all the laws of all the States be given full faith and credit: the laws of the forum are to be recognized as fully as the laws of the place where the set of facts occurred. Section 118 would not be obeyed by refusing recognition to the laws of a forum State and by applying only the laws of the part of Australia in which the set of facts occurred."

239 That case was concerned with, among other things, the construction and application of state statute law but I do not read the remarks which I have quoted as necessarily so confined.

240 The main sources for the view that there is one common law of, and for Australia would appear to be some statements by Quick and Garran³⁵¹, some observations in extra-judicial writings by Sir Owen Dixon³⁵², and several remarks to that effect by this Court (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ) in *Lange*³⁵³ and by McHugh J in *Kable*³⁵⁴.

241 With great respect to the opinion expressed by Sir Owen Dixon in "The Common Law as an Ultimate Constitutional Foundation"³⁵⁵, that there would not have been a High Court of Australia as a court of appeal for Australia unless

350 *Pedersen v Young* (1964) 110 CLR 162 at 170.

351 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1976) at 332-342.

352 Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal*, 240 at 241, reprinted in *Jesting Pilate* (1965) 203 at 205. See also *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 487.

353 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566.

354 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 112.

355 (1957) 31 *Australian Law Journal* 240 at 241.

there was in fact an antecedent system of jurisprudence involving one common law, I would differ. The High Court of Australia as a final court of appeal for this country owes its establishment (among other things) to a perceived need for the provision of an alternative final court of appeal to the Privy Council, which then, and subsequently, decided cases emanating from a diversity of jurisdictions with different histories, different conditions, and no doubt, in consequence, some differences in the common law applied in them. Indeed the Privy Council itself recognised the existence of such a difference in *Australian Consolidated Press Limited v Uren* in holding that the common law of New South Wales (and elsewhere in Australia) did not preclude an award of exemplary damages for defamation. In that case their Lordships advised³⁵⁶:

"There are doubtless advantages if, within those parts of the Commonwealth (or indeed of the English speaking world) where the law is built upon a common foundation, development proceeds along similar lines. But development may gain its impetus from any one and not from one only of those parts. The law may be influenced from any one direction. The gain that uniformity of approach may yield is, however, far less marked in some branches of the law than in others. In trade between countries and nations the sphere where common acceptance of view is desirable may be wide. Thus in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)*³⁵⁷, Lord Wright in his speech³⁵⁸ expressed the view that it is desirable that as far as possible there should be uniformity between the law merchant as administered in the United States and in Britain. To a similar effect were the words of Viscount Simonds in his speech in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd*³⁵⁹ when rejecting a view which involved a departure from 'the prevailing harmony' of the law of England and the United States in relation to the carriage of goods by sea. *But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling.*" (emphasis added)

242 Section 76(iv) of the Constitution provides:

"The Parliament may make laws conferring original jurisdiction on the High Court in any matter –

³⁵⁶ *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 at 238; [1969] 1 AC 590 at 641.

³⁵⁷ [1949] AC 196.

³⁵⁸ [1949] AC 196 at 231.

³⁵⁹ [1961] AC 807 at 840-841.

...

- (iv) Relating to the same subject-matter claimed under the laws of different States."

243 If the reference to "laws" in paragraph (iv) should be taken to include laws other than, as well as, statute law, then the section at least arguably recognises that different states may have different common laws.

244 Of course this Court will and should, so far as possible, exert a unifying influence upon the common law throughout the country but it is difficult to reconcile the statement by Quick and Garran written in 1901, to which I have referred and which I will set out, with the statements of Gibbs J in *Trigwell* which I have already quoted. Quick and Garran wrote³⁶⁰:

"The decisions of the High Court will be binding on the courts of the States; and thus the rules of the common law will be – as they always have been – the same in all the States."

245 When that statement was made the *Judiciary Act* 1903 (Cth) had not been passed and the High Court did not yet exist. Moreover, as Barwick CJ in *Dugan* made clear, the common law had not necessarily always been the same in all the colonies. The views of Quick and Garran were not universally held by their contemporaries writing at about the same time. Clark who had been heavily involved in the preparation of early drafts of the Constitution wrote in 1901³⁶¹:

"As an appellate tribunal with authority to hear and determine appeals from judgments of the Supreme Courts of the States, in cases arising solely under the laws of a State, the High Court will have jurisdiction to decide questions arising under whatever portion of the common law will from time to time constitute a portion of the law of any State; but whenever the High Court, in the exercise of that appellate jurisdiction, will apply the rules and doctrines of the common law, its relation to the common law will not be any different from the relation of the House of Lords to the civil law when that tribunal exercises its appellate jurisdiction in respect of judgments of the Court of Sessions of Scotland in cases in which questions arising under the civil law are to be decided. The Supreme Court of the United States of America also finds itself in the same relation to the civil law when it exercises

360 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1976) at 785.

361 Clark, *Studies in Australian Constitutional Law* (1901) at 192.

its appellate jurisdiction in respect of judgments of the Supreme Courts of the States of Louisiana and Florida."

246 Too much should not be read into the remarks of Griffith CJ in *R v Kidman* when his Honour referred to the common law of the Commonwealth. These remarks are fully explained in an article by Priestley JA from which I have derived much assistance³⁶². There, his Honour wrote³⁶³:

"This did not go beyond saying, that by implication from the establishment of the Commonwealth by the Constitution, the Commonwealth must have such powers as were necessary to protect the incidents of its sovereignty and to that extent could rely on the English common law rules by which United Kingdom sovereignty was protected. Those rules would be the English common law rules as they were at the inception of the Commonwealth, subject to any alterations to them subsequently authorised by the Australian Constitution, thus qualifying for the description, when they came to be applied at some date necessarily later than the commencement of the Commonwealth, of Australian common law rules. This is not very different from Inglis Clark's opinion."

247 I was also assisted by the analysis by Priestley JA in the same article, of the theory of a uniform common law which had been propounded by Sir Owen Dixon before the advice of the Privy Council in *Uren*³⁶⁴. To give context to what Priestley JA was saying, it is necessary first to set out Sir Owen Dixon's theory³⁶⁵:

"We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate Colonies and then united her in a federal Commonwealth. We therefore regard Australian law as a unit. Its content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may ... [The general common law] is one system which should receive a uniform interpretation and application, not only throughout Australia but in

362 Priestley, "A Federal Common Law in Australia?" (1995) 6 *Public Law Review* 221.

363 Priestley, "A Federal Common Law in Australia?" (1995) 6 *Public Law Review* 221 at 229.

364 (1967) 117 CLR 221 at 238; [1969] 1 AC 590 at 641.

365 Address to the Section of the American Bar Association for International and Comparative Law, (1943) 17 *Australian Law Journal* 138 at 139.

every jurisdiction of the British Commonwealth where the common law runs." (emphasis added)

248 Priestley JA wrote of that passage³⁶⁶:

"In the first of the emphasised sentences, Dixon seems to have been indicating agreement with Homes' basic point, but then in the second seems to be using a premise closely analogous to Story's in *Swift v Tyson*. In this paper Dixon's principal points were, first, that the State derived from the common law, and, second, that Australian law could be regarded as a unit. I do not see the validity of either proposition depends on the identity of the common law first in the colonies and later in the States.

He ended with the observation that:

'... under the Australian conception, while on the one hand there is neither need nor room for the doctrine of *Swift v Tyson* 41 US (16 Pet) 1 (1842) on the other hand the basal principle of *Erie Railroad Co v Tompkins* 304 US 64 (1938) is contradicted.'

This final observation was questioned by Professor Cowen³⁶⁷. Cowen fastened on what seems to me to be the key point, namely that it does not necessarily follow that because the authority of the United Kingdom Parliament rested on the common law, the common law therefore produced singleness of result in all jurisdictions. He said that if the *Swift v Tyson / Erie Railroad Co v Tompkins* problem had no relevance for Australia it was not because the authority of the United Kingdom legislature rested on the common law but because of the more cogent point that s 73 of the Commonwealth Constitution conferred general appellate jurisdiction on the High Court."

249 Save perhaps for the reference to the "brooding" presence of the High Court, I would be strongly inclined to adopt also what Priestley JA said in the following passages³⁶⁸:

366 Priestley, "A Federal Common Law in Australia?" (1995) 6 *Public Law Review* 221 at 231.

367 Cowen, "Diversity Jurisdiction: The Australian Experience", (1955) 7 *Res Judicatae* 1 at 29.

368 Priestley, "A Federal Common Law in Australia?" (1995) 6 *Public Law Review* 221 at 232-233.

"In recent years, judges in the High Court have referred to 'the Australian common law' or 'an Australian common law'. This has happened in circumstances where there has been no apparent point in asking whether there is one Australian or six State bodies of common law, or considering the distinction between Australian and federal common law. Because nothing has turned on these questions, assumptions have simply been made that there is an Australian common law. Looked at broadly, there is no visible harm in such assumptions, but it is arguable that they are not strictly correct.

...

There is no reason why variant judicial decisions on common law rules may not occur in different States and thus create divergences in the common law of the States. The brooding presence of the High Court will act as a brake on any such divergence but until such time as any particular point is dealt with by the High Court, which may take some time to happen or, as a matter of possibility, may never happen, the position will in fact be that the common law rule on the particular point will be different in at least two States. This in itself is sufficient to show in theory that there is not one common law throughout Australia, nor an Australian common law³⁶⁹.

Another way of showing this is to consider the total law in force in a State at any time. This will comprise the statute law (Imperial, Commonwealth and State) and the decisional law (common law) there prevailing. The whole of the law in the State is the background to the decision of any particular case. A court cannot be sure that the particular rule by which it decides a case is appropriate without considering that background. (Experience, convention and occasional help from legal representation usually keep this task, in theory almost impossibly onerous, within manageable limits.) That is, although it is possible to divide the law into the different areas of applicable statute and decisional law, what the court is seeking in any case is the rule thought to be most appropriate to be found in or derived from the global mass of all law in the State. For practical purposes, it is the totality that matters. This is different in every State. Even if it is assumed that the decisional component of the law in every State was identical when as a colony its legal system began to function, it must follow that from the time differences developed in statute law in the jurisdiction, the total effect of the decisional law in that jurisdiction necessarily became different from that in the others.

This was so in the colonies before federation. In regard to confessions for example, by 1894 the statutory position was different in New South Wales,

369 An example of this was the different reception in different states of the *Mareva* injunction. See Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 3rd ed (1992), at 605-614.

Victoria and Queensland³⁷⁰. It necessarily followed that the common law position concerning confessions was also different in each jurisdiction³⁷¹. Variation between common law rules in different States is bound to happen. Although there will be uniformity in the common law if the High Court speaks on the point, until that happens, the common law in the two States is in fact different."

250 There is another respect in which the common law at times will differ from State to State in a practical sense. Although a difference between decisions in different States may provide a criterion for a grant of special leave to appeal to this Court, the existence of that criterion may not guarantee the resolution of the difference by the Court. It may be that no litigant has applied to this Court for special leave in such a case for years, or even ever. Naturally, if and when the matter comes to this Court, the result is likely to be a decision binding for all of Australia; but in the meantime, the common law applied in the States will be that which has been stated to be the law by the respective Courts of Appeal and Full Courts.

251 In *Lange v Australian Broadcasting Corporation*³⁷² there are several unequivocal statements by this Court that there is one common law for the whole of Australia. If I were convinced that remarks to that effect so understood were necessary for that decision, I would of course have to apply them accordingly. I am bound on any view to accord them great weight and respect which I do. However, I do not think that their Honours' remarks were necessary for the decision in *Lange*. Once the Court said, as it did³⁷³, that, "[O]f necessity, the common law must conform with the Constitution" and that [they] cannot be at odds, it becomes apparent that this was so, no matter whether there might be one, or six or more, common laws of defamation in Australia. None of them could prevail over the Constitution. The same may be said of the remarks of McHugh J in *Kable*³⁷⁴, which was also a constitutional case and which would have been decided the same way no matter what view was taken of the common law in Australia.

370 *R v Connors* (1990) 20 NSWLR 438 at 456-458, 462.

371 There must be numerous examples; one is *Delehunt v Carmody* (1986) 161 CLR 464 at 471-473. Another difference in approach to spillage cases in supermarkets: see *Shoey's Pty Ltd v Allan* [1991] Aust Torts Rep ¶81-104.

372 (1997) 189 CLR 520 at 562-563.

373 (1997) 189 CLR 520 at 566.

374 (1996) 189 CLR 51.

252 Unlike in the United States³⁷⁵ there were no colonies in which the civil law was the applicable law at the time of union. It follows that there were unlikely to be any significant differences in Australia in the common law throughout the colonies.

253 The Privy Council as a final court of appeal from the Australian colonies had before federation inevitably exerted a strong, unifying influence on the common law in this country. There were not, so far as the administration of justice was concerned, the same difficulties and unevenness in the application of the law as between the respective colonies and their citizens, as existed in North America at the time of the establishment of the United States.³⁷⁶ Any differences that exist or may emerge in the common law of the States in this country are likely to be extremely rare and slight, but in my view it is not appropriate and there is no Constitutional imperative to foreclose the possibility of such differences.

254 Another reason for the view that I take is that it is important that the autonomy (subject to the Constitution) of the States not be eroded. The people of a State look to that polity for the enforcement of the law. The police force is part of the executive of each State. It falls to the police force of each State to be the primary law enforcer of, and within the boundaries of a State. It is, in my opinion well settled that "all offences are local and territorial"³⁷⁷. The locality and territory for Australian purposes should be taken to be the State (except of course with respect to offences enacted to be such by Commonwealth legislation within power). The people have, and are entitled to have an expectation that breaches of the law within the State, or having a sufficient connexion with it, will be checked and punished by the polity of the State. It is important that there be, close at hand a sovereign authority, empowered so to act and with the means of doing so. The truth is that a person, and indeed a police officer living in Cape York is unlikely to have very much interest in the apprehension and punishment of an offence against the common law committed in the Riverlands of South Australia.

375 eg Florida and Louisiana.

376 See *Re Wakim; Ex Parte McNally* (1999) 73 ALJR 839; 163 ALR 270. The experience in the United States was different. After the ratification of the Constitution it was realized that there was an immediate need for a system of federal courts, not only as a unifying influence over very parochial communities and States, but also because, during the Confederation, many of the State courts had been heavily partial in their determinations of suits involving sister States, citizens of those States and foreign governments and foreigners: see Morris, *Federal Justice in the Second Circuit: A History of the United States Courts in New York* (1987) at 6-11.

377 *Grannall v C Geo Kellaway and Sons Pty Ltd* (1955) 93 CLR 36 at 52 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ.

255 As H L A Hart wrote in *The Concept of Law*³⁷⁸:

"The legal system of a modern state is characterized by a certain kind of *supremacy* within its territory and *independence* of other systems".

256 The same author³⁷⁹ makes the related point that there must be a genuine sovereign power territorially and politically defined to which the subject may look for enforcement and protection.

257 Is not a notion with which Australians so far have become acquainted that a common law offence perpetrated in, say, South Australia which would be a statutory (Code) offence in Queensland should nonetheless be regarded as an offence against the common law of the whole of Australia, that is to say, the polity of Australia of which Queensland is part. I am unaware of any difficulties that have arisen in treating crime as territorial and referable to a particular State if committed within it or having a sufficient connexion with it. But I would be concerned, if all common law offences were to be treated as offences against the polity of Australia, that on occasions there might be either a disinclination to prosecute because of perceived remoteness or otherwise, or competition between States to prosecute in circumstances in which the existence of the relevant connexion is tenuous or controversial in relation to one or other of the States.

258 There is another potential problem. Assume that the legislature of Western Australia (a Code State) legislates to define an offence in such a way as to make its elements different from, or more numerous than those which would suffice to constitute an offence at common law. If a common law offence in Australia is against the broad, Australian community rather than against the community of the State (territory) in which it is committed would that not then leave open the possibility that a person doing the relevant acts in Western Australia might be guilty of a common law offence against the Australian community whilst at the same time what that person had done would not be an offence according to Western Australian law? The mere fact that such a possibility exists argues against any proposition that offences at common law are offences against the Australian community at large.

259 The Court system in this country is divided among the polities. It is, in my opinion, consistent with the legal and administrative fact of this division that the common law be regarded as the common law of each State, even though the differences between the common laws of each State may tend to be non-existent or insignificant.

³⁷⁸ 2nd ed (1994) at 24.

³⁷⁹ 2nd ed (1994) at 50.

260 There is perhaps another view again, and that is that although the common law is the common law of Australia and that common law is unvarying throughout the country, it is enforceable as such only by a State with which the relevant acts or elements have a sufficient connexion. It is not however a view to which I am attracted or which I think I am bound by authority to adopt.

261 There are, as I have indicated as many persuasive and authoritative statements for the proposition that the States each have their own, albeit virtually identical, common laws as there are statements the other way, if, as I think, is the position, such of those statements as were made in *Lange*³⁸⁰ and *Kable*³⁸¹ were unnecessary for the decision in those cases.

262 It has not been suggested that the common law of conspiracy differs anywhere in Australia. However I do not propose to look beyond South Australian law, and by that I mean the common law in and of South Australia, to decide this case.

263 There are five possible bases for argument that an offence contrary to the law of South Australia has been committed and that the South Australian courts had jurisdiction in respect of it: first, that if the conspiracy had been carried out, there would have been an impact upon a "resident" of South Australia or, to put it another way, a "victim" in South Australia; that the conspiracy, if effected, would have involved a breach of the Queen's Peace in South Australia; that the conspiracy was effected in part in South Australia by the dispatch of the facsimile to, and its receipt in, that State; the occurrence of a relevant event in South Australia, the consideration given to there to the representations and the proposed transaction and, that in a federal system such as the Australian one, s 118³⁸² of the Constitution operated so as to make it an offence against South Australian law for conspirators elsewhere in Australia to agree to do an act which, if the agreement were made in South Australia, would be a criminal conspiracy in that State.

264 As *Doot* itself shows, much crime may be international, crossing many borders and of potential danger to many states. (That does not mean that at the same time crime may not also be local.) The extent of criminal activity across borders is likely to be greatly increased as a result of developments in and the use

380 (1997) 189 CLR 520.

381 (1996) 189 CLR 51.

382 Section 118 provides: "Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State."

of electronic technology to effect transactions. The difficulties in searching for a principle were adverted to by Lord Wilberforce in *Doot*³⁸³:

"In the search for a principle, the requirement of territoriality does not, in itself, provide an answer. To many simple situations, where all relevant elements occur in this country, or, conversely, occur abroad, it may do so. But there are many 'crimes' (I use the word without prejudice at this stage) the elements of which cannot be so simply located. They may originate in one country, be continued in another, produce effects in a third. Some constituent fact, the posting or receipt of a letter, the firing of a shot, the falsification of a document, may take place in one country, the other necessary elements in another. There is no mechanical answer, either through the Latin maxim or by quotation of Lord Halsbury LC's words in *Macleod v Attorney-General for New South Wales* [1891] AC 445 or otherwise, which can solve these. The present is such a case."

The difficulties were also referred to by La Forest J delivering the judgment of the Supreme Court of Canada in *Libman v The Queen*³⁸⁴:

"But once it is decided that transnational crimes must come within the jurisdiction of one State, then on what basis should one take or refuse jurisdiction?

The cases reveal several possibilities, of which I mention a few. One is to assume that jurisdiction lies in the country where the act is planned or initiated. Other possibilities include the place where the impact of an offence is felt, where it is initiated, where it is completed or again, where the gravamen or essential element of the offence took place. It is also possible to maintain that any country where a substantial or any part of the chain of events constituting an offence takes place may take jurisdiction.

Though counsel for Mr Libman argued that exclusive jurisdiction belongs to the country where the gravamen of the offence took place or where it was completed, a review of the English authorities does not really support that position. What it shows is that the courts have taken different stances at different times and the general result, as several writers have stated, is one of doctrinal confusion, a confusion compounded by the fact that the discussion often focuses on the specific offence charged, a discussion made more complicated by the further fact that some offences are aimed at the act committed and others at the result of that act."

383 *R v Doot* [1973] AC 807 at 817.

384 [1985] 2 SCR 178 at 185-186.

265 In the United States, in *Hyde v United States*, McKenna J, delivering the opinion of the Court, posed the question in this way³⁸⁵:

"The question, therefore, is presented as to the venue in conspiracy cases, whether it must be at the place where the conspiracy is entered into or whether it may be at the place where the overt act is performed, the Sixth Amendment of the Constitution of the United States requiring all criminal prosecutions to be in the 'district wherein the crime shall have been committed'."

266 The majority justified their decision to hold that a court of a state in which an overt act is performed had jurisdiction by the following reasons³⁸⁶:

"It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs. We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him – indeed, of even detecting him. And this may result, if the rule contended for be adopted. Let him meet with his fellows in secret and he will try to do so; let the place be concealed, as it can be, and he and they may execute their crime in every State in the Union and defeat punishment in all. And the suppositions are not fanciful, as illustrated by a case submitted coincidentally with this³⁸⁷. The possibility of such a result repels the contention and demonstrates that to yield to it would carry technical rules and rigidity of reasoning too far for the practical administration of criminal justice. We see no reason why a constructive presence should not be assigned to conspirators as well as to other criminals; and we certainly cannot assent to the proposition that it is not competent for Congress to define what shall constitute the offense of conspiracy or when it shall be considered complete and do with it as with other crimes which are commenced in one place and continued in another. Nor do we think that the size of our country has become too great for the effective administration of criminal justice."

385 225 US 347 at 357 (1912).

386 *Hyde v United States* 225 US 347 at 363-364 (1912).

387 *Brown v Elliott* 225 US 392 (1912).

267 Delivering the minority opinion, Holmes J pointed out that the statute had not made the overt act part of the crime. The appellants in the present case relied upon his Honour's reasoning there³⁸⁸:

"It would be an amazing extension of even the broadest form of fiction if it should be held that an otherwise innocent overt act done in one State drew to itself a conspiracy in another State to defraud people in the latter, even though the first State would punish a conspiracy to commit a fraud beyond its own boundaries. Of course in the present case the conspiracy as well as the overt act was within the United States, but the case that I have supposed of different jurisdictions is a perfect test of where the crime was committed. If a conspiracy exists wherever an overt act is done in aid of it, the act ought to give jurisdiction over conspirators in a foreign State, if later they should be caught in the place where the act was done.

The defendants were in California and never left the State, so far as this case is concerned. The fraud, assuming as I do for the purposes of decision that there was one, was to get land from the United States there and elsewhere on the Pacific Coast. If successful it would be punished there. The crime with which the defendants are charged is having been engaged in or members of a conspiracy, nothing else; no act, other than what is implied as necessary to signify their understanding to each other. It is punished only to create a further obstacle to the ultimate crime in California. The defendants never were members of a conspiracy within a thousand miles of the District in fact. Yet if a lawyer entered his appearance there in a case before the Land Department, and the defendants directed it and expected to profit by it in carrying out their plans, it is said that we should feign that they were here in order to warrant their being taken across the continent and tried in this place. The Constitution is not to be satisfied with a fiction. When a man causes an unlawful act, as in the case of a prohibited use of the mails, it needs no fiction to say that the crime is committed at the place of the act, wherever the man may be³⁸⁹. But when the offense consists solely in a relation to other men with a certain intent, it is pure fiction to say that the relation is maintained and present in the case supposed. If the Government, instead of prosecuting for the substantive offence, charges only conspiracy to commit it, trial ought to be where the conspiracy exists in fact."

268 The respondent's principal submission in this case is that, by its nature, conspiracy cannot be subject to the usual rules of the territoriality of crime, that the offence has always been treated as something of an exception to that usual rule and that the common law has now developed to the stage that an offence should

388 *Hyde v United States* 225 US 347 at 389-390 (1912).

389 *In re Palliser* 136 US 256 (1890).

be regarded as having been committed in the jurisdiction if the relevant agreement has a real and substantial link with the jurisdiction.

269 In my opinion, having regard to the exceptional nature of a conspiracy and the authorities to which I have referred, it is proper to take the view that an offence should be regarded as having been committed against the law of South Australia if a conspiracy has been entered into anywhere which has a real link with the jurisdiction. It seems to me with respect that many of the conceptual difficulties associated with the designation of overt acts as the agreement or parts of it can be avoided by the adoption of such a test. It is, as a test, no less exact than many which common law courts are regularly called upon to apply, such as the reasonableness of conduct, whether conduct has been contributory conduct, and whether an expense is of and incidental to a particular enterprise or activity. It is also sufficiently flexible to take account of such matters as an actual or threatened breach of the peace, the place of the likely infliction, or sustaining of harm or damage, and the nature and significance of the overt acts occurring within a jurisdiction.

270 In this case, a relevant state of affairs existed, to provide real links in these respects: the transmission of the facsimile to South Australia as an act done in partial implementation of the conspiracy; the consideration given by the Board and solicitors of Collins St in South Australia to the transaction generally and the fraudulent representations made in furtherance of the conspiracy; and, the fact that the victim, the party directly affected, Collins St, was a South Australian corporation with its registered office in South Australia. Any one of these circumstances was sufficient in this case to provide a real link between the conspiracy and South Australia so as to make the conspiracy an offence against the law of South Australia and to ground jurisdiction in the courts of South Australia to try the offence.

271 I need only make these further observations.

272 In some cases the occurrence of an overt act in the State claiming jurisdiction may provide the relevant link. In others it may be the threatened or actual breach of the peace of the State if the conspiracy were to be brought into effect. Some acts within a State may not suffice to provide the necessary link to ground jurisdiction. In *Board of Trade v Owen*³⁹⁰ the conspiracy was hatched and indeed partially carried out in the United Kingdom, but its object, to defraud a state department of the Federal Republic of Germany, and its unlawful means, were wholly outside the jurisdiction. There was no actual or threatened breach of Her Majesty's peace in the United Kingdom. *Liangsiriprasert v United States*³⁹¹ was

390 [1957] AC 602.

391 *Liangsiriprasert v United States* [1991] 1 AC 225.

an extradition case. There an agreement was made in Thailand to export heroin to the United States. The drug entered the United States in a diplomatic pouch. Two of the conspirators travelled to Hong Kong to receive payment and were arrested there. An extradition request was made by the United States to the Governor of Hong Kong. The question at the extradition hearing was whether the evidence established a prima facie case against the conspirators on the assumption that the drug was to be imported into Hong Kong. The Privy Council advised that the importation into the United States was an overt act in that country in fulfilment of the conspiracy and the occurrence of such an overt act in Hong Kong would have been sufficient to ground jurisdiction there.

273 In *Liangsiriprasert* the actual overt acts were of such a kind as to satisfy a test of a real link, just as the direct sustaining of damage might do so if the other elements of the offence of conspiracy are present. It seems to me that, despite some suggestions to the contrary³⁹², damage to local economic interests, particularly direct damage in consequence of a conspiracy made elsewhere, is a relevant consideration and will usually, if it exists, be a decisive factor in establishing the relevant link and therefore of grounding jurisdiction.

274 It is unnecessary to consider the argument of the respondent based on s 118 of the Constitution.

275 I would dismiss the appeals.

392 *Attorney-General's Reference (No 1 of 1982)* [1983] 1 QB 751 at 758.