SUPREME COURT OF QUEENSLAND

CITATION:	*Weston v Commissioner of Police, Queensland* [2003] QSC 174
PARTIES:	**HOWARD MERVYN WESTON** (applicant) v **COMMISSIONER OF POLICE, QUEENSLAND** (respondent)
FILE NO/S:	SC No 2005 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	6 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2003
JUDGE:	McMurdo J
ORDER:	**1. Application for review dismissed** **2. Applicant pay the respondent's costs to be assessed**
CATCHWORDS:	CRIMINAL LAW - WARRANTS - where NSW magistrate issued warrant and applicant arrested for alleged breach of s 51(1) *Firearms Act* 1996 (NSW) – where alleged offences occurred in Queensland – where applicant applied to Queensland magistrate for release on basis warrant was invalid – where application refused – where applicant seeks review of magistrate's decision – whether s21 *Justices Act* 1902 (NSW) empowers a justice to issue a warrant for the apprehension of persons alleged to have committed an offence in another state – whether in s21(c) Act Queensland is a "land beyond the seas" CRIMINAL LAW - WARRANTS - where under Part 1A *Crimes Act* 1900 (NSW) an offence under NSW law may be committed by acts outside NSW – where there must exist a geographical nexus – where pursuant to 10E *Crimes Act* there is a rebuttable presumption the required geographical nexus exists - where but for Part 1A applicant could not be charged with offence under s 51(1) *Crimes Act*– whether s10E is beyond power *Australia Act* 1986 (Cth), s 3 *Service and Execution of Process Act* 1992 (Cth), s 82, s 83, s 83(8), s 83(10), s 86(1), s 86(3), s 86(7)

Crimes Act 1900 (NSW), Part 1A
Firearms Act 1996 (NSW), s 51(1)
Interpretation Act 1987 (NSW), s 12
Criminal Procedure Act 1986 (NSW), s 7, s 8
Justices Act 1902 (NSW), s 21, s 21(c), s 22, s 23

Air-India v Wiggins (1980) 71 A Cr App R 213, considered
Broken Hill South Ltd v Deputy Commissioner of Taxation (NSW) (1937) 56 CLR 337, applied
Lipohar v The Queen (2000) 200 CLR 485, distinguished
Liangsiriprasert v United States [1991] 1 AC 225, distinguished
Petranker v Brown [1984] 2 NSWLR 177, considered
R v Claverie [1970] 2 NSWR 487, considered
Ruckmaboye v Lulloobhoy Mottichund (1853) 8 Moo P. C. 4, considered
Societe Eqyptienne Financiere pour le Commerce et l'Industrie S.A.E. v Clyde Industries Ltd [1960] SR (NSW) 315, considered
Thompson v The Queen (1988 – 1989) 169 CLR 1, considered
Treacy v DPP [1971] AC 537, considered
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1, applied
Witten v Lombard Australia Ltd (1968) 14 FLR 322, applied

COUNSEL: M J Byrne QC, with F Martin, for the applicant
D J S Jackson QC, with P Davis, for the respondent

SOLICITORS: Roberts & Kuskie for the applicant
Crown Solicitor for the respondent

[1] **McMURDO J:** On 11 February 2003, a magistrate sitting at Murwillumbah in New South Wales issued a warrant for the apprehension of the applicant. The warrant stated the applicant's last known address to be one in Queensland. He was apprehended in Queensland on 12 February 2003, and on that day appeared before the Magistrates' Court at Brisbane when he was released on bail. His apprehension was in reliance upon s 82 of the *Service and Execution of Process Act* 1992 (Cth) which provides that a person named in a warrant issued in a State may be apprehended in another State.

[2] The applicant again appeared before the Brisbane Magistrates' Court on 26 February 2003, when he applied to be released on the basis that the warrant was invalid. The magistrate was obliged to order his release if satisfied of the warrant's invalidity: s 83(10). His application was dismissed and pursuant to s 83(8) orders were made that he be remanded on bail on condition that he appear at the Central Local Court at Sydney. Where an order is made under s 83, the apprehended person may apply to the Supreme Court of the State in which that order was made for a review of the order: s 86(1). The applicant applies for review of the Brisbane magistrate's decision, upon the basis that he should have been satisfied that the warrant was invalid. The respondent is the Commissioner of Police (Qld), because s 86(3) provides that in such a case, the respondent is to be the Commissioner of the

police force of the State in which the applicant was apprehended. The review is by way of rehearing: s 86(7).

[3] The offence shown on the warrant is that the applicant:

> "Between the 16/8/01 & 5/11/01 at Southport & Brisbane in the State of Queensland did sell a firearm to wit, four Browning semi-automatic pistols to another person, namely an undercover police officer who was not authorised to possess the firearms by licence or permit and without having produced to and inspected by the seller the purchaser's licence or permit, and without having produced to and inspected by the seller the purchaser's permit to acquire the firearm (or the equivalent of any such permit that is issued under the law of another state or Territory in respect of the firearm concerned) the said undercover police officer not being a licensed firearms dealer."

The conduct of the applicant is alleged to have breached s 51(1) of the *Firearms Act* 1996 (NSW).

[4] The warrant is said to be invalid for two reasons. First, it is argued that there is no power in a New South Wales justice to issue a warrant for the apprehension of a person who is alleged to have committed an offence in another State. This involves the interpretation of s 21 of the *Justices Act* 1902 (NSW), and in particular, whether another State is "land beyond the seas" as that term is used in s 21(c). Secondly, the applicant contends that the alleged offence is not one for which an indictment may be legally preferred in New South Wales as required by s 21(c), because the relevant acts occurred wholly within Queensland and to the extent that s 51 of the *Firearms Act* has an extraterritorial operation, it does not extend to the facts of this matter. The issues raised by the second ground include an issue of the validity of s 10E of the *Crimes Act* 1900 (NSW).

Land Beyond the Seas

[5] Section 21 of the *Justices Act* provides as follows:

> "21 When information may be laid
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> An information may be laid before a Justice in any case where any person has committed or is suspected to have committed any treason or other indictable offence:
>
> (a) in New South Wales,
> (b) on the high seas, or in any creek, harbour, or other place in which the Admiralty of England have or claim to have jurisdiction,
> (c) on land beyond the seas, when for such offence an indictment may legally be preferred in New South Wales."

"Such information" must be in writing where it is intended that a warrant in the first instance is to be issued (as here), in which case the "matter thereof" is to be

substantiated by the oath of the informant or of a witness.[1] Whenever any such information is laid before a Justice and so substantiated, the Justice may issue his or her warrant in the first instance for the apprehension of the relevant person.[2] It is common ground that the offence, as alleged, was not committed in New South Wales or at any place within s 21(b). This warrant can be valid only if the alleged offence the subject of the information was committed "on land beyond the seas" as that term is used in s 21(c).

[6] The applicant submits that another Australian State is not land beyond the seas in the relevant sense. Neither party suggests that there is some other law of New South Wales which empowers a justice to issue a warrant for an offence committed in another Australian State. Such an interpretation would plainly have a significant effect upon the enforcement of the laws of New South Wales. Even putting on one side the operation of Part 1A of the *Crimes Act*, an offence against the criminal law of New South Wales, in some circumstances, can be committed although the substantive elements of the offence occur outside that State.[3] This is a premise of s 21. There is no apparent reason for the legislature to have distinguished between offences in other Australian States and offences beyond the Commonwealth. If the expression "land beyond the seas" is susceptible only to the interpretation for which the applicant argues, then such an intention, however surprising, must be attributed to the New South Wales legislature. Nevertheless, the inexplicable consequences of a certain interpretation of an enactment are relevant in determining its proper interpretation. In *Petranker v Brown*[4] Mahoney JA said:[5]

> "… it is the function of the courts to ascertain and give effect to the intention of the legislature as expressed in its enactments. And, as is well settled, the courts will not be led to find the legislative intention to be other than the enactment indicates by the fact that they regard that which the legislature intends as undesirable or objectionable. But conversely the courts should not, in my opinion, find that the legislature, and the legislators, had the intention to do something for which they will be publicly accountable as undesirable or objectionable unless that intention appears clearly from the enactment. …
>
> In determining what appears from the enactment as the intention of the legislature, it is, I think, sometimes proper to ask whether, had these suggested intentions been spelled out in terms in the legislation, the legislators would have voted for it. And, the purpose of the legislative procedures being to make clear, to the legislators and the public, what it is that is being enacted, surprising results should not be seen to have been intended unless there be no alternative to them."

[7] No case was cited in which any opinion has been expressed as to the meaning of the expression in s 21. But it is legitimate to have regard to an accepted interpretation of the expression although given in a different statutory context. In *Ruckmaboye v*

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1 s 22
2 s 23
3 *Lipohar v The Queen* (1999) 200 CLR 485
4 [1984] 2 NSWLR 177
5 At 186-187 as applied by Muir J in *Le Blanc v Queensland TAB Ltd* [2003] 2 Qd R 65

Lulloobhoy Mottichund,[6] the Privy Council extensively examined cases which had interpreted the expression. The relevant statute in *Ruckmaboye* was the *Statute of Limitation* (1623), s 7 of which provided that if the plaintiff was "beyond the seas" when the cause of action accrued, and the action was commenced within six years from the time when the plaintiff "returned from beyond the seas", it was not time barred. Sir John Jervis said:[7]

> "These words "beyond the seas" are of extensive application in the law, many ancient rights being saved by the Common Law, to persons "beyond the seas"; it is, therefore, of considerable importance to ascertain what has been deemed to be the legal import and meaning of them, because, if it shall appear that they have long been used, in a sense which may not improperly be called technical, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature in that sense, long prior to the Statute, 21 James I., c. 16, the rule of construction of Statutes will require, that the words in the Statute should be construed according to the sense in which they had been so previously used, although that sense may vary from the strict literal meaning of them."

The use of the expression is no longer common and there is little Australian authority on its meaning. It is unnecessary to attempt a review of the cases which would largely borrow from that in *Ruckmaboye*. It is however necessary to discuss three decisions.

[8] The first is *Ruckmaboye* itself where a plaintiff pleaded that her suit in the Supreme Court of Bombay was not time barred because she had then been residing in India, but outside the territories subject to the government of the East India Company and beyond the jurisdiction of that court. The Privy Council had to decide whether her residence in those other places was a residence "beyond the seas" within the meaning of that statute. It was held that the words are synonymous with "out of the territories" and "out of the realm" with the result that the replication was a valid answer to the defendant's plea. What is clear from *Ruckmaboye* and many of the cases there discussed is that the words "beyond the seas" are not to be read literally, in the sense that one place had to be separated from the other by water.

[9] The second is a decision of Walsh J, sitting in the Supreme Court of New South Wales, in *Société Egyptienne Financière pour le Commerce et l'Industrie SAE v Clyde Industries Ltd* [1959] 60 SR (NSW) 315. Having held that the provisions of the *Statute of Limitations* 1623 then operated in New South Wales, he cited *Ruckmaboye* "as showing the extent of the departure which has been made from the literal meaning of the words" and said that:[8]

> "It decided that being "beyond the seas" is equivalent to being out of the territory to which the jurisdiction of the Court extends, whether or not any seas lie between the plaintiff's place of residence and that territory."

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6 (1853) 8 Moo P.C. 4 at p 27; 14 ER 2, at p 9

7 14 ER at p 9

8 at p 317

[10] The third is a decision of Gibbs J sitting as a judge of the Supreme Court of the Australian Capital Territory in *Witten v Lombard Australia Ltd*,[9] which is strongly relied upon by the applicant here. That again concerned the meaning of the expression within the same statute, which was then still in force in both New South Wales and the Australian Capital Territory. It was in force in the Territory because it was made part of the law of the Territory by enactments of the Commonwealth Parliament.[10] The plaintiff was a person at all relevant times carrying on business and living in Sydney when the cause of action arose. He brought proceedings in the Australian Capital Territory, parallel with like proceedings brought by him in the Supreme Court of New South Wales. He was forced to prosecute the ACT proceedings because of impediments to the prosecution of the New South Wales proceedings by adverse interlocutory decisions. His action in the ACT was commenced outside the prescribed period of limitation, but he pleaded that it was not statute barred, because he was at relevant times "beyond the seas" from the Australian Capital Territory, by being in Sydney. This was rejected by Gibbs J, who gave judgment for the defendant. In his view, the passage set out above[11] from the judgment of Walsh J in *Société Egyptienne Financière* had somewhat misstated the effect of the reasoning in *Ruckmaboye*. As Gibbs J read the judgment in *Ruckmaboye*, the plaintiff had succeeded not because she was out of the jurisdiction to which the Supreme Court of Bombay extended, but because she was in places "without the territories subject to the government of the East India Company".[12] In his view the determinative interpretation in *Ruckmaboye* of "beyond the seas" was in the following passage:[13]

> "And upon a review of the text books, statutes and decisions, we are of the opinion, that the words of the statute *21 James* 1 c 16, "beyond the seas", are in legal import and effect synonymous with the words "out of the territories" and "out of the realm", and that the replication, therefore, discloses a valid answer to the defendant's plea."

So it was necessary for Gibbs J to consider whether New South Wales was "out of the realm, or out of the territories to which the relevant government extends". He said that "the fact that two territories owe allegiance to one sovereign does not necessarily make them part of the one realm".[14] Gibbs J then turned to the question of whether, in the context of the relevant enactment, New South Wales and the Australian Capital Territory were both within the same realm. He said:[15]

> "It may be that notwithstanding federation the Australian States remain separate realms in relation to one another (cf *Pedersen v Young* (1964) 110 CLR, at p 170, per Windeyer J) and that one State is still "beyond the seas" from another, within the meaning of that expression where it is still used in a statute of limitations and is not affected by a definition clause. However, that is not the question in

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9 (1968) 14 FLR 322

10 *Seat of Government Acceptance Act* 1909 (Cth), s 6; *Seat of Government (Administration) Act* 1910 (Cth), s 4

11 at [9]

12 at p 328

13 14 ER at p 12 as set out by Gibbs J in 14 FLR at 328

14 14 FLR at 329

15 at p 330-331

> the present case; the question here is whether a State, which forms part of the Commonwealth, is "beyond the seas" from the Australian Capital Territory, within the meaning of those words in a statute which was made part of the law of the Territory by the provisions of Acts of the Commonwealth Parliament (*Seat of Government Acceptance Act* 1909, s 6; *Seat of Government (Administration) Act* 1910, s 4).
>
> In my opinion New South Wales and the Australian Capital Territory are both within the same realm. Both Sydney and Canberra are under the government of the Commonwealth. Laws of the Commonwealth Parliament operate both in the State and the Territory. Indeed, a law made by the Parliament for the Territory may operate not only within the Territory itself, but throughout the whole of Australia (*Lamshed v Lake* (1958) 99 CLR 132, at pp 141, 142-144, 146, 153-154; *Spratt v Hermes* (1965) 114 CLR 226, at pp 245, 270). It is not to the point that there may be local laws, made under delegated power, which operate only in the Territory, for the question is not whether New South Wales forms part of the Australian Capital Territory, but whether both form part of the one realm. Clearly they do, and it follows that New South Wales is not "beyond the seas" from the Australian Capital Territory, within the meaning of those words in the statute of limitations in force in the territory."

[11] It was critical to his Honour's decision that the relevant statute was made part of the law of the Territory by enactments of the Commonwealth Parliament. An enquiry as to what constituted a relevant "realm" had to be undertaken in the context of the law in question. To take a simple case, where the expression "land beyond the seas" is used within a Commonwealth Act, it would plainly refer to places which were not under the government of the Commonwealth. Gibbs J saw no difference between such a case and that before him, where the statute was made part of the law of the territory by a Commonwealth enactment. As he put it: "Laws of the Commonwealth Parliament operate both in the State and the Territory".[16] That is why he identified the realm as being the same between Sydney and Canberra. But he left open the question of whether the Australian States remain separate realms in relation to one another, so that one State is "beyond the seas from another".[17] In my view, there is nothing in his judgment which supports the view that the expression "beyond the seas" in a State statute is to be interpreted as the applicant contends. Nor is there an answer to the present question within the *Australia Act* 1986 (Cth) s 3, upon which the applicant also relies. The applicant's submission here is that: "just as there can be no doubt since the *Australia Act* 1986 s 3 that States are "beyond the seas" from the United Kingdom, a Federal system including the Constitution, s 109, is such that States are part of the same realm, namely, Australia. Hence, Queensland, unsurprisingly, is not "beyond the seas" from New South Wales.".[18] It is not necessary in the present case to decide whether the Australian States remain separate realms in relation to one another. Having regard to *Ruckmaboye*, that might be a relevant enquiry but not a necessary one. The

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16 at p 330

17 at p 330

18 Applicant's written submissions para 23

expression is synonymous not only with "out of the realm" but also with the expression "out of the territory".[19]

[12] Once it is accepted, as it must be, that the expression "land beyond the seas" as here used had a meaning which permits it to refer to land outside New South Wales which is not physically separated from it by water, then the term should be interpreted as meaning land beyond New South Wales. The term is synonymous with "out of the territory", and the territory, in the context of a State enactment is that State. No authority, apart from *Witten*, was said to support the applicant's interpretation. On the view I take of the authorities, they support the respondent's submission. When an interpretation with its very surprising consequences can be legitimately avoided, a court should do so.

[13] In my view "land beyond the seas" in s 21 includes land within another Australian State, such as Queensland. It follows that this ground of challenge to the warrant's validity must fail.

Part 1A of the *Crimes Act* 1900 (NSW)

[14] The offence with which the applicant is charged is one against s 51(1) of the *Firearms Act* 1996 (NSW) which is in these terms:

> "(1) A person ("the seller") must not sell, or knowingly take part in the sale of, a firearm to another person ("the purchaser") unless:
>
> (a) the purchaser is authorised to possess the firearm by a licence or permit, and
> (b) the following documents have been produced to, and inspected by, the seller:
>
> (i) the purchaser's licence or permit, and
>
> (ii) if the purchaser is not a licensed firearms dealer – the purchaser's permit to acquire the firearm (or the equivalent of any such permit that is issued under the law of another State or Territory in respect of the firearm concerned).
>
> Maximum penalty: imprisonment for 5 years."

This is an indictable offence: s 7 and s 8 of the *Criminal Procedure Act* 1986 (NSW).

[15] Absent provisions of the kind found in Part 1A, s 51 would apply only to acts committed within New South Wales. In the construction of an offence – creating statute it is presumed the legislature did not intend to proscribe acts done outside its territory: *Thompson v The Queen* (1988-1989) 169 CLR 1 at pp 23-24 per Brennan J citing *Air-India v Wiggins* (1980) 71 Cr App R 213 at 217, 218-219. It is recognised that in some kinds of cases, an offence might be committed by conduct outside the relevant territory. Where a statutory offence is a "result-crime" in the sense discussed by Lord Diplock in *Treacy v Director of Public Prosecutions*

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19 *Ruckmaboye* at 14 ER at 12

[1971] AC 537 at p 560, the offence might be committed by acts outside the territory if the result of the offence occurs within the territory.[20] The common law offence of conspiracy might be committed by acts outside the territory, if its implementation would involve consequences within the territory: *Lipohar v The Queen*; *Liangsiriprasert v United States* [1991] 1 AC 225. The present case is not within either category. An offence against s 51(1) of the *Firearms Act* could be committed by acts outside New South Wales only through the operation of Part 1A of the *Crimes Act* 1900.

[16] Part 1A was enacted in 2000.[21] It provides as follows:

> "**10A Application and effect of Part**
>
> (1) This Part applies to all offences.
> (2) This Part extends, beyond the territorial limits of the State, the application of a law of the State that creates an offence if there is the nexus required by this Part between the State and the offence.
> (3) If the law that creates an offence makes provision with respect to any geographical consideration concerning the offence, that provision prevails over any inconsistent provision of this Part.
> (4) This Part is in addition to and does not derogate from any other basis on which the courts of the State may exercise criminal jurisdiction.
>
> **10B Interpretation**
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> (1) For the purposes of this Part, the necessary geographical nexus is the geographical nexus required by section 10C.
> (2) For the purposes of this Part, the place in which an offence is committed is the place in which the physical elements of the offence occur.
> (3) For the purposes of this Part, the place in which an offence has effect includes:
> (a) any place whose peace, order or good government is threatened by the offence, and
> (b) any place in which the offence would have an effect (or would cause such a threat) if the criminal activity concerned were carried out.
> (4) A reference in this Part to the State includes a reference to the coastal waters of the State in which the criminal law of the State applies (including in any part of the adjacent area of the State in which the substantive criminal law of the State applies by force of the law of the State or of the Commonwealth in accordance with the *Crimes at Sea Act 1998*).

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20 See also *Thompson* at pp 24-25

21 Act No 43/2000

10C Extension of offences if there is a geographical nexus

(1) If:

(a) all elements necessary to constitute an offence against a law of the State exist (disregarding geographical considerations), and

(b) a geographical nexus exists between the State and the offence,

the person alleged to have committed the offence is guilty of an offence against that law.

(2) A geographical nexus exists between the State and an offence if:

(a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or

(b) the offence is committed wholly outside the State, but the offence has an effect in the State.

10D Provisions relating to double criminality

(1) This Part applies to an offence that is committed partly in the State and partly in another place outside the State, irrespective of whether it is also an offence in that other place.

(2) This Part applies to an offence that is committed wholly in a place outside the State only if:

(a) it is also an offence in that place, or

(b) it is not also an offence in that place, but the trier of fact is satisfied that the offence constitutes such a threat to the peace, order or good government of the State that the offence warrants criminal punishment in the State.

10E Procedural and other provisions

(1) The existence of the necessary geographical nexus for an offence is to be presumed and the presumption is conclusive unless rebutted under subsection (2).

(2) If a person charged with an offence disputes the existence of the necessary geographical nexus, the court is to proceed with the trial of the offence in the usual way. If, at the conclusion of the trial, the trier of fact is satisfied on the balance of probabilities that the necessary geographical nexus does not exist, it must (subject to subsection (3)) make or return a finding to that effect and the charge is to be dismissed.

(3) If the trier of fact would, disregarding any geographical considerations, find the person not guilty of the offence, it must make or return a finding of not guilty. The

> trier of fact must make or return a finding of not guilty on the grounds of mental illness in any such case if they were the only grounds on which the trier of fact would have found the person not guilty of the offence.
>
> (4) This section also applies to any alternative verdict available by law to the trier of fact in respect of another offence with which the person was not charged. A finding of guilt may be made or returned in any such case, unless the trier of fact is satisfied on the balance of probabilities that the necessary geographical nexus for that other offence does not exist.
>
> (5) The issue of whether the necessary geographical nexus exists must, if raised before the trial, be reserved for consideration at the trial.
>
> (6) A power or authority exercisable on reasonable suspicion or belief that an offence has been committed may be exercised in the State if the person in whom the power or authority is vested suspects on reasonable grounds or believes that the elements necessary to constitute the offence exist (whether or not the person suspects or believes or has any ground to suspect or believe that the necessary geographical nexus with the State exists)."

[17] The applicant's submission is that s 10E is invalid as beyond power. It is not argued that the remainder of Part 1A is invalid. The circumstances in which offences committed outside New South Wales have the nexus required by s 10A are expressed in terms which correspond with the State's extraterritorial legislative power. That power is to make laws for the peace, order and good government of the State: s 2(1) of *Australia Act* 1986 (Cth). But s 10E is said to be invalid, as not being a law for the peace, order and good government of New South Wales.

[18] Section 10E is a procedural provision. It places the onus upon the person charged to prove, on the balance of probabilities, that the necessary geographical nexus does not exist: s 10E(2). Absent that provision, the prosecution would have to prove that nexus, on the balance of probabilities: *Thompson v The Queen*. But once the onus is placed upon the person charged, there is a possibility that, in a particular case, the geographical nexus will not exist but the accused will be unable to establish that nonexistence. Accordingly, there is the possibility of a conviction where the conduct occurs wholly outside New South Wales and, in truth, there is no threat to its peace, order and good government. It is this reversal of the onus which is the basis for the applicant's submission that s 10E is beyond power.

[19] In placing this onus upon an accused, s 10E is not novel. The predecessor of Part 1A was s 3A of the *Crimes Act* 1900 (NSW), which was inserted by the *Crimes (Application of Criminal Law) Amendment Act* 1992 (NSW). Subsections (3) to (7) of that s 3A are, in effect, reproduced in s 10E. Section 3A was recommended by the Standing Committee of Solicitors-General and adopted by the Standing Committee of Attorneys-General in consequence of the decision in *Thompson v The Queen*. South Australia, the Australian Capital Territory and Tasmania enacted

relevantly identical provisions.[22] The South Australian provision was cited in *Lipohar*,[23] but its validity was not challenged.[24] Nor were those enactments the first to place this onus upon the accused: see e.g. *R v Claverie* [1970] 2 NSWR 487.

[20] The present question involves whether there is a sufficient connection between the subject matter of s 10E and the peace, order and good government of the State. The reversal of the onus was the subject of criticism in submissions for the applicant which had the appearance of attacking the provision as unfair or unreasonable. Valid legislation is not reviewable on that basis. In *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, Dixon J said at p 375:

> ""it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen."

The passage is cited in the judgment of the court in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at p 13, where the Court said at (p 10):

> "These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative powers by the

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22 See s 5C (repealed) *Criminal Law Consolidation Act* 1935 (SA), s 3A *Crimes Act* 1900 (ACT), *Criminal Law (Territorial Application) Act* 1995 (Tas)

23 P 499, 501 (Gleeson CJ), pp 519-520 (Gaudron, Gummow and Hayne JJ), pp 544-545, 559-561 (Kirby J), p 569 (Callinan J)

24 Nor, apparently, was it challenged in the Court of Criminal Appeal: see (1997) 70 SASR 300

> Parliament of New South Wales is not susceptible to judicial review on that score."

(and at p 14):

> "And, as 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* 1986 (Cth), s 2(1); *Australia Act* 1986 (U.K.), 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 recognise what has already been achieved in the course of judicial decisions. Be this as it may, it is sufficient for present purposes to express our agreement with the comments of Gibbs J in *Pearce*[25] 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."

[21] As I have mentioned, a consequence of the reversal of the onus is that there is a possibility that Part 1A will have an impact where, in truth, there is no threat to the interests of New South Wales, but where that cannot be proved, even on the balance of probabilities. Is it for the peace, order and good government of the State that there be a law providing for an offence where, in the circumstances of a particular matter, the effect within the State of the relevant conduct cannot be disproved? In my view it is. The evident concern of the law is still with the interests of New South Wales, and in particular with the possibility that New South Wales will be affected by the conduct in such a case. There is a sufficient connection between the State and a law which extends its criminal laws to conduct which cannot be shown to pose no threat to its peace, order and good government. In my view, it is a law for the peace, order and good government of the State.

[22] It is conceded that if s 10E is valid, the issuing magistrate did not have to give consideration to the existence of the necessary geographical nexus required by s 10A. However, the applicant submitted that if Part 1A is entirely valid, nevertheless "in order to base jurisdiction in New South Wales there needs to be (demonstrated) a real connection with that jurisdiction", and for this cited *Lipohar*.[26] In *Lipohar*, a similar statutory provision to Part 1A was held not to apply. That was s 5C of the *Criminal Law Consolidation Act* 1935 (SA), the terms of which appear in the judgment of Callinan J at pp 569-570. As I have mentioned, this and its then counterparts in some other jurisdictions[27] contained similar procedural provisions to those of s 10E. But they provided a different definition of the required nexus. In

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25 (1976) 135 CLR 507 at p 518

26 p 503 (Gleeson CJ), pp 534-535 (Gaudron, Gummow and Hayne JJ)

27 including the then s 3A of the *Crimes Act* 1900 (NSW)

Lipohar, that defined nexus could not be established. But as 5C did not provide the only basis for the exercise of jurisdiction when an offence was committed outside the territory, *Lipohar* was decided by the application of the common law. It was in that context that it was said that there was required a real connection with the jurisdiction. In my view, *Lipohar* does not support the submission that, assuming the validity of Part 1A, and its operation in a particular case, there must still be some demonstrated real connection with the jurisdiction of New South Wales. The effect of a valid enactment such as Part 1A is not to be qualified in the way which this submission suggests.

[23] In the application of Part 1A, the issuing magistrate did not have to be concerned with whether the person to be apprehended would be likely to ultimately prove the absence of the necessary geographical nexus. Nor was that magistrate to be concerned with whether there was a real connection between the facts set out in the information and the interests of New South Wales. It is then unnecessary and inappropriate for me to consider whether the facts put before the issuing magistrate could provide the required geographical nexus in this case.

[24] The result is that I am not satisfied that this warrant is invalid. The application for review should be dismissed, and the applicant should pay the respondent's costs to be assessed.