SUPREME COURT OF QUEENSLAND

CITATION:	*Abbott* v *Commissioner of Police* [2016] QSC 95
PARTIES:	**BRENDEN JAMES ABBOTT** (applicant) v **QUEENSLAND COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	BS3768/16
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	3 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application for review of the orders of the Deputy Chief Magistrate made on 12 April 2016 is dismissed.** **2. The applicant is to continue to be remanded in custody.** **3. The applicant is to be returned in custody to appear at the Perth Magistrates Court within 7 business days of the making of this order.** **4. The applicant is to be delivered together with a copy of the warrant referred to in the 12 April 2016 orders into the custody of Detective Sergeant W Davies of the Western Australia Police.**
CATCHWORDS:	EXTRADITION – RETURN AND ATTACHMENT WITHIN AUSTRALIA – UNDER SERVICE AND EXECUTION OF PROCESS ACT 1992 – ABUSE OF PROCESS – where the applicant escaped out of legal custody in Western Australia in 1989 and a warrant issued under the *Justices Act* 1902 (WA) – where the applicant was later imprisoned in Queensland for a variety of offences, then released on parole in 2016 – where following the applicant's release in 2016 an application was made to execute the 1989 warrant and return him to Western Australia – where the validity of the warrant was not disputed – where the magistrate ordered pursuant to s 83 that the applicant be

returned to Western Australia – where the applicant sought review of the decision by the Supreme Court pursuant to s 86 – where the applicant submitted that, given that the Attorney-General of Western Australia previously refused to agree to and failed to request the applicant's transfer to Western Australia, it was an abuse of process to be extradited to Western Australia to serve the balance of a term of imprisonment imposed on him in that State in the 1980s and face further charges – whether ss 83 and 86, properly construed, exclude abuse of process as a ground for refusal of an application for extradition

HIGH COURT AND FEDERAL COURT – THE FEDERAL JUDICATURE – NATURE AND EXTENT OF JUDICIAL POWER – CONFERRAL ON STATE COURTS – where the power conferred on the magistrate by s 83 was regarded as an administrative power – where the power conferred on the Supreme Court by 86 was regarded as a judicial power – where the magistrate and the Supreme Court exercising power under ss 83 or 86 respectively were concerned only with whether the applicant was liable to be extradited on a valid warrant, not with the extraditing State's criminal law or with determining the applicant's guilt or innocence – whether, by excluding the inherent power of the court to dismiss proceedings for an abuse of process, ss 83 and 86 are invalid because they require a court to act in a way which is inconsistent with its essential character

Australian Constitution, ss 51(xxiv), 76, 77
Acts Interpretation Act 1901 (Cth), ss 15A, 15AB
Corrective Services Act 2006 (Qld), s 212
Crimes Act 1914 (Cth), s 4AAA
Extradition Act 1988 (Cth), s 19
Judiciary Act 1903 (Cth), s 78B
Justices Act 1902 (WA)
Prisoners (Interstate Transfer) Act 1982 (Qld)
Service and Execution of Process Act 1901 (Cth), s 18
Service and Execution of Process Act 1992 (Cth), ss 83, 86

Aston v Irvine (1955) 92 CLR 353; [1955] HCA 53, cited
Berichon v Chief Commissioner, Victoria Police (2007) 16 VR 233; [2007] VSC 143, followed
Dalton v New South Wales Crime Commission (2006) 227 CLR 490; [2006] HCA 17, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, applied
Gould v Brown (1998) 193 CLR 346; [1998] HCA 6, cited
Grollo v Palmer (1995) 184 CLR 348; [1995] HCA 26, considered
Hamilton Island Enterprises Pty Ltd v Commissioner of Taxation [1982] 1 NSWLR 113, applied
Higgins v Comans (2005) 153 A Crim R 565; [2005] QCA

234, cited
Hilton v Wells (1985) 157 CLR 57; [1985] HCA 16, cited
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, cited
Killick v The Commissioner of Police New South Wales [2014] NSWSC 781, followed
Kuczborski v Queensland (2014) 254 CLR 51; [2014] HCA 46, cited
Lavelle v The Queen (1995) 125 FLR 110, followed
Lee v New South Wales Crime Commission (2013) 251 CLR 196; [2013] HCA 39, cited
Loveridge v Commissioner of Police for South Australia (2004) 89 SASR 72; [2004] SASC 195, not followed
McGlew v The New South Wales Malting Co Ltd (1918) 25 CLR 416; [1918] HCA 72, cited
Mok v Director of Public Prosecutions (NSW) [2016] HCA 13, considered
Nicholas v The Queen (1998) 193 CLR 173; [1998] HCA 9, considered
O'Donoghue v Ireland (2008) 234 CLR 599; [2008] HCA 14, applied
Project Blue Sky Mining Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Gummer [1995] 1 Qd R 346, cited
Ridgeway v The Queen (1995) 184 CLR 19; [1995] HCA 66, cited
Rodgers v Chief Commissioner of Victoria Police (2012) 263 FLR 478; [2012] VSC 305, followed
Vasiljkovic v The Commonwealth (2006) 227 CLR 614; [2006] HCA 40, considered
Visser v Commissioner of Australian Federal Police (No 3) [2012] NSWSC 1387, followed

COUNSEL: C Jennings for the applicant
P Davis QC, G Del Villar and C Hartigan for the respondent

SOLICITORS: Nyst Legal for the applicant
Queensland Police Service Solicitor for the respondent

[1] **Jackson J**: This is an application for review[1] of an extradition order[2] that the applicant be returned to Western Australia.

[2] The applicant's circumstances are well known. He is sometimes identified in the popular press by the nickname "The Postcard Bandit".

[3] The basis of his present application is that the application for extradition to Western Australia constitutes an abuse of process because it is unduly oppressive. He contends that, after serving many years in prison in this State, the refusals in 2004 and 2007 by the Attorney-General of Western Australia to agree to his transfer to

1 *Service and Execution of Process Act* 1992 (Cth), s 86.
2 *Service and Execution of Process Act* 1992 (Cth), s 83(8)(b).

that State,[3] and the failure by the Attorney-General of Western Australia to request his transfer, it is an abuse of process to apply for him to be extradited to serve the balance of any term of imprisonment imposed on him in that State in the 1980s or to face any further charges stemming from his escape from Fremantle Prison in 1989.

[4] Except for a few matters set out below, it is unnecessary to further analyse the factual grounds for the suggested abuse of process. What is important is that the abuse of process is alleged to have been the application for extradition made by the authorities of Western Australia.

[5] On 28 November 1989, a warrant issued under the *Justices Act* 1902 (WA) to the principal police officer in Perth, and to all other police officers in the State of Western Australia, to apprehend the applicant and bring him to answer a complaint that on 24 November 1989 at Fremantle he escaped out of legal custody ("the warrant").

[6] Until this month, the warrant remained unexecuted. It is not contended that it is no longer valid.

[7] Prior to 12 April 2016, the applicant was serving a lengthy period of imprisonment in Queensland for a variety of offences.

[8] On 12 April 2016, the Queensland Parole Board released the applicant to parole and granted to him a permit to leave and remain out of Queensland, to travel to Western Australia for the period of 12 April 2016 to 29 October 2020 for the purpose of extradition.[4]

[9] On 12 April 2016, an application was made to execute the warrant and return the applicant to the State of Western Australia. A copy of the original warrant was produced before the Deputy Chief Magistrate at Brisbane (and marked ex 1 as referred to in the order of the magistrate).

[10] On 12 April 2016 the Deputy Chief Magistrate made the following orders:

> 1. Bail refused. The defendant is remanded in custody.
> 2. I order the defendant be returned to W.A. pursuant to s 83(8)(b) [of the *Service and Execution of Process Act* 1992 (Cth)].
> 3. The defendant is to be returned in custody to appear at the Perth Magistrates Court within 48 hrs of the lifting of the suspension of the orders.
> 4. The defendant is to be delivered together with a copy of exhibit 1 into the custody of Det Sgt W Davies WA Police the person who brought the copy of the warrant to Queensland.
> 5. Pursuant to s 83(11) I suspend the orders and order that if an application for review is not filed pursuant to s 86 of the *Service and Execution of Process Act* 1992 (Cth) within one day the suspension will be lifted. If an application for review is filed pursuant to s 86 of *Service and Execution of Process*

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3 Under the *Prisoners (Interstate Transfer) Act* 1982 (Qld).

4 *Corrective Services Act* 2006 (Qld), s 212.

> *Act* 1992 (Cth) within 1 day the suspension will operate until the withdrawal or determination of the review.

[11] On 13 April 2016, an originating application was made to this court for an order that the orders of the Deputy Chief Magistrate made on 12 April 2016 be revoked and that the respondent's application for extradition of the applicant to Western Australia be dismissed.

[12] On 15 April 2016, the application was set down to come on for hearing in this court. On that day, the applicant by his counsel informed the court that he proposed to argue a matter arising under the Constitution or involving its interpretation. Directions were made for notices to be given under s 78B of the *Judiciary Act* 1903 (Cth).

[13] The constitutional matter is that if ss 83 and 86 of the *Service and Execution of Process Act* 1992 (Cth) ("SEPA"), properly construed, exclude the inherent power of the court to dismiss proceedings for an abuse of process, they are invalid because they require a court to act in a way which is inconsistent with its essential character.

[14] The source of the constitutional matter is located in obiter dictum in *Loveridge v Commissioner of Police for South Australia*.[5] In that case, White J held that ss 83 and 86, properly construed, were not inconsistent with the exercise by a magistrate of the Magistrates Court of South Australia of an inherent power to dismiss an application for extradition on the ground of abuse of process.

[15] Alternatively, White J said that:

> "… if s 86 of [SEPA] was to be construed as excluding the exercise, in an appropriate case, of the inherent power to dismiss or stay proceedings for abuse of process, a question of its validity may arise. The ability of the Commonwealth Parliament to enact legislation which would require a court to act in a way which is inconsistent with its essential character as a court has been doubted."[6]

[16] There are two questions. First, do ss 83 and 86, properly construed, exclude abuse of process as a ground for refusal of an application for extradition under SEPA? Second, if so, are they invalid because they would require a court to act in a way which is inconsistent with its essential character?

The proper construction of ss 83 and 86

[17] In *Loveridge*, White J construed s 83 (and s 86) as admitting a power to decline to make an order for extradition if a court is satisfied that the application constitutes an abuse of the court's process.

[18] Relevantly, ss 83 and 86 provide:

> "**83 Procedure after apprehension**

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5 (2004) 89 SASR 72.

6 (2004) 89 SASR 72, 82 [46].

(1) As soon as practicable after being apprehended, the person is to be taken before a magistrate of the State in which the person was apprehended.
(2) The warrant or a copy of the warrant must be produced to the magistrate if it is available.
…
(8) Subject to subsections (10) and (14) and section 84, if the warrant or a copy of the warrant is produced, the magistrate must order:
(a) that the person be remanded on bail on condition that the person appear at such time and place in the place of issue of the warrant as the magistrate specifies; or
(b) that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant.
(9) The order may be subject to other specified conditions.
(10) The magistrate must order that the person be released if the magistrate is satisfied that the warrant is invalid.
(11) The magistrate may suspend an order made under paragraph (8)(b) for a specified period.
(12) On suspending the order, the magistrate must order that the person be remanded:
(a) on bail; or
(b) in such custody as the magistrate specifies;
until the end of that period…

86 Review

(1) If an order has been made under section 83, the apprehended person or a person to whom the warrant was directed may apply to the Supreme Court of the State in which the order was made for review of the order.
…
(7) The review is to be by way of rehearing.
(8) The Supreme Court may confirm, vary or revoke the order…"

[19] Generally speaking, the provisions of SEPA, including ss 83 and 86, are laws with respect to "the service and execution throughout the Commonwealth of the … criminal process and the judgments of the courts of the States" within the meaning of s 51(xxiv) of the *Australian Constitution*.

[20] The purpose and history of that head of Commonwealth legislative power was traced in *Dalton v New South Wales Crime Commission*.[7] The discussion included the conclusion that "[a] warrant issued by a judicial officer, directing the arrest of a person on a criminal charge, is a [criminal] process".[8]

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7 (2006) 227 CLR 490, 500-505 [21]-[33].
8 (2006) 227 CLR 490, 502 [26].

[21] The operation of Pt 5 of SEPA was very recently reviewed in *Mok v Director of Public Prosecutions (NSW)*.[9] Gordon J said:

> "Part 5 of [SEPA] deals with 'Execution of warrants'. As has been seen, the Victorian police officer executed the NSW Bench Warrant and arrested the appellant under s 82, which is in Pt 5 of [SEPA]. Section 82(1) of [SEPA] relevantly provides that the person 'named in a *warrant* issued in a State may be apprehended in another State' (emphasis added). That person may be apprehended by 'an officer of the police force of the State in which the person is found'.
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> For Pt 5, 'warrant' is defined in s 81A of [SEPA] to include a 'warrant issued by a body or person that is an authority for the purposes' of Pt 5. Also for Pt 5, 'authority' is defined in s 81A to include a body or person that, 'under a law of a State, may issue a warrant for the arrest and return to custody or detention of a person, following the revocation or cancellation of' certain identified orders.
>
> After a person has been apprehended under s 82 of [SEPA], the procedure in s 83 is to be adopted. The person must be brought before a magistrate of the State in which the person was apprehended as soon as practicable after being apprehended. On production of the warrant (here, the NSW Bench Warrant), the magistrate must make an order of the kind provided by s 83(8)(a) or (b). Section 83(8)(b) relevantly provides that the order be 'that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the *place of issue* of the warrant' (emphasis added). '[P]lace of issue' is relevantly defined in s 3(1) of [SEPA] to mean 'the State in which the process was issued'."[10] (footnotes omitted)

[22] Earlier in *Mok*, French CJ and Bell J said:

> "The necessity for such a power was recognised well before federation because of the difficulties which had been experienced in the extradition of offenders between the Australian colonies. Those difficulties had led to reliance upon Imperial statutes relating to extradition and later laws made pursuant to the *Federal Council of Australasia Act* 1885 (Imp). The purpose of the power conferred by s 51(xxiv), given effect in SEPA 1901 and SEPA 1992, as stated by this Court in *Aston v Irvine*, is:
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> > 'securing the enforcement of the civil and criminal process of each State in every other State.'
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> It was described as:

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9 [2016] HCA 13, [10]-[12] and [72]-[74].

10 [2016] HCA 13, [72]-[74].

> 'a power to be exercised in aid of the functions of the States and [it] does not relate to what otherwise is a function of the Commonwealth.'

Early in the life of SEPA 1901, an argument was put to this Court in *McGlew v New South Wales Malting Co Ltd* that 'the intention' of s 51(xxiv) was to enable the Parliament to enact a law which would merely 'extend the arm of the State Courts so as to enable parties to be brought before them.' The Court took a broader view of Parliament's power to legislate with respect to service and execution of process throughout the Commonwealth, extending, for instance, to such incidental powers as enabling courts to protect against abuse of interstate process.

Following a report of the Law Reform Commission ('the Commission') on service and execution of process ('the Report'), SEPA 1901 was amended and then replaced completely by SEPA 1992. An important difference between SEPA 1992 and SEPA 1901 is that SEPA 1992 provides for the exclusion of State laws which might otherwise operate concurrently with it. SEPA 1901 made no express provision for any such exclusion and, at least in its application to civil process, was held to be not exhaustive. The Commission recommended that the new SEPA 'express an intention to cover the field, that is, to provide the only law on the subject of service and execution of State and Territory process and judgments outside the State or Territory of issue or rendition and within Australia.' So it is that SEPA 1992 makes express provision for the exclusion of State laws in s 8. Relevantly, s 8(4) provides:

> 'Subject to this Act, this Act applies to the exclusion of a law of a State (the ***relevant State***) with respect to:
>
> (a) the service or execution in another State of process of the relevant State that is process to which this Act applies'.

The subsection operates as an express exclusion by a Commonwealth law of the application of State law on a particular subject matter. It thereby renders any such State law inoperative not because it is directly invalidated by Commonwealth law but by operation of s 109 of the Constitution. There was no suggestion that s 8(4) did not have that effect in relation to the class of laws it described and the Court of Appeal so held in its judgment."[11] (footnotes omitted)

[23] The particular factual context in *Loveridge* was that L had escaped from prison in Western Australia in April 1980. In January 1989, the Crown Solicitor for Western Australia had indicated that the Western Australian Police did not intend to take action to extradite her. In April 2004, she was arrested and an order made that she

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11 [2016] HCA 13, [10]-[11].

be extradited back to Western Australia. It was held on review that it was an abuse of process to execute the warrant for her arrest after such a lengthy period and after she had been informed that she would not be extradited.

[24] In *Loveridge*, White J distinguished *Lavelle v The Queen*,[12] a decision of the Full Court of the Supreme Court of Western Australia on appeal from an order made under s 86. In *Lavelle*, Rowland J said:

> "It cannot be an abuse of process of the Court of Petty Sessions of Western Australia to exercise a power it is bound to, and, in the circumstances of this case, obliged to, exercise in accordance with an Act of the Commonwealth. This court does not exercise supervisory jurisdiction over courts of another State or Territory, valid on their face, issued by those courts.
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> It is apparent from reading the Second Reading Speech when the Act was introduced into the Commonwealth Parliament that the exclusion of the criteria which would enable a magistrate to refuse to make an order of extradition, based on matters such as delay and oppression and lack of justice, were deliberately excluded [sic] as a result of discussion amongst the various Attorneys General of the Commonwealth and States."[13]

[25] White J found it possible to distinguish *Lavelle*, but subsequent judges have not been able to do so, or to follow *Loveridge*. They include *Berichon v Chief Commissioner, Victoria Police*,[14] *Rodgers v Chief Commissioner of Victoria Police*,[15] *Visser v Commissioner of Australian Federal Police (No 3)*[16] and *Killick v The Commissioner of Police New South Wales*.[17]

[26] In terms of the doctrine of precedent, unless *Lavelle* is truly distinguishable, I must follow it as a decision of an intermediate appellate court on the interpretation of a Commonwealth Act, unless I am convinced that the interpretation is plainly wrong. As the High Court said in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*:[18]

> "Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong."[19] (footnote omitted)

[27] Alternatively, I should take the same approach to the single Judge decisions of the various States. As Rogers J said in *Hamilton Island Enterprises Pty Ltd v Commissioner of Taxation*:[20]

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12 (1995) 125 FLR 110.
13 (1995) 125 FLR 110, 112-113.
14 (2007) 16 VR 233, 235-238.
15 (2012) 263 FLR 478, 479-481 [2]-[5].
16 [2012] NSWSC 1387, [22]-[24].
17 [2014] NSWSC 781, [42]-[51].
18 (2007) 230 CLR 89.
19 2007) 230 CLR 89, 151-152 [135].
20 [1982] 1 NSWLR 113.

> "In my view it is of cardinal importance in the proper administration of justice that single judges of State Supreme Courts exercising federal jurisdiction should strive for uniformity in the interpretation of Commonwealth legislation. Unless I were of the view that the decision of another judge of co-ordinate authority was clearly wrong I would follow his decision."[21]

[28] That is, unless I were persuaded that the cases other than *Loveridge* were clearly wrongly decided, I should follow them.

[29] In the circumstances of this case, it is not necessary to examine the questions of construction of ss 83 and 86 in great detail in order to decide whether to follow the cases other than *Loveridge*. Those questions are clearly questions of construction.[22] As a matter of first principle, the proper construction of those sections requires consideration of the text of the sections in the context of the remainder of the statute, the "mischief" at which the statute is directed, the purpose of the statutory provisions and the relevant and admissible extrinsic circumstances.

[30] In the present case, there are four important matters that initially bear on the relevant questions of construction.

[31] First, there is no indication in the statutory text that either the magistrate on the initial application for extradition under s 83 or the court on a review of the magistrate's decision under s 86 is not to order extradition if to do so would be an abuse of process (in the sense of an abuse constituted by delay or oppression).

[32] The process of statutory construction must begin with a close examination of the statutory text and most often will also end there. But as was said by the plurality in *Project Blue Sky Mining Inc v Australian Broadcasting Authority*:[23]

> "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."[24] (footnote omitted)

[33] Second, as described in *Mok*, the history of SEPA is that it replaced the 1901 Act of the same name.[25] SEPA 1901 contained an express provision in s 18 empowering the extraditing magistrate or court to refuse to order extradition to the requesting State on the ground that it would be an abuse of process. Section 18 relevantly provided:

> "… and if it be made to appear to him or to any Judge of the State that the charge is of a trivial nature, or that the application for return has not been made in good faith in the interests of justice, or

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21 [1982] 1 NSWLR 113, 119.
22 See *Higgins v Comans* (2005) 153 A Crim R 565, 569-575 [15]-[38].
23 (1998) 194 CLR 355.
24 (1988) 194 CLR 355, 384 [78].
25 *Service and Execution of Process Act* 1901 (Cth).

> that for any reason it would be unjust or oppressive to return the person either at all or until the expiration of a certain period, the Justice or Judge may discharge the person either absolutely or on bail, or order that he shall be returned after the expiration of the period named in the order, or may make such other order as he thinks just."

[34] In contrast, ss 83 and 86 contain no equivalent express power.

[35] Third, as described in a number of the cases, the second reading speech for the bill that became SEPA made clear that it was not intended that a magistrate or court of extradition have regard to general discretionary factors such as abuse of process. That speech is admissible in aid of the construction of the sections.[26] The Minister said:

> "In addition, the grounds upon which an apprehended person may seek release will be narrowed considerably…
>
> None of these grounds [under s 18(6)] has been included in the Bill. Unless the warrant is invalid, a magistrate will be required to remand the apprehended person on bail to appear in the place of issue of the warrant, or order that he or she be taken in custody to that place."[27]

[36] Fourth, as a countervailing factor, the applicant submits that the powers to make an order to extradite under s 83 or on review under s 86 attract the operation of the "principle of legality", that general words are construed as limited to the objects of an Act and as not altering the law in any way that would infringe upon fundamental rights.[28]

[37] However, there are two observations to be made about the application of that principle in the present context. The applicant did not refer to any case other than *Loveridge* that supports the conclusion that it is a fundamental right that a person not be extradited if the extraditing court is of the opinion that it is an abuse of process because of delay or oppression for the application for extradition to be made. Further, the principle of legality "does not exist to shield those [fundamental] rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature."[29]

[38] It is unnecessary to go further. I am not persuaded that *Lavelle* is distinguishable or that *Lavelle* or the cases other than *Loveridge* are plainly wrong, and I propose to follow those cases as the weight of authority upon the questions of the proper construction of ss 83 and 86.

[39] In my view, it follows that the Deputy Chief Magistrate was clearly correct in considering that abuse of process based on delay or oppression in bringing the

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26 *Acts Interpretation Act* 1901 (Cth), s 15AB(2)(f).

27 Commonwealth, *Hansard*, House of Representatives, 9 November 1992, 3564 (Ian Wilson).

28 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

29 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313].

application before him was not available as a ground of dismissal of the application under s 83 of SEPA, on its proper construction.

[40] Further, consistently with the weight of authority, the power of the Supreme Court of Queensland on review under s 86 is in this respect no wider than the power of the Magistrates Court in making the original decision under s 83. Abuse of process based on delay or oppression in bringing the application under s 83 is not available as a ground to revoke an extradition order made under s 83 or to dismiss the application for such an order.[30]

Invalidity arguments

[41] If the proper construction of ss 83 and 86 is that the magistrate on the application for extradition and the court on review of the magistrate's order are to disregard any question of abuse of process in making the application based on delay or oppression as previously outlined, the applicant submits that they are invalid as beyond the power of the Commonwealth Parliament to enact them, or that the sections should be read down so as to avoid constitutional invalidity.[31]

[42] As the cases earlier mentioned show, one source of constitutional power for both ss 83 and 86 is s 51(xxiv) of the *Australian Constitution*.

[43] However, there may also be a question of conferring judicial power involved, depending on the particular power in question. For example, in *McGlew v The New South Wales Malting Co Ltd*,[32] it was held that the power of a Supreme Court to order security for costs in a proceeding served in the State under SEPA 1901 was invested in the court under s 77(iii) of the *Australian Constitution.*

[44] In my view, the power to make an order for extradition under s 83 is an executive or administrative power to be exercised judicially, because it requires a magistrate to determine of at least the identity of the person brought before the court and the validity of the warrant.[33]

[45] A number of cases have analysed the analogous power of international extradition conferred on State magistrates under the *Extradition Act* 1988 (Cth) ("EA"). In *Vasiljkovic v The Commonwealth*,[34] it was held that the power of the magistrate to determine the eligibility of a person for extradition was an administrative power not a judicial power. The same approach was taken in *O'Donoghue v Ireland*.[35] They support the conclusion that the power conferred by s 83 is an administrative power, as was held in relation to the corresponding power under SEPA 1901.[36]

[46] Section 86, on the other hand, is a clear grant of judicial power.[37]

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30 The applicant submitted in oral argument that there might be an additional question based on the "supervisory jurisdiction" of the Supreme Court as a superior court of record, but in my view this merely confuses the question of constitutional power next considered.

31 *Acts Interpretation Act* 1901 (Cth), s 15A.

32 (1918) 25 CLR 416.

33 Compare *Aston v Irvine* (1955) 92 CLR 353, 364-365.

34 (2006) 227 CLR 614.

35 (2008) 234 CLR 599.

36 *Aston v Irvine* (1955) 92 CLR 353, 365.

37 *R v Gummer* [1995] 1 Qd R 346, 355-356; *Aston v Irvine* (1955) 92 CLR 353, 366.

[47] In my view, if there is any constitutional limit of power affecting the validity and operation of ss 83 or 86 of SEPA, it is to be found in the proper application of the relevant principles as to the powers to make laws under s 51(xxiv) as well as ss 76 and 77 of the *Australian Constitution*, as exercised in making ss 83 and 86 in relation to the circumstances described by the applicant as an abuse of process.

[48] From there, a convenient jumping off point in relation to the constitutional provenance of s 83 is that:

> "… just as it has been held that Ch III confines the power which may be conferred on federal courts, it has been held that neither s 77(iii) of the Constitution, which allows the parliament to make laws investing State courts with federal jurisdiction, nor any other provision of the Constitution authorises the Commonwealth to make laws "requir[ing] State courts to exercise any form of non-judicial power."[38] (footnote omitted)

[49] So far as s 83 is concerned, a cognate question in relation to the external affairs power (s 51(xxix) of the *Australian Constitution*) and extradition laws made under the EA arose in *O'Donoghue v Ireland*. The question was whether State legislative approval was required as a condition for the Commonwealth to be able to confer the relevant functions on a State magistrate.

[50] Section 19 of the EA provided that a "magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country". One of the questions was whether s 19 imposed an administrative duty on a magistrate. The plurality judgment said:

> "It is settled by authority including *Pasini v United Mexican States* and *Vasiljkovic* that the determination under s 19(1) of eligibility to surrender and the making of consequential orders under s 19(9) and (10) involves the exercise of administrative functions and not the exercise of the judicial power of the Commonwealth. Accordingly, s 19 is not the product of an exercise by the Parliament of its power conferred by s 77(iii) of the *Constitution* to make laws investing State courts with federal jurisdiction."[39] (footnotes omitted)

[51] It was held further that s 19 conferred a power and not a duty. The distinction between administrative and judicial power in those cases did not determine validity. The power conferred on the State magistrate was conferred as an individual in a personal capacity and not as a member of the Magistrates Court. That conclusion followed from the application of s 4AAA of the *Crimes Act* 1914 (Cth). That provides, relevantly:

> "**4AAA Commonwealth laws conferring non-judicial functions and powers on officers**
>
> (1) This section sets out the rules that apply if, under a law of the Commonwealth relating to criminal matters, a function

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38 *Gould v Brown* (1998) 193 CLR 346, 401 [61].

39 *O'Donoghue v Ireland* (2008) 234 CLR 599, 621 [40].

> or power that is neither judicial nor incidental to a judicial function or power, is conferred on one or more of the following persons:
> …
> (b) a magistrate;
> …
> (2) The function or power is conferred on the person only in a personal capacity and not, in the case of a … magistrate, as a court or a member of a court.
> (3) The person need not accept the function or power conferred."

[52] If the reasoning from *O'Donoghue* applies to s 83, the provision in s 83(8) that the magistrate must order that the person be remanded or be taken to a specified place in the place of issue of the warrant, must be read as subject to s 4AAA. In my view, that is the correct approach.

[53] Next, the principles analysed in *Grollo v Palmer*[40] may by analogy respond to the question raised as to the validity of the grant of power under s 83 considered as a grant of non-judicial power. *Grollo* was concerned with the validity of the vesting of a non-judicial power to issue a telephonic interception warrant upon the Judges of the Federal Court of Australia. It was held that the power to issue the warrant was conferred on each eligible Judge as a designated person.

[54] Much of the argument in *Grollo* revolved around a statement made in *Hilton v Wells*[41] that:

> "[I]t has been recognised that non-judicial functions may be entrusted to judges personally and not in their capacity as judicial officers, but, it seems, on the footing that a duty of acceptance cannot be imposed. This recognition is no doubt subject to the general qualification that what is entrusted to a judge in his [or her] individual capacity is not inconsistent with the essence of the judicial function and the proper performance by the judiciary of its responsibilities for the exercise of judicial power."[42] (citations omitted)

[55] Although the applicant's counsel did not refer to *Grollo* or *Hilton*, it was in this sense that I understood his argument as to incompatibility leading to invalidity of s 83. In other words, the applicant submits that it would be incompatible and inconsistent with the judicial function of the Magistrates Court, as a repository or potential repository of Commonwealth judicial power otherwise, to confer a non-judicial power on a magistrate under s 83 that could be exercised irrespective of whether it was an abuse of process in the relevant sense to make the application for extradition under s 83.

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40 (1995) 184 CLR 348, 362-368.
41 (1985) 157 CLR 57.
42 (1985) 157 CLR 57, 83.

[56] However, *Loveridge* aside, there is no specific or generally analogous authority brought to my attention or of which I am aware that supports the argument, and I am unable to accept it as a matter of first principle.

[57] In my view, it must not be overlooked at any point that the subject of an application under s 83 is extradition and return to another State of the Commonwealth. The magistrate deciding an application under s 83 is not concerned generally with the processes of the criminal law of the other State and is not deciding the case against a person brought before him or her in any relevant way.

[58] Nor, in my view, is the answer to the question altered by focus on the refusal of the Attorney-General of Western Australia to consent to the applicant being transferred to that State under the interstate prisoner transfer legislation or the failure of the Attorney-General of Western Australia to have made an application for the transfer of the applicant as a prisoner in this State subject to a warrant for arrest in Western Australia. Those facts do not bespeak inconsistency between an order for extradition by a magistrate under s 83 and the proper performance of the Magistrates Court of Queensland of its responsibilities as a court exercising judicial power of the Commonwealth.

[59] Turning to s 86, and the power of this court to review the magistrate's order for return of the applicant to Western Australia, the applicant founded his incompatibility or inconsistency argument on *Nicholas v The Queen*.[43]

[60] The question in that case was whether, on the prosecution of charges of possession or attempted possession of heroin, evidence should be admitted that narcotic goods had been imported into Australia by law enforcement officers who committed an offence in doing so. A judge granted a permanent stay of the proceedings on the basis that the evidence was not admissible. A section of the *Crimes Act* 1914 (Cth), s 15X, subsequently enacted by the Commonwealth Parliament provided that the fact of the enforcement officers' offence should be disregarded. The accused contended that the section was invalid as an attempt to usurp or impermissibly interfere with the judicial power of the Commonwealth.

[61] The particular question in *Nicholas* was the place of the law of evidence in a court's functions in exercising the judicial power of the Commonwealth. Brennan CJ said:

> "The judicial power of a court is defined by the matters in which jurisdiction has been conferred upon it. The conferral of jurisdiction prima facie carries the power to do whatever is necessary or convenient to effect its exercise. The practice and procedure of a court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction but subject to overriding legislative provision governing that practice or procedure. The rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription. A law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order

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43 (1998) 193 CLR 173.

> which is the end and purpose of the exercise of judicial power."[44] (footnotes omitted)

[62] The question in *Nicholas* arose in the context of the court's discretionary power otherwise to exclude illegally and improperly obtained evidence as expounded in *Ridgeway v The Queen.*[45] One of the general points made by Brennan CJ in *Nicholas* was that:

> "To suggest that the statutory will of the parliament, expressed in s 15X, is to be held invalid because its application would impair the integrity of the court's processes or bring the administration of criminal justice into disrepute is, in my respectful opinion, to misconceive both the duty of a court and the factors which contribute to public confidence in the administration of criminal justice by the courts. It is for the parliament to prescribe the law to be applied by a court and, if the law is otherwise valid, the court's opinion as to the justice, propriety or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests. To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court's opinion about its own repute to the level of a constitutional imperative. It is the faithful adherence of the courts to the laws enacted by the parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice."[46]

[63] So far as s 86 is concerned, the question in this case is whether a provision that does not permit the reviewing court to refuse an application for extradition on a ground that otherwise would have constituted an abuse of the process for extradition is incompatible or inconsistent with the functions otherwise performed by this court as a repository or intended repository of the judicial power of the Commonwealth.

[64] Although Gaudron J formed part of the majority that rejected the invalidity alleged in *Nicholas*, her Honour analysed the nature of judicial power and said this:

> "In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with

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44 (1998) 193 CLR 173, 188-189 [23].
45 (1995) 184 CLR 19.
46 (1998) 193 CLR 173, 197 [37].

> rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute."[47]

[65] However, it will be noticed at once that her Honour's remarks were directed to the determination of a question of guilt or innocence. That is not the case here. The court's exercise of the judicial power of the Commonwealth on a review under s 86 is not a determination of anything other than the liability of the applicant to be returned on a valid warrant to the relevant State or territory.

[66] In my view, that circumstance is determinative of the applicant's argument that s 86 is invalid as a conferral of judicial power in a manner inconsistent with this court's functions otherwise as a repository of the judicial power of the Commonwealth or as undermining the integrity of the court's processes. Section 86 is not invalid on those grounds.

[67] For completeness, I observe that in *Loveridge*,[48] White J referred to the possible application of *Kable v Director of Public Prosecutions (NSW).*[49]

[68] In *Kuczborski v Queensland*,[50] the plurality said:

> "The *Kable* principle was most recently summarised in *Attorney-General (NT) v Emmerson*, where French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said:
>
> > 'The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.'
>
> Decisions of this Court establish that the institutional integrity of a court is taken to be impaired by legislation which enlists the court in the implementation of the legislative or executive policies of the relevant State or Territory, or which requires the court to depart, to a significant degree, from the processes which characterise the exercise of judicial power."[51] (footnotes omitted)

[69] While Hayne J was in dissent, his Honour also said this in *Kuczborski:*

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47 (1998) 193 CLR 173, 208 [74].
48 2004) 89 SASR 72, 82 [46].
49 (1996) 189 CLR 51.
50 (2014) 254 CLR 51.
51 (2014) 254 CLR 51, 98 [139]-[140].

> "The central *Kable* principle is that the Parliaments of the States may not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth."[52] (footnote omitted)

[70] *Kable* is concerned with the limits of State legislative power, not Commonwealth legislative power. It is an obvious point, but SEPA is not a State Act. Accordingly, the applicant did not rely on *Kable* and, in my view, was correct not to do so.

Conclusion

[71] The Deputy Chief Magistrate was correct in the orders that he made. The sections of SEPA that apply are valid laws. It follows, in my view, that the application for review must be dismissed.

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52 (2014) 254 CLR 51, 88 [102].