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## BOOK REVIEW

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### Jurisdictional Questions



#### CROSS-BORDER CRIMINAL LAW

*By David Lanham*

*(John Libbey & Co Pty Ltd 1997 pp 289 \$64.95)*

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**R**ECENT advances in communications, including the Internet, and the increasing globalisation of industries and trade are likely to generate an increasing number of criminal offences (and particularly fraud and 'white collar crimes') which straddle international boundaries and therefore give rise to debate as to which country's courts have jurisdiction and as to which laws apply. Cross-border issues also arise within Australia if a criminal matter straddles State or Territory boundaries. Professor Lanham's book is the first Australian text with a concerted focus on cross-border rules. It is very timely and both practitioners and researchers will find it an extremely valuable reference work.

The question of jurisdiction is, of course, not merely a 'technical' threshold question; it can have significant effects given the different rules which apply in Australian States and Territories with respect both to the definition of criminal offences and to general principles of criminal responsibility. For example, certain forms of 'devious' or 'sneaky' behaviour may be criminal in Western Australia but not elsewhere in Australia.<sup>1</sup> Western Australia also stands alone in the way it defines murder and wilful murder.<sup>2</sup> Professor Lanham effectively draws out this point in chapter one, in which he explores general theories of jurisdiction in cross-border cases and discusses the well-known case of *R v Ward*.<sup>3</sup> The defendant in that case was in Victoria when he deliberately shot and killed a person who was fishing in New South Wales. The High Court held that the case could only be tried in New South Wales as

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1. See G Syrota 'Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence' (1994) 24 UWAL Rev 261.
  2. See I Morgan 'Sentences for Wilful Murder and Murder' (1996) 26 UWAL Rev 207.
  3. (1980) 142 CLR 308.

this was where the act took effect; in other words, the Court adopted the 'terminatory' theory of jurisdiction. This result was very important as it enabled the defendant, without question, to rely on the partial defence of diminished responsibility, an excuse which was available in New South Wales but not in Victoria. As Professor Lanham states, there were two other possible approaches. One would have been to say that *both* the Victorian and New South Wales courts had concurrent jurisdiction and the other (the 'initiator theory') would have been to say that only Victoria had jurisdiction. Professor Lanham argues that both of these solutions would have caused problems; in particular, he says that if it was decided that both States had jurisdiction, 'the defendant's liability becomes a lottery, dependent not on the intrinsic nature of the conduct and harm, but on the accidents of prosecution' (p 7).

After discussing the general theories with respect to cross-border rules at common law and outlining the position under the various Australian Codes, Lanham moves on to consider other matters of general importance. Chapter two considers the various constitutional and international law constraints which affect questions of jurisdiction and chapter three is devoted to double jeopardy, proof of location and venue. The book then examines some rather more specific concerns. Chapters four to nine consider cross-border rules in the context of particular offences (homicide, sexual offences, assaults, fraud, money laundering and computer crimes). Chapters 10 to 12 deal with participation in crime (attempts, incitement, conspiracy and parties to offences) and chapters 13 to 16 are devoted to corporate liability, crimes at sea and in the air, extradition and deportation. Chapter 17 provides a useful discussion of cross border co-operation in terms of the gathering and release of evidence, the transfer of witnesses, etc, and international crimes such as currency offences, hostage taking and war crimes. The book concludes, in chapter 18, with a summary of international crimes including hijacking and war crimes.

The book effectively highlights the consequences of the different Australian States and Territories having different rules not only with respect to the substantive criminal law but also with respect to the cross-border rules themselves. One interesting question which crops up at several points is whether there are any 'gaps' in the law in the sense that the suspect will not be caught by the cross-border rules of any State or Territory. Lanham draws attention to a number of possible gaps. One such gap involves conspiracies to defraud (discussed at p 183). Sections 558 and 560 of the Criminal Code (WA) permit Western Australian courts, subject to certain limitations, to deal with conspiracies within Western Australia to commit offences elsewhere. However, there is no express provision to deal with conspiracies which are formed outside the State to commit offences within Western Australia. The general cross-border rule contained in section 12 would therefore seem to be triggered. However, under this rule, liability attaches only if the person is either in Western Australia at the time of the acts in question or subsequently comes into the State. Consequently, in *Gummer v Commissioner of Police*<sup>4</sup> it was held that the Western Australian courts have no jurisdiction over a conspiracy where the defendant never comes to Western Australia. Professor Lanham explains that the general common law rule is that jurisdiction lies in the place where the offence is to be committed. As he says, it therefore appears that 'Conspiracies entered

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4. [1995] 1 Qd R 346.

into, say in Victoria, to defraud victims in Western Australia would be punishable in neither jurisdiction unless at least one of them recognises a residual head of jurisdiction to avoid such vacuums' (p 183).

It is probably fair to characterise this book, apart from the first three chapters, as being a practical reference work rather than a book that is likely to be read in full. To that end, it is useful that the chapters are, where relevant, divided according to jurisdiction; it should therefore be relatively straightforward to find the sections which are relevant to any particular problem. However, since the different States and Territories have different cross-border rules, and it takes time merely to describe the rules, it is inevitable that some parts of the book are essentially descriptive of the basic position in a particular jurisdiction and do not subject the legislative provisions to very detailed analysis. From a Western Australian perspective it would have been useful if space had permitted more detail on certain points. For example, in chapter one, the common law position is analysed at some length, with particular emphasis on the debate between the 'terminatory' and 'inquisitory' theories of jurisdiction. The position under the statutory provisions of the various Codes is then *described* but there is comparatively little discussion of how far these provisions reflect one or other of the theories or how far they adopt a different approach.

This leads to a final observation. The book certainly exposes the complexity of the law and describes many of its flaws and inconsistencies. However, the reader is left to ponder the question of how a more rational and theoretically satisfactory approach could be developed. On a few occasions, Professor Lanham does provide proposals for reform, a notable example being his 'Blueprint for Reform' with respect to double jeopardy issues in chapter three. However, he does not generally do this. In this sense, the book would have been more fully rounded if there had been a concluding chapter and conclusions to the individual chapters, which summarised the problems and canvassed more fully some options for reform.

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