At a time when transnational crime is on the increase and the capacity to commit such crime is facilitated by the internet and ready access to international travel, there remains a lack of coherent policy or principle in relation to the prosecution of transnational or extra-territorial crime.

To the extent that legislatures have provided for extra territorial criminal jurisdiction, it tends to be reactive to particular concerns or protective of particular commercial or national interests. This is exemplified by the ‘sex tourism’ laws and the Foreign Proceedings (Excess of Jurisdiction) Act 1984. Certainly, there is no unifying principle, as with the civil law approach to the conduct of citizens abroad. Similarly, the United States has a developed policy in relation to the prosecution of conduct occurring beyond its borders that affects its national interests, including its economic interests.

The problem is exemplified by the divergent views expressed by Justices of the High Court in Lipohar v R (1999) 200 CLR 485, which involved a conspiracy entered into in Indonesia to defraud an Australian company. Where no overt acts are carried out in Australia pursuant to a conspiracy or no substantive offence is committed within Australian territory, a question arises as to whether and when there is jurisdiction to prosecute. The question was not satisfactorily resolved in Lipohar. In Australia, there does not appear to be a principled approach or a coherent theoretical underpinning to the extraterritorial application of criminal laws generally.

This paper looks at the approaches to extra territorial jurisdiction taken in Australia and compares and contrasts that with the jurisdictional laws of other countries, particularly the United States.

1 Introduction

In relation to the general application of Australian criminal law, underlying theories or principles can be discerned, including protection from harm, consent, morality and blameworthiness. In the context of the extra-territorial application of a state’s criminal laws, additional principles may come into play.
For example, civil law states commonly exercise jurisdiction over the extraterritorial conduct of their citizens, adopting the Roman law position that citizens owe allegiance to their State and that the conduct of citizens reflects on that State, no matter where the conduct occurs. This also serves to protect the interests of citizens, as civil law states will prosecute rather than send their citizens to face trial in foreign lands.

Similarly, the United States has a developed policy in relation to the prosecution of conduct occurring beyond its borders that affects its national interests, including its economic interests. The approach to the extra-territorial application of United States laws has been influenced, in part, by the perceived need to strike a balance between the potentially conflicting aims of protecting the country’s domestic interests and the maintenance of good relations with foreign states.

Perhaps because of its geographical isolation, Australia has not seen the need to develop a principled approach to the extra-territorial application of its laws. Rather, the approach has been one of ad hoc responses to the expression of community or commercial concerns. This is exemplified by ‘sex tourism’ laws and the Foreign Proceedings (Excess of Jurisdiction) Act 1984. The former reflects public concern in relation to specific conduct of Australian travelling abroad, while the latter is a reaction to the potential impact on Australian companies of, in particular, the United States anti trust laws.

Given the expansion of trade and other dealings between states, the growth of multinational corporations and the movement of people across national boundaries, as well as the potential for criminal activity through use of the internet, it is appropriate for Australia to consider the values or interests it should seek to protect in regulating extra-territorial conduct, whether undertaken by nationals or foreign citizens.

The potential for transnational crime is exemplified by the case of *R v Governor of Brixton Prison ex p Levin*, where the accused accessed a US bank computer from Russia in order to transfer funds to his own account. In that case it was held that the acts constituting the offences of forgery and theft occurred in the United States, as the keyboard in Russia was connected electronically with the computer in the US bank. As the accused pressed the keys, for practical purposes the information was simultaneously stored on the magnetic disk in the US computer, allowing the court to hold that that is where the forged instrument was created and where the conduct constituting the offence took place. However, difficulties will arise in applying traditional analysis of jurisdictional principles to the diverse facts situations that are likely to emerge in the modern age. For example, what would be the outcome where both the hacker and the computer were located outside the prosecuting state, but an effect occurred within that state?

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2 The basis of jurisdiction under international law

The traditional jurisdictional division is between prescriptive jurisdiction, the power to prescribe and proscribe conduct, and enforcement jurisdiction, the power to enforce laws. Given the concept of state sovereignty, generally the latter is possible only where the accused is within the territory of a state. For present purposes, the discussion involves a consideration of prescriptive jurisdiction.

There is a further demarcation between the basis of jurisdiction recognised in international law and the jurisdiction that a state in fact chooses to adopt. Under the present heading the former is considered, while later sections deal with the jurisdiction in fact adopted by states including Australia. In Australia, a wide view has been taken as to the potential jurisdiction. In *Pearce v Florencen* it was held that it is a question of whether the law is for the ‘peace, order and good government’ of the particular state and it was the view of the High Court that it imposed little restriction on the capacity of States to pass laws having extraterritorial effect; providing that it is connected “not too remotely” with the State.

In international law, there are generally considered to be 5 potential basis for jurisdiction: the territorial principle, the nationality principle, the passive personality principle, the protective principle, and the universality principle.

The **territorial principle** is most firmly rooted in state practice, encapsulating the idea that a state has jurisdiction over all acts occurring within its territory. It is based on the need to affirm state sovereignty and grew with the consolidation of modern states, replacing the previous dominant principle of ‘personality of laws’, which holds that people are governed by their national laws wherever they reside. The concept of ‘territory’ is broad and includes territorial seas and seabeds, airspace, artificial structures on the continental shelf, ships and planes carrying a state’s flag, and territory occupied by a state. The traditional approach has been to require that at least one of the elements of the offence occur in the prosecuting state, as envisaged by the popular notion of a shot being fired across a state border. However, some states, particularly the United States, have extended the principle to include circumstance where all of the conduct constituting the offence occurs outside the state but the conduct has or is intended to have substantial effect within the state. This is generally referred to as the ‘effects’ doctrine.

The **nationality principle**, which allows for jurisdiction over the conduct of citizens wherever it occurs, is strongly preserved in civil law states. At times, such as in the case of Germany, it is reflected in constitutional guarantees, so that the state cannot

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2 In the United States, commonly there is reference also to adjudicatory jurisdiction, which refers to the authority of the courts to apply the law.

3 In international law, the onus of establishing a limitation on jurisdiction is on the state seeking to deny jurisdiction: *The SS Lotus (Turkey-France)*, PCIJ, Series A, No 10 (1927).

4 (1976) 135 CLR 512 at 517, 524, 526. See also *Trustees Executors and Agency Co Ltd v FCT* (1933) 49 CLR 220 at 236, in which case Evatt J said that the circumstances in which legislation would be invalid on the grounds of extra-territorial jurisdiction “must necessarily be a very rare case”. See also the *Australia Act s 2*.

extradite its citizens to face trial in another state. The principle has less frequently been adopted in common law states.

The *passive personality principle* is the converse of the nationality principle. It gives a state jurisdiction where one of its citizens is the victim of a crime in a foreign state.\(^6\) It is a head of jurisdiction that is not generally adopted in common law states.\(^7\)

The *protective principle* allows jurisdiction in relation to extraterritorial conduct that is directed against the security and certain other interests of the state, including counterfeiting of currency and conspiracy to infringe immigration or customs laws.\(^8\) It has also been suggested that money laundering and the extraterritorial application of anti cartel laws may be justified under this principle.\(^9\)

The scope of the *universality principle* has been the subject of considerable debate. Certain crimes, by their nature, are considered to be universal in their impact and are thus punishable by any court. While the earliest example is piracy,\(^10\) crimes more recently categorised under this head of jurisdiction include crimes against humanity, genocide, torture, serious war crimes, and certain acts of terrorism. There is a question of whether this jurisdiction will wane with the establishment of international criminal courts.\(^11\)

### 3 Prescriptive jurisdiction in the United States

The effects doctrine and the protective principle have been used in the United States as a foundation and rationale for the exercise of extensive extraterritorial jurisdiction. The effects doctrine has been used to justify the regulation of a variety of

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\(^6\) In a judgment of the ICJ in *Congo v Belgium* (Case Concerning the Arrest Warrant of 11 April 2000, judgment of 14 February 2002), Judges Higgins, Kooijmans, and Buergenthal recognised that this principle is now reflected in the legislation of a number of countries, noting that today it “meets with relatively little opposition”. Judge Rezek noted that a majority of countries give effect to the principle. This basis of jurisdiction was also accepted by President Guillaume.

\(^7\) Though see *Criminal Code Amendment (Offences against Australians) Act* 2002, which deals with the offences of murder, manslaughter and intentional or reckless serious harm committed against Australians abroad.

\(^8\) In *Compagnie Europeenne Des Petroles SA v Sensor Nederland BV* [17 September 1982], the District Court of the Hague, while recognizing the protective principle and the effects doctrine, held that the principles did not extend to proscribing extraterritorial conduct that was contrary to US foreign policy. The case involved export to the USSR of non-American goods by a non-American exporter, contrary to a US embargo against that state. On the other hand, it has been suggested that, increasingly, extra-territorial legislation, which includes the imposition of criminal penalties, is being used to promote US foreign policy objectives: see, for example, Senz and Charlsworth, ‘Building Blocks: Australia’s Response to Foreign Extraterritorial Legislation’, [2001] Melb JIL 3. The authors give as an example the United States *Helms-Burton Act* of 1996, which it is said aims to isolate Cuba and to enforce the US economic embargo on that country.

\(^9\) See Ignaz Seidi-Hohenveldern, ‘International Economic Law’, 1999 pp 62-64. In relation to money laundering, the United States has threatened sanctions against banks that launder money outside of the US, for example by barring them from US dollar clearing and from maintaining accounts in US banks.


\(^11\) For relatively recent discussion in relation to the scope of the universality principle, see *Congo v Belgium* [Case Concerning the Arrest Warrant of 11 April 2000 – ICJ – judgment of 14 February 2002].
extraterritorial conduct, including corruption, drug trafficking, money laundering and economic crimes. The Restatement [Third] of (US) Foreign Relations Law, s 402, allows for laws that proscribe extraterritorial conduct that has or is intended to have substantial effect within the territory. A proviso in s 403 states: “a state may not exercise jurisdiction … with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable”. What is reasonable will depend on the nature of the activity. There has been a generous interpretation of the term in relation to cases involving drug trafficking12 and alleged Sherman Act antitrust violations.

In the context of considerations of international comity, United States Federal Guidelines identify factors that will be considered by agencies in deciding whether to bring enforcement action in relation to extraterritorial conduct; specifically, the significance of the conduct; the nationality of persons involved; whether there was intent to affect United States interests; the foreseeability of the effect of the conduct in the United States; the degree of conflict with foreign law; the effect on enforcement processes under the law of the other state; and the likely effectiveness of enforcement of a judgment in the foreign state.13

From a constitutional perspective, in United States v Davis,14 the Ninth Circuit held: “In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair”. In United States v Yousef,15 the nexus requirement was adopted to apply US anti-terrorism legislation to the accused for the bombing of a Philippine aircraft flying from the Philippines to Japan which killed a Japanese national. The ‘nexus’ arose because the bombing was part of a larger plot to blow up United States aircraft for the purpose of inflicting harm on the US and influencing US foreign policy.16

In the United States jurisdiction has also been assumed in order to prosecute extraterritorial breaches of the Sherman Act, which prohibits anti-competitive contracts, combinations, and conspiracies in restraint of trade, and the Clayton Act, which is concerned with preventing activity, such as mergers and acquisitions, which may restrain trade.17

Under the effects doctrine it is not a question of whether the conduct takes place on United States soil, but whether the conduct has an effect in the United States. It is “the situs of the effect, not the conduct that is crucial”: United Phosphorous Ltd v Angus
In relation to import commerce, the *Sherman Act* applies to foreign conduct “that was meant to produce and did in fact produce some substantial effect in the US”: *Hartford Fire Insurance Co v California*. In *Hartford Fire Insurance*, the alleged anticompetitive conduct was undertaken by foreign re-insurers in the United Kingdom. The United States antitrust laws were applied where a group of British reinsurance companies were accused of conspiring to limit the availability of certain types of insurance coverage in the United States.

Similarly, in *US v Nippon Paper Industries Co Ltd*, the court refused to dismiss a federal criminal indictment against a Japanese manufacturer of facsimile paper. It was alleged that Nippon Paper Industries (NPI) had participated in a conspiracy with other fax paper manufacturers to increase the price of thermal fax paper to be sold in North America, in violation of the Sherman Act. The indictment claimed that the manufacturers sold the fax paper, in Japan, to trading houses, which in turn sold the paper to foreign customers. It was said that they not only raised the prices to the trading houses for fax paper to be exported to North America, but also sold discrete quantities of fax paper to the trading houses on condition that such quantities be sold to North American customers at specified prices. It was held that it was not necessary to prove that any proscribed conduct or overt acts took place within the United States in order to establish a cognizable Sherman Act offence. Accordingly, even if the alleged proscribed conduct occurred entirely in Japan, it was held that liability under United States law could arise so long as the conduct was intended to have, and did in fact have, substantial anticompetitive effects in the United States. It was said that to hold otherwise would mean that price fixers could locate their conspiracy offshore when seeking to influence competition in United States’ markets.

### 4 Australian law

The uncertainty of principle in Australia is reflected in the High Court decision in *Lipohar v R*, which dealt with a conspiracy entered into in Indonesia to defraud a South Australian company. While some overt acts pursuant to the conspiracy were

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18 US Dist (ND Ill Oct 13, 1994).
19 113 S Ct 2891 at 2909 (1993). In relation to other foreign commerce, it appears that there is a more limited jurisdiction imposed by the *Foreign Trade Antitrust Improvements Act* [codified at 15 USC s 6a] – the FTAIA limits subject matter jurisdiction over US export commerce to conduct having a “direct, substantial and reasonably foreseeable” effect on domestic US commerce, on US import trade, or on export commerce of a person engaged in such commerce in the US.
20 It was argued that comity considerations should exclude the application of United States laws given the potential conflict with United Kingdom law and policy. However, the court held that comity requires abstention in this context only where there is in fact a true conflict between domestic and foreign law. There was no such conflict here, as the foreign re-insurers did not face direct conflicting requirements under United States and United Kingdom laws.
21 109 F 3d 1 (1st Cir 1997).
22 For the approach to the extra-territorial operation of antitrust laws in Europe, see, for example, *Chemical Industries v Commission* [1972] ECR 619; *Ahlstrom v Commission* (1988) ECR 5193; *Gencor v Commission* (1999) ECR II-753. Some states have resisted foreign antitrust laws by enacting blocking legislation; such as measures to prevent the blocking states’ nationals providing evidence, information or documents to any relevant antitrust hearing, and barring the enforcement of any judgment within the territory of the blocking state: see, for example, the United Kingdom’s *Protection of Trading Interests Act* 1980, Australia’s *Foreign Proceedings (Excess of Jurisdiction) Act* 1984, and Canada’s *Foreign Extraterritorial Measures Act* 1985.
carried out in Victoria and Queensland, given that a conspiracy is complete and prosecutable once the agreement has been reached, so that any overt acts carried out in pursuance of the conspiracy are not elements of the offence, the relevant conduct occurred outside of Australia and was not prosecutable under a traditional analysis of the territorial principle. In the United States, the matter would be dealt with as an application of the effects doctrine.

The approach in England, discussed in *DPP v Doot*, has been to artificially extend the concept of conduct constituting the elements of the offence so as to enable a finding that part of that conduct occurred within jurisdiction and hence within a traditional analysis of the territorial principle. In *Doot* it was held that a conspiracy to import drugs into England was prosecutable in that country even though the conspiracy was entered into [and the offence completed] elsewhere. It was said that the fact that it was ‘complete’ did not mean that it was ‘finished’; the offence is continuing if it is wholly or partly performed in England, in the sense that the parties continue to harbor the agreement. The overt act in England was evidence that the conspiracy was still alive at that time.

In *Lipohar v R*, there were differing views as to the nature of the jurisdiction in relation to the common law offence of conspiracy. Gaudron, Gummow and Hayne JJ, at para 67, while stating that “substantial steps in furtherance of the conspiracy took place within Australia and, it may be inferred, that at least to a significant degree, the conspiracy itself was formed within Australia”, took the approach adopted in *Doot* that jurisdiction arose from the fact that significant steps were taken in Australia in furtherance of the agreement. They left open the question of whether a conspiracy formed abroad to do an unlawful act in Australia, but not to any degree actually implemented in Australia, suffices to support a charge of conspiracy under Australian common law [at 112]. Kirby J took a traditional view and said that as no element of the offence occurred in South Australia there was no jurisdiction. Taking a broader approach, Gleeson CJ suggested that conspiracy was to be treated differently from other crimes where jurisdiction was confined to the state where the offence was completed and held that it is sufficient if there is a ‘real connection’ between the conspiracy and South Australia. This was evident in the present case as the intended victim was a South Australian company. On this view, it was not required that any overt acts pursuant to the conspiracy took place in Australia. The broadest approach was taken by Callinan J. While rejecting *Doot*, on the basis that it was difficult to see how the conspiracy was not fully effectuated once, as in that case, the drugs had been brought into England, Callinan J held that jurisdiction could be justified on the basis that the South Australian company was a potential victim of the offence, that if carried out the offence would have been a breach of the peace of South Australia, and,

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25 More recently, but without clear reference to guiding principles, in *Liangsiriprasert v US* [1994] 1 AC 225, the Privy Council stated that there is “no good reason why the common law should not regard as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of a criminal offence in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong”.

26 The passive personality principle was not specifically discussed, though see comment of Kirby J at para 177-178 and Callinan J at 263.
analogous to the United States effects doctrine, that damage to local economic interests will usually be a sufficient connection.

A further indication of a lack of coherence and consistency in Australia’s approach to extraterritoriality is evidenced by the trade practices laws. That legislation proscribes certain conduct that has had the effect or is likely to have the effect of substantially lessening competition in an Australian market. Section 5 of the Trade Practices Act provides that the competition laws extend to engaging in conduct outside Australia by corporations ‘carrying on business’ within Australia. While that provision does not require a foreign corporation to have a place of business in Australia and it may be that the legislation extends jurisdiction to the supply of goods and services to persons within Australia, it seems that it would not extend to extraterritorial conduct such as occurred in Nippon Paper Industries. The mere presence of goods in Australia, the price of which has been fixed overseas by an overseas company, will not be sufficient to establish jurisdiction. In any event, uncertainty remains and there do not appear to be any clear guidelines or principles to determine the reach of such provisions.

Under the Cybercrime Act 2001 (Cth), by s 476.3 extended jurisdiction category A of the Criminal Code applies to computer offences, requiring at least that ‘a result’ of extraterritorial conduct occurs or is intended to occur in Australia. By s 16.4 of the Criminal Code, a ‘result’ of conduct is a result that is a physical element of the offence, so that the concept is not analogous to the ‘effects’ doctrine. In relation to money laundering offences, by s 400.15 of the Criminal Code, extended geographical jurisdiction category B applies to each offence. Again, at least a ‘result’ of the extraterritorial conduct must occur within Australia. This is to be contrasted with Australian anti-terrorism laws, which make a wide range of extraterritorial crimes actionable in Australia.

5 Conclusions

In order to combat transnational crime a coherent approach to extraterritorial jurisdiction is desirable, not only to assist with deterrence but also in order to facilitate appropriate prosecutions. Under present Australian law, the starting point is a presumption against the extraterritorial effect of its criminal laws. It is questionable whether that long standing principle should be preserved in the age of the internet.

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27 Bray v F Hoffman-La Roche Ltd [2002] 118 FCR 1,19.
28 See s 5(2) and, for example, ss 47 and 48 of the Act. See also Bray v F Hoffman-La Roche Ltd [2003] 130 FCR 317.
30 For an example of conduct that constitutes a physical element of the offence and could be regarded as a ‘result’ of conduct, see Crowther v Sala [2007] QCA 133 at para 43.
31 See Security Legislation Amendment (Terrorism) Act 2002. By s 101.6(3), extended geographical jurisdiction D applies to any act in preparation for or planning of a terrorist act. Given the broad meaning of ‘terrorist act’ this is expansive. In Ul-Haque v R [2006] NSWCCA 241 it was held that it was not beyond the power of the Commonwealth to enact such legislation.
multi-national corporations and expanding trade and movement of people across national borders. Legislation appears to be reactive to particular demands rather than proactive, in the sense of formulating principles or a coherent theory of extraterritorial jurisdiction.

Leaving to one side the question of whether the effects doctrine and the protective principle are the appropriate foundations for such principles or theory,33 in the United States generally the approach taken or likely to be taken is readily discernable. European states are tending to follow a similar path. Australia might consider whether its interests would be better served by a holistic consideration of this issue. There is some merit in adopting a common universal standard,34 in order to facilitate international cooperation in the enforcement of laws and to enhance understanding, particularly in the business community, of the reach of domestic laws.

33 While there is growing recognition of the effects doctrine, there are differences in approach to its application: see IBA, ‘Report of the Task Force on Extraterritorial Jurisdiction’, 2008, pp 47ff.
34 Of course, that will not solve the problem of conflicting substantive laws. For example, in the case of Gencor-Lonrho [1999] ECR II-753, the European Union prohibited a merger that had been cleared by the South African competition authority, while in GE/Honeywell [2005] ECR II-5575, the European Commission prohibited a merger after it had been cleared by the US Federal Trade Commission: see IBA, ‘Report of the Task Force on Extraterritorial Jurisdiction’, 2008, pp 28-9. Nevertheless, a common jurisdictional standard would be a foundation for the establishment of agreement on a formula as to which state should be given priority in any given case.