Federal indictable offences: Has the 'Autochthonous Expedient' run its course?

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In the *Boilermakers' Case*, Sir Owen Dixon, when describing the use of state courts as repositories of federal jurisdiction, famously coined the expression an 'autochthonous expedient'.[2]

The framers of the Australian Constitution adopted the autochthonous expedient, in preference to the dual court system favoured in the United States, in part because it was understood from the outset that the High Court, unlike the Supreme Court of the United States, would be a general court of appeal. The term 'expedient' accurately reflects the rationale for adopting the model, since investing state courts with federal jurisdiction was seen as cheaper, and easier to manage, than creating a dual system of courts.[3] It was thought that it would have been burdensome to create a hierarchy of federal courts and tribunals, given the small population of this country.

It may be, however, that economic considerations alone do not adequately explain why well-established American precedent was not followed. After all, in 1787, the United States was also

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I wish to acknowledge the invaluable assistance given to me by my associate, Katerina Stevenson, during the course of preparation of this paper. The views expressed are, of course, my own and do not necessarily represent the views of any other member of the Supreme Court.

2 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (per Dixon CJ, McTiernan, Fullagar and Kitto JJ). It is clear that the majority judgment was written by the Chief Justice (See generally Philip Ayres, *Sir Owen Dixon* (Miegunyah Press, 2003), 255-8). The term 'autochthonous' is linked to 'autochthon', and means 'indigenous, or native to the soil'.

3 Professor KC Wheare remarked, in his 1946 text *Federal Government* (Oxford University Press, 1946) 68-9, that if the 'federal principle' were strictly applied then a federal system of government might be expected to have a dual court system. In other words, there would be two systems of courts, one applying and interpreting federal law, and the other applying the laws of the State or Territory or other regional government.

small in both population and resources.

Zelman Cowen and Leslie Zines, in their text *Federal Jurisdiction in Australia*, referring to the comments of Quick and Garran in 1901,[4] state:

> The large original and potentially original jurisdiction of the High Court, marked out in ss 75 and 76 of the Constitution, can most sensibly be explained on the assumption that the founding fathers believed that the High Court would in all probability be the only general federal court.[5]

Of course, there are strict limits upon the power of the Commonwealth Parliament to invest state courts with federal jurisdiction, in accordance with s 77(iii) of the Constitution. These are prescribed by s 77. Accordingly, a grant will be invalid unless it is with respect to a matter enumerated in ss 75 and 76.[6]

The Commonwealth Parliament cannot require state courts to exercise non-judicial power, or at least any form of non-judicial power that is incompatible with the exercise of federal jurisdiction.[7]

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4 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (London, The Australian Book Company, 1901).

5 Geoffrey Lindell, *Cowen and Zines' Federal Jurisdiction in Australia* (4th ed, 2016, Federation Press), 253 ('*Cowen and Zines*').

It is worth noting, at this stage, that federally invested state courts are not 'federal courts' within the Australian Constitution. There has been an unresolved debate as to whether such courts are to be regarded as part of the 'federal judicature', a term which appears in s 51(xxxix): see *Rizeq v Western Australia* (2017) 91 ALJR 707. Nonetheless, state courts, though utilised to exercise federal jurisdiction, and subject to Chapter III considerations, always remain state courts.

6 Section 75 sets out the original jurisdiction of the High Court, which is vested in that Court by the Constitution.

Section 76 provides that the Parliament may make laws conferring original jurisdiction on the High Court in a number of specified areas.

Section 77 provides that, with respect to any of the matters mentioned in the last two sections, the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to, or is invested in the courts of the States; and

(iii) investing any court of a State with federal jurisdiction.

7 See generally, the discussion of the '*Kable* principle': *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 cited in *Cowen and Zines*, above n 5, chapter 7, and later developments, including *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *South Australia v Totani* (2010)

From the time of federation, until the creation of the Family Court in 1975, and the Federal Court in 1976, state courts of all persuasions routinely dealt with almost all federal civil matters.

Over the past 40 years or so, far less use has come to be made, in civil cases, of the autochthonous expedient. It may be premature to proclaim, as one learned commentator did in 1969, that autochthonism, at least in relation to civil disputes, would soon be 'buried'.[8] It is true, however, that the vast majority of such disputes, insofar as they involve the exercise of federal jurisdiction, are now dealt with routinely by the Federal Court and the Federal Circuit Court, rather than by the state courts. That is despite the fact that often such jurisdiction is conferred concurrently upon both the federal and state courts.[9] On occasion, the federal courts are given exclusive jurisdiction in such matters.

The retreat from the use of state and territory courts in relation to federal civil matters has not been replicated in the field of federal criminal law. That is not surprising. The Federal Court, and the Federal Circuit Court, were created as purely civil courts. It was never seriously contemplated that the Federal Court would one day be called upon to conduct criminal trials upon indictment. The reasons for this are important, and will be considered later in this paper.

Before embarking upon that task, however, it is worth a brief excursus into the very different approaches to autochthonism taken in the United States and Canada.

The dual court system in the United States

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242 CLR 1 and *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 and *Wainohu v New South Wales* (2011) 243 CLR 181.

8 See generally Justice Rae Else-Mitchell, 'Burying the Autochthonous Expedient' (1969) 3(2) *Federal Law Review* 187. The notion of 'burying the expedient' evokes Mark Twain's sardonic comment, said to have been made when learning of reports of his death, that these were 'somewhat exaggerated'.

9 Thus, for example, copyright and admiralty, both of which involve federal legislation and are matters of federal civil law, can be dealt with in the state supreme courts. The fact is, however, that they seldom are. Matters under the *Corporations Act 2001* (Cth) are routinely dealt with in both the Federal Court and the state supreme courts, which have concurrent jurisdiction. Bankruptcy, on the other hand, is exclusively dealt with in the Federal Court and Federal Circuit Court.

The founders of the United States Constitution determined, from the outset, that there should be a dual court system in that country, both federal and state. With regard to criminal law, federal offences would be dealt with exclusively in what were known as federal district courts. State offences tried on indictment would continue to be tried in state courts.

In the early days of the Republic, there was almost no federal criminal law. The Constitution did specifically identify a handful of offences, but these were of little significance. The American equivalent of s 51(xxxix) of our Constitution (the incidental power) was used as the basis for criminalising such other conduct as was thought to warrant such treatment.

By the *Judiciary Act of 1789*,[10] Congress first implemented the constitutional provision in art III s 1 that '[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'

Although subsequent legislation altered many of that Act's specific provisions, and the *Circuit Courts of Appeals Act of 1891*[11] effected a major change, the basic design established by the original Act of 1789 has endured. A supreme appellate court interprets the federal Constitution and laws, and a system of lower federal courts, separated geographically, exercises similar jurisdiction. State courts still adjudicate the vast majority of ordinary criminal cases and will, if necessary, apply federal law, which is supreme.

The dual court system established in the United States stands in stark contrast with the systems adopted by most countries with federal forms of government. Few of these decided, at the time of federation, to establish lower national courts to enforce federal law. They chose instead, as did Australia, to have pre-existing state or provincial courts exercise that function.

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10 1 Stat 73.

11 26 Stat 826 (Also known as the *Judiciary Act of 1891*).

The dual court system approach adopted in the United States had to overcome considerable resistance in 1789. There was strong sentiment for leaving trial adjudication, both civil and criminal, to the state courts, save perhaps for a small cluster of federal admiralty judges.

As will be seen, in the period leading up to the creation of the Federal Court of Australia, there was similar resistance to having trial adjudication moved from the state and territory courts to the proposed new national court.

The Canadian Criminal Justice System

The Canadian system for dealing with indictable criminal matters can fairly be described as idiosyncratic. The Canadian *Criminal Code*[12] was first enacted in July 1892. It was based on the 'Stephen Code', drafted in 1879 by Sir James Fitzjames Stephen in the course of a Royal Commission in England. The 'Stephen Code' followed much of an earlier draft code bill that had previously been rejected in England in 1878.

The British *North America Act 1867*[13] established the Canadian Parliament as the sole source of criminal jurisdiction. Accordingly, the Canadian *Criminal Code*[14] is federal law. Although designated a 'code', that is not really an apt description. The *Criminal Code* operates in tandem with certain common law doctrines, including various defences. It also allows space for other federal statutes to create federal crimes.

The Canadian *Criminal Code* encompasses not merely substantive offences, but also many aspects of criminal procedure and sentencing. One might have thought, in these circumstances, that it would have been logical, in Canada, for the creation of a national court to deal with all indictable offences.

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12 SC 1892, c 29.

13 30-31 Vict, c 3 (UK).

14 SC 1892, c 29. The Canadian *Criminal Code* has been amended numerous times. As amended the current version is RSC, 1985, c C-46.

In 1971, a national trial court, designated the Federal Court of Canada, was in fact established. However, that Court exercises only a very narrow civil jurisdiction, largely confined to judicial review, bankruptcy and matters of that kind.

All indictable offences in Canada are tried in provincial courts. Curiously, however, despite their status as provincial courts, the superior court judges who preside over them are, in fact, appointed by the federal government. Judges appointed to inferior provincial courts are, by way of contrast, appointed by provincial governments.

The result is a strange mix, a kind of hybrid between the dual court system that operates in the United States, and the autochthonous expedient that continues to operate in relation to criminal matters in this country.

The controversy surrounding the creation of a Commonwealth Superior Court

In an article published in 1969, entitled 'Burying the Autochthonous Expedient', the Honourable Justice Rae Else-Mitchell[15] expressed his strong disapproval of the proposal to establish a Commonwealth Superior Court.[16] He spoke of the wisdom of the framers of our Constitution in having made provision for the vesting of almost all federal jurisdiction in state courts. He predicted that the creation of a new national court would produce many of the problems of the divided judicial system existing in the United States. He further predicted that it would result in 'the eventual burial of the autochthonous expedient'.[17]

The debate surrounding the proposal for a national court, below the level of the High Court, had by that stage been going on for some years. The genesis of the proposal was said to have been the suggestion that there be a federal divorce court, which emerged in about 1951, through the

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15 A judge of the Supreme Court of New South Wales, and of the Land and Valuation Court.

16 (1969) 3 *Federal Law Review* 187.

17 Ibid 187.

auspices of the Law Council of Australia. Later, it had broadened into a case for a new federal court, with jurisdiction in both divorce and federal civil matters.

In the early stages, at least, among the strongest proponents of such a proposal were Maurice Byers and Paul Toose, then both of the New South Wales Bar. Sir Garfield Barwick who, at that time, was Commonwealth Attorney-General, initially supported the creation of a new national court, though in later years his enthusiasm for the proposal waned greatly.

By the late 1960s, Sir Nigel Bowen, who by then had become Commonwealth Attorney-General, pressed strongly for the creation of what he termed a Commonwealth Superior Court.

Regrettably, the debate surrounding the creation of a new national court took on an acerbic tone. Professor Geoffrey Sawer, the doyen of constitutional scholars at the time, spoke out strongly against the proposal. He saw it as likely to lead to what the Americans themselves regarded as, at best, a 'necessary evil'.[18] He noted that, in the United States, efforts were being made to reduce the most pernicious aspect of federal jurisdiction affecting private civil law – the diversity jurisdiction – 'to minimum proportions'.[19] He was also concerned about the erosion of the standing of state courts that, until that time, had exercised almost all federal jurisdiction, both civil and criminal.

Even after the Federal Court began sitting in February 1977, a number of commentators, most prominent among them Sir Laurence Street, then Chief Justice of New South Wales, continued to voice strong opposition to its creation. In a paper that revealed his barely concealed aversion to the new court, Sir Laurence spoke '[t]o the visionaries and to the empire builders' who were seeking to

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18 Professor G Sawer, 'Judicial Administration: the Subject and Some Applications', (1964-5) 8 *Journal of the Society of Public Teachers of Law* 301, 311.

19 Ibid, 311. Professor Sawer commented that the creation of a specialist national court, the jurisdiction of which would be defined by subject matter, created the danger that such a jurisdiction might not be able to do the complete justice between the parties which a general jurisdiction could do. He added that, in Australia, state jurisdiction was in general preferable to a federal jurisdiction because of the 'irrational rigidities introduced into any federal jurisdiction by the Constitution and by the implications of the *Boilermakers' Case* and *R v Davison* (1954) 90 CLR 353': 312.

entice Australians down the path towards a dual court system.[20] He said:

> It cannot, I believe, be stated too often, too loudly or too clearly that the ideal court is one that can administer the whole of the law of the land in the course of the one case between the litigants who are in dispute.[21]

Sir Laurence contrasted the position in this country with that in the United States. He pointed out that, at federation, there existed in Australia state courts that were not merely competent, but highly regarded, and comprised of distinguished judges. No such description would have been apt for the American state court system in 1787. There judges were often entirely unqualified, and the state court system was something of a shambles.

Sir Laurence noted that, as the system of federal courts had been established in the United States specifically for the purpose of upholding and enforcing the rights set out in the Constitution, there was at least an historical justification for the choice that the American founders had made.[22] However, the downside of that choice was plain. In the United States, as Sir Laurence observed, cases typically are juggled from state to federal courts, and back to state courts, with a seemingly endless series of appeals. This can lead to inefficiency, and what Sir Laurence described as 'scandalous delays'.[23]

In relation to what Sir Laurence called '[o]rdinary red-blooded crimes',[24] it was clear, he said, that these could only ever be prosecuted within state courts. They involved matters of state law, and accordingly could not be tried within a federal court.

Moreover, unlike the position in the United States, the High Court would always play the role of

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20 Sir Laurence Street, 'The Consequences of a Dual System of State and Federal Courts' (1978) 52 *The Australian Law Journal* 434, 434.

21 Ibid 435.

22 Ibid 435.

23 Ibid 435.

24 Ibid 436. Presumably by that expression he meant traditional crimes such as murder, manslaughter, assaults of various kinds, rape and property offences.

ultimate unifying entity, exercising appellate control over the entire court system. Sir Laurence observed that a citizen should not have to take a risk in choosing whether to bring his or her case to a state or federal court. In his mind, the 'horrors' of a dual court system were almost beyond contemplation.[25]

But Sir Laurence went even further. In his view, it was still not too late, even after the Federal Court had begun hearing cases, to correct a mistake once 'exposed and recognised'.[26] In effect, he continued for some time to urge its abolition.

Not surprisingly, proponents of the proposal for the creation of the Commonwealth Superior Court had, at a much earlier stage, addressed concerns such as these. They disagreed profoundly with those who harboured them.

Sir Nigel Bowen, in an important paper delivered in 1967, recounted the history of the proposal.[27] He noted that, although there were, at that stage, some commentators who opposed the creation of a new court, there was broad agreement in the Law Council and among its constituent bodies that such a court should be established.[28]

Sir Nigel recognised that there were extreme views on both sides of the debate. Speaking on behalf of the Federal Government, he indicated that it was proposed to adopt what he saw as a middle course.

Sir Nigel recognised that there were, of course, those who, like Professor Sawer, were adamantly opposed to any change, and would have maintained the autochthonous expedient in preference to

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25 Ibid 437.

26 Ibid 437.

27 'Some Aspects of the Commonwealth Superior Court Proposal', (1967) 41 *Australian Law Journal* 336.

28 Ibid 336.

any new national court.[29] At the other end of the spectrum there were those who, like Messers Byers and Toose, believed that the new court should exercise all federal jurisdiction in civil matters, to the complete exclusion of the state courts.[30] Those state courts would, of course, continue to try federal indictable offences. However, that should be the last vestige of the autochthonous expedient.

As indicated, Sir Nigel preferred a more nuanced approach. He referred, in that regard, to the views advanced by Sir Kenneth Bailey in 1963 that the autochthonous expedient was a 'permanent and desirable' feature of the Australian judicial system.[31] Sir Nigel said:

> The fact that State courts can and do exercise federal jurisdiction means that in a case before a State court it is rarely necessary to consider whether the jurisdiction being exercised is State or federal jurisdiction. It is generally sufficient that the court has jurisdiction and is administering Australian law.[32]

It is interesting to note that Sir Nigel specifically addressed the question whether the new national court should have indictable criminal jurisdiction. His view was that, initially at least, no such criminal jurisdiction should be conferred.[33] He added, however, that it must be regarded as a possibility that, in future, criminal jurisdiction, concurrent with state and territory supreme courts, and lower level trial courts, should be given to the new Commonwealth Superior Court 'so that more important criminal prosecutions in the federal jurisdiction can be conducted there.'[34]

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29 Ibid 336.

30 Ibid 337.

31 Ibid 337.

32 Ibid 337. Sir Nigel pointed out that doing away with state courts exercising federal jurisdiction would mean that many matters at present litigated in one court in one action would need to be litigated in two courts in two separate actions. The arrangement would be complex, and would also give rise to difficulty in terms of staffing courts in the less populous States.

33 Ibid 340-1.

34 Ibid 341. Interestingly, Sir Victor Windeyer, speaking to Sir Nigel's paper, referred to a dual system of courts as 'complicated, undesirable, and dangerous': 344. He considered that the creation of a new federal court would result in complexity, 'conflict', 'jealousies' and 'competition' between the State and Commonwealth courts: 345.

This entire debate surrounding the creation of a new national court, fascinating as it may have been, is now water under the bridge. The Federal Court has been in existence for more than 40 years. It has served its primary purpose of relieving the High Court of much of its original jurisdiction, and enabling it to fulfil its constitutional and appellate functions.

The original civil jurisdiction conferred upon the Federal Court in 1976 was limited basically to industrial matters, bankruptcy, judicial review and trade practices. However, the civil jurisdiction exercised by the Federal Court today is vastly broader than that originally conferred. The expansion of its original jurisdiction culminated in 1997, with the largest grant of such jurisdiction being conferred in relation to cases in which the Commonwealth sought an injunction or declaration, matters arising under the Constitution, or involving its interpretation, and most importantly, civil matters arising under any laws made by the Parliament.

Today, the Federal Court has an almost unlimited civil jurisdiction in relation to federal matters. These range from intellectual property to native title and taxation, and across the entire spectrum of federal civil law. In 1976, there were some ten or so Acts of Parliament that conferred jurisdiction upon the Court. I understand that today, the figure reaches some 170 or so, and that figure seems to be growing from year to year.[35]

There is no turning back, and no reason even to contemplate doing so. The fears expressed by Professor Sawer and Justices Else-Mitchell and Street have been shown to be largely unfounded. Generally speaking, state and territory supreme courts, and the Federal Court, work well together, each within their own spheres.[36] To the extent that there is competition between them, that

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35 The Honourable Chief Justice Michael E J Black AC, 'The Federal Court of Australia: The First 30 Years — A Survey On The Occasion Of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1017.

36 There are exceptions. There was a time when, in Victoria, in the industrial sphere, there seemed to be a level of acrimony between the courts. Unions tended to bring proceedings in the Federal Court where they thought they might receive a more sympathetic hearing, whilst employers preferred to have disputes resolved in the Victorian Supreme Court. That era now seems to be over.

competition has for the most part been regarded as healthy.

If that means that, as a practical matter, Justice Else-Mitchell was correct in predicting, in relation to civil cases, that the creation of a new national court would 'bury' the autochthonous expedient, then 'buried' it is. If it means that, in relation to such cases, the expedient survives, albeit in a severely attenuated form, then again this may be no bad thing.

The one area where there can be no doubt that the autochthonous expedient is alive and well is federal indictable crime. The great majority of serious federal offences are tried in state courts, and will continue to be so tried for many years to come. There may, however, be a case for some modest recalibration in that regard. That is the subject to which I next turn.

Federal criminal law in Australia today

In recent years, the reach of federal criminal law in this country has expanded enormously. The framers of our Constitution could never have imagined anything like the array of indictable federal offences that exist today. Nor could they have imagined the many diverse areas into which federal criminal law now extends.

The enactment of the *Criminal Code Act 1995* (Cth) brought about a sea change in federal criminal law in this country. New offences were created, such as bribery of foreign public officials,[37] people smuggling,[38] slavery,[39] child sex offences outside Australia,[40] money laundering,[41] and sexual exploitation of children via the internet.[42] When one adds to these the vast array of new terrorism

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37 *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*') div 70 ('Bribery of foreign public officials').

38 Ibid div 73 ('People smuggling and related offences).

39 Ibid div 270 ('Slavery and slavery-like conditions').

40 Ibid div 272 ('Child sex offences outside Australia').

41 Ibid pt 400 ('Money laundering').

42 Ibid div 474 ('Telecommunications offences').

offences that are contained within the *Criminal Code*,[43] it become clear that the traditional focus of federal criminal law on drug importation,[44] and revenue fraud,[45] no longer comes close to defining the full scope of federal offending.[46]

Much the same can be said of the growth, through federal legislation, of detailed rules relating to criminal procedure,[47] and a comprehensive set of statutory provisions governing the sentencing of federal offenders.[48] This is all part of a new world of federal criminal law.

Regrettably, despite the enactment of Uniform Evidence Acts by the Commonwealth, and a number of the States and Territories, the rules of evidence that govern the conduct of criminal trials throughout Australia still vary significantly.[49]

In relation to federal criminal law, we have now lived with the 'autochthonous expedient' for well over a century. That being so, it might be thought almost heretical to suggest that what was once considered 'expedient' may no longer merit that description.

Cartel offences

In 2009, the Federal Court was given jurisdiction to conduct jury trials in relation to cartel offences.[50]

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43 Ibid div 101 ('Terrorism').

44 Formerly dealt with under the *Customs Act 1901* (Cth) s 233B.

45 Formerly dealt with under ss 29B (imposition), 29D (fraud), 86A and 86(1)(b) (conspiracy) of the *Crimes Act 1914* (Cth).

46 See generally Deborah Sweeney and Neil Williams, *Commonwealth Criminal Law* (Federation Press, 1990) and Troy Anderson, *Commonwealth Criminal Law* (Federation Press, 2014).

47 Part 1AA of the *Crimes Act 1914* (Cth).

48 Part 1B of the *Crimes Act 1914* (Cth).

49 The *Evidence Act 1995* (Cth) applies to all cases heard in all federal courts. Similar provisions apply through the Uniform Evidence Law in New South Wales (1995), Tasmania (2001), Victoria (2010), the Australian Capital Territory and the Northern Territory (2011). Different rules of evidence apply in Queensland, Western Australia and South Australia. Even in those States that have adopted the Uniform Evidence Law, there are significant differences. For example, the *Jury Directions Act 2015* (Vic) has modified a number of the rules of evidence contained in the *Evidence Act 2008* (Vic).

50 Cartel conduct became a criminal offence under the provisions of the former *Trade Practices Act 1974* (Cth) on 24 July 2009, and these provisions were carried over into the *Competition and Consumer Act*

This was the first breach in the dam of the autochthonous expedient, so far as criminal matters were concerned.

It is important to note that jurisdiction to try cartel offences on indictment was conferred concurrently on the Federal Court, as well as the Supreme Courts of the States and Territories.[51] Such cases cannot, however, be tried in the inferior courts of the states and territories.

Although there is concurrent jurisdiction in relation to cartel offences, my understanding is that the Commonwealth Director of Public Prosecutions will ensure that these cases are brought in the Federal Court, rather than in the state or territory courts.

Cartel conduct is dealt with in div 1 of pt 4 of the *CCA*. In what is said to be 'a simplified outline' of the legislative regime that follows, s 44ZZRA notes that contained therein are parallel offences and civil penalty provisions, all relating to 'cartel conduct'.[52] The 'simplified outline' goes on to say that a corporation must not make, or give effect to, a contract, arrangement or understanding that contains a 'cartel provision'. That term is defined as a provision relating to (a) price fixing; (b) restricting outputs in the production and supply chain; (c) allocating customers, suppliers, or territories; or (d) bid-rigging by parties that are, or would otherwise be, in competition with each other.

Division 1 runs for an astonishing 19 pages. It contains provisions expressed in language that seems to me to be prolix, dense and opaque. These provisions deal with what are described as 'purpose/effect conditions', 'purpose conditions', 'competition conditions', and various associated terms. The legislative jargon is, in my respectful opinion, unhelpful and off-putting.

A corporation commits an indictable offence if it makes a contractual arrangement, or arrives at an understanding, and the contract, arrangement or understanding contains what is described as a

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2010 (Cth) ('*CCA*').

51 See now *CCA* s 163.

52 Section 44ZZRG creates the separate indictable offence of giving effect to a cartel provision. The penalties are the same as those under s 44ZZRA for making a contract containing such a provision.

'cartel provision'. The reader is then directed to ch 2 of the *Criminal Code*, which sets out what are described therein as the 'General provisions of criminal responsibility'.

The fault element for a cartel offence is said to be either knowledge or belief. However, as anyone who has ever had to engage with this part of the *Criminal Code* knows, seemingly simple terms such as these, are by no means easy to construe, still less explain to a jury.

There are severe penalties for committing a cartel offence. These include a fine of up to $10 million dollars, or possibly three times the total value of the benefits derived, if those benefits exceed that figure. Indeed, if the Court cannot determine the value of those benefits, the fine will be up to 10 per cent of the corporation's annual turnover in the 12 month period preceding the commission of the offence. Plainly, we are not dealing with trivial matters.

To complicate matters still further, the *CCA* incorporates a separate regime of what are described as 'civil penalty provisions'.[53] This is in keeping with much modern Commonwealth regulatory legislation, whereby a choice is available to the regulator to proceed against those who contravene the law, civilly or criminally.

There is also, within the same division of the *CCA*, an elaborate regime allowing for what are described as defences and authorisations. These apply in relation to both criminal and civil penalty proceedings.[54]

Perhaps not surprisingly, given the complexity of the new regime, it was not until July 2016, some seven years after the cartel provisions were first enacted, that the first cartel prosecution, triable before a jury, was instituted. The case concerned alleged cartel conduct in the international car shipping industry. Those charged included a number of Japanese and European carriers.

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53 See *CCA* ss 44ZZRJ and 44ZZRK.

54 See *CCA* ss 44ZZRL (conduct notified) and 44ZZRM (cartel provision subject to grant of authorisation).

Nippon Yusen Kabushiki Kaisha Ltd ('NYK'),[55] pleaded guilty, within days of being charged, to one 'rolled up' count of intentionally giving effect to cartel provisions in an arrangement or understanding. The cartel provisions related to the fixing of freight rates for shipping routes to Australia, the rigging of bids in response to requests for bids by motor vehicle manufacturers, and the allocation of customers (the motor vehicle manufacturers) between the members of the cartel.

NYK's plea was heard before Wigney J in the Federal Court earlier this year. On 3 August 2017, his Honour fined NYK $25 million.[56] In determining a sentence of 'severity appropriate' in all the circumstances,[57] Wigney J considered a range of factors that both tended for, and against, a substantial penalty.

His Honour noted that the maximum penalty for the offence was a fine of $100 million. He further noted the serious nature of the offending, NYK's covert and planned conduct, the fact that the senior managers and executives at NYK had sanctioned the conduct, and the benefits obtained by the company as a result of what had occurred. He also noted the difficulties involved in detecting, investigating and prosecuting cartel conduct, meaning that general deterrence had to be given significant weight.

In moderating the penalty to some degree, Wigney J took into account NYK's early plea, cooperation, good prospects of rehabilitation and its lack of a prior record of criminal conduct in Australia, or overseas. A global discount of 50 percent was granted for the early plea of guilty, and the past and future cooperation of NYK.[58]

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55 A large Japanese company that had, for many years, shipped cars to Australia from the countries of manufacture.

56 *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876.

57 *Crimes Act 1914* (Cth) s 16A(1).

58 Under s 16AC of the *Crimes Act 1914* (Cth), the severity of the sentence imposed on NYK had been reduced as NYK had undertaken to cooperate with law enforcement agencies in proceedings relating to alleged offences committed by others.

Arising out of the same cartel arrangement as that concerning NYK, another Japanese shipping company, Kawasaki Kisen Kaisha Ltd (also known as 'K-Line') has been charged with 37 counts of intentionally giving effect to a cartel agreement. At the time this paper is being written, that matter is awaiting determination. A paper committal is set down for hearing on 19 and 20 October 2017, at the Downing Centre Local Court. This followed on from K-Line's unsuccessful application, under s 91 of the *Criminal Procedure Act 1986* (NSW) for an order directing the attendance of nine senior executives of various members of the cartel syndicate, all of whom reside in Japan, for cross-examination at the committal hearing. Assuming that K-Line is committed to stand trial, the case will be heard in the Federal Court in Sydney.[59]

Those responsible for the drafting of the cartel provisions clearly had a somewhat optimistic view of how juries might react to legislation of this nature. These provisions, drafted as they are, create a labyrinth which many lawyers would struggle to find their way through.[60]

In 2010, Justice Michelle Gordon commented on the conferral of cartel jurisdiction upon the Federal Court in the following terms:

> These reforms have created a highly specialised area of law which combines complex commercial and economic concepts of competition law with the rigours of criminal law. Significant legal and practical issues arise for the Courts. The practitioners and those charged with these cartel offences – offences which carry significant sanctions for companies and individuals, including up to 10 years' imprisonment.[61]

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59 I have been told that there may be other cartel cases in the wings. If charges are brought, these case too will be dealt with in the Federal Court, rather than the state or territory courts, though they have concurrent jurisdiction.

60 Of course, as is well understood, s 80 of the Constitution provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. See Clifford L Pannam, 'Trial by Jury and Section 80 of the Australian Constitution' (1968) 6 *Sydney Law Review* 1. There is no question, therefore, of trying cartel cases on indictment before a judge alone, however desirable, in any given case, that course might seem. Section 80 has also been interpreted in such a way as to require jury unanimity for all federal offences tried on indictment. See *Cheatle v The Queen* (1993) 177 CLR 541; *Rizeq v Western Australia* (2017) 91 ALJR 707.

61 The Honourable Justice Michelle Gordon, 'Criminalisation of Cartel Conduct' (2011) 34 *Australian Bar Review* 177, 177. One wonders whether the ACCC, and the Commonwealth Director of Public Prosecutions will focus mainly upon the corporate accused, or whether they will charge individual directors and officers as well. The first cartel prosecution seems to be confined at present to

My criticisms of the drafting of these cartel provisions echo more generally what many judges have said, both formally and informally, about modern Commonwealth drafting in general. The *Criminal Code*, in particular, is widely regarded by trial judges as a prime example of how not to go about enacting criminal provisions. It is conceptually difficult to grasp. It provides a steady diet of work for my Court, and for other intermediate appellate courts.

Given the difficulties associated with conducting jury trials in federal criminal matters, the time may now be ripe to consider having at least some of these cases dealt with in the Federal Court rather than in the usual trial courts of the major states and territories.

One reason for that is that, in Victoria, one of our two most populous States, the great majority of all indictable federal offences are tried in the County Court. To a lesser degree, the same seems to be true of New South Wales, and its District Court. Speaking generally, that may be a matter of necessity, rather than choice.[62]

Of course, the judges in the County Court, and the other state and territory trial courts, normally discharge their judicial responsibilities with diligence, and efficiency. Yet, it must be said that there are so many hidden traps in federal criminal law that such cases often present real difficulties.[63] All too frequently, serious mistakes are made, and miscarriages of justice result. It would surely be worth considering whether there might be an advantage in having at least some of these trials conducted in the Federal Court, rather than in the trial courts of the states in question.

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corporate accused.

62 In Victoria, the Supreme Court deals primarily with matters in its exclusive jurisdiction, murder, manslaughter and attempted murder. Occasionally, it will deal with other serious offences as well, but such cases are relatively rare. Even serious drug trials and complex white collar crime trials are usually dealt with in the County Court. As will be seen, this can have detrimental consequences.

63 Even the task of sentencing a federal offender is of such technical difficulty that mistakes are often made. See generally The Honourable Justice Mark Weinberg, 'Jury Directions On Trial – A Pathway Through The Labyrinth?' (Paper presented at the Supreme and Federal Court Judges' Conference Darwin, 5–9 July 2014).

In 2009, the *Federal Court of Australia Act 1976* (Cth) was amended by the introduction into pt III[64] of div 1A. That division is headed 'Original jurisdiction (indictable offences)'. As a result, it would now be a relatively simple matter to confer upon the Federal Court significantly broader criminal jurisdiction than merely that concerning cartel offences.

The new provisions in div 1A set out in great detail the procedures to be followed in trials for indictable offences conducted in the Federal Court.[65] The 'simplified outline' contained in s 23AA of the Act makes it clear that the provisions dealing with criminal procedures set out thereafter do not confer any jurisdiction in relation to indictable offences. It is necessary for any such jurisdiction to be conferred by particular statutes. However, once such jurisdiction is conferred, there is in place a comprehensive regime for dealing with any trials conducted on indictment.

The procedures set out in div 1A include those dealing with the form of indictments,[66] pre-trial matters (such as pre-trial hearings and prosecution disclosure),[67] jury matters including empanelment and those arising during the course of the trial,[68] arraignment, pleas, no-case submissions and the taking of verdicts.[69] In other words, div 1A encompasses almost all matters that pertain to the conduct of jury trials.

As previously indicated, cartel offences can, in theory, be tried in either the Federal Court, or the state or territory supreme courts. Accordingly, provision is made for determining which court, federal or state, should conduct a cartel trial. In those states or territories which retain committal hearings, the Commonwealth Director of Public Prosecutions is to be invited by the committal court,

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64 Which deals with the jurisdiction of the Court.

65 See *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 1976* (Cth) and ss 68A, 68B and 68C of the *Judiciary Act 1903* (Cth). See also, for a helpful discussion of div 1A, The Honourable Justice Michelle Gordon, 'Criminalisation of Cartel Conduct' (2011) 34 *Australian Bar Review* 177.

66 Subdiv B of div 1A, ss 23BA-BH.

67 Subdiv C of div 1A, ss 23CA-CQ.

68 Subdivs D and E of div 1A, ss 23DA-DZA and 23EA-EM.

69 Subdiv F of div 1A, ss 23FA-FK.

pursuant to s 68A of the *Judiciary Act*, to make submissions regarding that question. The committing magistrate is required to 'consider specifying the court suggested by the Director' as the court before which the accused is to be tried, or by which he or she is to be sentenced.[70]

Recently, the Federal Court introduced a system of National Practice Areas. These were said to be designed to improve efficiency and foster consistent national practice. Importantly, they include Federal Crime, and Related Proceedings. This seems to be a clear indication of the preparedness of the Federal Court to take on indictable trials.[71]

For the moment, the Federal Court's only capacity to try cases on indictment arises in relation to cartel offences. Given the almost frenetic expansion of federal criminal law that has taken place in recent years, it seems reasonable, at this time, to consider whether there may be other indictable offences that would be particularly well suited to being tried in that Court, rather than in the state or territory courts.

Other potentially appropriate criminal offences for Federal Court jurisdiction

Some candidates readily suggest themselves. I refer in particular to a number of the newer federal offences created by the *Criminal Code*, and perhaps by other Commonwealth statutes as well, that can fairly be described as having a national (or perhaps even international) character.[72]

Consider, for example, the array of terrorism offences now contained in pt 5.3 of the *Criminal Code*. Not only are such offences sourced in federal law, they are surely 'national' in character. They are almost invariably investigated by federal law enforcement bodies, though often with the cooperation

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70 In practical terms, this means that the Federal Court will almost invariably be the venue for any cartel prosecution.

71 Of course, so far as criminal matters are concerned, the Federal Court has, for many years, dealt regularly with summary offences under a significant number of Commonwealth statutes. Self-evidently, being summary offences, they are tried by judge alone.

72 See generally, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (4th ed, Lawbook Co, 2017) chapter 15.

of state and territory police.

The *Criminal Code* makes elaborate provision for the use of various coercive powers as part of the investigative process into terrorist activity. These include preventative detention and control orders. Such orders can only be issued by the Federal Court, the Family Court or the Federal Circuit Court.[73] It follows that a major part of the apparatus of anti-terrorism laws in this country is already exclusively within the purview of the national court system.

The terrorism provisions have, as their constitutional basis, a referral to the Commonwealth Parliament by the states, at least to the extent that they are not otherwise included in the legislative powers of that Parliament.[74] The provisions operate extraterritorially,[75] and are aimed at preventing prohibited actions affecting the interests of, specifically, the Commonwealth.[76]

The maximum penalty for the commission of a terrorist act is life imprisonment.[77] There are also a host of associated offences. These include providing or receiving training connected with terrorist acts,[78] possessing things connected with such acts,[79] and doing acts in preparation for, or planning, them.[80] These associated offences also carry heavy penalties.

The designation of a terrorist organisation is entirely a matter for the Commonwealth.[81] It is an offence to be a member of such an organisation,[82] or to recruit from it,[83] or to get funds to or from

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73 See s 100.1 (definition of 'issuing court').

74 The *Criminal Code*, s 100.3.

75 Ibid s 100.3.

76 Ibid s 100.4.

77 Ibid s 101.1.

78 Ibid s 101.2.

79 Ibid s 101.4.

80 Ibid s 101.6.

81 See ibid div 102.1

82 Ibid s 102.3.

83 Ibid s 102.4.

it.[84] It is also an offence to provide support to a terrorist organisation,[85] or associate with it.[86] Financing terrorism, or terrorists, carries a maximum penalty of life imprisonment.[87] All this suggests that the entire suite of terrorism offences should be dealt with at a national level by a national court. That would at least ensure that such cases were handled in a uniform manner, rather than in the disparate way in which they are currently tried.

There are other offences under the *Criminal Code* that might be particularly suitable to be dealt with in the Federal Court. One example would be bribery of foreign public officials,[88] which is very much a growth area throughout the western world, and clearly a matter of international concern. [89] Consider also people smuggling, particularly in its various aggravated forms.[90] Again, such offences carry heavy penalties, and are obviously matters of national and international, rather than purely domestic, concern.[91]

So too, slavery[92] and trafficking in persons,[93] both of which have an international character, and are recognised as offences under international criminal law.[94] Again, child sex offences committed

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84 Ibid s 102.6.

85 Ibid s 102.7.

86 Ibid s 102.8.

87 Ibid ss 103.1-2.

88 Ibid ch 4 div 70.

89 See *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997 [1999] ATS 21 (entered into force on 15 February 1999).

90 Ibid div 73.

91 People smuggling carries a maximum penalty of ten years' imprisonment, but the aggravated versions of the offence carry a maximum of 20 years. It is interesting to note that the Federal Attorney-Generals' written consent is required to bring proceedings for any form of people smuggling, demonstrating clearly the federal character of this crime.

92 Ibid div 270.

93 Ibid div 271.

94 See, eg, *Universal Declaration of Human Rights* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 4; *International Convention on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 8; *Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS 197 (entered into force 1 February 2008).

outside Australia[95] would seem to meet that description, as would large scale money laundering, certain computer offences and cybercrime.

That is not to say that the Federal Court should be given jurisdiction to try all indictable federal offences. For one thing, that Court does not have anything like the resources to undertake such a mammoth task. For another, there is really no call for it to do so. The trial on indictment of serious drug offences is so common an occurrence these days that it would be quite inappropriate to deal with such charges in the Federal Court. State and territory trial courts handle these matters on a daily basis, and by and large, deal with them entirely adequately.

There are, however, two additional categories of offending under federal law that seem to me to be particularly suitable to be dealt with in the Federal Court. The first is fraud upon the Commonwealth (whether it be tax fraud, large-scale social security fraud or systemic Medicare fraud). The second consists of specific offences under the *Corporations Act 2001* (Cth) that involve dishonesty, and that particularly warrant trial on indictment.

As regards fraud upon the Commonwealth, ch 7 of the *Criminal Code* lists a number of offences concerning theft, fraud, bribery, forgery, and offences relating to public officials. Part 7.3 deals specifically with fraudulent conduct. 'Dishonesty' is a key component of a number of these offences.[96]

Fraud upon the Commonwealth can take many forms. It includes, of course, tax fraud of various kinds.[97] It also includes social security fraud,[98] customs fraud, obtaining property by deception, and

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95 Ibid divs 272 and 273.

96 The term is defined in s 130.3 of the *Criminal Code*. There is at present a disconformity between the meaning of 'dishonesty' under the *Criminal Code* and the meaning of that same term in the context of offences under the *Corporations Act*. See generally, *SAJ v The Queen* (2012) 36 VR 435.

97 Project Wickenby, which concerned large scale international tax avoidance schemes, and has now been the subject of investigation for more than a decade, has generated a number of significant tax fraud prosecutions. I understand that there may be more such prosecutions brought in the near future, and such matters have been discussed at some length in the press.

misuse of Commonwealth assets. Prosecutions for offences of this nature can often involve lengthy and complex proceedings.

With regard to offences under the *Corporations Act*, these include the classic examples of breaches of directors' duties,[99] market manipulation,[100] insider trading,[101] and matters of that kind. Such offences typically require lengthy investigation, and need meticulous preparation. They give rise to complex factual and legal issues, often well beyond the capacity of non-specialist lawyers to grapple with. They are likely to be hard fought and, in some cases, defended by the most able counsel. These cases seem to be well suited to being tried in the Federal Court, given its general expertise in this area, as well as across the entire field of corporate insolvency.

The proposal to create Deferred Prosecution Agreements

I note with interest and, I confess, a degree of disquiet, that recently the Federal Government has embarked upon an inquiry into whether there might be a more effective and efficient response to corporate crime.

In March 2017, the Government published a consultation paper entitled *Improving Enforcement Options for Serious Corporate Crime: a proposed model for a Deferred Prosecution Agreement*

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98 See generally, *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408 and *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 for examples of some of the complexities associated with such prosecutions.

99 The statutory duties imposed upon the officers and employees of a corporation are set out in ss 180-4 of the *Corporations Act*. A breach of s 181(1), the requirement to act in good faith and best interest of the company, and for a proper purpose, can constitute a criminal offence. So too, making proper use of his or her position, contrary to s 182(1), and making improper use of information (s 183(1)). See generally as to the meaning of the term 'dishonestly' under the *Corporations Act*: *SAJ v The Queen* (2012) 36 VR 435. The tendency in recent years has been to proceed by way of civil penalty, rather than on indictment. See, eg, *ASIC v Adler* (2002) 168 FLR 253 and *ASIC v Rich* (2009) 236 FLR 1. For criticisms of the way in which these matters are currently being handled see *ASIC v Ingleby* (2013) 39 VR 554.

100 Section 1041A prohibits market manipulation. See *DPP (Cth) v JM* (2013) 250 CLR 135. Section 1311(1) renders such conduct a criminal offence.

101 *Corporations Act* s 1043A. *Hannes v Director of Public Prosecutions (DPP) (Cth) (No 2)* (2006) 205 FLR 217 and *Hartman v DPP (Cth)* (2011) 87 ACSR 52.

scheme in Australia. The effect of such a scheme is said to be to avoid the need for criminal trials for a number of *Corporations Act* offences.

The idea would be that, rather than prosecute corporate crime as such, a system of Deferred Prosecution Agreements ('DPAs') would be adopted. A DPA is described as a voluntary, negotiated settlement between a prosecutor and a defendant.[102] Under such a scheme, where a company or company officer has engaged in serious corporate misfeasance, prosecutors would have the option to invite the company to negotiate an agreement to comply with a range of specified conditions.

These conditions typically would require the company to cooperate with any investigation, admit to agreed facts, pay an agreed financial penalty and implement a program to improve future compliance. If the company fulfilled its obligations under the agreement it would not be prosecuted, and self-evidently, would not sustain any criminal conviction. However, a breach of the terms of a DPA might result in the prosecuting agency commencing prosecution, or re-negotiating the terms of the DPA with the company.

The attractions of such a scheme are obvious. They centre upon the difficulties associated with establishing corporate criminal liability, and the lack of incentives for companies proactively to report internal misconduct. DPAs are thought to provide a more effective and efficient way of holding offending companies to account, without the cost and uncertainty of a criminal trial. For companies,

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102 DPAs are now said to be in use in both the United States and the United Kingdom. In the United States, their introduction has meant that not a single senior banking official has been prosecuted for their role in the financial crash of 2008, notwithstanding the fact that their conduct clearly involved egregious criminality. The contrast with the treatment meted out to those involved in the savings and loans affairs of the late 1980s and early 1990s is startling. At that time, nearly 900 individuals, including the Chief Executives of several major banks were imprisoned. The same was true of the Enron scandal of 2001. Since that time, however, there has been a reluctance to prosecute major white collar crime in the United States, supposedly because of the consequences this can have for the market value of major corporations. A cynic would no doubt say that there appears to be one rule for big business, and another for everyone else. The position in Great Britain is no different. In 2012, British bank HSBC admitted to having laundered money for Mexican drug cartels, as well as having financed terrorist groups. The bank paid a fine amounting to half its profits for three months. The CEO apologised, but apparently remains in that position. Ironically, his salary has actually been raised.

the scheme would provide a way to avoid damage to reputation, and business interests. DPAs would, in some as yet unspecified way, be made public, though one would assume that there would be far less publicity associated with such a process than were senior management to end up in prison. Any reporting of a DPA would also show the steps the company was taking to cooperate and address the offending.

The proposed scheme would encompass many forms of serious corporate wrongdoing. Corporations would be able to resolve matters involving, inter alia, fraud, false accounting, foreign bribery, money laundering, dealing with proceeds of crime, forgery, as well as specific offences under the *Corporations Act*.

The desirability of such a scheme is surely questionable. For one thing, it might be largely pointless. Corporations as such are rarely, if ever, charged with offences involving actual fraud.[103] Rather, it tends to be the individuals (directors and senior office holders of the company) who have committed these offences, and have in the past been prosecuted for their own actions.[104]

One question that needs to be carefully considered before a DPA scheme is introduced is whether a DPA can include, among its terms, that the senior personnel responsible for serious criminality will not themselves be prosecuted. Plainly, the new scheme, if implemented, should preclude any such terms from being agreed. Immunity for senior management of large corporations would have the effect of taking even those relatively few cases that are presently prosecuted out of the reach of the criminal law, and would have a most detrimental effect upon both the principle of legality and the

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103 At common law, a corporation cannot be held criminally responsible for certain crimes which only an individual can commit. It may, however, be held criminally liable on the basis of complicity, conspiracy, attempt and incitement, though such prosecutions are rare. See generally Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (4th ed, Lawbook Co, 2017), 187-90. See also the discussion regarding prosecuting serious cartel conduct by the authors at 192-4.

104 All too often, in my view, various regulators have been prepared to deal with matters involving serious criminality by way of pecuniary penalty, rather than invoking criminal prosecutions, as they should. The proposed DPA system not only continues along that path, but extends it further, making it even less likely that those who have committed such crimes will ever face the consequences of their actions.

rule of law.[105]

The autochthonous expedient – the case for modification

The principal advantages of expanding the criminal jurisdiction of the Federal Court seem to me to be as follows:

1. That Court, having now 'dipped its toe in the water' in relation to cartel offences, should also be able to deal with other indictable offences that are of an essentially national character.

2. The Court now has available to it a highly developed set of procedures allowing for the conduct of jury trials. There would be no great difficulty, from that point of view, in modestly expanding its criminal jurisdiction.

3. The logistics of doing so could readily be accommodated. Court rooms in Federal Court buildings throughout Australia have already made provision for jury trials, and save for terrorism offences, which require additional facilities, could readily accommodate such trials.

4. There are currently a number of Federal Court judges who have had significant experience in the conduct of jury trials. They may, prior to their appointment, have sat on a state or territory supreme court. Alternatively, they may have practised at the criminal bar. Some judges sit quite regularly as trial judges in the Australian

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105 Perhaps even more worrying is the fact that the Consultation Paper notes that the Attorney-General's Department is also considering whether other types of crime (such as environmental crime, tax offences, cartel offences and workplace health and safety offences) should be included in a DPA scheme. Any such regime could have the effect of removing criminal sanctions from conduct that surely warrants nothing less than the most severe punishment including, in some cases, lengthy terms of imprisonment. Pecuniary penalties that punish corporate misfeasance have the effect of passing on to shareholders the consequences of criminality on the part of directors and senior company officers, but do little to deter such conduct. Nothing short of a threat of gaol is likely to have that effect.

Capital Territory, or on criminal appeals in that jurisdiction. They seem to find the work both challenging and enjoyable.

5. Federal Court judges also deal, from time to time, with criminal law related matters. For example, they hear applications for review brought under the *Extradition Act 1988* (Cth). They also engage in judicial review of decisions that are integral to the conduct of criminal investigations.[106]

6. Federal Court judges, by the very nature of their work, are accustomed to dealing with complex legislative regimes.[107] I mean no disrespect to the judges of the main trial courts in the major states when I say that Federal Court judges would, on the whole, be better equipped in that regard to unravel the mysteries of Federal statutes drafted in terms that are labyrinthine and opaque. In that regard, it should be noted that federal criminal law is not normally the 'bread and butter' of jury advocates. Nor is it an area of fondness for those trial judges who sit exclusively in criminal matters.

7. Regrettably, history shows that the public interest has sometimes not been well served by having federal offences of certain kinds tried before judges who lack the finely honed legal skills necessary to deal with them. To take but one recent example, in *Dragojlovic v The Queen*,[108] a tax fraud trial was somehow allocated to the Victorian County Court, rather than being dealt with in the Trial Division of the Supreme Court, where it clearly belonged. Unbelievably, the trial ran for 18 months. Six months were taken up with largely pointless preliminary argument. On appeal, it was found that the trial judge had, almost from the earliest stages, lost control of the entire proceeding. The case should have been completed within perhaps two or

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106 Subject of course to the admonition by the High Court that the Federal Court should not, via judicial review, encourage fragmentation of criminal proceedings. See *Yates v Wilson* (1989) 168 CLR 338.

107 Even those as badly drafted, and difficult to work with, as the *Criminal Code.*

108 (2013) 40 VR 71.

three months, at most.[109]

8. State and territory trial courts, and particularly inferior courts, are subject to extraordinary pressures. Their judges are vastly overworked, and they suffer from a serious lack of resources. All too often, this results in lengthy, and even unconscionable, delays in bringing cases on for trial. For example, in Victoria, sexual offences are given priority when it comes to listing for trial. This means that an enormous percentage of all criminal trials conducted in the County Court are of that character, but this has the effect of pushing out the delays in hearing other matters. In some regional areas, it can take literally years before a fraud case can be tried. The result is that some fraud prosecutions have had to be abandoned, or settled on inappropriate terms.

9. With regard to tax fraud, which seems all too rarely to be prosecuted these days, Federal Court judges would be particularly well equipped to handle such cases. An understanding of the complexities of tax arrangements can be essential when presiding over a trial of that kind. The same is true of corporate fraud. These are fields which some state trial judges, particularly those who sit exclusively in crime, find particularly daunting.

10. The autochthonous expedient, despite its having worked well for over a century, has a number of inherent limitations. It results in trials for federal offences being conducted under quite different sets of rules throughout Australia. Thus, matters

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109 Sadly, *Dragojlovic* is by no means a unique case. A famous example of a complex fraud trial that should never have been heard in the County Court was *R v Wilson & Grimwade*, which ran for an amazing 22 months. The appeal is reported at [1995] 1 VR 163. The convictions were quashed, on the basis that the length and complexity of the proceedings rendered the verdicts unsafe. There are a number of similar examples of such cases, some of which are cited in *Dragojlovic* itself. The problem seems to be that, in Victoria at least, the Supreme Court sometimes finds itself unable to hear lengthy fraud cases. That is primarily because its time is taken up in dealing with matters within its exclusive jurisdiction, namely murder and manslaughter. Of course, the Trial Division does take on major drug cases, and terrorism cases as well.

such as bail, the existence of committal hearings, rules governing drafting of indictments, pre-trial disclosure, empanelment of juries and, most importantly now, jury directions,[110] are dealt with quite differently, depending upon the state or territory in which the particular trial takes place. At present, these differences are accepted as the price to be paid for maintaining the autochthonous expedient. One benefit of dealing with some of these matters in the Federal Court, rather the state and territory courts, would be the adoption of uniform procedures, in conformity with the principle of equal treatment under the law.[111]

11. Currently, even the sentencing of federal offenders, which in theory is governed by a uniform legislative regime,[112] may operate quite differently in practice depending upon the location of a trial. This can result in very different outcomes, subject to the availability of particular sanctions in the state or territory in which the trial happens to take place. The fact that there may be such different outcomes is surely contrary to principle when dealing with federal offences.

12. Experienced practitioners, who happen to work in different parts of the country, often suggest that judges in some states seem to impose far heavier sentences across the board than judges in other states.[113] Trials before a single national court would no

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110 The enactment of the *Jury Directions Act 2015* (Vic) has brought about a major change in the way that trial judges charge juries in that State. There is a real question as to whether anyone charged with a federal indictable offence should be dealt with quite differently, in Victoria, than had the trial be conducted in, say, New South Wales. The differences are significant, and with each tranche of the *Jury Directions Act* that is adopted in Victoria, they become greater.

111 *Leeth v Commonwealth of Australia* (1992) 174 CLR 455.

112 Contained in Pt 1B of the *Crimes Act 1914* (Cth).

113 There is a perception, widely held, at the Criminal Bar in Victoria, that judges in New South Wales, and perhaps also in Western Australia, generally impose far heavier sentences right across the board than do their counterparts elsewhere. Plainly, that is of no particular significance in relation to state offences, but is a problem when dealing with federal offences. See *R v Pham* (2015) 256 CLR 550, where the High Court held that, in sentencing an offender for a federal offence, it is an error to sentence only in accordance with current sentencing practices in the courts of the state or territory of trial. Rather, a sentencing judge must have regard to current sentencing practice throughout the Commonwealth. This can give rise to difficulty when it becomes apparent that there are wide

doubt ameliorate this problem.

The case for 'if it ain't broke don't fix it'

1. The conduct of jury trials is very different from the conduct of judge alone trials. State judges are experienced in dealing with juries. Federal Court judges, by and large, do not have that experience. In the larger states it is by no means uncommon to have specialised criminal divisions within the state trial courts. The judges who sit in these divisions may even be specialists in a subset of particular types of offending. In Victoria, for example, the County Court has a number of judges who not only sit exclusively in crime, but do little apart from conducting trials involving sexual offences. As previously indicated, such cases constitute a high percentage of all criminal trials conducted in the County Court. It can fairly be said that jury trials are no place for the novice judge.

2. The autochthonous expedient has, on the whole, worked tolerably well, and for a very long time. Such differences as exist among the states and territories in matters of criminal procedure, and evidence, tend not to be of fundamental importance. They seldom affect substantive rights.

3. It will inevitably be difficult to mark out the boundaries between those federal offences that seem particularly suitable to be tried in the Federal Court, and those offences that must continue to be tried in state and territory courts. It would be quite wrong, for example, to confer upon the Federal Court jurisdiction to hear drug offences charged under the *Criminal Code*. There are far too many of such cases. Moreover, it is common in such matters to charge a combination of federal and state offences in what is generally known as a 'joint federal-state indictment'. The Federal Court could

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divergences in such practice with regard to, for example, terrorism offences: see *DPP (Cth) v MHK* [2017] VSCA 157 and *DPP (Cth) v Besim* [2017] VSCA 158, and the various cases cited therein.

not be given jurisdiction to hear the related state charges. That would be a matter of considerable inconvenience.

4. At least in the smaller states and territories, there might be logistical difficulties associated with conducting jury trials in the Federal Court. In addition, it must be remembered that, unlike state courts, the Federal Court does not sit on circuit. When it comes to criminal matters, regional sittings are at least symbolically important. Their value, so far as local communities are concerned, should not be ignored.

5. The availability of different sentencing options in the various states and territories may itself be useful. It should not be thought that one size necessarily fits all, even when it comes to federal offences. Thus, the ability in one state to impose home or weekend detention, though not in another, may not be a bad thing.

6. The fact that judges in some states and territories seem to impose heavier sentences for federal offences than do judges in other states and territories is, of course, a matter for legitimate concern. However, the High Court has now made clear, in *R v Pham*,[114] that, whereas consistency of approach is essential in relation to sentencing for federal offenders, that does not mean absolute consistency of outcome. That ruling should be sufficient, over time, to allay concerns in this regard.

7. Even where different courts in different states and territories have disagreed amongst themselves as to how particular federal statutes should be construed, the High Court's admonition that the decision of an intermediate appellate court upon the subject of a federal statute should be followed and applied by other intermediate appellate courts (unless regarded as 'plainly wrong') should be sufficient to overcome

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114 (2015) 256 CLR 550.

difficulties in this area.[115] In any event, the High Court itself will be the final arbiter of any such disagreement.

8. Giving the Federal Court wider indictable jurisdiction at trial level will, of course, necessitate conferring upon it a broader appellate jurisdiction. An entirely new body of principle regarding the exercise, in criminal matters, of that jurisdiction will have to be developed. This will take time, and will, by no means, be a simple task.

9. Finally, to the extent that the United States experience provides any lessons in this area, the dual system of criminal courts in that country has hardly been a resounding success. As has been noted, it results in technicality, fragmentation, undue delay, and a plethora of appeals. There is no reason why we, in this country, should seek to embark upon that same path.

Conclusion

Almost everyone with any experience in the area would accept that our criminal justice system is not working as well as it should. In some states and territories, delays are rife. Many trials are beset with unnecessary technicality, and undue complexity. A short trial, these days, is a rarity.

As previously indicated, Sir Nigel Bowen presciently observed that once a national court had been created, consideration would have to be given at some stage to vesting it with criminal jurisdiction.

We have now reached the point where, I think, there is a good case for broadening the Federal Court's indictable jurisdiction. This would have a number of benefits. I suspect that some of the more complex trials involving federal criminal law would be better handled by the members of the Federal Court than by their state and territory counterparts. Greater efficiency, and expedition, in the conduct of such trials might have an additional benefit. It might persuade those regulators who

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115 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

appear to have all but eschewed the use of criminal proceedings in complex white collar matters, choosing instead to seek civil penalties in such cases, to think again about the wisdom of what they are doing.[116]

The Australia of today is not the Australia of federation. The autochthonous expedient, which suited the times, is no longer the most effective means of dealing with criminal justice in this country. In civil cases, that expedient, though perhaps not quite yet 'buried', is most certainly en route to interment. It would be timely, and appropriate, in criminal matters to take a small, but definite, step along the same path.

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116 The unwillingness of some regulators to prosecute white collar crime is manifest, not just in this country, but overseas. For an instructive, but frightening indication, of what has been occurring in this area, see Matt Taibbi, *The Divide: American injustice in the age of the wealth gap* (Scribe, 2014). Currently, the United States seems to be extraordinarily forgiving of those responsible for what has been described as a 'relentless crime spree' on Wall Street. In addition, the Department of Justice, under former Attorney General Eric Holder, effectively made Wall Street crime its lowest priority. It is said that, since 2009, white collar prosecutions for federal offences have all but ceased.