

The Current and Proposed Criminal Jurisdiction of the Federal Court

A paper presented at the Federal Criminal Law Conference

Sydney, Friday 5 September 2008

Justice Mark Weinberg, Victorian Court of Appeal¹

Introduction

This conference is timely. The Federal Government is currently in the process of investing the Federal Court of Australia with indictable criminal jurisdiction in relation to what have been described as hard-core cartels. This expansion of the Court's jurisdiction represents something of a landmark in its history and development. It gives rise to a number of difficult issues, both theoretical and practical. My purpose in preparing this paper is to set out something of the background to the Court's past involvement in criminal matters, and to consider some of the obstacles which must be overcome if it is to function, in the future, as court or more general criminal jurisdiction.

¹ This paper could not have been written without the invaluable assistance of my associate, Louise Martin. I also acknowledge the assistance of Philip Kellow, Deputy Registrar of the Federal Court. I emphasise, however, that the views expressed in this paper are my own. They date back at least 20 years to the time that I held the position of Commonwealth Director of Public Prosecutions. They are not the views of the Federal Court. They are not the views of the Supreme Court of Victoria.

Background

In the early years of federation, the Commonwealth Government had almost nothing to say on the subject of criminal law. The *Crimes Act 1914* (Cth) created a number of new offences, some of them of a general character. However, these were modest in scope and largely confined to the protection of Commonwealth interests.

It was not until the 1980s that federal criminal law came into its own. Heroin, in particular, was being brought into this country on an unprecedented scale. In addition the discovery of the 'bottom of the harbour' tax schemes, and other forms of revenue fraud, led to the creation of new Commonwealth agencies, including the Director of Public Prosecutions and the National Crime Authority.

By the end of the 1980s, it was clear that federal criminal law had become a discrete and important branch of the criminal law more generally. It operated alongside State and Territory criminal law. It raised complex issues involving federal jurisdiction and constitutional and administrative law. Those who practised in the field soon learned that they had to familiarise themselves with a host of statutes involving different rules of procedure, evidence, and principles of substantive law. The introduction of the new sentencing provisions into the *Crimes Act 1914* at about that time brought about its own difficulties.

The past decade has seen the federalisation of aspects of the criminal law continue unabated. The enactment of the Commonwealth Criminal Code in 1995, and its gradual evolution, has already had a profound impact upon conceptual thinking in the field of general principles of criminal responsibility. It has also criminalised a range of conduct never previously encountered in this country; for example, people smuggling, terrorism, crimes against humanity and related offences, sexual slavery and trafficking in persons.

The expansion of federal criminal law into new areas of human activity is likely to continue. Yet, since federation, almost all federal offences have been, and continue to be, prosecuted in State and Territory courts. Unlike the position in the United States, there are no federal criminal courts in this country. The Federal Court itself has had some exposure to the criminal law, but usually only as an incidental feature of some civil proceeding. Whether that limited role should continue is a question to which I shall return.

The autochthonous expedient – vesting federal jurisdiction in State Courts.

First, a short excursus into constitutional law. Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court of Australia, such other federal courts as the Parliament creates, and such other courts as the

Parliament invests with federal jurisdiction. The section does not expressly designate State courts as the potential repositories of federal jurisdiction. However, the prevailing view has always been that it confers upon the Parliament two options, namely the creation of a federal court system, or the investment of State courts with federal jurisdiction.

For the greater part of the twentieth century, the Commonwealth elected to utilise State courts to exercise federal jurisdiction rather than creating a federal court system to do so. That decision was taken largely for financial reasons. It was thought that establishing a separate layer of federal tribunals represented an unnecessary economic burden for a country with such a small population.

The use of State courts to exercise federal jurisdiction was famously described by the High Court in *Boilermakers*² as an “autochthonous expedient”; that is, something that was indigenous or native to this country and not to be found elsewhere. For example, no similar arrangement exists in the United States despite its almost identical federal structure.

There are of course limits on the power of the Parliament to invest State courts with federal jurisdiction. These are set out in s 77 of the Constitution, such that a

² *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

grant of power to a State court will not be valid unless it is with respect to one of the, albeit wide, list of matters enumerated in ss 75 and 76.

Prior to the decision of the High Court in *Re Wakim*,³ both the Federal and State courts could exercise each others' jurisdiction and regularly did so through cross-vesting. Regrettably, it is now clear that the Constitution does not enable any federal court to exercise State judicial power, as such.

The establishment of the Federal Court

The Federal Court was established by the *Federal Court of Australia Act 1976* (Cth). As a creature of statute, the Court has no inherent jurisdiction. However, this is of little consequence since it has implied powers that are of similar amplitude.

The Federal Court is a superior court of record, and is a court of law and equity.⁴ Its original jurisdiction is set out in s 19(1), which provides that the Court: "... has such original jurisdiction as is vested in it by laws made by the Parliament." Its appellate jurisdiction is set out in s 24.

It is apparent that the Court's jurisdiction is that given to it by statute. In the early days of its existence, that jurisdiction was somewhat narrowly confined,

³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511

⁴ *Federal Court of Australia Act* (1976) s 5(2).

consisting largely of industrial matters and bankruptcy together with a general jurisdiction under the *Trade Practices Act 1974* (Cth). It was also given jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and original jurisdiction to review decisions of the Administrative Appeals Tribunal pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth).

The enlargement of the Federal Court's civil jurisdiction

While the Federal Court started out as a court whose limited jurisdiction was conferred by a short list of individually named statutes, this is no longer the case. In broad terms, the Court has a wide, almost exclusively, civil jurisdiction now given to it by over 150 federal statutes. The jurisdiction of the Court has expanded greatly over the years as Parliament began to use the powers available to it under ss 75 and 76 of the Constitution.

One of the first and most important stages in this process was the enactment in 1983 of s 39B(1) of the *Judiciary Act 1903* (Cth). That section conferred upon the Court the same powers of judicial review as the High Court exercised under s 75(v) of the Constitution. In 1988, the Court's jurisdiction was expanded by the enactment of the *Admiralty Act 1988* (Cth), which conferred upon it wide-ranging powers in relation to admiralty and maritime matters.

However, the most important step towards transforming the Federal Court into a court of general federal jurisdiction came in 1997 with the enactment of s 39B(1A) of the *Judiciary Act*. That section provides:

The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

- (a) *in which the Commonwealth is seeking an injunction or a declaration; or*
- (b) *arising under the Constitution, or involving its interpretation; or*
- (c) *arising under any laws made by the Parliament, **other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.** (Emphasis added.)*

As a result of the enactment of s 39B(1A)(c), the Federal Court now has virtually unlimited jurisdiction in all non-criminal matters arising under any federal statute. If a Commonwealth Act is involved at any stage of a dispute, the Federal Court will have jurisdiction to resolve the whole of that dispute.

Limited criminal and quasi-criminal jurisdiction of the Federal Court

As a result of the limitation contained within s39B(1A)(c), the Federal Court's criminal jurisdiction stands in marked contrast to that of its civil jurisdiction. It is

only where a particular federal statute specifically confers criminal jurisdiction upon the Federal Court that it can deal with the matter.

That is not to say that the Federal Court has had nothing to do with the criminal law or determining criminal matters. The Court has jurisdiction to deal with a number of offences under federal law, most notably under the *Trade Practices Act* and the *Copyright Act 1968* (Cth).⁵ In addition, the Court has long had a criminal jurisdiction in relation to industrial matters. It must be said, however, that these offences are all summary offences. They are not indictable; they do not ordinarily carry the possibility of terms of imprisonment.

Most federal statutes are silent as to the court which has jurisdiction to deal with proceedings for offences which they create. In such cases, s 68(2) of the *Judiciary Act* confers on State courts 'like jurisdiction' with respect to federal offences.

Reference is then generally made to State law to determine whether the matter is to be treated as summary or indictable. The process is very complex.

The Federal Court, though rarely the repository of criminal prosecutions as such, has had a considerable involvement with the criminal law in other ways. The Court has wide powers to deal with contempt. It also encounters the criminal

⁵ See, for example, *Trade Practices Act 1974* (Cth), s 163 and *Copyright Act 1968* (Cth), s 133A(1) & (3).

law through judicial review of a wide range of administrative powers exercised as part of the criminal process. For example, there is a substantial jurisprudence within the Court regarding challenges to the validity of various warrants, the exercise of coercive powers as part of the process of information gathering, the decision to prosecute, and the decision to commit for trial. It is fair to say, however, that the Court's role in judicial review of such decisions has diminished greatly in recent years in line with the High Court's strong admonition against fragmentation of the criminal process.⁶

The Federal Court also comes into contact with the criminal law through its oversight of the process of extradition, which often entails detailed consideration being given to substantive aspects of the criminal law. In addition, the criminal law comes into play at various points of the *Migration Act 1958* (Cth) when questions arise as to whether a permanent residency visa has been lawfully cancelled.

Appellate jurisdiction of the Federal Court

The Federal Court's criminal jurisdiction is enlivened in its purest sense when the Court hears criminal appeals from the Supreme Court of Norfolk Island.

This occurs infrequently, but as part of the Federal Court's general appellate

⁶ See *Yates v Wilson* (1989) 168 CLR 338 for an explanation as to why applications for judicial review of matters such as the decision to commit for trial have virtually died out.

jurisdiction in civil and criminal matters over that Court. Earlier this year, this resulted in the Federal Court hearing an appeal against the conviction of Glen McNeill for the murder of Janelle Patton.⁷

Previously, the Court exercised general appellate jurisdiction in both criminal and civil matters for the Australian Capital Territory and the Northern Territory. However, this jurisdiction was abolished when those Territories established their own appellate structures.

Proposal to criminalise cartel offences

In a landmark development, the Federal Court is about to be given, for the first time, indictable criminal jurisdiction. This arises out of the proposal, now in the process of being implemented, to criminalise what is generally known as cartel conduct. As one commentator notes, it is well recognised that if, instead of competing with one another, enterprises manipulate their dealings with one another through agreements that divide up the market, society as a whole is not well served.⁸

⁷ *McNeill v R* [2008] FCAFC 80. I happened to be the trial judge in that case.

⁸ Russell Miller, *Miller's Annotated Trade Practices Act* (29th Ed, 2008) at 284.

Section 45 of the *Trade Practices Act* prohibits anti-competitive agreements, contracts, arrangements or understandings that have an anti-competitive purpose or likely effect. Such arrangements are regarded as a form of 'cheating', but have never attracted possible imprisonment as a sanction. That position is changing. Australia is about to come into line with many other countries in which such behaviour is regarded not only as reprehensible but as warranting criminal liability.

Section 45 of the *Trade Practices Act* prohibits a corporation from making a contract or arrangement or arriving at an understanding if the proposed contract arrangement or understanding contains what is described as an exclusionary provision, or one of its terms would have, or is likely to have, the effect of substantially lessening competition. Section 75B extends liability from corporations to individuals. Section 78 expressly provides that any breach of s 45 does not attract criminal sanctions. As already indicated, this is about to change.

I do not propose to go into the history of the current proposal to criminalise cartel conduct. Others will speak on that subject. It is sufficient simply to note that, in May 2002, the former government appointed a committee, headed by Sir Daryl Dawson, to conduct a review into the competition provisions of the *Trade Practices Act*. The committee recommended, inter alia, that the civil penalties regime under the Act be maintained but the maximum penalties for corporations

be significantly increased. It also recommended that criminal penalties, including imprisonment of up to seven years for individuals, be introduced for what it termed “hard-core cartel behaviour”, subject only to the resolution of an appropriate definition for that conduct.

On 24 June 2004, the Howard Government introduced into Parliament legislation amending s 76 of the *Trade Practices Act* to raise the maximum pecuniary penalty against corporations to bring it into line with the recommendations of the Dawson Committee. That legislation did not, however, render cartel conduct criminal.

In August 2007, the Government’s website listed a Bill dealing with the criminalisation of serious cartel conduct, and another providing for an expansion of the Federal Court’s limited criminal jurisdiction, as Bills it intended to introduce in the Spring sitting of Parliament. However, the federal election intervened, and these Bills were never introduced.

However, the criminalisation of serious cartel conduct has had bipartisan support. The Australian Labor Party pledged during the election campaign to introduce laws to criminalise serious cartel behaviour within the first 12 months of office. On 11 January 2008, an exposure draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth)*, along with a discussion paper

and draft memorandum of understanding between the Australian Competition and Consumer Commission and the Commonwealth Director of Public Prosecutions, was released.

The exposure draft of the Bill foreshadowed two criminal offences under Part IV of the *Trade Practices Act*, and equivalent offences in the Competition Codes enacted in each State and Territory. It would be an offence to:

- make a contract, arrangement or understanding containing a cartel provision with the intention of dishonestly obtaining a benefit; or
- give effect to a cartel provision with the intention of dishonestly obtaining a benefit.

The Bill contained two pecuniary penalty provisions, which are substantively the same as those currently in the *Trade Practices Act*. Critically a proceeding with respect to a criminal cartel offence could be instituted in either the Federal Court, or in a State or Territory Supreme Court.

It was recently suggested that the Government has toughened its stance against cartel conduct by no longer insisting that the behaviour be dishonest in order to give rise to a criminal offence.⁹ There had been a great deal of criticism of this

⁹ Matthew Drummond, 'Labor toughens up criminal cartel laws', *The Australian Financial Review*, 18 August 2008.

requirement from a wide range of sources, and the Government appears to have accepted the force of that criticism. This means that there is likely to be a significant re-working of the key offence provision. Accordingly, the entire process of criminalization of cartel conduct appears to be still a work in progress.

Why vest criminal jurisdiction in cartel cases in the Federal Court?

A recently retired judge of the High Court has publicly questioned the wisdom of a dual system of courts in this country, arguing that a single judicial hierarchy would operate more effectively and efficiently.¹⁰ His remarks have been read by some as a call for the abolition of the Federal Court, though that is perhaps a simplistic view of his thesis. It is no secret that there was considerable opposition to the establishment of the Federal Court at the time of its creation, not always prompted by the purest of motives.

As a former Federal Court judge, and current Supreme Court judge, it is not appropriate that I engage in debate on this subject. However, I can say with confidence that, by any objective measure, the Federal Court has achieved great success as a court of general civil jurisdiction. I know that it is held in high regard, not just in this country, but also overseas.

¹⁰ The Hon. Ian Callinan QC, 'Imagining a judiciary for a new republic', *The Australian*, August 22 2008.

Still, the question remains. Should the Federal Court's jurisdiction be expanded so that it takes on not merely those somewhat incidental criminal matters earlier outlined but also crime in the truer sense?

In the context of cartel offences, there are arguments both ways.

In principle, those charged with offences against federal law should all be accorded the same rights and protections when they come to trial. This does not happen at the moment. Federal charges are dealt with in State courts, under State rules of procedure which vary greatly from place to place. The rules of evidence which apply to criminal trials for such offences also vary, sometimes in significant ways.

My former colleagues on the Federal Court will not thank me for saying so but the Court is well-resourced. It has effective case management procedures which can be adapted to criminal trials, and which will facilitate the management of what are likely to be long, costly and extremely hard-fought cases.

A number of Federal Court judges have previously served as State Supreme Court judges, and have significant experience in the conduct of jury trials. Many judges have a particular interest in competition law, and are familiar with the difficult concepts so elaborately developed in Pt IV of the *Trade Practices Act*.

They also have a particular expertise in dealing with economic experts of the kind whose evidence is likely to be adduced in trials of this nature.

There is another advantage in conferring cartel jurisdiction upon the Federal Court. There is a greater likelihood of consistency of interpretation if the new offence provisions are dealt with predominantly within the one court, rather than working their way through a series of different courts with different appellate structures.

These are all powerful considerations in support of the current proposal to confer this new indictable criminal jurisdiction upon the Federal Court.

There are, of course, arguments to the contrary. State and Territory judges are, as a general rule, likely to be more experienced than their federal counterparts when it comes to conducting jury trials. That is an important consideration.

Moreover there is an established apparatus within the structure of State and Territory courts for the conduct of all criminal trials. This includes matters leading up to the commencement of the trial, such as bail, committal (though not in all States), and pre-trial hearings. States and Territories also have developed rules of criminal procedure and detailed provisions governing jury empanelment and supervision, and the entire post-conviction appellate process.

The Commonwealth must either adopt State practices in these areas or develop its own procedures.

It should also be said that State and Territory judges regularly deal with Commonwealth offences. They have experience, not always happy, with coping with the labyrinth of federal sentencing law.

Twenty years ago, when I held the position of Commonwealth Director of Public Prosecutions, it was extremely difficult in some States to have Commonwealth matters listed. Even summary prosecutions were given low priority. As for indictable matters, it was almost impossible, in Victoria, to have a Commonwealth case tried in the Supreme Court. That Court confined its trial work to cases of murder and the like. Cases raising immensely difficult issues were left to the County Court. All this was entirely unsatisfactory.

It is pleasing to note the position has since changed. Commonwealth matters are now far more frequently tried in the Supreme Courts of New South Wales and Victoria than they once were. Nonetheless, given a chronic shortage of judges in those courts, there are still delays in getting trials on in both those States. There are also delays in having appeals heard despite the strenuous efforts currently being made to alleviate this problem. A modest incursion by the Federal Court

into indictable criminal work would no doubt assist in easing some of the pressure currently resting on State courts.

Current state of play regarding cartel prosecutions

It is proposed that criminal cartel trials take place in either the Federal Court or the State and Territory Supreme Courts. It is not altogether clear to me how the choice will be made. Presumably, it will be at the election of the Director of Public Prosecutions. I expect that most, if not all, cartel trials will be conducted in the Federal Court.

As part of its cartels legislative package, the former Government had previously put forward the *Federal Court Amendment (Criminal Jurisdiction) Bill 2006 (Cth)*. That Bill proposed to introduce into the *Federal Court of Australia Act* provisions relating to pre-trial issues of a procedural nature and the empanelment and keeping of juries. The Bill also contained provisions designed to enable the Court to conduct jury trials and to hear subsequent appeals in relation to them. It proposed consequential amendments to a host of other federal statutes including for example, the *Proceeds of Crime Act 2002*, the *Transfer of Prisoners Act 1983*, the *Director of Public Prosecutions Act 1983* and the *Mutual Assistance in Criminal Matters Act 1987*.

Of fundamental importance are the changes that will have to be made to enable the Federal Court to conduct jury trials, in accordance with the requirements of s 80 of the Constitution.

The status of that Bill is not clear to me. What is apparent, however, is that a similar bill will be required if the Government is to proceed with its proposed cartel legislation.

The changes contemplated are complex and varied. It is not simply a matter of enacting new laws, or amending old ones. Numerous administrative changes will also have to be effected.

For example, decisions will have to be made as to whether the Commonwealth should enact its own bail provisions. The vexed question of committals will have to be addressed. If they are to be retained, will they be conducted by State courts? It would be difficult to vest this function in the Federal Magistrates' Court, even assuming that that Court survives as a separate body. A committal proceeding involves the exercise of administrative, and not judicial, power.

There would be questions as to whether the exercise of administrative power of that kind, vested in a Ch. III court, is compatible with its exercise of federal judicial power. It should also be remembered that Federal Magistrates tend to be

experienced in family law matters. They are unlikely to have any great familiarity with, or deep understanding of, the criminal law.

It is also important to remember that any expansion of the role of the Federal Court into indictable jurisdiction will necessitate a close examination by that Court of the rules of criminal procedure which will govern such trials. Presently, each State and Territory has its own detailed laws governing these matters. Terminology varies. The rules governing issues such as joinder and severance of counts, separate trials, pre-trial disclosure of defences, and a host of other issues are by no means the same. Indeed, in some ways these differences are becoming more pronounced. Of course, the Federal Court could simply apply those rules which operate in the relevant State or Territory in which the trial is to be conducted. However, even if that were to be done, the co-operation of the States and Territories would need to be obtained, both in relation to the drafting of their own legislation and in relation to the interplay between their own courts, Local or Magistrates', and the Federal Court.

In addition, picking up State and Territory laws could provoke constitutional issues. For instance, an accused charged before the Federal Court with a particular federal offence may have different substantive and procedural rights depending upon the State or Territory in which the offence is alleged to have been committed. Most notably, in Victoria and the Australian Capital Territory,

the accused might be able to benefit from a host of human rights provisions not operating at a federal level. Similarly, inconsistencies could arise in relation to the prosecution's rights and obligations, depending upon the procedural legislation of the State or Territory in which the prosecution originates.

It is possible to illustrate some of the practical difficulties that will need to be addressed by taking the apparently simple example of bail. For instance, in federal prosecutions of criminal cartel offences:

- should bail applications continue to be heard in State or Territory Magistrates and Local Courts or should the Federal Court, or Federal Magistrates Court, play a role in this process?
- If the State and Territory Courts continue to deal with bail, are there any issues in relation to the power of such courts to bail and order an accused to appear before the Federal Court? Which court should review such bail orders: the Federal Court or the relevant Supreme Court?
- In either case, what arrangements might need to be made with State and Territory authorities regarding the transportation of accused persons from remand centres to the Court? In some States and Territories this has been outsourced to private firms. Will the Commonwealth need to make its own contractual arrangements with these providers? Or could those arrangements currently made by relevant States or Territories be applied?

- How should repeated bail applications be managed? Should the legislation leave it to the discretion of the Court or should the accused be required to show special or exceptional circumstances to seek bail once an application for bail has been refused?

In addition, as it was not envisaged that the Federal Court would hear indictable offences when the current Court buildings were designed, significant changes will need to be made to court rooms to allow for jury trials to take place.

Associated changes will also have to be made to existing staffing arrangements.

New case-management systems will have to be adopted to respond to the different demands that dealing with criminal defendants and juries will introduce to a Court whose trial experience to date has been strictly civil.

Steps being taken by the Federal Court to address these difficulties

Since the cartel proposal was first seriously mooted, the Federal Court has been actively making arrangements to allow for as smooth a transition as possible.

The Court has established a Criminal Procedure Committee comprising a number of judges with criminal experience, which has met on a number of occasions since May 2006.

The Committee was established to oversee the implementation of the criminal jurisdiction within the Court, and to provide advice to those engaged in drafting the relevant provisions pertaining to the Court. To this end, the Committee has considered and provided comments to the Attorney-General's Department on the proposed legislation. It has also provided comments on related issues.

As I understand it, the Court intends to develop new Rules of Court and procedures for the conduct of criminal proceedings. It also intends to promote further judicial education, acquire additional library and electronic resources, improve registry facilities and administrative arrangements, and implement changes to the Court's electronic case management system.

The future of federal criminal jurisdiction – the United States experience

The conferral of indictable jurisdiction on the Federal Court in relation to cartel offences might potentially lead to an expansion of its criminal jurisdiction in other areas. Some examples readily suggest themselves. Tax fraud is a prime example. So too are the various *Corporations Act* offences.

As matters stand, there is little prospect that the Federal Court will, in the short term, assume a major role in the conduct of federal criminal trials. The vast bulk of such trials involve either drugs or fraud upon the Commonwealth. These are

routinely dealt with by State and Territory courts, and there is not the slightest possibility that the Federal Court, as presently constituted, would have the capacity to take them on.

The position might be different in relation to crimes under Commonwealth law that have a particular national significance. I refer to terrorism, and crimes against humanity as just two examples.

If the Federal Court were, at some point in the future, to be given broader criminal jurisdiction beyond that of cartel offences, consideration would have to be given to problems associated with the duality of criminal courts. In that event, lessons could be drawn from the experience in the United States.

Just as in Australia, criminal offences in the United States exist under both federal and state law. Federal offences are tried in the federal district courts, and state offences in the state courts. Some criminal offences in the United States are exclusively federal, however, the vast majority are “dual jurisdiction” crimes; in the sense that the same conduct can be characterised as criminal under both federal and state law.

As in Australia, the number of federal offences has been increasing rapidly in the United States. Congress has passed a number of federal laws that seemingly

overlap with state laws, such as the *Anti-Car Theft Act 1992* and the *Child Support Recovery Act 1992*. It has also enacted new laws on arson, narcotics and dangerous drugs, guns, money laundering and reporting, domestic violence, environmental transgressions, career criminals and repeat offenders. As a result, the number of criminal prosecutions in federal courts increased by 15 per cent in 1998 alone.¹¹

Under what is known as the “dual sovereignty doctrine”, a crime under both federal and state law is not considered to be the same offence “no matter how identical the conduct” is that those laws proscribe.¹² This doctrine has long permitted the Federal and State Governments in the United States to initiate separate prosecutions in relation to what would otherwise be the same offence. The principle of double jeopardy does not apply in these circumstances.

The effect of the dual sovereignty principle is that an accused can receive two separate jail terms in state and federal prisons if convicted in both systems. However, the court in imposing sentence after the second of the two convictions, must take into consideration and give credit for the time served or being served by the accused in another system for the same underlying conduct.¹³ A famous example of the dual sovereignty principle is the Rodney King case, in which an

¹¹ Rory K Little, *Myths and Principles of Federalization* 46 *Hastings Law Journal* 1029 at 1031

¹² *Texas v Cobb* 532 US 162 2001.

¹³ See, for example, *Covington v US* (DNJ 2008) 2008 WL 1826813.

African-American motorist was stopped and repeatedly bashed by Los Angeles Police Officers after being chased for speeding. The assaults were filmed by a passer-by and broadcast to the world. Four police officers were acquitted of Mr King's assault in a California state court. However, two of them were subsequently convicted of violating his civil rights in a federal court in California.

There are often tensions between the state and federal systems as to which jurisdiction will prosecute an individual. There are also "turf wars" between prosecutors. Generally, a defendant will only be prosecuted once even where the conduct offends both state and federal law. The decision as to whether the state and federal authorities both prosecute an offender, and, if there are to be both federal and state prosecutions, who goes first, is left to the discretion of the prosecutors. Ultimately, the decision turns on the nature and importance of the crime, the relative advantages and disadvantages of each forum (for instance, a state might have a particular rule that would allow certain evidence that might be inadmissible in a federal court), and the type of punishment available in the forum. Often, the better-resourced federal authorities are able to bring their prosecutions in advance of, if not instead of, the states.

It seems that defendants generally fear federal prosecutions more than state prosecutions. Federal sentences tend to be significantly longer, though this is

balanced by the fact that federal prisons are regarded as vastly better than their state equivalents.

That said, enforcement of criminal laws has traditionally been a matter handled by the states. The increasing federalisation of the United States criminal justice system has been criticised. Former Chief Justice William Rehnquist said:

“Federal courts were not created to adjudicate local crimes ... The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the judiciary’s resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.”¹⁴

However, the increasing federalisation of criminal law enforcement also has its supporters. Professor Rory Little, of the University of California, Hastings College of law, argues that the trend protects against the incapacity of states to catch and prosecute all criminals. If the quality of justice is better in the federal courts, as it almost invariably is, “then problems of crime cannot be ignored federally while state criminal justice slowly sinks and justice fails”.¹⁵

¹⁴ William Rehnquist, The 1998 Year-End Report on the Federal Judiciary, 11 Fed Sent R 134 (1998)

¹⁵ Rory K Little, ‘Myths and Principles of Federalization’ 46 *Hastings Law Journal* 1029 at 1085.

Conclusion

As matters presently stand, the idea of establishing a separate federal criminal court system in Australia is simply not viable. There is, however, a case for conferring upon the Federal Court a limited indictable jurisdiction extending beyond cartel cases, and into other areas where that Court has particular expertise. I include in that category tax fraud and serious offences under the *Corporations Act*.

If such a jurisdiction is conferred upon the Court, it would make sense to make it concurrent rather than exclusive. That allows for the possibility of a joint trial of state and federal offences where that is appropriate. The Federal Court could not, as matters stand, conduct such a trial. I should add, however, that it would be unlikely, in the sorts of cases that I am discussing, that state charges would be brought in conjunction with federal charges.

The Australian Law Reform Commission in its recent report, *Same Crime, Same Time: Sentencing of Federal Offenders (2006)*, recommended that the original jurisdiction of the Federal Court be expanded to hear and determine proceedings in relation to nominated federal offences where the subject matter of the offences

was closely allied to the existing civil jurisdiction of the Court.¹⁶ It also foreshadowed the possibility of an exclusively appellate jurisdiction for the Federal Court in relation to federal offenders. This would have the advantage of promoting greater consistency in sentencing practice, but it would create its own difficulties.

This ALRC report repays careful consideration. Its recommendations posit a modest retreat from the autochthonous expedient, but these are hardly revolutionary in scope.

It is always difficult to predict what governments may do in relation to matters involving the Commonwealth and the States. One thing, however, is certain. Federal criminal law will continue to grow. It will increasingly cover the same ground as State offences, as has already been demonstrated in relation to the field of drugs. It will also expand into areas that the founders of our Constitution never for one moment contemplated. Ultimately, there will be pressure upon the Commonwealth to develop its own court system to deal with federal crimes, just as there will be pressure, eventually, upon the Commonwealth to construct and manage its own prisons. In that regard, we will almost certainly emulate what the United States has long done. It will not happen soon, it may not happen in my lifetime, but happen it will.

¹⁶ I should indicate that I was a member of the ALRC and party to this report.