Chapter 17

Federal Indictable Offences: Has the 'Autochthonous Expedient' Run its Course?

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Introduction

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'.[1] The idea of conferring federal jurisdiction on State courts in this country required a specific grant of legislative power. This was conferred by s 77(iii) of the *Constitution*. Surprisingly, given the close reliance that the framers of our *Constitution* placed upon the United States model, autochthonous expediency has never been a feature of the court system in that country.[2]

The framers of the Australian *Constitution* adopted autochthonism in part because it was understood from the outset that the High Court, unlike the United States Supreme Court, 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.

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1 *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'.

2 See generally Geoffrey Lindell, *Cowen and Zines' Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 252 ('*Cowen and Zines*'). See also Justice Susan Kenny, 'The Evolving Jurisdiction of the Federal Court of Australia – Administering Justice in a Federal System' (Speech delivered at the 40th Anniversary of the Federal Court Act, National Judicial Institute, Canada, 28 October 2011) <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kenny/kenny-j-20111028>.

3 Professor K C 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.