CRIMINAL TRIAL JURIES IN AUSTRALIA: FROM PENAL COLONIES TO A FEDERAL DEMOCRACY

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I

INTRODUCTION: HISTORY OF CRIMINAL JURIES

As recently as forty years ago, Australians within certain social classes and age-groups regularly described a journey to England as "going home," even if they had in fact been born in Australia to Australian parents. It is therefore no surprise that, along with numerous other English social, cultural, and legal practices, the English model of trial by jury was adopted in each of the Australian colonies at a relatively early stage of its development and remains an enduring feature of the Australian legal system. Interesting adaptations of this model are to be found in Australia, as this article will demonstrate, but the core concept remains essentially unchanged.

A. Juries in the Australian Colonies of the Nineteenth Century

The introduction of juries[1] during the nineteenth century into Britain's colonies in Australia played an integral role in moving the country toward democratic government and the establishment of the rule of law.[2] It gave ordi-

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1. This account of juries in Australia addresses only the trial of criminal offences by petit jury. Grand juries, although briefly used in some of the Australian colonies during the 19th century, and still available in Victoria in theory, have never been of practical significance in Australia. Civil juries are still used, but in a decreasing minority of cases. Apart from the fact that in some jurisdictions they have only four members, they present no features of special interest. This article lays out the history of the establishment of juries in Australia, and discusses how juries have been utilized and limited. It also examines some of the difficult issues facing juries and analyzes the protections established to protect jury impartiality.

2. The ensuing historical summary draws heavily on the work of DAVID NEAL, THE RULE OF LAW IN A PENAL COLONY ch.7 (1991); *see also* LAW REFORM COMM'N OF VICTORIA, BACKGROUND PAPER NO. 1, THE ROLE OF THE JURY IN CRIMINAL TRIALS app.9 (1985); NEW SOUTH WALES LAW REFORM COMM'N, DISCUSSION PAPER NO. 12, THE JURY IN A CRIMINAL TRIAL ch.1 (1985); J.M. Bennett, *The Establishment of Jury Trial in New South Wales*, 3 SYDNEY L. REV. 463 (1959-60); A.C.

nary citizens a significant role to play in the administration of justice, making inroads into the potentially oppressive authority of judges, colonial governors, and, at a more remote level, the British Colonial Office.

In the first-established colony, New South Wales, this familiar political dimension of a community's adoption of jury trial had an unusual twist to it. In this instance, the struggles over jury trial formed part—an important part—of a wider battle over full citizenship rights for ex-convicts. Four of the six Australian states (New South Wales, Queensland, Tasmania, and Victoria, but not South Australia or Western Australia) began life as penal colonies, to which numerous convicted criminals were transported from Britain as punishment. By modern standards, the convicts' crimes were often trivial: for example, a theft of property worth less than two pounds. Thefts the value of two pounds or more were punishable by hanging.

In the first thirty-odd years after the arrival of the First Fleet in Sydney,[3] New South Wales, in January 1788, the only "juries" used comprised of six military officers, chosen by the Governor, sitting with a military judicial officer, the Judge-Advocate. During this period, many convicts served their sentences, elected to stay in the colony, and acquired sufficient land to qualify them for jury service. Yet they were still subject to a form of trial in which any resentment or prejudice against them on the part of the Governor or his military associates could weigh heavily against them.

During this time, free settlers ("Exclusives") who migrated from Britain did not leave their prejudices behind along with their homes. But freed convicts ("Emancipists") greatly outnumbered them, so much so that trial by jury of civilians would not be feasible unless Emancipists could be empanelled as jurors. Predicably, the Exclusives strongly resisted this measure. They argued that Emancipists would be far too willing to acquit and, moreover, that they themselves should not suffer the indignity of trial before jurors who were still tainted by their criminal records, even though they might now be law-abiding people who were able to satisfy a property qualification.

These arguments were put forward in the context of fierce political resistance by Exclusives to the broader notion that Emancipists should be recognised as full citizens, with the capacity, among other things, to be appointed to public office or to practise as lawyers. The Emancipists, for their part, freely engaged in political rhetoric about juries found in other British colonial settlements at a similar stage of development; for example, that trial by one's peers was the "birthright" of every Englishman. But this was more a power-struggle over equality of status between these two clearly defined groups within the colony than a legal debate about the merits and demerits of juries within a small community.

Castles, *The Judiciary and Political Questions: The First Australian Experience, 1824-1825*, 5 ADEL. L. REV. 294 (1975); H.V. Evatt, *The Jury System in Australia*, 10 AUSTL. L.J. 46 (1936).

3. White settlement commenced in Australia when the first group of convict ships to be sent out from England, known as the "First Fleet," reached what is now Sydney Harbour on January 26, 1788. Its commander, Arthur Phillip, became the first Governor of New South Wales.

The efforts of Emancipists to secure jury trial for the colony, beginning in 1819 with a petition to the Colonial Office, produced only partial success during the ensuing twenty years. Between 1824 and 1828, juries of twelve, from which Emancipists were excluded, were used in Quarter Sessions trials, but not in the Supreme Court. Under British legislation passed in 1828, a Supreme Court judge could grant trial by jury in civil cases on the application of either party, but amending legislation was needed in 1829 to permit Emancipists to sit as jurors. At last, in 1833, criminal trial juries with twelve members were introduced in the Supreme Court, yet the accused could choose instead to be tried by a military panel of seven members. Not until 1839 was this option abolished.

Significantly, transportation of convicts from Britain had ceased by this time. The first important steps toward representative government in the colony were taken only three years later. The Emancipists, while winning the battle over juries, had also won the war over equal citizenship at a sufficiently early stage to participate in the first democratic institutions of government in Australia.

In the other Australian colonies, the process of establishing jury trial was not so long or painful. In Victoria, for instance, which was first settled in 1836, the first jury trial took place in 1839 and the jury system was permanently introduced in 1847. Each of the other four colonies (Queensland, South Australia, Tasmania, and Western Australia) found their way to jury trial well before the end of the nineteenth century.

B. Federation, with a Constitutional Provision for Jury Trial

At the beginning of the new century, in 1901, the six colonies federated to become the Commonwealth of Australia. Under the Commonwealth Constitution, which entered into force on January 1, 1901, the former colonies, transformed into states, retained their former general legislative powers over matters of criminal law and procedure, including the process of jury trial. The new central commonwealth Government obtained no general power to legislate on these matters, except in relation to the territories, over which it acquired plenary power. Within the last twenty years, however, it has granted limited self-government to the two principal territories—that is, the Australian Capital Territory and the Northern Territory—which now control their general criminal law. For practical purposes, the legislative powers of the commonwealth Government are confined to a number of specific subject-matters—for example, external affairs, interstate trade and commerce, taxation, and communications—and to matters relating to commonwealth Government institutions.

Although the Commonwealth Constitution limits the federated government's powers, the commonwealth can create criminal offences as part of such legislation, and has done so frequently. For example, corporate fraud offences and offences relating to the importation of prohibited drugs from overseas are Commonwealth offences, enacted under the commonwealth's powers to regulate corporations and to control imports, respectively. Nonetheless, all com-

monwealth offences are tried in state or territory courts. Federal courts have been created by the Constitution itself—namely, the High Court, which functions both as the court of constitutional interpretation and the highest general court of appeal—and by commonwealth legislation (the Federal Court and the Family Court). None of these courts, however, possesses any original criminal jurisdiction.

Accordingly, while federation set in motion the creation of an important body of commonwealth criminal law, it did not give rise to new trial procedures at the commonwealth level. But one provision of the Constitution, governing the trial of these offences in state courts, has a direct impact on criminal procedure. Section 80 of the Constitution begins with the words "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury . . . ."[4]

This provision is remarkable because the Australian Constitution, unlike that of the United States, from which it borrows many significant elements, contains no general Bill of Rights and very few guarantees of citizens' rights.[5] The inclusion of this clause requiring jury trial for commonwealth offences—though not, it should be emphasised, for the much larger range of state offences, which include the "classic" common law crimes—is a striking testament to the importance attributed to criminal jury trial by Australian politicians and lawyers one hundred years ago. Jury trial was said in the debates leading up to the preparation of the Constitution to be "a necessary safeguard to the individual liberty of the subject in every state."[6]

The impact of section 80 has been distinctly weaker than might have been expected or hoped for.[7] Although the fight to incorporate juries into the Australian legal system was won during the nineteenth century, the interpretation of this constitutional guarantee of jury trial has served to limit its effect throughout the present century.

II

USE OF JURIES IN CRIMINAL CASES

A. Offences Arising Under the Common Law or Under a Statute of a State or a Territory

The bulk of criminal offences in Australia arise under the common law or under state or territory statutes. The availability of juries when these offences

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4. CONST. § 80 (Austl.).

5. The Australian Constitution provides only limited protection of citizen's rights against Commonwealth laws. For example, the Constitution establishes limited guarantees of freedom of religion (§ 116) and freedom from discrimination on grounds of place of residence (§ 117), and requires the Commonwealth to compensate citizens whose property is compulsorily acquired (§ 51(xxxi)).

6. 1 OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALIAN FEDERAL CONVENTION 350 (3d Sess. 1898).

7. *See infra* text accompanying notes 14-23.

are tried in the appropriate state or territory court is thus an issue of primary importance. The most important classification of criminal offences in Australian law is between "indictable" and "nonindictable" (more normally called "summary") offences. The distinction between these two classes of offence determines substantially, but by no means wholly, whether an offence will be tried before a jury.

An indictable offence under state or territory law is one which *may* be tried on indictment. If it is so tried, three things follow. First, the offence will be tried in a superior court—that is, the Supreme Court of a state or territory—or an intermediate court, such as a District or County Court. Second, it will be prosecuted in the name of the Crown through a formal document under the hand of an Attorney General, a Director of Public Prosecutions, or some other state-authorised officer. Third, a twelve-member jury will normally be empanelled. Investigation as to whether sufficient evidence is available to warrant the case going to trial is generally entrusted to committing magistrates, though Attorneys General and Directors of Public Prosecutions can bypass committal proceedings by filing an *ex officio* indictment. The characterisation of an offence as indictable is frequently stipulated expressly in the legislation creating it. Alternatively, it may be determined by a general provision to the effect that any offence carrying a maximum sentence above a specified limit—typically, one year imprisonment—is to be deemed to be indictable unless the contrary intention appears in the provision.

The classification of an offence as indictable does not necessarily mean, however, that any charge laid for the offence *must* be tried on indictment. Although this is the rule for the most serious indictable offences, such as murder or rape, in a wide range of other such offences, the option exists between trying them on indictment or as summary offences in a Magistrates' Court. In some instances, these "hybrid" offences carry a substantial maximum penalty, such as imprisonment for ten years. The question whether such an offence will in a given case be tried on indictment or summarily is governed by one or more of a wide range of factors, generally spelled out in relevant legislation. These include, in particular, the seriousness of the criminal conduct alleged against the accused, the opinion or wishes of the accused, and the views of the prosecutor and of the court which would hear the case if it proceeded summarily. When a hybrid offence is tried summarily, a significantly lower maximum sentence is available to the court than if it were tried on indictment.

By contrast, a proceeding for a nonindictable or summary offence is not, in formal terms, a "plea of the Crown." It may be prosecuted by a police officer or a private citizen and it is tried by a magistrate or bench of magistrates, sitting without a jury. Another form of summary trial exists for cases of contempt (which in strict terms is not a criminal offence even though it attracts criminal penalties). These are tried by a single judge or magistrate or by a full bench of a superior court, again without a jury.

A further complication is that in four Australian jurisdictions (the states of New South Wales, South Australia, and Western Australia, and the Australian Capital Territory), a person who has been prosecuted on indictment in a superior or intermediate court may elect to be tried by a judge sitting alone. To prevent "judge-shopping," the accused is required to make the election before the identity of the trial judge is known by the accused. Except in Western Australia, the judge must be satisfied that the accused has been advised on this issue by a legal practitioner. In New South Wales and Western Australia, the legislation requires the consent of the prosecutor as well, but prosecutorial vetoes rarely occur in practice.[8] On occasions, trial judges—who do not possess any veto power—have expressed concern about the idea that the trial of a major indictable offence may take place without a jury.[9]

In South Australia, where this form of trial by judge alone was first introduced, thirty-eight of them were held in the Supreme Court between 1989 and 1993 (the annual proportion of all criminal trials in the Court ranged between 3.9% and 8.9%).[10] In New South Wales, less than five percent of criminal trials in the District Court during a nine-month period in 1991-92 were conducted without a jury.[11]

The overall trend in recent decades clearly has been toward enhancement of the range of offences that will in practice be tried summarily (regardless of whether they fall within the category of "indictable"). To illustrate this, in New South Wales in 1994, juries were used in no more than one percent of all criminal cases (including those with pleas of guilty) and four percent of those where a plea of not guilty was entered.[12] Yet changes introduced in that state in the following year reduced jury use even further. They replaced a system of requiring an accused person's consent to summary trial within a range of offences with a system that requires the accused to elect positively for trial on indictment. A wide range of thefts and other offences involving dishonesty, plus offences involving corruption of witnesses or jurors or escape from lawful custody, are now normally tried summarily by a magistrate, whereas before 1995 they were invariably tried on indictment before a jury in the District Court.[13]

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8. Consent was recently refused by the prosecution in New South Wales when Ivan Milat, the accused in a very high-profile case called the "backpacker murders," elected trial by judge alone, claiming that a jury would be prejudiced against him because of media publicity. Judicial review of this refusal by the Director of Public Prosecutions was then refused by the Supreme Court. *See* M. v. DPP (June 3, 1996) (unreported) (Dunford, J.).

9. In *R. v. Marshall* (1986) 43 S.A.S.R. 448 (Sup. Ct. S. Austl.), the first murder trial to be conducted alone by a judge in Australia, the trial judge expressed misgivings about shifting many important value judgments from jury to judge. *See id.* at 496-99; *see also* Justice D.C. Heenan, *Trial by Judge Alone*, 4 J. JUD. ADMIN. 240 (1995); Justice P. Hidden, *Trial by Judge Alone in New South Wales*, 9 JUD. OFFICERS BULL. 41 (1997); John Willis, *Trial by Judge Alone*, 7 J. JUD. ADMIN. 144 (1998).

10. *See* Heenan, *supra* note 9, at 243.

11. *See id*.

12. *See generally* 1 DAVID BROWN ET AL., CRIMINAL LAWS 253-54 (2d ed. 1996).

13. *See* Trevor Nyman, *New Procedures Under Criminal Procedure Act*, 33(8) L. SOC'Y J. 15 (1995).

B. Commonwealth Offences

As already indicated, offences under commonwealth laws relate only to specific subject matters that fall within commonwealth legislative power. Comparatively speaking, they are not numerous, though they cover some areas of considerable significance in modern times, notably the importation of prohibited drugs. They are classified in the same way as state and territory offences and are tried in state or territory courts.

When tried in a state court, commonwealth offences[14] are subject to the requirement in section 80 of the Commonwealth Constitution that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury . . . ."[15] But the foregoing outline of classifications of offences should be enough to show that this phraseology is, on a straightforward interpretation, distinctly circular. Literally interpreted, it means merely that when a commonwealth offence is tried under the procedure, involving trial by jury, which is generally stipulated for offences prosecuted on indictment, there shall indeed be trial by jury. This is not to require that all *indictable* offences—which would at least bring in the hybrid category described above—must be brought before a jury, but only that those which *are in fact prosecuted on indictment* must be tried in this way.

Despite some powerful dissenting judgments,[16] this literal interpretation has in fact been adopted by the High Court of Australia.[17] A Chief Justice of the Court has quite openly acknowledged that in consequence "[w]hat might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision."[18] Section 80, so interpreted, gives full leeway to the Commonwealth Parliament to choose summary trial rather than trial on indictment for any commonwealth offence, no matter how serious, or to characterise the offence as hybrid, leaving the mode of trial to be determined by the prosecutor, the court, and the accused in each individual case. The sole outcome of the section, to quote another High Court judge, is that "if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment."[19]

The reason for the choice of wording of section 80 would seem to have been that the drafters of the Constitution believed that it might avert the problems that the courts of the United States had encountered in interpreting the phrase

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14. These do not include offences created by the Commonwealth Parliament in the exercise of its power to legislate for a territory. *See* R. v. Bernasconi (1915) 19 C.L.R. 629 (Austl. H. Ct.); *see also supra* text accompanying notes 4-6.

15. CONST. § 80 (Austl.).

16. *See* Kingswell v. R. (1985) 159 C.L.R. 264, 296 (Austl. H. Ct.) (Deane, J.); Li Chia Hsing v. Rankin (1978) 141 C.L.R. 182, 196-203 (Austl. H. Ct.) (Murphy, J.); R. v. Federal Court of Bankruptcy *ex parte* Lowenstein (1938) 59 C.L.R. 556, 581-85 (Austl. H. Ct.) (Dixon & Evatt, JJ.).

17. *See Li Chia Hsing* (1978) 141 C.L.R. at 182; Zarb v. Kennedy (1968) 121 C.L.R. 283 (Austl. H. Ct.); R. v. Archdall & Roskruge *ex parte* Corrigan & Brown (1928) 41 C.L.R. 128 (Austl. H. Ct.).

18. Spratt v. Hermes (1965) 114 C.L.R. 226, 244 (Austl. H. Ct.) (Barwick, C.J.).

19. *Archdall & Roskruge* (1928) 41 C.L.R. at 139-40 (Higgins, J.).

"all Crimes" in the guarantee of trial by jury contained in Article III, Section 2 of the United States Constitution. Yet they were warned of the inherent circularity of the wording they adopted.[20] In an eloquent dissenting judgment opposing the accepted literal interpretation of section 80, Justice Deane in *Kingswell v. R.* argued that the section "reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases"[21] and that it should in fact be interpreted along lines similar to those adopted in the United States for the phrase "all Crimes"—namely, that it should apply to any "serious" offence against a commonwealth law. He tentatively suggested that an offence should be deemed "serious" if it was punishable by a maximum prison sentence of more than one year.[22] Only a wholly new interpretation such as this would, in his view, eliminate the "potentially mischievous mockery" of the Constitution inherent in the accepted literal interpretation.[23]

This literal interpretation does not, however, leave section 80 wholly devoid of content. One form of trial currently open for some state and territory offences which are actually prosecuted on indictment is a trial by judge alone,[24] when the accused so elects and (in most versions) the prosecutor consents. In *Brown v. R.*,[25] the High Court held by majority that section 80 invalidated this mode of trial for commonwealth offences. The majority took the view that, unlike Article III, Section 2 of the United States Constitution (when read in conjunction with the Sixth Amendment), section 80 does not simply confer a private right of a jury trial on the accused, which he or she can waive at will. The right, the High Court held, exists for the benefit of society generally, and fosters "the ideal of equality in a democratic community."[26] It also promotes public acceptance of decisions in criminal trials since they are not made either by "a judge or magistrate who might be, or be portrayed as being, overresponsive to authority or remote from the affairs and concerns of ordinary people" or "by reference to sensational or self-righteous publicity or the passions of the mob."[27]

The existence of section 80 poses a broad question of policy for the trial of commonwealth offences when an indictment is filed. These offences are uniform in substantive terms throughout the commonwealth and have been tried, since 1995, according to a uniform law of evidence. But the versions of trial by

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20. *See, e.g.*, GRAHAM FRICKE, TRIAL BY JURY 3-4 (1997); SAM RICKETSON, TRIAL BY JURY (1983).

21. (1985) 159 C.L.R. 264, 268 (Austl. H. Ct.).

22. *See id.* at 319.

23. *Id.* at 307. The notion that a literal interpretation of § 80 makes a "mockery" of the Constitution is drawn from *R. v. Federal Court of Bankruptcy ex parte Lowenstein* (1938) 59 C.L.R. 556, 580-82 (Austl. H. Ct.) (Dixon & Evatt, JJ., dissenting).

24. *See supra* text accompanying notes 8-11.

25. (1986) 160 C.L.R. 171 (Austl. H. Ct.) (3-2 majority decision).

26. *Id.* at 202 (Deane, J.).

27. *Id.* at 216 (Dawson, J.) (citing the dissenting judgment of Justice Deane in *Kingswell* (1985) 159 C.L.R. at 301-02).

jury adopted within the states differ from each other. There are different rules, for instance, in relation to exemptions from jury service, grounds to be excused, and challenges of individual jurors. The underlying policy question is whether the variations between the states should be permitted to remain, so that each state has a uniform jury process for all its jury trials on indictment, or whether the commonwealth should legislate to require that where section 80 is applicable, the jury process is uniform irrespective of where in Australia the trial takes place.[28] To date, the former approach prevails.

Section 80 regularly calls for the resolution of significant procedural questions. The ensuing pages of this chapter contain discussion of its impact on state law procedures permitting verdicts by juries of less than twelve people, reserve jurors, "jury vetting,"[29] majority verdicts,[30] and directed verdicts of guilty.[31] A further example may be mentioned here. Some commonwealth offences tried by a jury on indictment carry more than one maximum sentence, with the choice between them to be made by the judge in the course of sentencing, by reference to stipulated factual criteria (such as whether the quantity of heroin an offender conspired to import was "commercial" or "trafficable").[32] In 1985, the High Court held by majority that this relegation of specific fact-finding to the judge does not contravene section 80, provided that the alternative penalties all operate within the boundaries of a single offence.[33]

III

DETERMINING WHO SHOULD SIT ON A JURY

In all Australian jurisdictions, the standard number of jurors in a criminal trial is twelve. In Victoria, up to fifteen can be sworn in for a long trial on the basis that a ballot must be held to reduce the number to twelve before the jury retires to consider its verdict.[34] If after a trial begins the judge discharges one or more jurors for reasons such as ill health, a verdict may still be rendered by those remaining, provided (generally speaking) that the number does not fall below ten.[35] Reserve jurors, of which the maximum number permitted ranges between two and six, may be used in four jurisdictions.[36]

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28. *See generally* Arie Freiberg, *Jury Selection in Trials of Commonwealth Offences*, *in* THE JURY UNDER ATTACK 112 (Mark Findlay & Peter Duff eds., 1988).

29. *See infra* Part III.A.3.

30. *See infra* Part IV.

31. *See infra* text accompanying notes 159-167.

32. *See, e.g.*, Customs Act, 1901, §§ 233 B(1), 235(2) (Austl.).

33. *See* Kingswell v. R. (1985) 159 C.L.R. 264 (Austl. H. Ct.) (4-2 majority decision).

34. *See* Juries Act, 1967, §§ 14A, 48A (Vict.).

35. Under the Jury Act, 1977, § 22 (N.S.W.), the number can drop below ten if both sides agree, or can drop to no lower than eight if the trial has been in progress for at least two months.

36. Queensland, Tasmania, Western Australia, and the Northern Territory.

It has been held recently in state courts that both the delivery of a unanimous verdict by a jury of less than twelve[37] and the use of reserve jurors,[38] if in conformity with these provisions, can take place in the trial of a commonwealth offence without any contravention of section 80 of the Constitution.

The primary aspiration of the processes for selection of the twelve jurors is to obtain a jury which is both "representative of the community"[39] and impartial. But it is recognised that neither of these characteristics can be achieved in absolute terms. It is also recognised that "[t]here has always been some tension between the objective of obtaining a jury which is randomly selected and representative of the community, on the one hand, and the desire to ensure that such a jury is impartial and indifferent to the cause on the other."[40]

A. The Jury Should Be "Representative of the Community"

The generally accepted method of ensuring representativeness is random selection—for example, by a computer—from the electoral roll.[41] This method of selection fails to achieve full representativeness in so far as migrants who do not have Australian citizenship cannot be on the electoral roll and many rural Aborigines do not take the necessary steps to ensure that they are enrolled.[42]

There is little jurisprudence on what should be deemed to constitute the relevant "community": that is, whether it is Australia as a whole, or the state or territory where the trial takes place (being generally also the state or territory where the alleged offence was committed), or some smaller region. In practice, the subdivision of the states into "jury districts" (which may or may not coincide with electoral districts) for the purpose of summoning jury panels produces the result that the relevant community will be a district in which the court conducting the trial is located or has regular sittings. This will often, but by no means invariably,[43] be the district where the alleged offence was committed.[44]

This loose concept of selecting a jury which "represents" a geographically defined "community" does not imply that the jury must be deliberately constructed so as to represent a cross-section of all different types of people within that community (defined, for instance, in terms of race, gender, social status,

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37. *See* R. v. Brownlee (1997) 41 N.S.W.L.R. 139 (N.S.W. Ct. Crim. App.).

38. *See* Ah Poh Wai v. R. (1995) 132 W.A.R. 708 (W. Austl. Ct. Crim. App.).

39. *See, e.g.*, R. v. Su (1997) 1 V.R. 18 (Vict. Ct. App.).

40. *Id.*

41. In New South Wales, random selection is required by statute. *See* Jury Act, 1977, § 12 (N.S.W.). See generally 1 LAW REFORM COMM. OF THE PARLIAMENT OF VICTORIA, JURY SERVICE IN VICTORIA ¶¶ 2.20-2.34 (1996), and for critical commentary on this report, see Brendan Cassidy, *12 Angry Persons Still Needed*, 23 ALTERNATIVE L.J. 9 (1998).

42. This problem is discussed in relation to Aboriginal people in Queensland in *Binge v. Bennett* (1989) 42 A. Crim. R. 93, 106-07 (N.S.W. Sup. Ct.).

43. Two exceptions are where an offence committed outside a city or town where the State Supreme Court sits is serious enough to warrant Supreme Court trial, and where the venue is shifted to another location because of concerns about local prejudice against the accused.

44. *See* Duvoric v. R. (1994) 4 T.R. 113 (Tas. Ct. Crim. App.) (upholding trial court's decision to refuse a change of venue although pretrial publicity of the case was significant).

and so on). Reliance on random selection indicates as much. By the same token, Australian courts do not apply the concept that accused persons are entitled to a jury of their "peers," for example, of members of some "community," defined other than geographically, to which they belong.[45] In 1988, the Supreme Court of Queensland specifically held in *R. v. Walker*[46] that even if this notion, as expressed in clause 39 of Magna Carta,[47] was received into Queensland colonial law as part of English common law, it was subsequently overruled by legislation, and accordingly that Queensland law "does not recognise the possibility of a jury drawn exclusively from a particular ethnic or other distinctive group in the community."[48] A statutory exception to this general principle exists in South Australia: The trial court may order, on application by a party or on its own motion, that the jury be composed of men only or of women only if the nature of the case so requires.[49]

A consequence of the general principle of random selection is that any exclusion of a major grouping—for example, of women—through the deliberate act of the sheriff or through challenges by one of the parties may give grounds for applying to have the selection set aside. For example, in 1981, the judge in a District Court trial of an Aboriginal defendant in a New South Wales country town discharged a jury which comprised only white people because the Crown had challenged all Aboriginal members of the panel.[50] He did so in the exercise of a generally recognised judicial power to stand aside a whole jury, or one or more individual jurors, where unfairness, on account of bias or for some other reason, would otherwise result.[51] Similarly, in 1990, a full bench of the Supreme Court of Queensland held null and void a trial in which the male accused had been permitted to challenge for cause all women on the jury panel on the ground that it was against his religious beliefs (and "an abomination of God") to be tried by women.[52] It may, however, be necessary in such a case to show affirmatively that the actual motive for the challenges was an improper one—for example, that it was based simply in racial or gender considerations.[53]

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45. For critical comment, see Meredith Wilkie, *Composition of Juries*, *in* 2 THE CRIMINAL INJUSTICE SYSTEM 111, 114-18 (George Zdenkowski et al. eds., 1987).

46. (1989) 2 Q.R. 79 (Queensl. Sup. Ct.); *see also* R. v. Grant & Lovett (1972) 1 V.R. 423 (Vict. Sup. Ct.) (refusing application to discharge jury when defence took part in empanelling the jurors).

47. MAGNA CARTA cl. 39 (Eng. 1215) (proclaiming that "[n]o freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land").

48. *Walker* (1989) 2 Q.R. at 86 (McPherson, J.).

49. *See* Juries Act, 1927, § 60A (S. Austl.).

50. *See* R. v. Smith (1981) (unreported), *discussed in* 1 AUSTRALIAN LAW REFORM COMM'N, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS ¶¶ 593-94 (1986).

51. *See, e.g.*, R. v. McDonald (1979) 21 S.A.S.R. 198, 210 (S. Austl. Sup. Ct.); R. v. Searle (1993) 2 V.R. 367, 370-76 (Vict. Ct. Crim. App.) (Marks & McDonald, JJ.).

52. *See* R. v. A Judge of District Courts & Shelley *ex parte* Attorney General (1991) 1 Q.R. 170 (Queensl. Sup. Ct.).

53. *See* Binge v. Bennett (1988) 13 N.S.W.L.R. 578, 598 (N.S.W. Sup. Ct.) (Mahoney, J.A.); (1989) 42 A. Crim. R. 93, 106 (N.S.W. Sup. Ct.) (Smart, J.).

A number of further factors undermine the representativeness of Australian juries. Three of them will be discussed here: (1) the existence of categories of ineligible persons, grounds of exemption, and grounds to be excused from jury service; (2) the exercise of rights of challenge or "standing aside;" and (3) "jury vetting."

1. Exclusions from Jury Service. The various grounds on which persons may escape jury service through being deemed ineligible, exempted, or excused are less broad-ranging than they once were. As the High Court of Australia pointed out in *R. v. Cheatle*, at the time of Australian federation (1901), only men who satisfied a property qualification were permitted to serve on juries because at the time they were perceived to be "the only true representatives of the wider community."[54] The Court added that it would be "absurd"[55] to perpetuate this notion nowadays. Yet the equal status of women with men in regard to jury service dates back only to the mid-1970s. Other exclusions removed only around this time included people of "bad fame or of immoral character and repute."[56]

At the present day, a wide range of potential jurors still do not in fact serve as jurors. This is for reasons as diverse as old age, pregnancy, child-care responsibilities, medical condition, place of residence, prior criminal convictions which jury legislation classifies as "disqualifying," insufficient ability to understand English, conscientious objection, professional involvement with the legal system, occupational status, and individual hardship.

In recent years, concern from rather different points of view has been expressed about the degree of unrepresentativeness caused by two particular forms of exclusion. First, the fact that people falling within a number of skilled occupational groups—for example, doctors, schoolteachers, ministers of religion, and senior bureaucrats—can claim exemption as of right without needing to show specific hardship in the circumstances in which they are summoned deprives the jury pool of a significant stratum of educated members.[57] A recent survey of juries in New South Wales revealed that about one half of those selected for a draft jury roll were covered by some form of exclusion which prevented them being summoned.[58] Secondly, the low incidence of Aboriginal persons on jury panels (already mentioned in connection with the requirement of electoral registration) is enhanced because of broad rules of disqualification on account of prior custodial sentences for criminal offences and exemption as of right for people living at a prescribed distance (in Victoria, for example, thirty-two kilometres) from the courthouse.[59]

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54. R. v. Cheatle (1993) 177 C.L.R. 541, 560 (Austl. H. Ct.).

55. *Id.*

56. *See generally* MARK FINDLAY, JURY MANAGEMENT IN NEW SOUTH WALES 232-35 (1994).

57. *See, e.g.*, 1 LAW REFORM COMM. OF THE PARLIAMENT OF VICTORIA, *supra* note 41, at ch.3.

58. *See* FINDLAY, *supra* note 56, at 173.

59. *See* Owen Trembath, *Judgment by Peers: Aborigines and the Jury System*, 123 LAW INST. J. 44 (1993); *see also* Wayne T. Westling & Vicki Waye, *Promoting Fairness and Efficiency in Jury Trials*, 20

2. Challenging or "Standing Aside" Jurors. Australian jury law retains traditional common procedures whereby the prosecution or defence may prevent jurors presented by the sheriff from being sworn in.[60] Their practical utility differs amongst Australian jurisdictions according to whether and, if so, when the composition of the jury panel may be ascertained by the parties. Provisions on this issue vary widely. For example, in New South Wales, the names of the panel may not be revealed; in Victoria, the identity of those with prior criminal convictions (or, it seems, with other "unsuitable" characteristics) may be made known to the prosecution; in South Australia, both sides must have access to the list at least seven days before the trial.

It has been held in the High Court of Australia that where a right of objection has been improperly denied, the trial is a nullity.[61]

Four types of objection may be distinguished. First, on specified grounds[62] involving default or bias on the sheriff's part in constructing the panel, a "challenge to the array," that is, to the composition of the whole panel, may be made. However, this scarcely ever occurs.[63]

Second, individual jurors may be challenged "for cause." The permitted grounds are as follows:[64] lack of any necessary qualification; personal defects creating an incapacity to serve as a juror; partiality; having served on another jury in the same matter; and past conviction for an "infamous," but not necessarily disqualifying, crime.[65] In any case where a challenge is sought to be made, the grounds must be specified and must normally be supported by an affidavit.[66] Challenges for cause are rare, for three reasons: as just pointed out, the parties' advance knowledge about the panel is often limited, the procedural requirements rule out "fishing expeditions," and it is in any event easier for a party to make objections without having to assign reasons, in the ways now to be mentioned.

Third, either side (except for the prosecution in Tasmania) may make "peremptory" challenges to a specified number of individual jurors,[67] and

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CRIM. L.J. 127, 129 (1996) (pointing out that "the arrest and imprisonment rates of Aboriginal persons for minor offences is [*sic*] almost 15 times higher than those of the white majority").

60. *See generally* 1 LAW REFORM COMM. OF THE PARLIAMENT OF VICTORIA, *supra* note 41, ¶¶ 6.32-6.45; NEW SOUTH WALES LAW REFORM COMM'N, REPORT NO. 48, THE JURY IN A CRIMINAL TRIAL ¶¶ 4.49-4.75 (1986); FINDLAY, *supra* note 56, at 45-57, 235-36; KERRY D. STEPHENS, VOIR DIRE LAW ch.3 (1997); Freiberg, *supra* note 28.

61. *See* Johns v. R. (1979) 141 C.L.R. 409 (Austl. H. Ct.); Corbett v. R. (1932) 47 C.L.R. 317 (Austl. H. Ct.).

62. For recent emphasis of this point, see *Greer v. R.* (1996) 84 A. Crim. R. 482, 485 (W. Austl. Ct. Crim. App.).

63. *See, e.g.*, Freiberg, *supra* note 28, at 120.

64. For High Court endorsement of these features of challenges for cause, see *Murphy v. R.* (1989) 167 C.L.R. 94, 102 (Austl. H. Ct.) (Mason, C.J. & Toohey, J.); *see also* Bush v. R. (1993) 43 F.C.R. 549 (Fed. Ct.).

65. As to this last ground, see *R. v. Robinson* (1989) 1 V.R. 289 (Vict. Sup. Ct.).

66. *See Murphy* (1989) 167 C.L.R. at 104.

67. Currently, the generally permitted maximum number of peremptory challenges for both sides in the trial of a single accused person ranges between three (New South Wales) and eight (Queensland). More challenges may be permissible if the offence is treason or murder, if there is

fourth, in four Australian jurisdictions,[68] the prosecution may in addition (or instead) "stand aside" jurors until the panel is exhausted, either as of right or with the court's leave. The important feature of these two procedures is that no ground of objection need be put forward. In practice, these are the two important forms of objection that may be raised at the stage of swearing in the jury. They are regularly used by both sides.

These two forms of objection in which no cause need be shown clearly impair the random element in jury selection. It has been cogently asked[69] whether any of the presumed countervailing benefits—notably that of eliminating jurors who might be unduly biased in one direction or another—are present. Where, as in New South Wales, the challenges are "blind" because no prior access to the jury list has been granted, the lawyers on either side are driven to rely virtually entirely on crude assessments of appearances (for example, apparel, demeanour, apparent social status) or on preconceived notions of whether jurors of a particular race or gender would or would not be sympathetic to their cause. The process may have some symbolic value, notably in permitting the accused to have some say in the process of jury selection,[70] but it is anything but scientific.[71]

In addition, where access to the jury list, or some aspects of it, has been granted to either side a significant period before the trial, the opposite danger arises. There may be scope for undesirable manipulation of the process of selection, through "jury vetting."

3. Jury Vetting. The practice of jury vetting in its most familiar form involves engaging the police to scrutinise draft jury panels to identify those who have disqualifying criminal convictions and also those who might, in the police's view, be "unsuitable" as jurors because (for instance) of nondisqualifying convictions or perceived antagonism to the police. Typically, the disqualified people are identified to the sheriff in accordance with a statutory procedure so that they may be struck off the panel, and the "unsuitable" people are identified for the prosecutor, who may then exercise rights of challenge or standing by (if he or she so wishes) in order that they do not in fact serve on the jury. This practice is only feasible where the prosecution is permitted access to the list of jurors to be empanelled.[72]

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more than one accused, or by agreement. Usually each side is entitled to the same number of peremptory challenges.

68. Tasmania, Western Australia (by leave, up to four), the Australian Capital Territory, and the Northern Territory (up to six).

69. *See* FINDLAY, *supra* note 56, at 45-57 (reporting on the results of observing the selection of juries in 10 trials).

70. But see *id.* at 50, where it is pointed out that generally defence counsel did not consult the accused during the challenge process.

71. For suggestions about how lawyers on both sides could receive carefully limited briefing about each potential juror just before the challenge process, see Westling & Waye, *supra* note 59.

72. This is the case in Tasmania, Victoria, Queensland, Western Australia, and the Australian Capital Territory, but not in New South Wales or South Australia.

In addition, where, as used to be the case in Queensland,[73] the defence as well as the prosecution may gain access to jury panels some significant time before the trial, jury vetting may be carried out by the defence. The most notorious Australian instance occurred in 1991 in the course of the trial, on charges of corruption, of a former National Party Premier of Queensland, Sir Joh Bjelke-Petersen.[74] The publication of the members of a number of jury panels twelve days before the trial provided an opportunity for jury consultants employed by the defence to (1) procure the discharge of all of the panel likely to be employed in the trial by representing falsely to the defence lawyers (and through them, to the court) that they had all been contacted and polled as to their political opinions, and (2) ensure that the first juror in the substituted panel who was *not* challenged by the defence lawyers was (unknown to them) a member of the National Party with strong sympathies for the ex-Premier. The outcome of the trial was a hung jury, in which (as later emerged) this juror was an unyielding minority supporter of a verdict of not guilty. Under legislation subsequently passed in Queensland, the list of those summoned for jury service must be made available to either party, but only on the afternoon before the trial, and any information acquired by a party showing that a potential juror is unsuitable must be given to the other parties.[75]

The practice of jury vetting has been criticised by academic commentators[76] and in law reform reports.[77] The principal grounds of criticism have been that it undermines representativeness, that when carried out by the prosecution it frequently operates to the disadvantage of the defence (who may not get to see the information provided to the prosecution), that it may be used to exclude minority viewpoints or (at worst) to manipulate jury selection so as to provoke a hung jury, and that it may deter people from jury service because they may fear that their past indiscretions will be brought up against them. But in *R. v. Su*,[78] the Victorian Court of Appeal reaffirmed earlier authority[79] to the effect that, at least in relation to people on the panel with nondisqualifying convictions, jury vetting by the prosecution was not unlawful. In so far as it contravened the principle of random selection, it was justifiable because it served the accompanying aim of impartiality. It permitted the prosecution to eliminate those potential jurors who might, in its view, be so antagonistic to the police or

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73. Under the Jury Act, 1981, § 23(2) (Queensl.) (now repealed).

74. The ensuing summary is drawn from the CRIMINAL JUSTICE COMM'N OF QUEENSLAND, REPORT BY THE HONOURABLE W.J. CARTER QC ON HIS INQUIRY INTO THE SELECTION OF THE JURY FOR THE TRIAL OF SIR JOHANNES BJELKE-PETERSEN (1993). The trial, including events within the jury-room, became the subject of an Australian Broadcasting Corporation docu-drama, *Joh's Jury*.

75. *See* Jury Act, 1995, §§ 30, 35 (Queensl.).

76. *See, e.g.*, MARK FINDLAY ET AL., CRIMINAL JUSTICE IN AUSTRALIA 141 (1994); Freiberg, *supra* note 28; Meredith Wilkie, *Composition of Juries*, *in* 2 THE CRIMINAL INJUSTICE SYSTEM, *supra* note 45, at 111, 122-24.

77. *See, e.g.*, LITIGATION REFORM COMM'N, REFORM OF THE JURY SYSTEM IN QUEENSLAND: REPORT OF THE CRIMINAL PROCEDURE DIVISION 27 (1993); NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 60, ¶¶ 4.43-4.45.

78. (1997) 1 V.R. 1 (Vict. Ct. App.).

79. *See* R. v. Robinson (1989) 1 V.R. 289 (Vict. Sup. Ct.).

to the lawful authority of the state that they would be likely to harbour undue bias against the prosecution.[80]

The Victorian Court of Appeal in *R. v. Su* dismissed two other objections to jury vetting raised by defence counsel. One was that the failure to make the list of people with nondisqualifying convictions available to the defence infringed an implied principle of equality between prosecution and defence in the matter of jury selection, a principle deriving from recent Victorian jury legislation giving them equal rights of peremptory challenge. The other was that because the drug offences in the case were created by commonwealth law, section 80 of the Constitution was applicable and this section, as interpreted by the High Court in *R. v. Cheatle*[81] with reference to the long history of jury trial, imposed an "essential requirement" of representativeness through random selection, which was contravened by this form of jury vetting.[82] The Court of Appeal's response to these arguments was that jury vetting was just a process of supplying relevant information to the prosecution so that it could more effectively exercise its rights of challenge or "standing by," which had always been part and parcel of the process of jury selection despite its potential to impair full "representativeness."[83]

The Victorian Court of Appeal's endorsement of prosecution jury vetting in *R. v. Su* is subject to one significant limitation. This is that it covers only the vetting of people with nondisqualifying convictions,[84] not those listed as "unsuitable" (albeit formally qualified) for other reasons. It may therefore be open in a subsequent case to argue that in this latter situation the influence exerted on jury selection by the police, applying highly subjective criteria, does in fact contravene the requirement of representativeness. In a subsequent law reform report in Victoria,[85] it is recommended that jury vetting continue to be permissible, but that it be made subject to two significant limitations: It should be carried out by the sheriff instead of the police, and at the swearing-in stage, with the leave of the trial judge, the defence should have access to the information acquired through vetting.

B. The Jury Should Be "Impartial"

In a number of the foregoing situations where the selection of a jury in Australia is not wholly random because of a process such as challenge, the ground on which the general aim of "representativeness" is departed from is frequently that the concomitant aim of impartiality must also be pursued. Australian courts have acknowledged that a right of "fair trial," derived from both the common law and the Constitution, includes a requirement that any jury em-

80. *See Su* (1997) 1 V.R. at 12-15.
81. (1993) 177 C.L.R. 541 (Austl. H. Ct.).
82. *See id.* at 560-61. This case is discussed *infra* text accompanying notes 136-141.
83. *Su* (1997) 1 V.R. at 18-21.
84. This is clear throughout in the Court's discussion of the issue. *See id.* at 11-21.
85. *See* 1 LAW REFORM COMM. OF THE PARLIAMENT OF VICTORIA, *supra* note 41, ¶¶ 2.20-2.34.

ployed should be reasonably impartial.[86] They have, however, given little precise content to the notion of impartiality.

Potentially, a conflict arises between representativeness and impartiality when defence counsel in a trial makes a peremptory challenge in the belief (correct or otherwise) that the challenged juror is likely to harbour a prejudice against persons of the same lifestyle or social class or race as the accused. In addition, circumstances may arise where the jury as a whole, even though randomly selected, may be claimed to lack impartiality because some or all of its members are likely to be unduly prejudiced for or against the accused. An example would be where a case of alleged child sexual abuse is tried at a time of exceptionally strong public anger and anxiety about this type of offence. But for practical purposes, there is only one situation in which an alleged risk of general jury prejudice of this nature receives direct and sustained attention from Australian law. This is where prejudice has allegedly been created by media publicity dealing specifically with the case or with particular issues directly raised in it.

A basic principle of Australian criminal procedure is that the jury's primary duty is to reach an impartial verdict on the basis only of the admissible and admitted evidence and the argument put before it in the courtroom.[87] It is bound also to give full weight to the law's presumption of innocence and its insistence that guilt be proved beyond reasonable doubt.[88] There is accordingly a particular concern that the rules designating certain categories of evidence to be inadmissible on the ground that they are more prejudicial than probative will be ineffective if media publicity is left wholly unregulated and nothing is done to prevent such evidence from reaching the jury or to counter any effects that it has on the jury.[89] Media allegations that the accused has prior criminal convictions,[90] or has confessed (unless the confession has been held by the trial court to be genuinely voluntary),[91] are deemed particularly harmful in this sense.

At the same time, the Australian legal system attaches significant weight to considerations of freedom of speech, particularly in relation to what the High Court has called "government or political matters,"[92] and to the allied principle

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86. The leading High Court case is *Dietrich v. R.* (1992) 177 C.L.R. 292; *see also* Justice K.P. Duggan, *Reform of the Criminal Law with Fair Trial as the Guiding Star*, 19 CRIM. L.J. 258 (1995); Sir Anthony Mason, *Fair Trial*, 19 CRIM. L.J. 7 (1995).

87. For High Court affirmation, with particular reference to the problems created by media publicity, see *Murphy v. R.* (1989) 167 C.L.R. 94, 98-99 (Austl. H. Ct.) (Mason, C.J. & Toohey, J.).

88. *See, e.g.*, Woomington v. Director of Public Prosecution, (1935) App. Cas. 462, 481 (Eng. H.L.).

89. *See* AUSTRALIAN LAW REFORM COMM'N, REPORT NO. 35, CONTEMPT ¶¶ 282-83 (1987).

90. *See* Hinch v. Attorney-General (1987) 164 C.L.R. 15, 19-20 (Austl. H. Ct.).

91. *See* Attorney General v. TCN Channel Nine Pty. Ltd. (1990) 20 N.S.W.L.R. 368 (N.S.W. Ct. App.).

92. Speech on these topics is protected by an implied constitutional principle of freedom of political communication. But it is primarily defined in terms of speech which might bear upon decisions on how to vote in elections, and in any event the constitutional principle is subject to common law principles (such as those of contempt law) which are held to be reasonably adapted and appropriate to a

that, prima facie at least, legal proceedings should be conducted in open court and be freely reportable.

In seeking to reconcile these competing considerations of fair trial, free speech, and open justice, the overall response of Australian law can be outlined as follows.[93] It gives primacy to the fairness of trials as against claims of the media (and others) for freedom of speech. But the principle of open justice, being viewed as a safeguard for the fairness of trials generally, is frequently, though not invariably, treated as superior to concerns that openness of proceedings and freedom of reporting might jeopardise the fairness of any specific trial (including the trial being reported). Several legal strategies are invoked in order to implement this general approach.

The primary strategy is deterrence of the media through penal sanctions. Under the so-called *sub judice* principle,[94] a branch of the law of contempt of court, the media (and others) may be subject to penal sanctions (usually fines) for publishing material which is found, through proof beyond reasonable doubt, to have had a "real and definite tendency, as a matter of practical reality" to prejudice the fairness of a current or forthcoming criminal trial by virtue of influence on the jury.[95]

In determining whether this tendency exists, it is assumed, however, that jurors will "exercise a critical judgment of what they see, read or hear in the media,"[96] and will do their best to focus only on the evidence and argument put to them in the courtroom.[97] In addition, there are two important grounds of exoneration a media defendant may raise. One, reflecting the principle of "open justice," is that the prejudicial material formed part of a fair and accurate report of legal proceedings held in open court and not subject to any rule of law or court order restricting reporting.[98] The other, reflecting free speech values up to a point, is that no contempt liability exists where the prejudice occasioned by this material is held to be outweighed by the countervailing public interest in the freedom of discussion of, and the dissemination of information about, matters of public concern. But the High Court has warned that it will be difficult, if not impossible, to invoke this ground of exoneration if the prejudice to the criminal trial was intentional, or if the central issue in the trial (that is, the guilt

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countervailing legitimate purpose (such as protecting juries from media prejudice). *See* Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520 (Austl. H. Ct.).

93. This outline is adapted from Michael Chesterman, *OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt with in Australia and America*, 45 AM. J. COMP. L. 109, 114-24 (1997); *see also* AUSTRALIAN LAW REFORM COMM'N, *supra* note 89, ¶¶ 246-47, 271-79.

94. *See* Chesterman, *supra* note 93, at 116-17.

95. John Fairfax & Sons Pty. Ltd. v. McRae (1955) 93 C.L.R. 351 (Austl. H. Ct.).

96. Duff v. R. (1979) 39 F.L.R. 315, 333 (Fed. Ct. Austl.).

97. *See, e.g.*, Attorney-General v. TCN Channel Nine Pty. Ltd. (1990) 20 N.S.W.L.R. 368, 383 (N.S.W. Ct. App.).

98. *See* Hinch v. Attorney-General (1987) 164 C.L.R. 15, 25-26, 43, 83 (Austl. H. Ct.); R. v. Pearce (1992) 7 W.A.R. 395, 426-27 (W. Austl. Sup. Ct.) (Malcolm, C.J.). But when open court proceedings in a criminal trial are conducted in the absence of the jury—for example, to determine the admissibility of specific evidence—reports of them are not protected by this principle. *See* R. v. Day (1985) V.R. 261 (Vict. Sup. Ct.).

or innocence of the accused) was canvassed in the published material, or if information recognised to be highly prejudicial, such as the accused person's criminal record, was disclosed.[99]

As an ancillary strategy, the law provides in limited circumstances for specific prevention. When presented with clearly established grounds, a court may grant an injunction forbidding the publication of specified prejudicial material which, if published, would be in contempt.[100] A court or an investigatory body, if appropriately empowered, may make an order that the reporting of prejudicial material disclosed in proceedings which it is conducting should be prohibited or postponed.[101] In this situation, contrary to the normal outcome, the principle of open justice gives way to concerns that a jury might be prejudiced.

The strategies outlined so far do not affect the composition of the jury in the relevant criminal trial. They seek instead to ensure, by deterrence or by direct prevention, that no media publication creating a significant risk of jury prejudice occurs. If despite these legal constraints prejudicial publicity does occur, either before or during the trial, the presiding judge may decide that it is sufficient to warn the jury to ignore the publicity and focus only on the evidence and argument.[102] This may be termed a "remedial" strategy of a low-key variety. It is frequently employed irrespective of whether the publicity in question would attract contempt sanctions.

However, there are other, more substantial remedial measures available, which will or may (according to the circumstances) affect the composition of the jury to which the trial is ultimately committed. These are as follows:[103]

> (1) the start of the trial, and with it the selection of the jury, may be delayed until it is considered that any influence exerted on the potential jury by the offending publicity has sufficiently died down;[104]
>
> (2) the presiding judge may briefly question the jury panel to ascertain whether any of them have encountered the publicity and, if

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99. *See Hinch* (1987) 164 C.L.R. at 43.

100. *See, e.g.*, John Fairfax Publications Pty. Ltd. v. Doe (1995) 37 N.S.W.L.R. 81, 84 (N.S.W. Ct. App.).

101. But the evidence of prejudice must be strong. *See, e.g.*, Friedrich v. Herald & Wkly. Times Ltd. (1990) V.R. 995 (Vict. Sup. Ct.).

102. For discussion at the High Court level, see *R. v. Glennon* (1992) 173 C.L.R. 592, 601, 603-04. For examples of judicial warnings in leading cases, see J.L. GLISSAN & S. TILMOUTH, AUSTRALIAN CRIMINAL TRIAL DIRECTIONS 3-600-10; *see also* Connell v. R. (No. 6) (1994) 12 W.A.R. 133, 154-58 (W. Austl. Sup. Ct.).

103. *See generally Glennon* (1992) 173 C.L.R. at 601, 611-15; Dietrich v. R. (1992) 177 C.L.R. 292, 363 (Austl. H. Ct.); Jago v. District Court of New South Wales (1989) 168 C.L.R. 23, 46-47, 49 (Austl. H. Ct.); Murphy v. R. (1989) 167 C.L.R. 94, 99 (Austl. H. Ct.).

104. For example, the start of the trial in *Murphy v. R.*, (1989) 167 C.L.R. 94 (Austl. H. Ct.), was delayed for one week. The trial judge's rejection of a defence application for a delay of six months was endorsed by the High Court. *See also* R. v. Keogh (Dec. 22, 1995) (unreported) (S. Austl. Ct. Crim. App.); R. v. Plunkett (July 1, 1997) (unreported) (S. Austl. Ct. Crim. App.) (refusing to overturn a trial judge's decision not to delay the start of a trial even though it was held in a country town and the offending publicity appeared in a local newspaper on the morning when the trial began).

so, invite or require the relevant jurors to stand down if it seems that they are likely to be influenced by it in arriving at a verdict;[105]

(3) questioning of potential jurors by counsel on a "challenge for cause" may also be permitted, though only (as mentioned above) when before the questioning begins there is sufficient evidence to raise a prima facie case of the probability that the individual juror being questioned is biased as a result of the publicity;[106]

(4) the court may order the severance of the trials of two or more co-accused;[107]

(5) where the publicity occurred during the trial, the jury may be discharged before a verdict is reached, and a new trial ordered;[108]

(6) the venue for the trial may be moved to an area where the offending material was not published or had only limited circulation;[109]

(7) in four Australian jurisdictions,[110] where the offence is created by commonwealth law, the accused must be tried by a jury. In all other jurisdictions,[111] the accused may elect to be tried by a judge sitting alone; and

(8) in exceptional circumstances, a guilty verdict may be set aside on the ground that prejudicial publicity rendered the trial unfair, even though one or more of the foregoing remedial techniques was employed, or a permanent stay of proceedings against the accused may be granted, on the ground that there is nothing that a trial judge could do to repair the consequences of such publicity so as to make a subsequent trial fair.[112]

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105. For a description of the procedure, see, for example, *Glennon* (1992) 173 C.L.R. at 601; Bush v. R. (1993) 43 F.C.R. 549, 558 (Fed. Ct. Austl.). Under § 47 of the Jury Act, 1995 (Queensl.), the trial judge, on prior application with supporting grounds, can authorise questioning of a potential juror by a party, having first put his or her own questions. This is the only Australian jury legislation to permit questioning by a party.

106. *See* Murphy v. R. (1989) 167 C.L.R. 94, 95 (Austl. H. Ct.); R. v. Stuart and Finch (1974) Q.R. 277 (Queensl. Sup. Ct.); *Bush* (1993) 43 F.C.R. at 549; Connell v. R. (No. 6) (1994) 12 W.A.R. 133, 162-168 (W. Austl. Sup. Ct.).

107. *See Murphy* (1989) 167 C.L.R. at 99.

108. *See, e.g.*, Registrar, Court of Appeal v. Willesee (1985) 3 N.S.W.L.R. 650, 664-73 (N.S.W. Ct. App.). In New South Wales, under § 55D of the Jury Act, 1977, jurors may be questioned under oath by the trial judge to determine whether they have encountered the publicity and, if so, whether it has influenced them.

109. In addition to the trial court, the Attorney General, who has primary responsibility for determining the venue, may direct a change of venue. *See* R. v. Cattell (1968) 1 N.S.W.L.R. 156 (N.S.W. Ct. App.). The applicant for a change of venue must furnish significant evidence of the likelihood of prejudice. *See* R. v. Pepperill (1981) 54 F.L.R. 327 (N. Terr. Sup. Ct.); R. v. Webb (1992) 64 A. Crim. R. 38 (S. Austl. Sup. Ct.); Durovic v. R. (1994) 4 T.R. 113 (Tas. Ct. Crim. App.).

110. New South Wales, South Australia, Western Australia, and Australian Capital Territory.

111. *See* Brown v. R. (1986) 160 C.L.R. 171, 176 (Austl. H. Ct.).

112. It appears that the only case where a permanent stay has been granted is *Tuckiar v. R.* (1934) 52 C.L.R. 335, 344, 347 (Austl. H. Ct.) (conviction set aside on other grounds, but post-conviction publicity held to rule out any possibility of a fair trial in the future). The leading authority is *R. v. Glennon*, (1992) 173 C.L.R. 592, 598-99 (Austl. H. Ct.), where a conviction set aside by the Victorian Supreme Court because of prejudicial publicity was restored by a majority of the High Court. The High Court minority considered the Victorian Court's order to be within the limits of its discretion on the

It should be noted that these "remedial" techniques of jury trial management operate independently of the rules determining whether or not a publisher is liable to sanctions for contempt under the *sub judice* doctrine. A jury may be discharged on account of publicity in respect of which the publisher is held not liable in contempt proceedings,[113] or indeed is not even prosecuted for contempt.[114] Conversely, a publisher may be convicted of *sub judice* contempt for material published even though the trial judge refused to discharge the jury on the ground of prejudice to the fairness of the trial.[115] The High Court has explained this apparent discrepancy on the ground, *inter alia*, that the issue of contempt liability is determined with regard to the situation as at the time of the publication, which is generally a different time than when a remedial measure is considered.[116] A further reason for the discrepancy is that some aspects of the rules governing contempt liability—for example, exoneration on the ground of "public interest"—have no relevance to the trial court's decision whether or not to employ such a measure.[117]

Because Australian law, like English law, relies principally on the deterrent effect of contempt law to curb media publicity that may prejudice a trial, the use of these techniques for finding a jury that, despite such publicity, can be expected to reach an impartial verdict is relatively uncommon.[118] Trial judges frequently express concern about the likely impact of publicity on the jury, but then declare themselves satisfied, in the light of their own experience as trial judges, that the integrity and good sense of the jury, reinforced by judicial warnings to ignore the publicity, will result in an impartial verdict.[119] Appeal courts frequently defer to the decisions of trial judges, to whom a broad discretion is permitted,[120] that major remedial measures, such as aborting or delaying

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facts. *See also* Duff v. R. (1979) 39 F.L.R. 315 (Fed. Ct. Austl.); R. v. Donald (1983) 34 S.A.S.R. 10 (S. Austl. Ct. Crim. App.); Lewis (1992) 63 A. Crim. R. 18 (Queensl. Ct. App.); R. v. Von Einem (1991) 55 S.A.S.R. 199, 218-19 (S. Austl. Sup. Ct.) (Duggan, J.) (pointing out that the existence of a right for the accused to elect to be tried by a judge alone was a factor in favour of not granting a permanent stay).

113. *See, e.g., Willesee* (1985) 3 N.S.W.L.R. at 654 (Kirby, P.).

114. This occurred in New South Wales in September 1997. Observations by the New South Wales Police Minister to the effect that people convicted of pedophilia offences had generally committed such offences many times before they were arrested and charged induced two trial judges—almost certainly unnecessarily—to discharge juries currently engaged on pedophilia trials. There was never any likelihood that the media organisations reporting the Minister's observations would be charged with contempt, let alone held liable.

115. *See, e.g.*, Nationwide News Pty. Ltd. *ex parte* Director of Public Prosecutions (Commonwealth) (1997) 94 A. Crim. R. 57 (W. Austl. Sup. Ct.).

116. *See* R. v. Glennon (1992) 173 C.L.R. 592, 605-06 (Austl. H. Ct.) (Mason, C.J. & Toohey, J.); *id.* at 612-15 (Brennan, J.).

117. This explains why a criminal jury was discharged on the ground of prejudice caused by a television broadcast the night before it was due to consider its verdict, but in subsequent proceedings for contempt the broadcasters were held not liable. *See Willesee* (1985) 3 N.S.W.L.R. at 650.

118. *See* Chesterman, *supra* note 93, at 133-37.

119. *See* R. v. Connell (No. 3) (1993) 8 W.A.R. 542, 559-60 (Sup. Ct. W. Austl.) (Seaman, J.).

120. This was made clear by the High Court in *R. v. Glennon* (1992) 173 C.L.R. 592 (Austl. H. Ct.) This was a significant element in the majority's ruling that the Victorian Court of Criminal Appeal should not have reversed the "discretionary judgment" of the trial judge. *See id.* at 598.

a trial, are not after all necessary.[121] There appears generally to be significant judicial resistance to adopting these measures in a whole-hearted fashion.

These points are probably best illustrated in relation to the questioning of jurors before they are sworn in. Generally, the judge simply tells the panel that any among them who feel that they might have been unduly influenced by publicity, or might have a good reason to stand down from the jury, should identify themselves. Further questioning of individual jurors by the judge is rare. Questioning by counsel is even more rare, because the threshold requirements for challenges for cause are not easily complied with. Doubts have indeed been expressed in the High Court about the efficacy of challenges for cause in detecting bias.[122] The contrast between the Australian approach and the lengthy *voir dire* interrogations typical of high-profile American trials is very striking.[123]

Attempts by defence lawyers to introduce expert evidence to show that media publicity is likely to predispose the jury toward their clients have had a frosty reception. In two recent cases,[124] defence lawyers, seeking leave to challenge individual jurors for cause or to obtain a temporary or permanent stay of proceedings, tendered the results of telephone surveys within the relevant region and called an expert witness to interpret and comment on them. In both cases, this evidence was rejected on methodological grounds by the trial judge, whose decision on this point was upheld on appeal. In the earlier case, one of the appellate judges remarked that "it would be an exceptional case" to have survey evidence that went as far as to provide grounds for a challenge for cause to every member of the panel.[125] Although doubted in the later of the two cases,[126] this remark is symptomatic of Australian judicial reluctance to explore fully the possible remedial approaches to the problem of pretrial prejudicial publicity.

In addition, judges regularly draw attention to the expense, delay, inconvenience, and (in some circumstances) hardship occasioned by the more drastic of these techniques, such as aborting a part-heard trial or reversing a conviction.[127] Australian courts are a good deal less willing than their American counterparts to subject the state, the accused, and the witnesses to these detriments.

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121. *See, e.g.*, R. v. George, Harris & Hilton (1987) 9 N.S.W.L.R. 527, 534 (N.S.W. Ct. Crim. App.) (Street, C.J.).

122. *See* Murphy v. R. (1989) 167 C.L.R. 94, 103-04 (Austl. H. Ct.) (Mason, C.J. & Toohey, J.); *id.* at 123-24 (Brennan, J.).

123. *See, e.g.*, Philip R. Weems, *A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California*, 10 SYDNEY L. REV. 330, 340-47 (1984) (estimating that the average time spent selecting a jury in New South Wales was 30 minutes, whereas in California it could take up to six weeks).

124. *See* Bush v. R. (1993) 43 F.C.R. 549 (Fed. Ct. Austl.); Connell v. R. (No. 6) (1994) 12 W.A.R. 133, 167 (W. Austl. Sup. Ct.) (affirming the ruling of Judge Seaman in *R. v. Connell* (No. 3*)* (1993) 8 W.A.R. 542, 550-557 (W. Austl. Sup. Ct.)); *see also* Hugh Selby, The Pre Trial Use of Survey Evidence by Trial Judges, in Another Dimension 125 (Proceedings of the 28th Australian Legal Convention, Hobart, Sept. 1993).

125. *Bush*, (1993) 43 F.C.R. at 555 (Drummond, J.).

126. *See Connell* (1994) 12 W.A.R. at 166.

127. *See, e.g.*, Gallagher (1987) 29 A. Crim. R. 33, 41 (Vict. Ct. Crim. App.).

Similarly, even though it was recently said by an appellate court that "where a trial judge is faced with a situation in which pre-trial adverse publicity has a potential to prevent the fair trial of the accused the first step to take is to consider a change of venue,"[128] the actual use of this expedient is uncommon. The states and territories have not yet agreed on a general scheme of cross-border changes of venue, which means that the technique will not produce much benefit in any of the smaller ones, such as Tasmania or the Australian Capital Territory.[129]

Commentators have labelled the Anglo-Australian reliance on restricting media publication, instead of developing and applying sophisticated remedial techniques, as unduly hostile to freedom of speech and unduly narrow in focus.[130] They have also criticised it for failing to account for the inevitable incidence of cases—likely to increase in frequency as electronic technologies of communication become more sophisticated and more global—where despite legal restraints potential jurors come into contact with prejudicial material.[131] In response, the Australian legal community has at least begun to accept that remedial strategies involving departures from the normal processes for finding a jury should be thought about seriously. They are distinctly more on the agenda nowadays than, say, ten years ago. But as has been made clear, they are a long way from supplanting prosecutions for *sub judice* contempt as the primary strategy to deal with publicity that might jeopardise a jury's impartiality.

IV

THE QUESTION OF UNANIMITY OF VERDICT

The common law rule, dating back in England to the fourteenth century, that a criminal jury verdict must be unanimous is maintained and reinforced by statute in three Australian jurisdictions, namely New South Wales, Queensland, and the Australian Capital Territory.[132] Strangely, however, there is no hard-and-fast rule that a jury must be expressly directed to this effect, though if anything said by the judge (for example, in answer to a juror's question) conveys the impression that a nonunanimous verdict will suffice, this will give grounds for quashing a conviction on appeal.[133]

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128. *Connell* (1994) 12 W.A.R. at 167.

129. *See Bush* (1993) 43 F.C.R. at 553.

130. *See, e.g.*, Matthew Lippman & Thomas Webber, *The Law of Constructive Contempt: A Comparative Perspective*, 8 ANGLO-AM. L. REV. 210, 225, 237-38 (1979).

131. *See* Clive Walker, *Fundamental Rights, Fair Trials and the New Audio-Visual Sector*, 59 MOD. L. REV. 517, 519-25, 533-35, 538-39 (1996).

132. *See* Jury Act, 1997, § 56 (N.S.W.); Jury Act, 1995, § 59 (Queensl.); Juries Act, 1967, § 38 (A.C.T.). For authoritative discussion of the common law rule requiring unanimity, see the joint judgment of all seven Justices of the High Court of Australia in *Cheatle v. R.* (1993) 177 C.L.R. 541, 550-59.

133. *See* Milgate v. R. (1964) 38 A.L.J.R. 162 (Austl. H. Ct.), *approved by* Lalchan Nanan v. State, [1986] 1 App. Cas. 860, 873-74 (P.C.).

In the other five major Australian jurisdictions, majority verdicts are authorised by statute, though subject to significant limitations.[134] The minority may never be more than two in number and under some provisions—namely when the number of jurors has fallen below twelve and in all cases in Victoria—may only constitute one juror. In South Australia, Tasmania and Western Australia, there may be no majority verdict in cases of murder.[135] The jury may not deliver a majority verdict until they have tried for a stipulated time (ranging between three and six hours under the different provisions) to reach a unanimous verdict.

A further important limitation on these majority verdict provisions is that they do not apply to trials of offences against the laws of the commonwealth, by virtue of section 80 of the Constitution. The High Court made a unanimous ruling to this effect in 1993, in the case of *Cheatle v. R.*[136] Its principal reasons were that when the Australian colonies agreed in 1900 to form a federation, jury unanimity was "a basic principle of the administration of criminal justice"[137] in each of them, that unanimity ensured a genuine consensus of all the jurors, thereby reducing the danger of unduly hasty verdicts and reflecting the fundamental rule that guilt must be proved beyond reasonable doubt, and that it was supported by case law authority in Australia, England, and America.

From time to time, the incidence of hung juries in trials where no majority verdict is allowed prompts calls for the introduction of majority verdicts in those jurisdictions which do not permit them.[138] A familiar reason advanced is the waste of criminal court time caused by the need to retry cases that would have been resolved the first time around if majority verdicts were permitted. But some degree of inhibition on this change is imposed by the *Cheatle* decision. In addition, a survey of members of thirty-three recent hung juries by the New South Wales Bureau of Crime Statistics and Research[139] showed that, contrary to popular and (generally speaking) professional expectation, the proportion of these juries in which there were only one or two jurors in the minority was less than half (about forty-two percent). There was no generally recurring pattern of one or two minority jurors holding out against the rest. The survey report pointed out that the proportion of these juries from which a verdict could actually have emerged if majority verdicts had been permitted along the lines just set out would in fact be less than forty-two percent because six of the trials surveyed (18.2%) involved commonwealth offences, for which a unanimous verdict was mandatory. It concluded that because hung juries were rela-

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134. *See* Juries Act, 1927, § 57 (S. Austl.); Jury Act, 1899, § 48(2) (Tas.); Juries Act, 1967, § 47 (Vic.); Juries Act, 1957, § 41 (W. Austl.); Criminal Code, § 368 (N.T.).

135. The same applies to treason in South Australia and Tasmania, and to any other offence punishable by life imprisonment in Western Australia.

136. (1993) 177 C.L.R. 541 (Austl. H. Ct.).

137. *Id.* at 551.

138. In September 1995, for instance, the Attorney General of New South Wales announced that he was considering this measure.

139. *See* Pia Salmelainen et al., *Hung Juries and Majority Verdicts*, CRIME & JUST. BULL., July 1997, at 1.

tively rare (less than ten percent of jury trials) and because a high proportion of cases with hung juries (in recent years in New South Wales, about forty-three percent) were not in fact re-tried, the actual saving of criminal court time which might be achieved from introducing majority verdicts in New South Wales might be as little as 1.7%.

It is worth adding here that if a trial judge encountering the prospect of a hung jury exerts undue pressure on the jury to reach agreement, a verdict of guilty may be set aside on appeal. The High Court, in so ruling in 1993,[140] specifically held that it would be improper for the judge to draw attention to the inconvenience and expense occasioned by the failure to agree, or to suggest that jurors should compromise with each other to reach a verdict. Referring to the Court's decision in *Cheatle*, Justice Deane said: "Any suggestion that a minority juror should democratically submit to the view of the majority is antithetical to the jury process under the common law of this country."[141]

V

DIVISION OF FUNCTIONS BETWEEN JUDGE AND JURY

In Australian criminal jury trials, the tasks of judge and jury are demarcated along traditional lines. In the words of a former Chief Justice of South Australia, "[i]t is fundamental to trial by jury that the law is for the judge and the facts are for the jury."[142]

The jury's task is to resolve the relevant questions of fact and apply the law, as outlined by the judge, so as to arrive at a verdict. This will normally be a general one: that is, guilty or not guilty as charged. A possible alternative is a partial verdict—guilty on some counts charged but not others. On rare occasions, the court may seek a special verdict[143] or a verdict on a special fact. Here the jury makes the relevant finding or findings of fact but the court determines the legal implications.

Australian juries play no role in the sentencing of those whom they have found guilty, except that they may make a recommendation for mercy. The trial judge is not bound, however, to accept this recommendation.[144]

This demarcation of functions does not mean that the judge plays no role at all in the factfinding process. So much is clear from the following typical passage in a judge's summing-up to a jury:

> It is the function of the judge to control the trial, to rule on questions of the admissibility of evidence and to define the issues that are to be decided. It is also the duty of

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140. R. v. Black (1993) 179 C.L.R. 44 (Austl. H. Ct.), *discussed in* Paul A. Fairall, *Resolving Jury Deadlock in Criminal Cases*, 24 W. AUSTL. L. REV. 112 (1994).

141. (1993) 179 C.L.R. at 56.

142. R. v. Prasad (1979) 23 S.A.S.R. 161, 162-63 (S. Austl. Sup. Ct.) (King, C.J.).

143. In Queensland, Tasmania, Victoria, Western Australia, and the Northern Territory, there is statutory provision for special verdicts. *See* Criminal Code, § 624 (Queensl.); Criminal Code, § 383(3) (Tas.); Crimes Act, 1958, § 569(3) (Vict.); Criminal Code, § 642 (W. Austl.); Criminal Code, § 369 (N.T.).

144. *See* Whittaker v. R. (1928) 41 C.L.R. 230 (Austl. H. Ct.).

> the judge to instruct the jury as to the law which applies in the case and the practice by which evidence is to be evaluated or weighed and you are required, by your oath, to follow the directions on the law as I give them to you.[145]

This duty of the judge to instruct the jury about the evaluation of the evidence as well as about the application of substantive criminal law principles is implemented in procedural terms through a requirement that the judge should sum up on the evidence as well as the law before the jury retires to consider its verdict.[146] In the course of doing this, the judge must put the issues fairly and in a balanced way. This does not mean that the relative strengths and weaknesses of each side in the case must be glossed over,[147] though by virtue of the presumption of innocence, the judge should ensure that any ground of defence that might be supported by the evidence should be considered by the jury, even if defence counsel has deliberately or inadvertently failed to raise it.[148]

The judge may also convey his or her own views on aspects of the evidence, though not too freely and forcefully.[149] But this is subject to the important proviso that the jury must be clearly directed to ignore these views if its own conclusions are different. The judicial summing-up just quoted continues as follows:

> But having said that, let me with equal emphasis state that the facts of the case are the exclusive province of the jury; you are the sole judges of the facts. You exclusively decide what are the facts of this case. You ignore any view of the trial judge, you ignore any of the views of counsel if it should come to pass that the views expressed by the judge or by counsel do not accord with your own views.[150]

An issue of the judge/jury demarcation that for a time provoked significant debate in Australia is whether and, if so, in what circumstances the judge may direct a verdict. Most of the debate has focussed on directed acquittals.[151] A recent investigation of these in New South Wales[152] suggested that they occurred in about two percent of jury trials. They are uncontroversial when they happen because the prosecution has, in effect, discontinued the case by offering no evidence. This may be because plea-bargaining has taken place at the last minute or because some unexpected difficulties have arisen in relation to essential evidence. The controversial issue is instead the criterion to be applied when the prosecution has presented what it believes to be a fully substantiated case, but the judge is nonetheless minded to direct an acquittal.

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145. R. v. Manunta (Dec. 20, 1988) (unreported) (O'Loughlin, J.) (quoted in GLISSAN & TILMOUTH, *supra* note 102, ¶ 1-600-30).

146. *See* J.L. GLISSAN & S. TILMOUTH, THE RIGHT DIRECTION: A CASEBOOK OF GENERAL JURY DIRECTIONS IN CRIMINAL TRIALS § 5 (1990).

147. *See* Ali Ali (1982) 6 A. Crim. R. 161, 165 (N.S.W. Ct. Crim. App.) (Street, C.J.).

148. *See* Van Den Hoek v. R. (1986) 161 C.L.R. 158, 161-62 (Austl. H. Ct.).

149. *See* Cunningham v. Ryan (1919) 27 C.L.R. 294, 298-99 (Austl. H. Ct.).

150. *Manunta* (quoted in GLISSAN & TILMOUTH, *supra* note 102, ¶ 1-600-30).

151. For a summary of the course of the case law, see GLISSAN & TILMOUTH, *supra* note 146, ¶ 7-2000-1ff.

152. *See* NEW SOUTH WALES LAW REFORM COMM'N, DISCUSSION PAPER NO. 37, DIRECTED VERDICTS OF ACQUITTAL (1995).

The broader of two competing criteria, adopted in cases during the 1970s, is that the judge should direct an acquittal when he or she believes that a verdict of guilty would be "unsafe or unsatisfactory."[153] But a narrower test, set out in a 1979 case in South Australia,[154] became accepted in state courts of criminal appeal during the 1980s.[155] A High Court decision in 1990 confirmed the narrower test, with some modifications, declaring that an acquittal should not be directed unless "there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."[156] This comes close to saying that, in effect, there must be an absence of evidence. The important element differentiating this criterion from the earlier, broader one is that it leaves to the jury the assessment of the weight of any evidence that has actually been admitted (albeit with a warning from the judge) on the basis that it may have probative value. Accordingly, in the High Court's words, "if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision."[157]

This narrower principle, despite its affirmation of the traditional scope of the jury's function, has encountered some criticism.[158] It has, for instance, been argued that since the broader test of a guilty verdict being "unsafe or unsatisfactory" is the same as an appeal court invokes in deciding whether a conviction should be set aside on appeal, it would be better put into operation during the trial.[159] The trial judge is generally accepted to be better placed than an appeal court to assess the quality of the prosecution's case.

The converse issue of a judge's instruction to a jury that it should bring in a verdict of guilty has also provoked some disagreement. In the leading High Court case, *Yager v. R.*,[160] four out of the five members of the Court agreed that, in view of a number of admissions of the accused relating to the importation of a prohibited drug, which in effect left no relevant issue of fact to be determined by the jury, it was appropriate for the judge to make it clear to the jury that the appropriate verdict was guilty. Three members of this majority[161] indicated that this could, in effect, be put in the form of a direction to convict. The fourth, Justice Gibbs, considered the judge's formulation to be acceptable, but only because it did not amount to a formal direction.[162] The judge, in his view, could tell the jury that "if they do their duty they will return a verdict of

153. *See, e.g.*, R. v. Falconer-Attlee, (1973) 58 Crim. App. 348 (Ct. Crim. App.) (Eng.).

154. *See* R. v. Prasad (1979) 23 S.A.S.R. 161 (S. Austl. Ct. Crim. App.).

155. *See, e.g.*, Attorney-General's Reference (No. 1) (1983) 2 V.R. 410 (Vict. Sup. Ct.).

156. Doney v. R. (1990) 171 C.L.R. 207, 214 (Austl. H. Ct.).

157. *Id.* at 214-15.

158. *See, e.g.*, James Glissan, *Unsafe and Unsatisfactory: The Law as to Directed Verdicts*, 63 AUSTL. L.J. 283 (1989); Donald Just, *Judicially-Directed Acquittals*, 65 LAW INST. J. 933 (1991).

159. This point was made implicitly by Justice Dawson in the High Court in *Whitehorn v. R.* (1983) 152 C.L.R. 657, 689.

160. (1977) 139 C.L.R. 28 (Austl. H. Ct.).

161. Chief Justice Barwick and Justices Mason and Stephen.

162. *See* (1977) 139 C.L.R. at 38-39.

guilty," but "he cannot dictate the verdict they are to return."[163] This followed from "the fundamental principle of our constitutional law that a juror may not be punished for returning a verdict against the direction of the court, and hence may not be intimidated into returning a particular verdict."[164]

Justice Murphy, the lone dissenter, held that the judge's statement, being tantamount to a direction, had deprived the accused of her right under section 80 of the Constitution to trial by jury of an offence against a commonwealth law which had been prosecuted on indictment.[165] In an earlier case,[166] he had explicitly linked this view on directed verdicts of guilty to the principle that juries had traditionally "refused to convict when there was oppression in the law or its administration, despite overwhelming evidence of guilt."[167]

The position adopted by Justice Gibbs would certainly seem as far as a judge should be permitted to go in instructing a jury to declare that the accused is guilty. The principle that a jury cannot be ordered to render its verdict one way or the other or be punished for bringing in a perverse verdict is well-established. It was, for instance, affirmed by the High Court in 1969 in the context of a jury's acknowledged power, under both common law and statutory principles, to bring in a verdict of manslaughter in any trial of an accused for murder.[168]

VI

APPELLATE REVIEW OF JURY VERDICTS

A. Acquittals

The rule called *autrefois acquit* and the rule against double jeopardy preclude any appeal against a jury verdict of not guilty.[169] These rules are indeed broad enough to rule out any appeals against decisions by judges that an accused person is not liable to penal sanctions: for example, on grounds of criminal contempt.[170] In 1995, the New South Wales Law Reform Commission was asked to consider whether the law should be changed to permit prosecution appeals against directed acquittals in jury trials. Its recommendation was that since such acquittals occurred only rarely, the incidence of errors of law would

163. *Id.* at 38.
164. *Id.* at 38-39.
165. *See id.* at 51.
166. *See* Jackson v. R. (1976) 134 C.L.R. 42, 54 (Austl. H. Ct.).
167. *Id.*
168. *See* Gammage v. R. (1969) 122 C.L.R. 444, 451 (Austl. H. Ct.) (Barwick, C.J.); *id.* at 463 (Windeyer, J.).
169. *See, e.g.*, 1 BROWN ET AL., *supra* note 12, at 155-56.
170. *See* Director of Public Prosecutions v. Chidiac (1991) 25 N.S.W.L.R. 372, 375-77 (N.S.W. Ct. App.). The prohibition does not, however, apply to liability for civil contempt. *See* Microsoft Corp. v. Marks (No. 1) (1996) 69 F.C.R. 117, 137 (Fed. Ct. Austl.).

be very low indeed, and it would not be appropriate to introduce this limited exception to the long-established rule against double jeopardy.[171]

In consequence, when the prosecution believes an acquittal to have been incorrect on legal grounds, it is restricted to submitting the relevant issue of law to an appeal court. This must be done on the basis that the decision on the appeal will not affect the verdict of not guilty.[172]

It is noteworthy that this approach leaves full scope for "jury equity." It may on occasion seem highly likely that the reason underlying a jury verdict of not guilty is not that the necessary evidence to establish guilt was lacking but that the jury believed the relevant principles of criminal law to be unjust and oppressive. In conformity with traditional views about this prerogative of a jury,[173] there will be no redress for the prosecution because an appeal against the verdict itself is simply not allowed, nor can any punitive action be taken against the jury.

In 1855, a series of highly politicised trials of thirteen gold prospectors for treason took place in Melbourne following one of the most famous events in nineteenth century Australian history—the "Eureka stockade." Together with a number of fellow prospectors, the accused had established the stockade in an attempt to escape the highly oppressive enforcement of a regime of licensing of gold exploration. The acquittal of all of them after very short periods of deliberation by the juries represents an outstanding instance of "jury equity" in Australia. In the first of the trials, the presiding judge, being unable to vent his anger about the acquittals upon the jury, had to be content with sentencing two spectators in the courtroom, randomly chosen, to a week in prison for contempt of court for participating in the spontaneous applause which followed the jury's delivery of its verdict.[174]

B. Convictions

Appeals against convictions in jury trials may be on matters of fact or law or mixed law and fact. Generally they allege errors of law by the trial judge: for example, that the substantive law has been misstated, or evidence has been wrongly admitted or excluded. In so far as they are based on the issues of fact which have been entrusted to the jury, the general principle on which Australian courts of criminal appeal operate is that a verdict of guilty which is found to be unreasonable or which cannot be supported having regard to the evidence may be set aside, but not unless it has resulted in a "miscarriage of justice."[175]

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171. *See* NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 152, at 30.

172. *See, e.g.*, Criminal Appeal Act, 1912, § 5A(2) (N.S.W.).

173. *See, e.g.*, Lord Devlin, *The Conscience of the Jury*, 107 LAW Q. REV. 402 (1991).

174. For an attractive account of these events, see Graham L. Fricke, *The Eureka Trials*, 71 AUSTL. L.J. 59 (1997).

175. This is the net effect of a statutory provision operating throughout Australia. Appeals against a jury's conclusion that an accused is guilty may be allowed if this conclusion is found by the appeal court to be unreasonable or insupportable on the evidence, or on any ground where there has been a miscarriage of justice, provided however that the appeal court may dismiss the appeal if it considers

In a number of leading cases,[176] the High Court has established that this requires a finding that the jury's verdict of guilty was "unsafe or unsatisfactory," which in turn means that a jury, acting reasonably, *must* have entertained a reasonable doubt as to the guilt of the accused. This is not the same as saying that the appeal court itself entertained such a doubt,[177] because this would be to substitute the appeal court's own assessment of the evidence for that of the jury.

Even this relatively remote consideration of the jury's verdict requires that the appeal court must conduct its own independent review of the evidence. In so doing, it must remember that certain issues, notably the credibility and reliability of oral testimony, are preeminently issues for the jury. But occasions may still arise where the court concludes that "the Crown case rests upon oral testimony which is so unreliable or wanting in credibility that no jury, acting reasonably, could be satisfied of the accused's guilt to the requisite degree."[178] In addition, the appeal court may decide that the jury has attached undue weight to testimony within a category which the law has traditionally treated with great caution. The examples given by the High Court in a leading case in 1990 are unsatisfactory identification evidence and the uncorroborated evidence of accomplices and of complainants in sexual offence cases.[179]

One of the High Court cases establishing these general principles was an appellate proceeding in Australia's most celebrated criminal trial in the last two decades, the *Chamberlain* case.[180] In August 1980, Azaria Chamberlain, a ten-week-old baby, disappeared from her family's tent in a camping ground near Uluru (Ayers Rock) in the central Australian desert. Her mother, Lindy, claimed that Azaria had been carried off by a dingo,[181] but after two coronial inquiries Lindy was herself tried and convicted in the Northern Territory Supreme Court for the murder of her daughter, whose body was never found. She appealed unsuccessfully to the Federal Court[182] and thence to the High Court, where her appeal again failed, though only by a 3-2 majority.[183] The majority judges expounded and applied the criteria of "unsafe or unsatisfactory" verdict that have just been outlined, while the minority were more inclined to believe that if the Court itself had a reasonable doubt in relation to the prosecution

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that in all the circumstances "no substantial miscarriage of justice has actually occurred." *See* Criminal Appeal Act, 1912, § 6 (N.S.W.); Criminal Code, § 668E (Queensl.); Criminal Law Consolidation Act, 1935, § 353 (S. Austl.); Criminal Code, § 402 (Tas.); Crimes Act, 1958, § 568 (Vic.); Criminal Code, § 689 (W. Austl.).

176. *See* Chidiac v. R. (1990) 171 C.L.R. 432 (Austl. H. Ct.); Morris v. R. (1987) 163 C.L.R. 454 (Austl. H. Ct.); Chamberlain v. R. (No. 2) (1984) 153 C.L.R. 521 (Austl. H. Ct.); Whitehorn v. R. (1983) 152 C.L.R. 657 (Austl. H. Ct.).

177. This was the formulation advocated in *Chamberlain v. R. (No. 2)* (1984) 153 C.L.R. 521, 617-22 (Austl. H. Ct.) (Deane, J., dissenting).

178. Chidiac v. R. (1990) 171 C.L.R. 432, 444 (Mason, C.J.).

179. *See id*. at 444-45 (Mason, C.J.).

180. *See Chamberlain* (1984) 153 C.L.R. at 521.

181. A dingo is a variety of indigenous wild animal resembling a hunting-dog.

182. *See* Chamberlain v. R. (1983) 72 F.L.R. 1 (Fed. Ct. Austl.); 46 A.L.R. 493.

183. *See* Chamberlain v. R. (No. 1) (1983) 153 C.L.R. 514 (Austl. H. Ct.)

case, which was based entirely on circumstantial evidence, the conviction should not be allowed to stand.

This "dingo baby" case had attracted enormous publicity, and the Australian community was sharply divided on whether Lindy Chamberlain had killed her daughter. The level of popular controversy is graphically shown in a film made about the case, called *Evil Angels* (entitled in the United States, *A Cry in the Dark*), which starred Meryl Streep as Lindy Chamberlain and Sam Neill as her husband Michael. Eventually, after Lindy Chamberlain had spent about four years in jail, she was released on account of continued campaigning by her supporters and the appearance of significant new evidence which cast further doubt on the reliability of the jury's verdict. The conviction was in fact formally quashed a further two years later, following a Royal Commission in which important defects were revealed in the scientific evidence that had been put to the jury.[184]

The Chamberlain case is one of a number which have given cause for concern[185] that the criteria for allowing appeals against jury convictions may be drawn too narrowly. It is recognised, however, that to give appeal courts too much discretion in this context may jeopardise the essential independence of the jury. The final defence against unjust convictions may therefore have to be special investigatory review procedures, such as the Royal Commission in the Chamberlain case. Yet the danger here is that generally a government is unwilling to establish such an inquiry unless it is compelled to do so by public pressure. Very few criminal convictions have anything like the high public profile of the Chamberlain case, which developed essentially because the claim of Lindy Chamberlain that her baby had been taken from a tent by a dingo so fiercely gripped the public imagination.

VII

PROTECTION FROM INTERFERENCE

In general, Australian jurors are reasonably well shielded from forms of interference which might either prevent them from carrying out their duties impartially and to the best of their capacities or deter them or their fellow citizens from being willing in the future to serve on a jury. The shield provided by the law is not, however, impenetrable. These general statements may be briefly illustrated by reference to three matters: anonymity, protection from improper contacts during the trial, and confidentiality of deliberations.

As the above discussion of jury vetting shows,[186] ascertainment of the identity of jurors is generally feasible for the parties and their advisers. But the

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184. For nonlegal accounts of the case, see, for example, JOHN BRYSON, EVIL ANGELS (1985) (on which the film was based); NORMAN H. YOUNG, INNOCENCE REGAINED (1989).

185. *See, e.g.*, ACADEMICS FOR JUSTICE, LAW SCHOOL, MACQUARIE UNIVERSITY, NEW SOUTH WALES, TRAVESTY! MISCARRIAGES OF JUSTICE (Kerry Carrington et al. eds., 1991); 1 BROWN ET AL., *supra* note 12, at 307-09.

186. *See supra* Part III.A.3.

trend in recent times has been toward restricting access to their names. This is particularly observable in Queensland, where in the wake of the Bjelke-Petersen trial, this information, instead of being easily accessible at least five days before the trial, is now made available to parties only after 4:00 p.m. on the previous day. In New South Wales, amendments to section 38 of the Jury Act 1977, enacted in 1997, prevent the open disclosure of jurors' names even when they are called to be sworn. They are instead to be called up by numbers, though their names will be made known to the parties in order to help them decide whether to challenge them. This is reinforced by section 68 of the Act, which makes it an offence to publish, broadcast, or otherwise disclose any matter likely to lead to the identification of a juror or former juror, unless the juror consents.

These provisions in New South Wales go further than their equivalents in other jurisdictions in seeking to keep jurors anonymous. Yet they do not prevent a juror's identity becoming known to any person who attends the court and is acquainted with the juror. In a small country town, and even in larger communities, absolute or even relative anonymity will be impossible so long as the court is open to the public and the jury sits in full view of the court.

The possibility of interference with jurors—for example, their being approached by "outsiders" wishing to influence them—is in general terms viewed seriously. However, the issue of isolating them during their deliberations has shown a change of approach. While the days of jurors being sequestered throughout a trial are gone, it was until recently the invariable practice not to allow them to separate once they had retired to consider their verdict.[187] Accordingly, in a case in 1986,[188] for instance, a conviction was overturned because three of the jurors travelled in a taxi without a "keeper" on their way to their overnight accommodation during the period of deliberation. Yet perhaps surprisingly, the modern trend, at least in New South Wales, is toward allowing them to go home for the night even during this period, having been duly warned by the judge not to discuss the case with anyone or let themselves come into contact with media stories about it.[189] This faith in the power of judicial admonitions seems surprising, though it seems in line with apparent judicial confidence in the effectiveness of warnings about prejudicial publicity.

With confidentiality of deliberations, as with anonymity, the trend is toward tightening up the law. In Tasmania, each juror swears an oath not to reveal deliberations. During the last thirty years and in each case following some highly publicised revelations from the jury-room, four Australian jurisdictions (Victoria in 1967, New South Wales in 1968, Queensland in 1995, and the Australian Capital Territory in 1997) have introduced specific provisions in their

187. *See, e.g.*, Ah Poh Wai v. R. (1995) 132 A.L.R. 708, 720-30 (W. Austl. Ct. Crim. App.).

188. *See* R. v. Chaouk (1986) V.R. 707 (Vict. Ct. Crim. App.).

189. *See* Brownlee v. R. (1997) 41 N.S.W.L.R. 139 (N.S.W. Ct. Crim. App.); *id.* at 145-46 (Grove, J.). In New South Wales, a judicial discretion to permit this is conferred by statute. *See* Jury Act, 1977, § 54 (N.S.W.).

jury legislation prohibiting media reporters or other people from soliciting former jurors to obtain their accounts of jury room deliberations, particularly when there is any prospect of these accounts being published generally.[190] In New South Wales, but not Queensland, Victoria, or the Australian Capital Territory, it remains permissible, under these provisions, for former jurors to offer this information of their own accord, though not in return for payment. The statutory restrictions in New South Wales, Queensland, and the Australian Capital Territory leave scope for officially authorised research into jury decisionmaking.[191] In jurisdictions other than these four, the issue is controlled generally by a loose principle of contempt law that the disclosure or publication of jury deliberations may constitute contempt if in the circumstances it constitutes an interference with the administration of justice.[192]

This concern for confidentiality is reinforced by a common law rule that evidence relating to jury deliberations may not be tendered in any appeal against the jury's verdict.[193] Even when this evidence might raise serious doubts about the propriety of the verdict, it cannot be received.[194] Juror misconduct occurring after the jury has retired, but not while strictly speaking they are deliberating, is not however caught by this rule.[195] It has been held in Victoria[196] that a statutory exception to the confidentiality restrictions, permitting evidence of misconduct during deliberations to be revealed to a court, the Attorney General, or an investigating or prosecuting authority, does not detract from this rule relating to criminal appeals.

VIII

CONCLUDING OBSERVATIONS

The recent history of juries in Australia reveals an interesting clash between the endeavours of state and territory governments to reduce the costs associated with jury trial by various means—for example, relegating more and more cases to summary trial by magistrates, allowing for trial on indictment by judges sitting alone, and introducing majority verdicts—and the determination of the High Court of Australia, in its decisions on section 80 of the Constitution, to

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190. *See* Jury Act, 1967, §§ 68A, 68B (N.S.W.); Jury Act, 1995, § 70 (Queensl.); Juries Act, 1967, § 69A (Vic.); Juries Act, 1967, § 42C (A.C.T.).

191. The importance of leaving scope for research into jury deliberation is emphasised in Mark Findlay, *Politics of Secrecy and Denial*, CRIM. JUST., Mar. 1996, at 368.

192. *See* Attorney-General v. New Statesman & Nation Publ'g Co. Ltd., [1981] Q.B. 1 (Div. Ct.) (Eng.).

193. For an overview of these issues, see the article of the Honorable Chief Justice of New South Wales, A.M. Gleeson, *The Secrecy of Jury Deliberations*, 1(2) NEWCASTLE L. REV. 1 (1996).

194. *See, e.g.*, Medici (1995) 79 A. Crim. R. 582 (Vict. Ct. Crim. App.). For an extreme instance in the Privy Council, see *Lalchan Nanan v. The State*, [1986] 1 App. Cas. 860 (P.C.), where it was alleged that the jury, having not been specifically instructed to reach a unanimous verdict, had found the accused guilty of murder by a majority of eight to four. Although the accused had been sentenced to death, this evidence was still not admissible to challenge the conviction.

195. *See, e.g.*, Gleeson, *supra* note 193, at 13.

196. *See Medici* (1995) 79 A. Crim. R. at 582; Portillo (1996) 88 A. Crim. R. 283 (Vict. Ct. App).

reassert the traditional values and features of jury trial. While the scope of the High Court's efforts is circumscribed—it can only affect the trial of commonwealth offences and it appears committed to retaining its long-standing literal interpretation of the section, robbing it of much of its potential force—the Court's judgments do operate as strong reminders of the reasons why jury trial travelled from England to Australia in the first place.

One suspects that the community generally is scarcely aware of this conflict. Although sometimes the media and other contributors to public debate ask whether juries are really worthwhile, sustained bursts of criticism are not common and defenders of the jury system are generally quick to make the arguments in favour of it.[197]

Australian life and culture have diversified enormously in the last twenty to thirty years, due chiefly to the arrival of large numbers of migrants from many countries with very different legal traditions. The inflow from South East Asian countries has been especially prominent. Nevertheless, the "little bit of England" that is trial by jury remains more or less intact. Although its range of operation may continue to shrink, it is reasonably well assured of a continuing role in the Australian criminal justice system.

197. The last significant wave of public criticism of juries was in the mid-1980s, provoking a series of eloquent replies in THE JURY UNDER ATTACK, *supra* note 28.