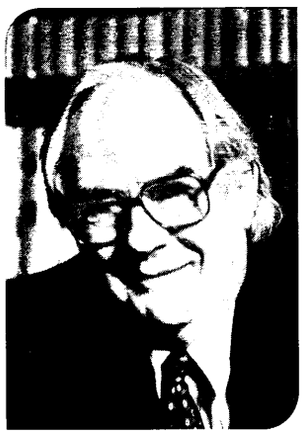
The introduction of juries to the Federal Court of Australia

By Michael Black



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Although the Federal Court of Australia has the power to order that any matter or issue of fact be tried before a jury and although that possibility has been raised from time to time, no order for a jury trial has ever been made in the 30-year history of the Court. That is likely to change very soon.

Bills are expected to be introduced into the Parliament in the winter session for the creation of the new criminal offence of serious cartel behaviour and for the conferral of jurisdiction upon the Federal Court for the trial of the offence. Since the new offence will be a serious one, punishable by a term of imprisonment, the prosecution will have to be commenced by indictment. That will bring into play s 80 of the Constitution, which provides that 'trial on indictment of any offence against any law of the Commonwealth shall be by jury...'.

While trial by jury in the civil cases with which the Federal Court has so far been primarily concerned is not obligatory, s 80 of the Constitution means what it says; in cases to which it applies the trial must be by jury and there is no option for such a case to be heard by a judge sitting alone.[1] The existing provisions of the *Federal Court of Australia Act 1976* that enable jury trials to take place by reference to state law would not be suitable for the new criminal jurisdiction and so comprehensive amendments will need to be made.

Eligibility to serve

One of the issues to be considered is whether a person who has previously been convicted of a serious criminal offence should be eligible to serve as a juror. The issue is important because a jury is 'representative' of society. As so often happens in the development of the law, this issue has an historical aspect.

The right to trial by jury did not come to Australia with the First Fleet in 1788 because the first non-Indigenous settlement here was a penal colony. But the concept did come. It arrived in the minds of the first people—both convicts and free settlers—who came here from the British Isles and the right to trial by jury soon became an important issue in the new colony. The freed convicts (the Emancipists) pressed for the introduction of trial by jury but were opposed in this by the free settlers (the Exclusives) who argued that juries would be tainted by the presence of former convicts who, moreover, would be far too ready to acquit.

When the first civilian juries were established in the 1820s, former convicts were excluded but in the end the Emancipists won the day and as from 1829 they were permitted to serve as jurors. Events moved rapidly and by the end of the 1830s the right to trial by jury was well established in New South Wales. When Victoria became a separate colony in 1851 the right to trial by jury was already well established in that part of the country too and by the time the *Australian Constitution* was being framed in the 1890s, trial by jury was accepted as a right throughout Australia. The framers of the Constitution included as 'a safeguard of individual liberty'[2] the guarantee that a trial on indictment against any law of the Commonwealth shall be by jury.[3]

Why now?

Since there are very many serious offences under the laws of the Commonwealth, why is

it only now that criminal jurisdiction is being conferred upon a Federal Court? What has happened since 1901? The answer is that in 1903, in the exercise of the power conferred upon it by Chapter III of the Constitution, the Parliament invested state courts with federal jurisdiction to try federal offences and they have (nearly) all been tried in state or territory courts.

There have been at least two notable exceptions. *The King v Porter,*[4] a case famous in the criminal law for its statement of principle on the defence of insanity, was a murder trial in the High Court of Australia. The trial judge was Sir Owen Dixon and the famous point of principle emerged from his charge to the jury in that case. The circumstances were, admittedly, very unusual in that the murder was alleged to have taken place in the newly created Australian Capital Territory but before the Supreme Court of the Territory had been established. There was another jury trial in the High Court a few years later: *The King v Brewer*.[5]

The Federal Court, although essentially a trial and appellate court of general jurisdiction in *civil* matters arising under laws made by the Parliament, has always had some criminal jurisdiction in areas related to the Court's civil jurisdiction, such as intellectual property and workplace relations. These offences, being relatively minor in nature and classified as 'summary offences', are not prosecuted by way of indictment and so may be heard by a judge sitting alone. The Federal Court also has jurisdiction to award 'civil penalties' of as much as $10 million for breaches of some of the provisions of the *Trade Practices Act 1954* and the *Corporations Act 2001*.

The proposal to confer criminal jurisdiction on the Federal Court of Australia to try offences of serious cartel behaviour follows the recommendation of the *Review of the Competition Provisions of the Trade Practices Act*, chaired by retired High Court Justice, the Hon Sir Daryl Dawson. However, the amendments to the *Federal Court of Australia Act* could be in general terms, such as might allow for any subsequent further conferral of criminal jurisdiction. This could occur if, for example, the Parliament chose to implement the recommendations of the Australian Law Reform Commission in *Same Time, Same Crime: Sentencing of Federal Offenders*[6] where the Commission recommended that criminal jurisdiction be conferred upon the Federal Court in relation to indictable Commonwealth offences whose subject matter was closely allied to the Court's existing civil jurisdiction—in areas such as taxation, trade practices and corporations law—and that there be future consideration of conferring appellate jurisdiction on the Court in relation to all federal offences (Recommendations 18-2 and 20).

The requirement of s 80 of the Constitution that trials on indictment against a law of the Commonwealth should be by jury necessarily carries with it the protection of the essential features of trial by jury. Thus, contrary to the change in the common law rule brought about by legislation in some of the states, the verdict in a trial to which s 80 of the Constitution applies must be unanimous.[7] In some states an accused may waive the right to a jury trial but this reform is not available where s 80 applies.[8] A trial that begins with a jury of 12 may, however, proceed if the number of jurors is reduced to as few as 10.[9] Section 80 also provides that the trial must be held in the state where the offence was committed or, if the offence was not committed within any state, at any place that the Parliament prescribes. This would present no difficulties for the administration of a criminal jurisdiction in the Federal Court which has registries in each state and territory.

Issues for law reform

Within the framework set by s 80 of the Constitution there are many issues, of particular interest to law reformers, that might be considered. One has already been mentioned—whether or not there should be an exclusion from eligibility for service on the ground of prior criminal conviction. Even this does not admit of a simple answer. What convictions? How long ago? What about a conviction in a foreign jurisdiction? Are there any other relevant matters to be taken into account? There are other possible grounds of exclusion such as disability or lack of fluency in English. Here again there are complex issues: Commonwealth legislative policy stands against discrimination on the ground of disability but are there disabilities that should prevent a person from serving as a juror, and if so which ones? And under all circumstances or only some? Other matters to be considered include ways to assist people who do have disabilities to serve on juries; challenges to jurors; substitute jurors; compensation for jurors; and the finality of jury verdicts.

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Much has been written about the jury system throughout the common law world and the rules governing juries can vary greatly between jurisdictions. Proposals for reform also vary greatly. For example, should legal practitioners and even judicial officers be excluded from service? Practising lawyers and members of the judiciary are currently ineligible to serve as jurors in all Australian jurisdictions, but in some states in America they have long been eligible to serve. The law in England and Wales, the home of the common law jury, has recently been changed to make lawyers and judicial officers eligible for jury service. If a lawyer or judicial officer feels that it would be inappropriate to serve as a juror in a particular case, they must make an application to be excused or to have service deferred or moved to a different court.[10]

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Because the world in which jurors serve is constantly changing, new issues arise quite frequently. Some are very difficult: what should be done about the possibility of internet access and the improper acquisition of knowledge about the case? There is presently a debate about a less obvious issue—how to accommodate jurors who smoke. Our court buildings are smoke free environments. Should the jury be allowed to separate so that some of them may smoke? It would surely be undesirable for jurors to be suffering from nicotine withdrawal while considering a verdict, but on the other hand being a heavy smoker does not seem like a good reason for being excused from jury service! Pragmatic solutions will be found for these problems but when jury facilities are being constructed in a new building the question arises whether there should be architectural solutions, such as balconies near the jury rooms.

Changes to practice, procedure and policy

The amendments to the *Federal Court of Australia Act* will also need to expand the provisions that regulate and protect the jury system by creating criminal offences and imposing penalties. The amendments will establish a framework for the quite complex matter of summoning jurors and other aspects of administering a jury system. As criminal trials are likely to be relatively infrequent in the Federal Court, the aim will be to have a flexible administrative structure, providing for the administrative arrangements to operate as and when needed. In these and other respects, the experience of the states and territories and the many reports of law reform agencies have, of course, been closely considered.

The Federal Court has also had to address infrastructure and staffing needs in preparing for its first criminal trials. There are now Commonwealth Law Courts buildings in each state and territory capital (except, currently, Darwin) and all have provision for accommodating juries. The existing jury facilities in the Federal Court in Brisbane, Perth and Melbourne are, however, being upgraded and very careful consideration is being given to the provision of appropriate jury facilities in the Law Courts Building in Sydney, in the course of its current refurbishment. In the newest building, the Roma Mitchell Commonwealth Law Courts in Adelaide, the jury facilities have been designed so that they may be used for other purposes—in that case as a mediation suite—when not being used for juries.

The cost of juries is a necessary and integral part of our system of justice. As the experience of the Federal Court in preparing for criminal juries shows, many facets require careful consideration. From a budgetary viewpoint, a significant sum needs to be set aside. The 2006–07 Commonwealth budget, for example, provided $3.9 million over four years to enable the Court to hear trials relating to serious cartel offences.

For the past 12 months, the Federal Court has had a committee of experienced judges, assisted by the Court's Deputy Registrar and the newly-appointed Sheriff, to consider the many questions of practice, procedure and policy that arise in the introduction of criminal juries to a Court that has not previously had jurisdiction to try indictable offences. In accordance with well-established practice when legislation affecting the Court's procedures is to be introduced, the Court has been consulted by the Executive Government about practical and policy aspects of the proposals. The Court's Criminal Practice Committee has provided a forum for these discussions. It may not be widely appreciated that many of the Federal Court's judges have had extensive experience in criminal law and procedure, through practice as trial and appellate advocates when at the Bar and as judges hearing criminal trials and appeals on other courts.

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Five present members of the Court conducted criminal trials when they were formerly members of State Supreme Courts, one was a member of a Court of Appeal with extensive criminal work and another was the Commonwealth Director of Public Prosecutions. Many of the judges hold secondary commissions as members of courts with trial and appellate criminal jurisdiction: the Supreme Court of the Australian Capital Territory, the Supreme Court of Norfolk Island, and the Supreme Courts of Vanuatu, Tonga and Fiji. This depth and mix of experience has informed the work of the Criminal Practice Committee as the Federal Court moves towards another chapter in its history as a court created under Chapter III of the Constitution.

Endnotes

1. *Brown v R* (1986) 160 CLR 171.
2. J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 806. The statement is attributed to Bernhard Ringrose Wise speaking at the Constitutional Convention in Melbourne in 1898.
3. For a description of the development of criminal jury trials in Australia see M Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62 *Law and Contemporary Problems* 69.
4. *The King v Porter* (1936) 55 CLR 182.
5. *The King v Brewer* (1942) 66 CLR 535.
6. Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, ALRC 103 (2006).
7. *Cheatle v R* (1993) 177 CLR 541.
8. *Brown v R* (1986) 160 CLR 171.
9. *Brownlee v The Queen* (2001) 207 CLR 278.
10. See New South Wales Law Reform Commission, *Jury Service*, Issues Paper 28 (2006), at 57–58. See also New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004); New Zealand Law Commission: *Report 69: Juries in Criminal Trials*, Report 69 (2001).

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7. *Cheatle v The Queen* (1993) 177 CLR 541, 560.
8. For example, Australian Institute of Criminology, *Jury Satisfaction and Confidence Survey* (2007) (forthcoming); D Boniface et al, *Jury Comprehension and Obedience to Judicial Directions: The Accused's Criminal History and Extra-curial Juror Investigations* (2007) (forthcoming); Bureau of Crime Statistics and Research, *Child Sexual Assault Trials: A Survey of Juror Perceptions* (2006); J Napier, D Spencer and J Sabolcec, *Guilty or Not Guilty? An Investigation of Deaf Jurors' Access to Court Proceedings via Sign Language Interpreting* (2007) (forthcoming).

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Endnotes

4. J Barber, 'Account of a Deaf Juror' (2005) July *Sign Matters*, 25–32.
5. S Travaglia, 'Deaf Person to Serve on Jury' (2005) *Resource: The Official Newsletter of the Disability Resource Centre Auckland*, 5.
6. S Mather and R Mather, (2003), 'Court Interpreting for Signing Jurors: Just Transmitting or Interpreting?' in C Lucas (ed), *Language and the Law in Deaf Communities* (2003), 60–81.
7. T Dick, 'Nine Angry Jurors... and a Few Left Confused', *The Sydney Morning Herald* (Sydney) 6–7 January 2007, 16.
8. For example, V Charrow & R Charrow, 'Characteristics of the Language of Jury Instruction' in J Alatis & G Tucker (eds), *Language in Public Life* (1979), 163–185; J Levi, 'Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions' (1993) 68(1) *American Speech*, 20–49.
9. NAATI is the National Accreditation Authority for Translators & Interpreters—the body that establishes and regulates the Australian industry standard for all languages. Any interpreter that works in a NSW court is required to have NAATI Interpreter level accreditation (formerly known as Level 3).
10. The judge's summation was taken from the case of *R v Rodney Ivan Kerr*, which was tried in the Supreme Court of NSW Criminal Division between 27 October–6 November 2003. Kerr was charged with the manslaughter of William Christopher Harris at Redfern station in Sydney. He was also charged with affray and endangering the safety of a person on the railway. Two excerpts, which incorporated sufficient legal terminology and important facts of the case, were selected by the NSWLRC.