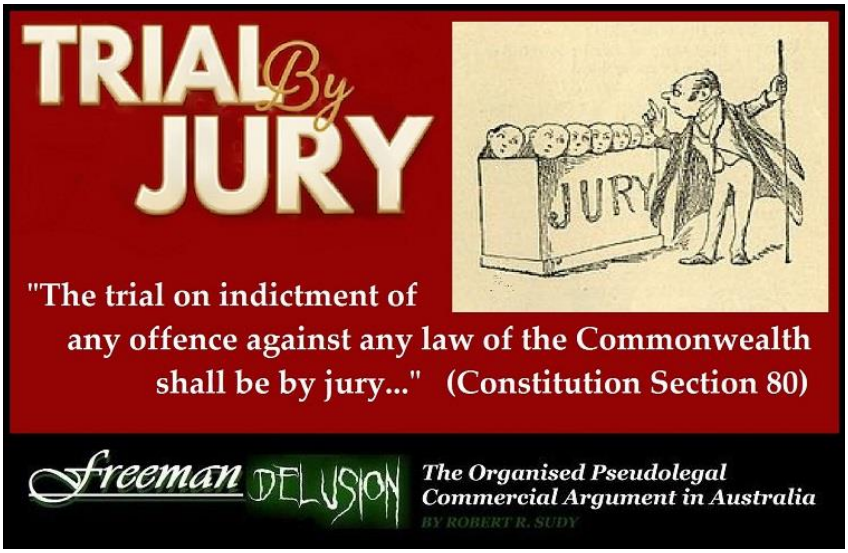
Trial by Jury



Section 80 of the Commonwealth Constitution

It is a common belief among OPCA theorists that the judiciary is denying a defendant his rights under chapter 29 of the Magna Carta by not allowing him *"the judgment of his peers"* implying that a ***trial by jury*** must be conducted for every matter before the court, including summary offences. Section 80 of the *Commonwealth Constitution* provides:

> *"The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."*

Section 80 does not require that summary offences be dealt with by way of jury trial, such proceedings are not *"on indictment."* As originally drafted the section applied to trials of *"all indictable offences."* However during the Constitution Convention an amendment was successfully moved to change the words *"indictable offences"* to the present *"trial on indictment"* so as to ensure that the less serious offences could be prosecuted summarily. *(See Pannam C "Trial by Jury and Section 80 of the Australian Constitution" (1968) 6 Sydney Law Review 1 at 3.)*

Even the amendment proposed to section 80 in 1988 (which would have enlarged the right to jury trial, but was defeated) specifically exempted summary offences from its operation. *(See Constitutional Alteration (Rights and Freedoms) Bill 1988)*

Further, section 80 has no application to indictable offences under State laws. (See *Birch v The Queen (1994) 12 WAR 292; Williamson v Hodgson [2010] WASC 95*.) The phrase "*any law of the Commonwealth*" in section 80 specifically relates to those laws made by the Federal parliament pursuant to its legislative powers which have derived from the *Constitution*. In ***Spratt v Hermes [1965] HCA 66*** (at 25 per Barwick CJ), His Honour stated:

> *"...the proper construction of section 80, read in the Constitution as a whole, the offences to which it refers are offences created by or under the authority of laws made by the Parliament pursuant to legislative powers derived from section 51 of the Constitution, that is to say, to offences made under those laws of the Commonwealth..."*

See also ¶ 341 "*Any Offence Against any Law of the Commonwealth.*" in ***The annotated constitution of the Australian Commonwealth*** by Quick and Garran.

The question of whether section 80 is applicable to offences created by an exercise of the powers given to the Commonwealth Parliament by section 122 of the *Constitution* to make laws for the government of any territory was the subject of discussion in ***R v Bernasconi [1915] HCA 13***, where Griffith CJ (with whom Given, Duffy and Rich JJ agreed) held that section 80 of the *Constitution* did not apply in cases arising under what Griffith CJ (at 634) called "*the local laws of a territory, whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it*". The offence with which Bernasconi was charged was an indictable offence under the Queensland *Criminal Code*, but the trial, held as it was in accordance with the procedure laid down by the ordinance, was not a *"trial on indictment"* within the meaning of section 80.

OPCA theorists generally hold that the chapter 29 of the *Magna Carta*, together with section 80 of the *Constitution*, grants them this right, despite it being long recognised neither establishes an immutable right to trial by jury for criminal offences.

In ***Brown v The Queen (1986) HCA 11*** Gibbs CJ (at 181) stated:

> *"It has been held in a long line of cases ... that s 80 applies only if there is an indictment and that the Parliament is free to decide whether any particular offence, however serious, may be tried summarily."*

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The judgment of his peers

The phrase *"The judgment of his peers"* in c. 29 of the Magna Carta did not even refer to *"trial by jury". (See Adams and Schuyler, Constitutional History of England, Jonathon Cape, London at 136-7; Forsyth, History of Trial by Jury, 2nd Edition, Burt Franklin, New York, 1878 at pp 91-92; Holdsworth, History of English Law, 6th edition, volume 1 at pp 59-660, 385 48; Holt, Magna Carta, 2nd edition, Cambridge University Press, 1992, pp 9-10; Howard, Magna Carta Text and Commentary, The University Press of Virginia, at 14; Lyon, Magna Carta, the Common Law, and Parliament in Medieval England, Forum Press, Missouri, 1980 at p 7; McKechnie, Magna Carta, 2nd edition, 1914 at pp 375-379; Windeyer, Lectures on Legal History, Law Book Company, 1938, "Magna Carta" at pp 64-66.)*

Magna Carta c 29 embodies a *"protest against arbitrary punishment, and against arbitrary infringements of personal liberty and rights of property". (See Holdsworth, Volume II at p 215; Wade and Bradley, Constitutional and Administrative Law, 10th edition, Longman, London, pp 13-14)* The summary procedure undertaken in this case accords with these principles.

Although c.29 traditionally has been thought to embody this fundamental principle, historical analysis reveals that this chapter:

> *"...has had much read into it that would have astonished its framers: application of modern standards to ancient practice has resulted in complete misapprehension"*

*(See McKechnie, Magna Carta, 2nd ed (1914) at 395 as quoted by Toohey J in **Jago v District Court (NSW) (1989) 168 CLR 23** at 66).* In *Jago* Toohey J thought it pertinent to note Holdsworth's observation that whilst it was said in the seventeenth century that c. 29 (together with related chapters) embodied the principles of the writ of Habeas Corpus and of trial by jury:

> *"It is not difficult to show that, taken literally, these interpretations are false. Trial by jury was as yet in its infancy..."*

(See Holdsworth, History of English Law, 7th edition (1956), volume 2 at pp 214-215 cited by Toohey J at p 66)

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Similarly in ***Kingswell v The Queen (1985) 159 CLR 264***, Deane J (in dissent as to the outcome of the appeal) observed that modern scholarship would indicate that much of the traditional identification of trial by jury with Magna Carta was erroneous.

For many years after the establishment of the colony of NSW there were no jury trials, with criminal matters being heard by the Judge Advocate and a panel of six military officers. (See Evatt J "*The Jury System in Australia*" (1936-37) 10 ALJ (Supplement) 49, Bennett JM "*The Establishment of jury Trial in NSW*" (1956-61) 3 Sydney Law Review 463 and Neale D *The Rule of Law in a Penal Colony*, Cambridge University Press, 1991.)

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All States have Magistrate's Courts or Courts of Petty Sessions, in which summary trials of summary offences are conducted. Summary offences are heard by a magistrate, who determines both the verdict and the sanction. Persons charged with a summary offence cannot have the matter heard by a jury, so there is no point in demanding "trial by one's peers" if the Justices Act or Summary Offences Act of your State says the charge is triable summarily.

Every Australian jurisdiction has legislation that outlines which offences can be heard summarily, as well as prescribing penalties for each offence. Commonwealth law also outlines numerous summary offences, but since there is no network of Commonwealth criminal courts, most Commonwealth summary offences are heard in State or Territory Magistrate's Courts.

Summary offences are generally dealt with quickly and efficiently. If the accused pleads guilty, the prosecution simply summarises the offences and establishes the basic facts. The accused or their legal counsel will speak on their behalf, offer mitigating factors and/or character references. The magistrate will then find the matter proven, speak briefly to the accused and deliver a sanction. This process may take no more than several minutes. If the accused pleads not guilty, the magistrate will review the

evidence, hear witnesses and decide whether or not the matter is proven 'beyond reasonable doubt'. If the magistrate returns a finding of guilt, he or she will then decide an appropriate sanction.

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Robert R. Sudy (author) Website: **Freeman Delusion: The Organised Pseudolegal Commercial Argument in Australia** Email: **robertsudy@freemandelusion.com** * Like the page on **Facebook** Public group **Australian Pseudolaw** * Follow me on **Twitter** * Subscribe on **YouTube**.