Charge

The defendant is charged with the following offence(s) [read from indictment].

He says he is not guilty. Your role is to determine on the evidence whether he is guilty or not guilty.

Summing-up

I must now sum-up the case to you. You will then retire to consider your verdict(s).

Functions of judge and jury

Our functions are different. My task is to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law.[1]

You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your verdict(s).

I may comment[2] on the evidence if I think it will assist you in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view. You are the sole judges of the facts.

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1 See *R v Knight & Ors* [2010] QCA 372 at [324]: In complex, lengthy trials, it may be advisable to prepare a draft summing up, provide it to the parties and invite submissions upon it.

2 A comment is to be distinguished from a warning (e.g. against following impermissible paths of reasoning, and where care is needed in assessing some types of evidence such as identification evidence or the testimony of prison informers): *Crampton v The Queen* (2000) 75 ALJR 133 at [39]-[40], [125]-[126], [142]. Where the observation is only comment, the jury should be told that they may ignore it: *Azzopardi v The Queen* (2001) 205 CLR 50, 69-70, at [49]-[50]. The trial judge is not bound to comment on the facts. The preferable course will often be to make no comment on the facts beyond reminding the jury of the arguments of counsel: *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3 at [42]. The exercise of the discretion to comment on the facts requires a degree of judicial circumspection. Because of the risk of unfairness to either side, a comment on the evidence should not go so far as to suggest how a disputed question of fact should be resolved: *McKell v The Queen* (2019) 264 CLR 307, 323 at [46].

Unanimous verdict

In respect of each charge you must [try to (where a majority verdict is permitted)[3]] reach a unanimous verdict: that is, a verdict on which you all agree, whether guilty or not guilty.

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[3] There are differing approaches in other jurisdictions where majority verdicts are allowed as to whether mention ought to be made of them at the stage of the summing up to the jury. In some jurisdictions, model directions make mention of the existence of majority verdicts when summing up on the issue of a unanimous verdict. See for example the *Crown Court Benchbook: Specimen Directions* (at 56) published by the Judicial Studies Board for England and Wales, found at <http://www.jsboard.co.uk> and the *Criminal Trial Courts Benchbook*, a publication of the Judicial Commission of New South Wales, where the model direction at [7-020], after stating that a jury's verdict ought to be unanimous, suggests the following: "*As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances may not arise at all, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a verdict which is not unanimous, I will give you a further direction*." In *Ngati v R* (2008) 180 A Crim R 384 the Court of Appeal noted a divergence of opinion at trial level as to the appropriateness of reference to the existence of majority verdicts when the jury first retire [25], but declined to determine whether making such a reference could lead to miscarriage of justice, finding it inappropriate to do so, partly because the verdict returned in that case was unanimous: [26].

The position in Victoria is similar to that in NSW see Chapter 3.9.2.2 in the *Victorian Criminal Charge Book* published by the Judicial College of Victoria and available at www.judicialcollege.vic.edu.au; see also *R v Muto & Eastey* [1996] 1 VR 336 where it was noted (at 399) that the advantages of giving such a direction is that it is frank with the jury yet makes it clear that their verdict should be unanimous and encourages them to put the possibility of a majority verdict out of their minds. But see *Doklu v R* (2010) 208 A Crim R 333 at [79].

As to the Northern Territory, in *CEV v The Queen* [2005] NTCCA 10 at [16], the NT Court of Criminal Appeal reiterated previous statements of that court that trial judges should not tell the jury anything about majority verdicts when they first retire, emphasising that an impression should not be created before the time when a majority verdict may be accepted, that if jurors were unable to reach a unanimous verdict, the view of the majority will ultimately prevail. However, the court also held at [17] that if a jury asks what the procedure is for majority verdicts before the time such a verdict is permitted, they should be directed as follows, "*Parliament has introduced a provision which in certain circumstances allows a court to take a majority verdict. Those circumstances have not yet arisen and, until they do, you should consider your verdict must be unanimous*."

In Western Australia, the usual approach is not to advise the jury at the outset of the existence of majority verdicts and in *Pearmine v The Queen* [1988] WAR 315, the Criminal Court of Appeal indicated a preference for such an approach, since at that stage a unanimous verdict is required by law. It found no error arose in not explaining the (eventual) possibility of a majority verdict at the outset. Kennedy J, referring to the WA legislation allowing for majority verdicts, said at 321:"[J]uries should be encouraged to reach a unanimous verdict if they are able to do so, because that is the entitlement of an accused before s 41 operates. That is more likely to be achieved by refraining from telling them at some time in the future, if they have not reached a unanimous verdict, a verdict of not less than ten may be accepted."

Conflicting views have been expressed by judges of the SA Court of Criminal Appeal. In *R v Harrison* (1997) 68 SASR 304, Cox CJ at 306 (with William J concurring and Olsson J reserving his position) considered it an undesirable practice to draw the jury's attention to the existence of majority verdicts at a stage when their thoughts should be directed to the desirability of reaching a unanimous verdict. In *R v K* (1997) 68 SASR 405, Doyle CJ at 413-414 expressed agreement with the Victorian approach.

In *R v BCG* [2012] QCA 167 the Court of Appeal held that it was not inappropriate for the trial judge to inform the jury of the possibility of returning a majority verdict and the circumstances where that could occur before the prescribed period had elapsed.

As to a suggested direction in respect of the returning of a majority verdict, see Direction No 52A.

What evidence is

You must reach your verdict on the evidence, and only on the evidence.[4]

The evidence is what the witnesses said from the witness box, the documents [or photos etc] and other things received as exhibits [and the admission(s) made[5]]. The exhibits will be with you in the jury room; [and you will have facilities for playing the electronically recorded material].

What is not evidence

If you have heard, or read, or otherwise learned anything about this case outside this courtroom, you must exclude that information from your consideration. Have regard only to the testimony and the exhibits put before you [and the admission(s) made] in this courtroom since this trial began. Ensure that no external influence plays a part in your deliberations[6].

A few things you have heard are not evidence. This summing-up is not evidence. And statements, arguments, questions[7] and comments by the lawyers are not evidence either. The purpose of the opening of the case by the prosecutor was to outline the nature of the evidence intended to be put before you. [The same is true of the opening of defence counsel]. Nor were the lawyers' final addresses evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

How do you use the testimony and the exhibits?

Primary facts and inferences

Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. The [documents,

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4 Where defence evidence is called, add: **It does not matter whether that evidence was called for the prosecution or the defence.**

5 Where facts are admitted, the jury might also be informed that **the prosecution and the defence have agreed that (**here set out admitted facts**). You must therefore treat those facts as proved.**

6 This requires further emphasis where adverse pre-trial publicity matters: cf *R v Glennon* (1992) 173 CLR 592 at 603-604, 616, 624.

7 Sometimes it may be appropriate to add:

A thing suggested by a lawyer during a witness's cross-examination is not evidence of the fact suggested unless the witness accepted the suggestion as true. That is, the lawyer's question is not evidence. Let me give you an example. Imagine a lawyer asking a witness, "The sky was grey, wasn't it?" The lawyer's statement in the question that the sky was grey is not evidence that the sky was grey. The evidence is instead to be found in the answer of the witness.

photographs and other] things put into evidence as exhibits may also tend directly to prove facts. But in addition to facts directly proved by the evidence, you may also draw inferences – that is, deductions or conclusions – from facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else occurred. That will be the process of drawing an inference from facts. For example, suppose that when you went to sleep it had not been raining, and when you woke up you saw rainwater around. The inference – the deduction, the conclusion – would be that it had rained while you were asleep. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by the evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.[8]

Burden of proof

The burden rests on the prosecution to prove the guilt of the defendant.[9] There is no burden on a defendant to establish [any fact, let alone] his innocence.[10] Nor is the defendant obliged to give evidence or call other people to give evidence on his/her behalf, or otherwise produce evidence.

The defendant is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged [or some other offence of which he may be convicted on the indictment: You will be directed later on as to this].

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[8] In a circumstantial case, consider adding, for example: **Importantly, if there is an inference reasonably open which is adverse to the defendant (i.e. one pointing to his guilt) and an inference in his favour (i.e. one consistent with innocence), you may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.** cf *Wedd* (2000) 115 A Crim R 205 at 214; see also Direction as to "Circumstantial Evidence" at No 48.

Further, where a particular intent is an element of the offence or otherwise indispensable to a conclusion of guilt, and there are no admissions of it, the jury might be told that: **The defendant's intent is a central issue. No one can look inside his head. So you will need to examine the evidence and ask yourselves whether it is proved beyond reasonable doubt that the defendant intended to (**describe**).** See also Intention.

[9] In a case where the outcome of the trial depends on the resolution by the jury of a conflict between Crown witnesses, the evidence of one pointing to innocence and the evidence of the other pointing to guilt, the jury should be directed that if they are in doubt as to which version is correct, they should acquit: *R v Johnson & Honeysett* [2013] QCA 91 at [19]-[21].

[10] This will require modification where the onus is borne by the defendant: eg. insanity, diminished responsibility, and s 57(c) of the *Drugs Misuse Act* 1986. In such instances, the jury might be directed that: **Where the burden of proof of an issue rests on a defendant as with (**describe issue**), he is not required to establish it beyond reasonable doubt. The standard of proof required of him is lower. Where he is required to prove something, he need only satisfy you that what he contends for is more probable than not.**

Standard of proof

> For the prosecution to discharge its burden of proving the guilt of the defendant, it is required to prove beyond reasonable doubt that he is guilty.[11] This means that in order to convict you must be satisfied beyond reasonable doubt of every element that goes to make up the offence charged. I will explain these elements later. [The prosecution must also satisfy you beyond reasonable doubt of any other matter which I indicate you must be satisfied about in order to find the defendant guilty].[12]
>
> It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence [and the other matters of which you must be satisfied in order to find the defendant guilty]. If you are left with a reasonable doubt about guilt, your duty is to acquit: that is, to find the defendant not guilty. If you are not left with any such doubt, your duty is to convict: that is, to find the defendant guilty.[13]
>
> Proof beyond reasonable doubt is the highest standard of proof known to the law. It can be contrasted with the lower standard of proof that is required in a civil case where matters need only be proved on what is called the "balance of probabilities." That is, the case must be proved to be more likely than not.
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> In a criminal trial, the standard of satisfaction is much higher; the prosecution must prove the guilt of the defendant beyond reasonable doubt.[14]

(Where the locality of the offence is in issue, the standard of proof is on the balance of probabilities.)[15]

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[11] A trial judge should not expand on the meaning of "reasonable doubt" or attempt to define the concept any further, unless asked to do so by the jury. In the latter case, reference should be made to the suggested direction on "reasonable doubt", direction number 57.1. Attempts to explain or define the concept has been disapproved in *Green v The Queen* (1972) 126 CLR 28 (where it was held a misdirection to suggest a reasonable doubt was confined to a "rational doubt" or a "doubt founded on reason"); in *R v Punj* (2002) 132 A Crim R 595, where it was held a misdirection to explain "beyond a reasonable doubt" as meaning "feeling sure" or being "really sure"; and in both *R v Kidd* [2002] QCA 433 and in *R v Irlam*; *ex-parte Attorney-General* [2002] QCA 235, the Court of Appeal advised against trial judges speaking about community standards when describing the standard of proof. In *Irlam* the court referred with approval to the model directions at No 24.5 and noted the direction at No 57.1 of the Benchbook.

[12] As, eg, excluding self-defence, accident, or provocation.

[13] In an essentially circumstantial case, add the appropriate Circumstantial Case Direction.

[14] In *R v Dookhea* (2017) 91 ALJR 960; [2017] HCA 36 at [41], the High Court said that although it is, general speaking, unwise for a trial judge to attempt any explication of the concept of reasonable doubt, trial judges should be encouraged to contrast the standard for proof beyond reasonable doubt and the lower civil standard of proof on the balance of probabilities. Therefore the direction is included here although, for the time being, it appears also in Direction No 60.

[15] In *Thompson v The Queen* (1989) 169 CLR 1, Mason CJ and Dawson J said, "Proof of jurisdiction is a prerequisite of guilt but otherwise it is not an element in proof of the commission of the offence

No evidence by a defendant/evidence by a defendant

Having discussed the burden and standard of proof, direct the jury on the use to which they might put evidence given by the defendant; the defendant's silence at trial; or the defendant's silence before trial, as applicable.

See the following directions and adapt as necessary (for example, because you have already said that a defendant is not obliged to give, call or produce evidence, you might replace the first sentence of direction 27 or 28 with "**As I've said, a defendant is not obliged to given, call or produce evidence and he/she has not done so here":**

26. Defendant Giving Evidence

27. Defendant Not Giving Evidence, Where No Adverse Inference

28. Defendant Not Giving Evidence, Where An Adverse Inference May Follow From That

29. Defendant's Right To Silence

No sympathy or prejudice influential

> You should dismiss all feelings of sympathy or prejudice, whether it be sympathy for or prejudice against the defendant or anyone else. No such emotion has any part to play in your decision. [Nor should you allow public opinion to influence you.] You must approach your duty dispassionately, deciding the facts upon the whole of the evidence.

Evidence may be accepted in whole or in part

> Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence.[16] It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.

Testimony accuracy indicators

> Many factors may be considered in deciding what evidence you accept. I will mention some general considerations that may assist you.

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except in those cases in which the offence is so defined that commission of it in a place or locality is made an element of the offence charged." (at 12). Gaudron J said, "Locality, in this sense, may be contrasted with locality as an element of the offence charged, as, for example, in the case of an offence which is constituted by acts or omissions in a public place. In the latter case, locality is an essential element of the offence and as such may be decisive of criminality: In the former case, locality is decisive only of the operation of the law and of the jurisdiction of the courts charged with administering that law to enter judgment." (at 39); *R v WAF & SBN* [2010] 1 Qd R 370, [2009] QCA 144.

[16] The jury might also be informed: **Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.**

You have seen how the witnesses presented in the witness box when answering questions. Bear in mind that many witnesses are not used to giving evidence and may find the different environment distracting. Consider also the likelihood of the witness's account. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory?

You may also consider the ability, and the opportunity, the witness had to see, hear, or know the things that the witness testified about. Another point may be: Has the witness said something different at an earlier time?[17] These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.[18]

In cases involving Indigenous witnesses or those who speak Aboriginal English or Torres Strait Creole (including a defendant; and including a defendant who does not give evidence, but whose out-of-court statements, such as to police during an interview, have been tendered), see page 194 of the 2nd edition of the *Equal Treatment Bench Book* (available on JVL under "Bench Books") for directions about the way in which a jury is to approach their evidence.

Body of the summing-up

Here give those directions appropriate to assisting the jury to apply the law to the facts and which are otherwise necessary to avoid a perceptible risk of a miscarriage of justice.[19]

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[17] Where a prior inconsistent statement assumes importance, elaboration may be helpful: eg, **a matter to be considered in assessing testimony is whether it differs from what has been said by the witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question. In weighing the effect of such an inconsistency or discrepancy, consider whether there is satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence.** As to the evidentiary value of a prior inconsistent statement, see J R S Forbes, *Evidence Law in Queensland*, 3rd ed (1999), pp 247-250; and as to warnings required where a jury might be inclined to treat the prior statement as reliably stating the true facts, see *R v Nguyen* [1989] 2 Qd R 72 at 77-78.

[18] Where warnings are required to avoid a perceptible risk of a miscarriage of justice (cf *Bromley v The Queen* (1986) 161 CLR 315 at 319; *Robinson v The Queen* (1999) 197 CLR 162) as, for example, (though subject to s 632 of the *Criminal Code*) with accomplices, prison informers, indemnified witnesses, and identification evidence, add, **I will, however, be mentioning some special warnings that you must take into account in assessing particular parts of the evidence.**

[19] The Judge's duty to instruct the jury as to the law applicable to the case requires an identification of the real issues in the case, the facts that are relevant to these issues and an explanation as to how the facts are relevant to them: see *Fingleton v The Queen* (2005) 227 CLR 166 at 196-197 [77]-[80]; *R v Baker* [2014] QCA 5 at [9], [86]-[89].

Rival contentions

This brings me to a summary of the rival contentions.[20]

Further assistance

If you find that you need further direction on the law, please send a written message through the bailiff. Likewise, if you wish to be reminded of evidence, let the bailiff know, and make a note of what you want. When you return to the courtroom, I will provide such further assistance on the law as I can or arrange for the relevant part of the transcript to be read out to you; or given to you if I consider it appropriate to do so. As I mentioned at the start of the trial, you must not disclose in any communication to me the voting numbers.[21]

Delivering the verdict[22]

General direction

When you return after having reached your verdict(s), my associate will ask:

"Have you agreed upon a verdict?"

You will all then say, "*Yes*" to show that you have.

My associate will then ask: "*Do you find the defendant (naming him/her), guilty or not guilty of (specifying the offence)?*"

Your speaker will then state your verdict: That is, whether guilty or not guilty.

My associate will then ask you all: "*So says your speaker, so say you all?"* -which is the time-honoured method for inviting the whole jury to signify that the verdict announced by the speaker is indeed the verdict of all. So you will collectively confirm that the verdict is unanimous by saying "*yes*".[23]

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[20] See *RPS v The Queen* (2000) 199 CLR 620 at 637-8; *R* v *Hytch* (2000) 114 A Crim R 573 at [10].
As to inviting the jury to consider alternatives, see the Alternative Charges Direction. And as to the judge's responsibility to leave a possible defence for the jury's consideration even against the wishes of defence, see *Van Den Hoek* (1986) 161 CLR 158 at 161-162, 169; *R v Murphy* (1988) 52 SASR 186 at 195-197; *Hawkins v The Queen* (1994) 179 CLR 500 at 517.

[21] *Smith v The Queen* (2015) 89 ALJR 698; (2015) 255 CLR 161; [2015] HCA 27 at [32] and [53].

[22] As to the taking of a verdict associates should be referred to the Associates' Manual.

[23] Where a circumstance of aggravation is charged, it is usually convenient initially to take a single verdict in respect of both the offence and that circumstance. If the jury is not satisfied that the circumstance of aggravation has been proved to the requisite standard, a verdict can then be taken in respect of the offence simpliciter, without mention of the circumstance of aggravation.

This procedure is repeated for each offence.

I ask you to retire now to consider your verdict(s).

Alternative verdict

If the verdict on the offence of [*specifying offence*] is guilty, no further verdict will be taken. However, if the verdict is not guilty, my associate will then ask*, "How do you find the defendant, guilty or not guilty of [the alternative offence]?"* Your speaker will answer. Then you will again collectively confirm that the verdict is unanimous in the manner just mentioned.

Majority Verdict[24]

In respect of a charge where a judge has given directions to the jury that a majority verdict may be returned, the speaker, after indicating that a verdict has been reached, should be asked whether the verdict is unanimous or not. The remainder of the jury should be asked to confirm what the speaker has stated.[25] Disclosure of the jury's interim votes is irrelevant to the discretion to take a majority verdict under s 59A(2) of the *Jury Act*.[26]

Discharge of reserve jurors

Now, the following remarks are directed to the reserve jurors. As I mentioned at the start of the trial, because there has been no need to replace any member of the jury your participation in this trial is no longer required and I discharge you from further participation. However, I thank you for your careful attention throughout the trial, and for the dedication with which you have approached your task. I understand that you may feel disappointed that you are to play no further part in this trial and I again acknowledge the very considerable service that you have performed over the last weeks. You are free to leave or to stay at the back of the Court as you wish.

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[24] As to majority verdicts: see Direction No 55.

[25] For a suggested procedure for the taking of a verdict where a majority verdict direction has been given: see Direction No 55.

[26] *Smith* at [32] and [53].