IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. S279 of 2015

BETWEEN:

HAMDI ALQUDSI
Applicant

and

THE QUEEN
Respondent

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS AND NATURE OF INTERVENTION

2. The Attorney-General for the State of Queensland ('Queensland') intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth).

3. Queensland intervenes in this matter because of the practical application for a State of the construction of s 80 of the Commonwealth Constitution (the 'Constitution'). Although Queensland supports certain arguments of the Applicant, it does not intervene in support of the Applicant and in particular, apart from the question removed into this Court, has no interest in the pending proceeding in the Supreme Court of New South Wales.

Intervener's submissions

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PART III: STATUTORY PROVISIONS

4. The applicable constitutional and legislative provisions are as per the Applicant's submissions paragraphs [84]-[87].

PART IV: SUMMARY OF SUBMISSIONS

5. Queensland submits that the Constitution is capable of containing and does contain personal rights where necessary and expedient for the maintenance of the Commonwealth of Australia as a free and democratic society. Accordingly, s 80 of the Constitution should not be construed strictly as mandating a trial by jury in all cases to which it applies. Section 80 is capable of being, and should be, construed in the interests of justice as affording an accused to whom the section applies an *option* to waive their right to a jury trial in favour of a judge only trial.

6. Further, or in the alternative, Queensland submits that construing s 80 of the Constitution as denying an accused the option *not* to be tried by a jury is inconsistent with overarching requirements inherent in Chapter III which includes standards according to which justice is to be administered. It is submitted that such requirements are analogous to the combined effect of Article III and the Sixth Amendment of the Constitution of the United States of America, such that the requirement that charges of indictable offences must be tried by jury may be waived by the accused, at least with the agreement of the prosecution or the approval of the court.[1]

PART V: SUBMISSIONS

7. *Brown v The Queen*[2] holds that once s 80 is engaged, the requirement of a trial by jury cannot be waived.[3] By a narrow majority (3:2)[4] it was held that the terms of s 80 of the Constitution precluded an accused person from electing, pursuant to the *Juries Act 1927* (SA), to be tried for an indictable offence against a law of the Commonwealth by a judge sitting alone.

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1 *Patton v United States* (1930) 281 U.S. 276; *Adams v United States; Ex rel McCann* 317 US 269 (1942).
2 *Brown v The Queen* (1986) 160 CLR 171 (***Brown***).
3 *Brownlee v The Queen* (2001) 207 CLR 278, 305 [77] (Kirby J).
4 Brennan, Deane and Dawson JJ; Gibbs CJ and Wilson J dissenting.

8. In the subsequent matter of *Brownlee v The Queen*,[5] the Attorney-General for the Commonwealth (intervening) sought leave to reopen *Brown*. Leave was refused by the majority and consequently the correctness of the decision in *Brown* was not reconsidered. However, Kirby J, in dissent on this point, held that leave to reopen was not required.[6] His Honour considered and summarised the majority judgments in *Brown* as follows:[7]

> The essential reason of the majority was that, from its language and context, s 80 of the Constitution established a requirement which was for the protection of the whole community. It was to be distinguished from the provisions of the United States Constitution in respect of which waiver of jury trial by an accused had been permitted. Emphasis was placed on the fact that s 80 appears within Ch III of the Constitution; the imperative language of s 80 itself; and the fact that the jury requirement was not, in this country, merely a "right" in "the accused" but a "structural or organizational" mode of trial ordained, as well, for the benefit of society. In such circumstances, it was held that it was not for the accused to waive the mandatory requirement of the section where it was engaged. Still less was it for the accused to waive the interests of society as a whole where the section had been engaged.
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> (footnotes omitted)

9. Justice Kirby observed that the majority in *Brown* were affected by a view of s 80 of the Constitution that it represents a "constitutional guarantee" and not merely a procedural provision.[8] His Honour did not dissent from that premise, but he observed that:[9]

> [If] s 80 of the Constitution can so easily be avoided [by pleading guilty] or confined, to the disadvantage of the accused, it is hardly convincing, in the matter of informed waiver, to force the mode of trial provided in the section on the accused, contrary to that accused's interests and desires.

10. Moreover, referring to Gibbs CJ in *Brown*, Kirby J observed that forbidding informed waiver on the part of an accused would impose a most capricious operation upon s 80. It would hold that the accused person must accept trial by jury, despite a preferred alternative procedure.[10] His Honour concluded saying:[11]

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5 *Brownlee v The Queen* (2001) 207 CLR 278.
6 *Brownlee v The Queen* (2001) 207 CLR 278, 312 [101] (Kirby J).
7 *Brownlee v The Queen* (2001) 207 CLR 278, 317 [114] (Kirby J).
8 *Brownlee v The Queen* (2001) 207 CLR 278, 318 [115].
9 *Brownlee v The Queen* (2001) 207 CLR 278, 318-9 [117].
10 *Brownlee v The Queen* (2001) 207 CLR 278, 318 [117].

> I do not consider that the existence of a privilege to waive "trial ... by jury" is incompatible with the essential characteristics of jury trial or with the purposes for which s 80 of the Constitution provides that mode of trial.

11. Queensland submits that *Brown* is distinguishable on the basis that the South Australian legislation in that case permitted unilateral waiver by the accused, regardless of the public interest in the administration of justice as represented either by the attitude of the prosecution or an order of the court. By contrast, the present legislation does not permit unilateral waiver. An accused may waive only with the agreement of the prosecution (*Criminal Procedure Act 1986* (NSW), s 132(2)) or by order of the court in the interests of justice (s 132(4)).[12]

12. Further or alternatively, Queensland submits that s 80 can properly be construed in a manner that does not require that *Brown* be overruled as follows.

13. Justice Bell, writing extra-curially, has reasoned that:[13]

> A more satisfying rationale [for s 80], that does not depend upon a rights-protective foundation, builds on *Brown* and may be found in Gaudron J's analysis in *Cheng*.[14] Her Honour characterised s 80 as a 'constitutional command' limiting judicial power by 'prevent[ing] the trial of indictable offences by judge alone'.[15] Consistently with the statements of the majority in *Brown*, she laid emphasis on the importance of trial by jury to 'the rule of law ... the judicial process and the judiciary'.[16] Respect for each is enhanced by placing the determination of criminal guilt in the hands of ordinary members of the community.[17]

14. To characterise s 80 as a limitation of judicial power emphasises its constitutional nature. A constitutional provision should not be interpreted in absolute and literal terms.

15. Provisions which confer jurisdiction on courts only with the consent of a party are not unknown.[18] By analogy, a provision such as s 80 which imposes a limitation of

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11 *Brownlee v The Queen* (2001) 207 CLR 278, 319-320 [120].
12 The *Criminal Code* (Qld), s 615(1) empowers the court to make a no-jury order if it considers that it is in the interests of justice to do so, whether the prosecution supports the order or not.
13 Hon Justice V Bell, Section 80 – The great constitutional tautology', (2013) 40 *Monash U L Rev* 7, at 23.
14 (2000) 203 CLR 248, 277–8 [78]–[82].
15 Ibid 277.
16 Ibid.
17 Ibid 277–8.
18 E.g. *Family Law Act 1975* (Cth), ss 26B(1A)(f), 28(4)(b), 37A(2A)(e), 44(3), 46(1) and (1B).

judicial power may be subject to unexpressed exceptions, and one such exception may arise where the person whose private interest the provision at least partly protects, consents to a modification to the limitation of judicial power.

16. When the issue is, as here, whether s 68(2) of the Judiciary Act can operate to pick up s 132 of the Criminal Procedure Act, the modification to the limitation of judicial power requires not only the consent of the accused, but also the protection of the public interest in the administration of justice which s 80 also protects, in the form of the agreement of the prosecution or the approval of the Court. The latter expressly requires consideration of the interests of the administration of justice.

17. Queensland submits that s 80 does not prevent s 68(2) of the Judiciary Act from picking up s 132 of the Criminal Procedure Act in a case like the present. Section 80 can and should be interpreted so as not to prevent a Court from trying a charge of an indictable offence without a jury any more than from accepting a plea of guilty to such a charge.

18. If those submissions are not accepted, Queensland submits, with respect, that if leave is given to reopen *Brown*, it should be overruled for the following reasons.

19. *First*, whilst the Constitution does not expressly provide for personal rights and freedoms of citizens, it is submitted that there is nothing to prevent it from impliedly doing so; it would be undesirable from the perspective of a citizen if it could not so provide.

20. To this end, the Constitution has been construed to protect personal rights indirectly from negative interference by the Parliament and in fact indirectly provides, to some extent, certain personal guarantees in its text. Aside from s 80, implicit protection of personal rights can be found in the following provisions:[19]

    a. Section 51(xxiiiA) authorises the Commonwealth Parliament to make provision for medical and dental services but is subject to the limitation that it does not authorise any form of civil conscription.

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[19] Chief Justice Robert French, 'The Constitution and the Protection of Human Rights', paper presented at Edith Cowan University Vice-Chancellor's Oration, Perth, 20 November 2009.

b. Section 51(xxxi) imposes a just terms requirement in respect of any compulsory acquisition by the Commonwealth of property belonging to the State or a person. It has been held to extend to a very wide range of property interests.

c. Section 75(v) confers on the High Court jurisdiction in any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The High Court can prevent a public official, including a Minister of the Crown, from exceeding their lawful powers and may require same to discharge a duty imposed upon them by law and quash a decision made in excess of power.

d. Section 92 protects freedom of trade and commerce and intercourse among the States. The latter has been relied upon to strike down national security regulations which were found to prohibit interstate movement and has been said to relate to the freedom of movement guaranteed in Art 12 of the International Covenant on Civil and Political Rights (ICCPR).

e. Section 116 prevents the Commonwealth Parliament from making any law for establishing any religion, or for imposing any religious observance or for prohibiting the free exercise of any religion as well as precluding any religious test being required as a qualification for any office or public trust under the Commonwealth.

f. Section 117 prohibits discrimination between residents of States. The provisions was relied on to strike down as invalid, legislation which operated to discriminate against out of State legal practitioners.

21. It may be true that "Prima facie, a constitution is concerned with the powers and functions of government and the restraints upon their exercise."[20] It is true that some provisions which operate as limitations on governmental powers (whether legislative, executive or judicial) do not confer correlative rights on individuals. However, there

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20 *James v Commonwealth* (1939) 62 CLR 339, 362 (Dixon J).

is nothing in the nature of the Constitution which precludes the creation by it of individual rights.[21]

22. In addition to the examples given above, ss 7 and 24 provide that senators and members of the House of Representatives shall be chosen directly by the people of the States and the Commonwealth respectively. Those provisions demonstrate a number of points of present relevance.

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a. A provision expressed in superficially mandatory and absolute terms must, in its constitutional context, be given a more nuanced interpretation that admits of unexpressed qualifications and exceptions.

b. A single provision may be consistent with both an individual interest (the right to vote, or the right to a trial by jury) and a collective public interest

20 (representative government by way of free and fair elections, or the administration of justice including by way of fair trial).

c. That is, ss 7 and 24 demonstrate that a provision may both be 'part of the structure of government'[22] and also involve the grant of a privilege to an individual.

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d. A guarantee expressed in mandatory and absolute terms does not preclude the legislature from providing for significant qualifications and exceptions to the guarantee. Thus for example, ss 7 and 24 do not on their face admit of the electoral disqualification of minors, prisoners and aliens for example.

23. It is true that the *Commonwealth Electoral Act 1918* does not in terms permit a person otherwise qualified to vote to waive his or her entitlement to vote. But the

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legislative choices made in that Act do not determine the nature of constitutional guarantees generally, nor dispose of the present question specifically.

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21 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173 [4] (Gleeson CJ).

22 *Brown v The Queen* (1986) 160 CLR 171, 214 (Dawson J).

24. Queensland submits that s 80 can and should be construed in its constitutional context so that an accused person facing trial on indictment is entitled to be tried by a jury, but may waive his or her entitlement to a jury trial where the waiver is consistent with not only the individual but also the public interests which the provision serves.

25. It is difficult to identify a *ratio decidendi* from the several reasons of the majority in *Brown*, but to the extent that it holds that s 80 does not protect an individual right, Queensland respectfully submits that it is in error or at least is incomplete.

26. *Second*, it is submitted that the possible unfairness to an accused observed by Kirby J in *Brownlee* which results from construing s 80 as mandating a trial by jury regardless of the circumstances of their case, is inconsistent with the general requirements of a Chapter III court, including that its proceedings be conducted in the interests of justice.

27. Doubtless it is of benefit to society generally that there be a constitutional guarantee that a person accused of an indictable offence may be tried by a jury of their peers. Justice Deane observed in *Brown* that the prescription of a trial by jury as the method of trial on indictment represents an important constitutional guarantee against arbitrary determination of guilt or innocence and remarked that "[t]hat constitutional guarantee is, however, for the benefit of the community as a whole as well as for the benefit of the particular accused."[23]

28. However, that community benefit, and more particularly the proper administration of justice are well served not only by a prima facie right to trial by jury, but also by an entitlement to waive that right in appropriate circumstances and with appropriate safeguards. As noted above, in this case, unlike *Brown*, the community interest in an accused facing the judgment of his or her peers is ensured by the requirement for prosecution agreement or court order.

29. Alternatively, the public interest in the s 80 guarantee may be seen as secondary to what the Applicant calls the 'liberty interest'. In other words, the majority in *Brown*

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[23] *Brown v The Queen* (1986) 160 CLR 171, 202 (Deane J).

gave undue primacy to the public interest over the individual interest. On that alternative view, s 80 is primarily directed towards an accused person and their right to a jury trial when charged with an indictable offence. Thus, in the interests of individual justice and of maintaining community confidence in the criminal justice process, an accused person should be permitted by the Constitution which grants the right to waive the right in the interest of ensuring their best defence in any given case. It follows that where that is achieved, the interests of the community are also served.

30. The relationship between the individual and public interests is that the latter depends on the former. Put another way, the public interest in the administration of justice depends on fairness to the accused as the first of many considerations. Fairness to the accused may not be assured by a provision which dictates that a particular procedure be used in all cases without exception or qualification.

31. *Third*, regardless of the accused's personal interests, trial by jury is a means to the end of the interests of justice, not an end in itself. There are circumstances in which the interests of the accused and the public interests of justice are better served by a judge-only trial than a jury trial, such as where there are issues concerning the types of evidence to be led and whether a judge rather than a jury would be better placed to consider the particular evidence. For example, considering forensic evidence is arguably a purely intellectual, logical and rational exercise and therefore a judge is probably better equipped to assess it. Likewise with identification evidence, judges are more aware of the inherent dangers of identification evidence.[24] In such cases, a properly structured and confined waiver is consistent with the interests which s 80 protects, both private and public.

32. *Fourth*, s 80 "guarantees trial by jury *only* when the trial is on indictment"[25] and it has been consistently said by this Court that it is a matter for the Parliament to determine which offences are indictable.[26] Thus, the *Brown* majority construction of

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24 Conversely, on issues of credibility, a jury of the accused's peers might be more appropriate to judge.
25 *Cheng v The Queen* (2000) 203 CLR 248, 295 [143] (McHugh J) (emphasis added).
26 *Kingswell v The Queen* (1985) 159 CLR 264, 276-7 (Gibbs CJ, Wilson and Dawson JJ; Mason J agreeing); *Re Colina; Ex parte Torney* (1999) 200 CLR 386; *Cheng v The Queen* (2000) 203 CLR 248.

s 80 can, despite the "mandatory" and "unqualified" "command" of its words,[27] be subverted either by the Parliament prescribing that serious offences are not indictable or by the Crown proceeding summarily in respect of offences that are indictable. Moreover, as Kirby J noted in the passage quoted above, where a trial on indictment has commenced, an accused can avoid a jury verdict by pleading guilty.[28]

33. *Fifth*, the Convention Debates reveal that the founding fathers modelled s 80 on Article III of the United States Constitution, which relevantly provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury ...

34. The notable difference is that Art III applies to "all crimes" and s 80 only applies to "indictable offences". The change was considered necessary to ensure that trial by jury would only be required when the Commonwealth chose to prosecute by indictment as opposed to summarily.[29]

35. The Sixth Amendment to the United States Constitution forms part of a Bill of Rights. The amendment provides for the Rights of Accused in Criminal Prosecutions, and provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed ...

36. Quite obviously the United States' Bill of Rights expressly confers personal rights on citizens; that is its purpose. The Sixth Amendment, in particular, relevantly confers a right to a trial by jury. Deane J considered the jurisprudence of the United States Supreme Court in terms of its interpretation of Art III and the Sixth Amendment in *Brown* as follows:[30]

> At the time of the adoption of the Australian Constitution, the predominant view in the United States would appear to have been that waiver of trial by jury of serious offences was not permitted under Art. III, s 2, cl 3 see, e.g., *United States v Gilbert* ... The subsequent decisions of the United States Supreme Court in *Patton v United States* and *Adams v United States*; *Ex rel*

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27 *Brown v The Queen* (1986) 160 CLR 171, 201 (Deane J).
28 *Brownlee v The Queen* (2001) 207 CLR 278, 318-9 [117].
29 *Official Record of the Debates of the Australian Federal Convention* (Melbourne), 4 March 1898, p 1894-5.
30 *Brown v The Queen* (1986) 160 CLR 171, 204 (footnotes omitted).

> *McCann* upholding the constitutionality of a limited right of waiver are based largely on special considerations – a history of State decisions upholding waiver as consistent with State constitutional provisions and the context provided by the Sixth Amendment – which find no parallel in this country.

37. Whilst Australia does not expressly have a parallel to the Sixth Amendment to the United States Constitution, Queensland submits that the requirements of the judiciary which emanate from Chapter III, in particular a Chapter III court's inherent jurisdiction to protect itself from abuse of its processes and the necessity for those courts to maintain public confidence in their administration of justice[31] is not dissimilar to the end sought to be achieved by the Sixth Amendment.

PART VI: ORAL ARGUMENT

38. Queensland will require no more than 15 minutes for oral argument.

PART VII: CONCLUSION

39. The question for the Court's consideration in the cause removed is:

> Are ss 132(1) to (6) of the *Criminal Procedure Act 1986* (NSW) incapable of being applied to the Applicant's trial by s 68 of the *Judiciary Act 1903* (Cth) because their application would be inconsistent with s 80 of the Constitution?[32]

40. Queensland submits that the question should be answered "No".

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31 *Nicholas v The Queen* (1998) 193 CLR 173, 226 (McHugh J) and 258 (Kirby J).
32 CRB 10, line 30.