

## Section 80 – The Great Constitutional Tautology

### The Lucinda Lecture

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Section 80 is in Ch III of the Constitution which deals with the judicature. It provides for the mode and venue of the trial on indictment of any offence against any law of the Commonwealth: such trials shall be by jury and shall be held in the State where the offence was committed, and in the event the offence was not committed within a State, at such place or places as the Parliament prescribes. The provision has been interpreted according to its terms as requiring only that the trial of a Commonwealth offence which is on indictment is by jury<sup>1</sup>. Whether an offence is triable on indictment is left to the Parliament ("the orthodox interpretation").

The orthodox interpretation of s 80 has provoked some of the sharpest divisions among Justices of the High Court<sup>2</sup>.

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<sup>1</sup> *R v Bernasconi* (1915) 19 CLR 629; *The King v Archdall*; *Ex parte Carrigan* (1928) 41 CLR 128 at 139-140 per Higgins J; *The King v Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1938) 59 CLR 556 at 571 per Latham CJ; *Sachter v Attorney-General (Cth)* (1954) 94 CLR 86 at 88; *Zarb v Kennedy* (1968) 121 CLR 283 at 294 per Barwick CJ, 297 per McTiernan J, 298 per Menzies J, 312 per Owen J; *Clyne v Director of Public Prosecutions* (1984) 54 CLR 640 at 648 per Mason and Brennan JJ; *Kingswell v The Queen* (1985) 159 CLR 264 at 276-277 per Gibbs CJ, Wilson and Dawson J; *Cheng v The Queen* (2000) 203 CLR 248 at 268-270 [49]-[58] per Gleeson CJ, Gummow and Hayne JJ, 299 [152] per McHugh J, 344-345 [283] per Callinan J.

<sup>2</sup> *The King v Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1938) 59 CLR 556 at 580-584 per Dixon and Evatt JJ; *Hsing v Rankin* (1978) 141 CLR 182 at 196-202 per Murphy J; *Kingswell v The Queen* (1985) 159 CLR 264 at 298-320 per Deane J; *Re Colina*; *Ex parte Torney* (1999) 200 CLR 386

The Constitution contains few constraints on governmental power in favour of the freedom of the individual. There are two provisions which have been routinely characterised as guarantees of individual rights: trial by jury under s 80 and freedom of religion under s 116<sup>3</sup>. Commentators have been roundly critical of the High Court for the narrow scope given to each. The criticism has been particularly pointed in the case of s 80<sup>4</sup>.

Professor Sawyer considered that the orthodox interpretation has rendered s 80's guarantee "practically worthless"<sup>5</sup>. Professor Coper dismisses the orthodox interpretation as "apparent nonsense" producing what he pithily describes as the "great constitutional tautology"<sup>6</sup>: a guarantee of trial by jury where the Parliament provides that the offence is to be tried by jury.

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at 408-427 [63]-[104] per Kirby J; *Cheng v The Queen* (2000) 203 CLR 248 at 306-307 [173]-[177] per Kirby J.

<sup>3</sup> Sawyer, *Australian Federalism in the Courts*, (1967) at 19.

<sup>4</sup> Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1; Simpson and Wood, "'A Puny Thing Indeed' – *Cheng v The Queen* and the Constitutional Right to Trial by Jury", (2001) 29 *Federal Law Review* 95; Charlesworth, *Writing in Rights*, (2002) at 27-28; Galligan and Morton, "Australian Rights Protection", Paper delivered at the Australasian Political Studies Association Conference, University of Adelaide, 29 September – 1 October 2004 at 2; Stone, "Australia's Constitutional Rights and the Problem of Interpretive Disagreement", (2005) 27 *Sydney Law Review* 29 at 32; Gray, "Mockery and the Right to Trial by Jury", (2006) 6 *Queensland University of Technology Law and Justice Journal* 66; Winterton, Lee, Glass and Thomson, *Australian Federal Constitutional Law*, 2nd ed (2007) at 630 [8.75]; Zines, *The High Court and the Constitution*, 5th ed (2008) at 571-572; Blackshield and Williams, *Australian Constitutional Law and Theory*, 5th ed (2010) at 1155; Moens and Trone, *Lumb, Moens and Trone: The Constitution of the Commonwealth of Australia*, 8th ed (2012) at 346 [617]; Hanks, *Constitutional Law in Australia*, 3rd ed (2012) at 590-591 [10.105]-[10.108].

<sup>5</sup> Sawyer, *Australian Federalism in the Courts*, (1967) at 19.

<sup>6</sup> Coper, *Encounters with the Australian Constitution*, (1987) at 326.

### Origins of the orthodox interpretation

The "nonsense" of which Professor Coper and other critics complain stems from the decision in *The King v Archdall; Ex parte Carrigan*<sup>7</sup>. Two union officials were convicted before the Brisbane Magistrates' Court of hindering the provision of services by the Commonwealth by means of a boycott, an offence under s 30K of the *Crimes Act* 1914 (Cth). They challenged their convictions on a number of grounds. One ground contended that s 30K was invalid by reason of s 80. They argued that the phrase "trial on indictment" referred to those offences that would have been regarded as indictable at Federation and that it had not been open to the Parliament to enact the offence as triable summarily<sup>8</sup>. Knox CJ, Isaacs, Gavan Duffy and Powers JJ dismissed the argument saying that it was without foundation and that its rejection needed no exposition<sup>9</sup>. Starke J also said it was untenable<sup>10</sup>. Higgins J explained s 80 as saying no more than that if there be an indictment there must be a jury but the provision did not compel proceeding by indictment<sup>11</sup>. It may be noted that Isaacs and Higgins JJ were active participants in the debate at the Melbourne Convention when the provision in its final form was adopted.

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<sup>7</sup> (1928) 41 CLR 128.

<sup>8</sup> *The King v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 at 133.

<sup>9</sup> *The King v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 at 136.

<sup>10</sup> *The King v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 at 147.

<sup>11</sup> *The King v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 at 139-140.

Despite the absence of reasoning, *Archdall* has survived repeated challenge.

### A criticism of the orthodox interpretation

Dixon and Evatt JJ in a trenchant joint dissent in *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* rejected the orthodox interpretation, insisting that s 80 should be construed so as to produce "some real operative effect"<sup>12</sup>. Sir Anthony Mason, reviewing the jurisprudence of the High Court over its first 100 years, described their Honours' dissenting reasons as of such persuasive power as to make one wonder why their interpretation had not prevailed<sup>13</sup>. Famously, Dixon and Evatt JJ considered that *Archdall* ascribed a "queer intention" to the Constitution: it supposed the concern of the framers was not to ensure that no one should be found guilty of a serious offence against the laws of the Commonwealth except by the verdict of a jury but merely to prevent a procedural solecism<sup>14</sup>. A cynic, they said, might suggest that s 80 was drafted in mockery; its language carefully chosen so that the guarantee it appeared to give should be illusory<sup>15</sup>.

Dr Pannam, more in sorrow than in anger, suggests that one need not be a cynic, but merely an historian, to observe that the phrase "[t]he trial on indictment" was inserted in s 80 for the very

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<sup>12</sup> (1938) 59 CLR 556 at 582.

<sup>13</sup> Mason, "The High Court of Australia: A Personal Impression of Its First 100 Years", (2003) 27 *Melbourne University Law Review* 864 at 875.

<sup>14</sup> *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 581.

<sup>15</sup> *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 582.

purpose of producing the result that their Honours regarded as a mockery<sup>16</sup>. This is a reference to the drafting history and the Convention Debates to which I will return.

### The grand bulwark of liberty

The Justices who have rejected the orthodox interpretation have shared with Dixon and Evatt JJ a view that s 80 is intended to confer a right or privilege on the accused protective of individual freedom<sup>17</sup>. Murphy J read the provision in the light of the "deep attachment of the people for whom the Constitution was made to trial by jury for criminal offences"<sup>18</sup>. His Honour saw the institution of trial by jury as a defence against governmental oppression<sup>19</sup>. In similar vein, Deane J considered s 80 to reflect the deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. His Honour also saw the institution as a protection against tyranny<sup>20</sup>. Kirby J, too, favoured this analysis<sup>21</sup>.

These ideas owe much to Blackstone. Blackstone characterised the jury as the grand bulwark of liberties of every Englishman as secured by Magna Carta<sup>22</sup>. It preserved, he said,

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<sup>16</sup> Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 6.

<sup>17</sup> *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580.

<sup>18</sup> *Hsing v Rankin* (1978) 141 CLR 182 at 198.

<sup>19</sup> *Hsing v Rankin* (1978) 141 CLR 182 at 198.

<sup>20</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 298-299.

<sup>21</sup> *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 422 [95].

<sup>22</sup> Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 349.

an admirable balance under the English constitution: without it Justices of *oyer* and *terminer* appointed by the Crown might imprison or despatch any man obnoxious to the government, as happened in France and in Turkey. By contrast, English law required that the truth of an accusation preferred on indictment should be established by the unanimous vote of 12 of the accused's equals, indifferently chosen and superior to suspicion<sup>23</sup>.

### The United States experience

Blackstone's *Commentaries* exerted considerable influence on the thinking of the founding fathers of the United States Constitution<sup>24</sup>. The Declaration of Independence records, among the King's repeated injuries and usurpations, his assent to acts of pretended legislation "depriving us in many cases, of the benefits of trial by jury"<sup>25</sup>.

In his classic work on the sources of the United States Constitution, Stevens quotes Blackstone's retort to Montesquieu<sup>26</sup>:

"A celebrated French writer, who concludes that Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish, should

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<sup>23</sup> Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 349.

<sup>24</sup> Dicey, "Blackstone's Commentaries", (1932) 4 *Cambridge Law Journal* 286 at 300-301; Hoeflich, "American Blackstones", in Prest (ed), *Blackstone and his Commentaries*, (2009) 171; Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact", (1976) 51 *New York University Law Review* 731.

<sup>25</sup> Declaration of Independence, (1776).

<sup>26</sup> Stevens, *Sources of the Constitution of the United States*, (1894) at 238, citing Blackstone, *Commentaries on the Laws of England*, (1768) bk 3 at 379.

have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost were strangers to the trial by jury."

It comes as no surprise that the Constitution of the United States should provide for trial by jury in the case of "all Crimes" save for impeachment<sup>27</sup>. The provision is seen as a guarantee of the liberty of the individual against tyranny. The Supreme Court of the United States put it this way in *Duncan v Louisiana*<sup>28</sup>:

"A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority."

### The Australian experience

By contrast, an understanding of the attitude of mind of the framers of our Constitution is apt to make one wonder how s 80 found its way into the document<sup>29</sup>.

Andrew Inglis Clark was a great admirer of American democracy<sup>30</sup>. His draft constitution, which was circulated to the

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<sup>27</sup> Article III, s2(3) provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

<sup>28</sup> 391 US 145 at 155-156 per White J (1968).

<sup>29</sup> Dixon, "Two Constitutions Compared", in Woinarski, *Jesting Pilate and Other Papers and Addresses*, (1965) 100.

delegates before the 1891 Convention, included a provision drawn in terms from the jury clause of the United States Constitution<sup>31</sup>.

One difficulty occasioned by the United States jury clause was that, read literally, it required trial by jury for the most minor of crimes. By 1888 it was settled that the constitutional guarantee did not apply to petty offences, which under the common law might be prosecuted summarily<sup>32</sup>. Nonetheless, the determination of whether an offence was a petty offence had been attended by difficulty<sup>33</sup>.

The Judiciary Committee chaired by Clark drafted the judicature provisions of the Constitution that was adopted at the 1891 Convention. The jury clause was amended by the Committee. The requirement that the trial of "all crimes cognisable by any Court established under the authority of this Act shall be by jury" was deleted and a requirement that the trial of "all indictable offences cognisable by any Court established under the authority of this Act shall be by jury" was inserted<sup>34</sup>. A fair inference is that the amendment was designed to avoid the

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<sup>30</sup> Reynolds, "A I Clark's American Sympathies and his Influence on Australian Federation", (1958) 32 *Australian Law Journal* 62.

<sup>31</sup> Clause 65 of Clark's draft provided: "The trial of all crimes cognisable by any Court established under the authority of this Act shall be by Jury, and every such trial shall be held in the Province where the crime has been committed, and when not committed within any Province the trial shall be held at such place or places as the Federal Parliament may in law direct." Williams, *The Australian Constitution: A Documentary History*, (2005) at 107.

<sup>32</sup> *Callan v Wilson* 127 US 540 at 557 (1888).

<sup>33</sup> Frankfurter and Corcoran, "Petty Federal Offences and the Constitutional Guaranty of Trial by Jury", (1926) 39 *Harvard Law Review* 917.

<sup>34</sup> Williams, *The Australian Constitution: A Documentary History*, (2005) at 452.

difficulties experienced in the United States respecting the trial of summary offences.

The delegates at the Convention had an informed understanding of the United States model of federalism. Influential to that understanding was James Bryce's *The American Commonwealth*<sup>35</sup>. Bryce dedicated that work to his friend, A V Dicey. Patapan, writing about the protection of rights in Australia, discusses Bryce's influence, observing that Bryce's interest in United States federalism did not extend to the Bill of Rights<sup>36</sup>. For Bryce, and for the Diceyan lawyers who attended our Constitutional Conventions, there was something outmoded about the idea that the individual needed to be protected from the tyranny of the legislature<sup>37</sup>:

"The English, however, have completely forgotten these old suspicions, which, when they did exist, attached to the Crown and not to the Legislature. ... Parliament was for so long a time the protector of Englishmen against an arbitrary Executive that they did not form the habit of taking precautions against the abuse of the powers of the Legislature; and their struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority."

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<sup>35</sup> Bryce, *The American Commonwealth*, (1888).

<sup>36</sup> Patapan, "The Dead Hand of the Founder? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia", (1997) 25 *Federal Law Review* 211 at 216-219.

<sup>37</sup> Patapan, "The Dead Hand of the Founder? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia", (1997) 25 *Federal Law Review* 211 at 218, citing Bryce, *Studies of History and Jurisprudence*, (1901) vol 1 at 502-3.

The jury clause was included in the Judicature Chapter of the draft presented to the Adelaide session of the Convention in April 1897. Barton presented the Chapter. His account of the jury clause focussed on the guarantee of venue<sup>38</sup>. He explained that the provision would prevent a person being taken from the State where the offence was committed into another State and there tried by jury some 1,000 or 1,500 miles distant. The jury clause ensured trial by one's peers in one's own State<sup>39</sup>.

At the Melbourne session of the Convention in January 1898, South Australia moved to amend the jury clause to omit the requirement that the trial be by jury<sup>40</sup>. Patrick Glynn explained that the object of the amendment was to ensure that the Federal Parliament would be as omnipotent within its sphere of authority as the Parliaments of the States<sup>41</sup>. Bernhard Wise spoke against the amendment, arguing that the clause, as it stood, provided "a necessary safeguard to the individual liberty of the subject in every state"<sup>42</sup>. Wise's concern was also directed to the guarantee of venue. He, like Barton, voiced the concern that without the clause the Executive might remove an accused from one State to

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<sup>38</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 12 April 1897 at 445.

<sup>39</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 12 April 1897 at 446.

<sup>40</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 350.

<sup>41</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 350.

<sup>42</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 350.

another and there subject him to trial by resident magistrate<sup>43</sup>. The response of Higgins is eloquent of the point made by Patapan: had Wise been speaking 100 years earlier the remark might have been applauded, but it was "mere claptrap to say that trial by jury was a safeguard of liberty at the present time"<sup>44</sup>. Higgins considered that no matter how much trial by jury might be valued, it was not a matter for the Constitution.

On 4 March 1898 when the jury clause was read again Barton moved an amendment to delete the words "of all indictable offences" and to substitute the words "on indictment of any offence"<sup>45</sup>. The object of the amendment was, he said, simple. As the clause stood, it provided that the trial of all indictable offences against any law of the Commonwealth should be by jury. Barton pointed out<sup>46</sup>:

"This meant that, however small might be the offence created by any Commonwealth enactment, supposing an offence that should be punishable summarily, it would, nevertheless, have to be tried by jury."

He illustrated his concern by prosecutions for contempt, an indictable offence that was commonly tried summarily. The object, he said, was to preserve trial by jury where an indictment

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<sup>43</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 350.

<sup>44</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 351.

<sup>45</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1894.

<sup>46</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1894.

was brought but to allow for contempt to be punishable in the ordinary way<sup>47</sup>. So, too, should minor offences be amenable to a summary procedure. He continued<sup>48</sup>:

"There will be numerous Commonwealth enactments which would prescribe, and properly prescribe, punishment, and summary punishment; and if we do not alter the clause in this way they will have to be tried by jury".

Isaacs repeated a point that he had earlier made, which was that the clause would not have any real effect because it would be within the powers of the Parliament to declare what is an indictable offence and what is not<sup>49</sup>.

### A controversy over the Convention Debates

Freed by *Cole v Whitfield* to take into account the Convention Debates<sup>50</sup>, McHugh J in *Cheng v The Queen* held that when s 80 is read in the light of its history, the only possible conclusion is that it was enacted in the form it was for the purpose of enabling the Parliament to determine whether an offence was to be indictable or punishable summarily<sup>51</sup>. The joint

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<sup>47</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1894-1895.

<sup>48</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1895.

<sup>49</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1895.

<sup>50</sup> (1988) 165 CLR 360 at 385.

<sup>51</sup> (2000) 203 CLR 248 at 295 [142].

reasons in *Cheng*, while less emphatic than McHugh J on the point, saw nothing in the history to support a departure from the orthodox interpretation<sup>52</sup>.

In a paper published shortly after *Cheng* was delivered, Simpson and Wood were critical of the majority judgments for "seizing upon" Barton's amendment to confirm a "sterile, procedural" meaning for s 80<sup>53</sup>. They propose an alternative reading of the debate on Barton's amendment, suggesting that the intention was to confer on the Parliament the power to withhold jury trials within the discrete sphere of "minor offences"<sup>54</sup>. On this view, "trial on indictment" is an expression having definite content<sup>55</sup>.

Quick and Garran's Commentary, that pristine source of reflection on the Constitution, does not lend support to the Simpson and Wood argument. After setting out the drafting history, the authors state<sup>56</sup>:

"The constitutional requirement of trial by jury only applies when the trial is 'on indictment;' and there is no provision, corresponding to the Fifth Amendment of the United States Constitution, that all capital or

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<sup>52</sup> (2000) 203 CLR 248 at 269-270 [54]-[57] per Gleeson CJ, Gummow and Hayne JJ.

<sup>53</sup> Simpson and Wood, "'A Puny Thing Indeed' – *Cheng v The Queen* and the Constitutional Right to Trial by Jury", (2001) 29 *Federal Law Review* 95 at 109.

<sup>54</sup> Simpson and Wood, "'A Puny Thing Indeed' – *Cheng v The Queen* and the Constitutional Right to Trial by Jury", (2001) 29 *Federal Law Review* 95 at 109.

<sup>55</sup> Simpson and Wood, "'A Puny Thing Indeed' – *Cheng v The Queen* and the Constitutional Right to Trial by Jury", (2001) 29 *Federal Law Review* 95; Stellios, *The Federal Judicature*, (2010) at 523 [11.19].

<sup>56</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 808.

infamous crimes must be tried on indictment. As was pointed out by Mr Isaacs (Conv Deb, Melb, p 1894), 'it is within the powers of the Parliament to say what shall be an indictable offence and what shall not. The Parliament could, if it chose, say that murder was not an indictable offence, and therefore the right to try a person accused of murder would not necessarily be by jury.'

Reference to the Convention Debates may assist in understanding the contemporary meaning of the language used in the instrument and the subject to which the language is directed. It is not undertaken with a view to divining the subjective understanding of the delegates as to the object of a clause or proposed amendment<sup>57</sup>. The drafting history culminating in the adoption of Barton's amendment may present difficulties in the way of acceptance of the construction for which Simpson and Wood contend. It is sufficient to note the observation of the plurality in *Cheng* that in light of this history there is every reason for not embarking on consideration of a substantial re-interpretation of s 80 unless and until a case arises that makes that course necessary<sup>58</sup>.

#### Jury trials for serious Commonwealth offences – the experience to date

Professor La Nauze, in his account of the making of the Constitution, did not cavil with the orthodox interpretation. He

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<sup>57</sup> *Brownlee v The Queen* (2001) 207 CLR 278 at 285 [7] per Gleeson CJ and McHugh J; *Cole v Whitfield* (1988) 165 CLR 360 at 385.

<sup>58</sup> (2000) 203 CLR 248 at 268 [52] per Gleeson CJ, Gummow and Hayne JJ.

suggested that the lawyers at the Convention had been content to let through a provision "so vulnerable" because they had perfect confidence that trial by jury for those categories of cases in which it had been sanctioned by centuries of tradition would not be at risk. They believed that neither the Commonwealth nor the States would seek to evade the use of juries in cases in which trial by jury was conceived by the electors as necessary to justice<sup>59</sup>. It remains to ask, why include the provision? Professor La Nauze's pragmatic answer was to say that, as the jury clause had included from the first draft of the Constitution in 1891, to throw it out might have led to misunderstanding<sup>60</sup>.

The concern that s 80 has been shorn of its capacity to protect trial by jury for offences of a serious character is apt to overlook a point made by Dawson J in *Brown v The Queen*, which is that there has been nothing in the Australian experience so far that puts the accepted view of the provision to any severe test<sup>61</sup>.

The assumed confidence of the delegates that the Parliament would not make provision for the summary trial of offences properly viewed as indictable has been justified<sup>62</sup>. The offence challenged in *Archdall* was punishable by a maximum penalty of imprisonment for one year. At Federation, many statutes in England and in the Australian colonies created

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<sup>59</sup> La Nauze, *The Making of the Australian Constitution*, (1972) at 228.

<sup>60</sup> La Nauze, *The Making of the Australian Constitution*, (1972) at 228.

<sup>61</sup> (1986) 160 CLR 171 at 215.

<sup>62</sup> Section 4G of the *Crimes Act 1914* (Cth) provides that offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.

summary offences. The maximum penalty for an offence triable summarily was commonly imprisonment for a period not exceeding 12 months<sup>63</sup>. Given that to date the Parliament has chosen to provide for the trial on indictment of offences of a serious character, it is unsurprising that the successive challenges to the authority of *Archdall* have been mounted in cases in which the offence might fairly be viewed as summary: *Sachter v Attorney-General (Cth)*<sup>64</sup>; *Zarb v Kennedy*<sup>65</sup>; *Clyne v Director of Public Prosecutions*<sup>66</sup>; and *Hsing v Rankin*<sup>67</sup>. It is true that the offence under the *National Service Act* 1951 (Cth) in *Zarb* was punishable by a maximum sentence of two years' imprisonment. However, as Deane J has noted<sup>68</sup>, it was an unusual offence that may well have been, within limits, properly regarded as appropriate for summary disposition.

The absence of detailed consideration of s 80 in the majority reasons in *Lowenstein* is to be understood in context, which is that Mr Barwick's challenge to the validity of the bankruptcy offence in that case was based on the conferral on the Court of the power both to charge and to try the offence<sup>69</sup>. No argument

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<sup>63</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 309 per Deane J.

<sup>64</sup> (1954) 94 CLR 86.

<sup>65</sup> (1968) 121 CLR 283.

<sup>66</sup> (1984) 54 CLR 640.

<sup>67</sup> (1978) 141 CLR 182.

<sup>68</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 315.

<sup>69</sup> *Bankruptcy Act* 1924 (Cth), s 217(1)(a) and (2); and see McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235 at 241, where it is suggested that in light of the modern view of Ch III, it is difficult to see how the decision in *Lowenstein* can stand.

on s 80 was advanced on the hearing of the special case in the High Court<sup>70</sup>.

The dissenting reasons in *Lowenstein* to one side, the first detailed consideration of the authority of *Archdall* was in *Rankin*<sup>71</sup>. Gibbs J observed that the challenge was impossible to maintain on the existing state of authorities<sup>72</sup>. Pointedly, his Honour said the proceeding did not provide an occasion to further consider the scope of s 80, since on no possible view could the offence with which Mr Hsing was charged be characterised as an offence tried on indictment<sup>73</sup>. Mr Hsing had been charged at Thursday Island by an officer attached to the Fisheries Unit with an offence under the Commonwealth fisheries statute<sup>74</sup> that was subject to a maximum penalty of imprisonment for six months.

### "Trial on indictment"

Any challenge to the orthodox interpretation has to come to grips with the phrase "trial on indictment". Those who support the interpretation have pointed to the difficulty the dissentients have had in agreeing on its meaning<sup>75</sup>. Before turning to the differing formulations, I should make brief reference to the meaning of "indictment" at common law.

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<sup>70</sup> *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 571 per Latham CJ.

<sup>71</sup> (1978) 141 CLR 182.

<sup>72</sup> *Hsing v Rankin* (1978) 141 CLR 182 at 193.

<sup>73</sup> *Hsing v Rankin* (1978) 141 CLR 182 at 193.

<sup>74</sup> *Fisheries Act* 1952 (Cth), s 13AB.

<sup>75</sup> See, eg, *Cheng v The Queen* (2000) 203 CLR 248 at 295-296 [144]-[145] per McHugh J.

The term referred to the accusation of the grand jury found as a true bill<sup>76</sup>. Both felonies and misdemeanours were Pleas of the Crown prosecuted on indictment in the name of the Crown. The accused was arraigned on the indictment and required to plead to it. An accused who entered a plea of "not guilty" was taken to have "put himself on the country"<sup>77</sup> for trial and a jury was empanelled to try the case. This was distinct from the provision made under various statutes for the prosecution of minor offences in the name of the private informant and before justices of the peace or magistrates.

The mechanism of the grand jury was considered unsuited to the colony of New South Wales in its early days. The *New South Wales Act 1823 (Imp)* (4 Geo IV, c 96) made provision for "all crimes misdemeanours and offences" to be prosecuted on information by the Attorney-General or such other officer as may be duly appointed. The method of initiating criminal proceedings in the higher courts by filing an accusation, variously described as an indictment, information or presentment and signed by the Attorney-General or a Crown Prosecutor, was found to be convenient, and the grand jury procedure did not take firm root in

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<sup>76</sup> The grand jury or jury of presentment comprised 23 persons summonsed by the sheriff to consider whether there were grounds for suspicion that the person presented had committed an offence. By majority the grand jury returned the presentment endorsed as a "true bill" upon which the accused was put on his trial or "ignore" upon which no further proceedings were taken: Holdsworth, *A History of the English Law*, 7th ed (rev) (1956) vol 1 at 321-323.

<sup>77</sup> The verdict of the jury was the verdict of a *pays* or "country", a *persona ficta* signifying a community or neighbourhood. Litigants consented to the verdict of the jury and hence they "put themselves upon the jury, or country, for trial". This history is reflected in statutory provisions of which s 154 of the *Criminal Procedure Act 1986 (NSW)* is an example. It provides: "If an accused person arraigned on an indictment pleads "not guilty", the accused person is taken to have put himself or herself on the country for trial, and the court is to order a jury for trial accordingly." The history is explained in Pollock and Maitland, *History of English Law*, 2nd ed (1898) vol 2 at 623-624.

any of the colonies<sup>78</sup>. Colonial statutes provided for the summary trial of a range of minor offences.

Dixon and Evatt JJ recited this history and concluded that historically, offences punishable by imprisonment were prosecuted upon indictment and should therefore be seen as within the constitutional guarantee<sup>79</sup>. Murphy J inclined to that view<sup>80</sup>. However, his Honour would have allowed an offence not punishable by imprisonment for more than six months to be tried summarily. Deane J took into account the range of offences punishable summarily at the time of Federation as indicative that offences punishable by imprisonment for one year or more should be subject to the constitutional guarantee<sup>81</sup>. His central point was that the determination of the limits beyond which a charge cannot properly be dealt with summarily is a matter for judicial determination and not legislative policy<sup>82</sup>. In this regard, as his Honour observed, in 19th century legislation it was common for a justice or magistrate to determine whether a particular charge was "fit" to "be disposed of summarily"<sup>83</sup>.

The difficulty of giving a fixed meaning to the words "trial on indictment" was recognised by the Judicature Sub-Committee

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<sup>78</sup> *R v McKaye* (1885) 6 NSW 123 at 130 per Martin CJ.

<sup>79</sup> *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 582-584.

<sup>80</sup> *Hsing v Rankin* (1978) 141 CLR 182 at 201-202.

<sup>81</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 319.

<sup>82</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 310-311.

<sup>83</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 310, citing *Hall v Braybrook* (1956) 95 CLR 620 at 630-632 per Dixon CJ, 649-650 per Fullagar J.

of the Australian Constitutional Convention in 1985<sup>84</sup>. The Committee was unable to formulate a satisfactory standard to differentiate those offences which might properly be dealt with summarily from those that should be subject to the constitutional guarantee<sup>85</sup>. It noted that one option would be to remove the provision altogether. However, for the reason that Professor La Nauze surmised the framers left s 80 in the final draft, the Committee also reported there would be obvious difficulties standing in the way of a referendum campaign to repeal the provision. It considered that the only satisfactory alternative was to leave the provision in its present form for the time being<sup>86</sup>.

### Defining the offence

In *Lowenstein* Dixon and Evatt JJ saw the difficulty of s 80 as lying in the words "trial on indictment" and not the words "any offence"<sup>87</sup>. In the event, it has been the interpretation of

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<sup>84</sup> Australian Constitutional Convention, Judicature Sub-Committee, *Second Report to Standing Committee*, (1985) Ch 4.

<sup>85</sup> The Constitutional Convention was replaced by the Constitutional Commission in 1985. The Advisory Committee on the Australian Judicial System under the chairmanship of D F Jackson QC prepared a report in May 1987, which included a chapter on trial by jury. The report recommended that s 80 should be amended to make it an effective guarantee respecting offences properly described as "serious". It considered the most practical line to draw was at offences punishable by more than two years' imprisonment. It proposed that the guarantee should extend equally to trial for offences against the laws of the States and Territories: Australia, Constitutional Commission, Australian Judicial System Advisory Committee, *Report*, (1987) at [6.13]-[6.14]. The four proposals for constitutional change submitted for determination by referendum on 3 September 1988 included that the guarantee of trial by jury be clarified and extended to the States. The proposal was not carried nationally or in any State.

<sup>86</sup> Australian Constitutional Convention, Judicature Sub-Committee, *Second Report to Standing Committee*, (1985) at [4.9].

<sup>87</sup> (1938) 59 CLR 556 at 581.

"offence" which has posed the more lively threat to the "right" to trial by jury for serious offences. The Court divided over the question in *Kingswell v The Queen*<sup>88</sup>. The issue was raised by the drafting technique used in the *Customs Act* 1901 (Cth) of providing for offences involving importation of narcotic goods<sup>89</sup>. Section 233B(1)(cb) created the offence of conspiring to import narcotic goods and provided that a person convicted of the offence was subject to punishment as provided by s 235. Under s 235(2) the maximum sentence in a case in which the court was satisfied of the specified circumstances of aggravation was life imprisonment. A lesser maximum penalty applied in a case in which the court was not satisfied of the circumstances of aggravation.

Mr Kingswell was convicted after trial by jury of a s 233B(1)(cb) offence. The sentencing judge was satisfied of the presence of the matters of aggravation and sentenced Mr Kingswell on the basis that the maximum penalty for his offence was life imprisonment. Mr Kingswell argued that "offence" in s 80 refers to the combination of facts that make the accused liable to a criminal penalty. He contended that, if by the addition of a further ingredient a person is made liable to an increased penalty, there is a different offence, and that the further ingredient could only be established by the finding of a jury<sup>90</sup>. The majority rejected Mr Kingswell's argument. Their Honours considered that

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<sup>88</sup> (1985) 159 CLR 264.

<sup>89</sup> Offences arising out of the importation of prohibited drugs are now provided under the *Criminal Code* (Cth).

<sup>90</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 266.

the law does not require the Parliament to include, in the definition of an offence, any circumstance the existence of which exposes the offender to a maximum penalty greater than the penalty that might have been imposed if the circumstance did not exist<sup>91</sup>. Brennan J, in dissent, said that s 80 is a constitutional guarantee of trial by jury and said that it followed that the term "offence" is not left to be defined by Parliament<sup>92</sup>. His Honour considered that if liability to greater punishment depends upon establishment of a factual ingredient, that ingredient is an element of the offence to be proved at trial to the satisfaction of the jury<sup>93</sup>. Deane J reiterated his view that the dissenting judgment in *Lowenstein* should be accepted as correct<sup>94</sup>. In his view Mr Kingswell was entitled to have the jury determine each of the factual ingredients which exposed him to the penalty under s 235(2)(c).

The potential threat to the institution of trial by jury posed by the drafting technique discussed in *Kingswell* has been ameliorated by the practice of pleading the circumstances of aggravation in the indictment and requiring the prosecution to prove those matters to the satisfaction of the jury<sup>95</sup>. An application to reconsider *Kingswell* was refused in *Cheng*. Gleeson CJ, Gummow and Hayne JJ, acknowledged that some issues of construction presented by s 80 may still be open for

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<sup>91</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 276 per Gibbs CJ, Wilson and Dawson JJ.

<sup>92</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 292.

<sup>93</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 293.

<sup>94</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 318-319.

<sup>95</sup> *R v Meaton* (1986) 160 CLR 359 at 363-364 per Gibbs CJ, Wilson and Dawson JJ.

debate<sup>96</sup>. Nonetheless, in light of the practice of charging and trying the circumstance of aggravation the occasion to reconsider *Kingswell* might not arise<sup>97</sup>.

In practice, the "sterile" interpretation of the words "trial on indictment" or "any offence" has not led to an erosion of trial by jury for offences properly viewed as indictable offences. It remains that the conclusion, that the subject to which s 80 is directed is the freedom of the Parliament to choose which offences are to be tried by jury<sup>98</sup>, is not entirely satisfying. Why confer this freedom on the Parliament when its power to determine whether an offence was indictable was not in doubt and the only mode of trial in such a case was by jury?

#### A non rights-based purpose for s 80

A faint suggestion that constitutional warrant was needed for trial by jury of offences against Commonwealth law is found in the Commonwealth's argument in *Brown v The Queen*<sup>99</sup>. Michael Brown was presented for trial in the Supreme Court of South Australia on an information charging him with a *Customs Act* 1901 (Cth) offence. He sought to avail himself of the then novel procedure under the South Australian jury statute of electing to be tried by judge alone<sup>100</sup>. The trial judge ruled that s 80 precluded

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<sup>96</sup> *Cheng v The Queen* (2000) 203 CLR 248 at 262 [29].

<sup>97</sup> *Cheng v The Queen* (2000) 203 CLR 248 at 268 [48].

<sup>98</sup> *Cheng v The Queen* (2000) 203 CLR 248 at 295 [141] per McHugh J.

<sup>99</sup> (1986) 160 CLR 171.

<sup>100</sup> *Juries Act* 1927 (SA), s 7(1).

the making of that election in the case of an offence against Commonwealth law. Following his conviction Brown appealed to the Full Court of the Supreme Court contending that the ruling was wrong. This aspect of the proceeding was removed into the High Court<sup>101</sup>.

The principal argument of the Commonwealth, which intervened in support of *Brown*, was that s 80 guarantees to the accused the right or privilege to trial by jury for an offence tried on indictment and that this did not preclude the voluntary and informed waiver of that right or privilege. The Commonwealth also submitted that s 80 had been devised, at least in part, in response to doubts that "the Commonwealth common law" might not bring with it the right to trial by jury, which had not been introduced on settlement as part of the common law<sup>102</sup>. Neither the majority nor the dissentients found it necessary to deal with the argument. The judgment of Forbes CJ in *R v Magistrates of Sydney*<sup>103</sup> may call into question the assumption on which the argument is based.

The judgments in *Brown* highlight an important distinction between the conception of s 80 as a guarantee of individual rights and the conception of s 80 concerned with the functioning of the judicial arm of government. The majority favoured the latter analysis. The dissentients, Gibbs CJ and Wilson J, approached s 80 as a provision enacted for the benefit and protection of the

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<sup>101</sup> *Judiciary Act* 1903 (Cth), s 40(1).

<sup>102</sup> *Brown v The Queen* (1986) 160 CLR 171 at 173.

<sup>103</sup> [1824] NSWKR 3.

accused. Viewing the section in this way, as a right or privilege, their Honours held that it was appropriate to allow for its informed and voluntary waiver<sup>104</sup>.

The majority held that s 80 precludes an accused from making an election for trial by judge alone. Although they differed in their reasons for that conclusion, each saw s 80's insistence on trial by jury in the case of offences tried on indictment as concerned with more than the conferral of a right or privilege on the individual accused. Brennan J rested his conclusion on the common law history of trial by jury, noting that after trial by ordeal ceased, trial by jury became the only mode of trial. Far from permitting waiver of trial by jury, his Honour pointed out that the common law of England had for centuries compelled the accused to plead, thereby putting himself "upon the country"<sup>105</sup>. His Honour saw s 80 as entrenching the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence. The provision, he said, is not concerned with a mere matter of procedure, but, rather, with the constitution or organisation of any court exercising that jurisdiction<sup>106</sup>.

Deane J reiterated his view that s 80 is a guarantee against the arbitrary determination of guilt, but his Honour differed from the dissentients in holding that the guarantee is for the benefit of

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<sup>104</sup> *Brown v The Queen* (1986) 160 CLR 171 at 178 per Gibbs CJ, 189 per Wilson J.

<sup>105</sup> *Brown v The Queen* (1986) 160 CLR 171 at 196, citing Holdsworth, *A History of English Law*, 7th rev ed (1956) vol 1 at 326-327.

<sup>106</sup> *Brown v The Queen* (1986) 160 CLR 171 at 197.

the community as a whole as well as the individual accused<sup>107</sup>. The prescription of trial by jury as the method of trial on indictment of any Commonwealth offence, in Deane J's view, was an element of the structure of government and the distribution of judicial power adopted for the benefit of the people of the Federation as a whole<sup>108</sup>.

The determinative consideration for Dawson J was that the only mode of trial at common law for indictable offences was by jury and that waiver was unknown<sup>109</sup>. In his Honour's view, the location of s 80 in Ch III was indicative that trial by jury for indictable offences was intended to form part of the structure of government rather than to grant a privilege to the accused<sup>110</sup>. He put it this way<sup>111</sup>:

"Dixon and Evatt JJ in their dissenting judgment in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*, thought that s 80 was such an exception but did not turn their attention to the ultimate scope of s 80, which is not limited to individual privilege. The privilege which it does confer is contained within the wider prescription of trial by jury in all prosecutions upon indictment. It is thus that the section spells out positively, and not by way of restriction, the method by which a particular function is to be performed. Notwithstanding that it may operate to secure a privilege, s 80 speaks in terms of function rather than freedom." (citations omitted)

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<sup>107</sup> *Brown v The Queen* (1986) 160 CLR 171 at 201.

<sup>108</sup> *Brown v The Queen* (1986) 160 CLR 171 at 202.

<sup>109</sup> *Brown v The Queen* (1986) 160 CLR 171 at 211, citing Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 280.

<sup>110</sup> *Brown v The Queen* (1986) 160 CLR 171 at 214.

<sup>111</sup> *Brown v The Queen* (1986) 160 CLR 171 at 214.

The jury exercising the judicial power of the Commonwealth?

The majority reasons in *Brown*, particularly those of Brennan and Dawson JJ, provide a foundation for the analysis of s 80 that has been proposed by Stellios<sup>112</sup>. Stellios suggests that s 80 serves to regulate the exercise of Commonwealth judicial power in trials on indictment prosecuted in federal courts. The argument draws on the statement in the joint reasons in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*<sup>113</sup>:

"There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth."

In Stellios' analysis, absent s 80, the lay members of a jury could not exercise the exclusively judicial power of adjudging guilt<sup>114</sup>. The thesis does not depend upon considerations of history. It is an analysis provoked by the Court's modern Ch III jurisprudence. Stellios seeks to provide a coherent explanation for s 80 which does not depend on a rights-protective foundation.

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<sup>112</sup> Stellios, "The Constitutional Jury – 'A Bulwark of Liberty?'" (2005) 27 *Sydney Law Review* 113.

<sup>113</sup> Stellios, "The Constitutional Jury – 'A Bulwark of Liberty?'" (2005) 27 *Sydney Law Review* 113 at 134, citing (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ (Mason CJ generally agreeing on this point).

<sup>114</sup> Stellios, "The Constitutional Jury – 'A Bulwark of Liberty?'" (2005) 27 *Sydney Law Review* 113 at 136.

The jury is a constituent element of the Court trying an offence on indictment. The idea that the jury, as distinct from the Court, exercises judicial power is controversial. In *Huddart, Parker & Co Pty Ltd v Moorehead* Isaacs J characterised the essence of s 80 as the requirement that "a jury, and not a judicial officer, shall pronounce upon the guilt or innocence of the accused"<sup>115</sup>. In context, this was no more than the conventional recognition of the jury's exclusive function of determining the facts<sup>116</sup>. The finding of the facts is an essential step in the exercise of the sovereign power to decide the controversy<sup>117</sup>. In the trial of a civil action by jury, the controversy is quelled by the judgment of the court: "a verdict on facts should, as a matter of the practice of the court, be regarded as a matter merely preliminary to judgment, and not as a judgment of the court"<sup>118</sup>. In a criminal trial, while the judge may not refuse to accept the verdict, it remains that as in a civil trial, legal effect is given to the verdict by the court. At Federation, conviction following trial by jury was not final until judgment because it might have been quashed on a motion in arrest of judgment<sup>119</sup>.

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<sup>115</sup> (1909) 8 CLR 330 at 386.

<sup>116</sup> See, eg, *Brown v The Queen* (1986) 160 CLR 171 at 196-197 per Brennan J.

<sup>117</sup> *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffiths CJ; *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

<sup>118</sup> *Musgrove v McDonald* (1905) 3 CLR 132 at 141-142; and see *Tronson v Dent* (1853) 8 Moo PCC 419 at 442 [14 ER 159 at 168].

<sup>119</sup> *Griffiths v The Queen* (1977) 137 CLR 293 at 315 per Jacobs J, citing Russell, *A Treatise on Crimes and Misdemeanours*, 2nd ed (1828), vol 2 at 594.

Brennan J put it this way in *Brown*<sup>120</sup>:

"the issues joined between the Crown and the accused are determined by the verdict of a jury and, once the verdict is accepted, the judgment of the court is founded on and conforms with that verdict".  
(citations omitted)

The insistence that the judicial power of the Commonwealth be vested only in Ch III courts has been to ensure that judicial power would be exercised by those courts acting as courts "with all that that notion essentially requires"<sup>121</sup>. The Constitution is informed by the common law, including that which forms "part of the exercise of judicial power as understood in the tradition of English law"<sup>122</sup>. At Federation the common law institution of trial by jury applied in all the Australian colonies as the only method of trial of serious criminal offences<sup>123</sup>. To posit s 80 as necessary to permit lay jurors to carry out their ancient constitutional function of determining the facts under the superintendence of the trial judge may be to substitute one "queer intention"<sup>124</sup> for another.

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<sup>120</sup> (1986) 160 CLR 171 at 196; and see his Honour's analysis in *Nicholas v The Queen* (1998) 193 CLR 173 at 185-191 [13]-[26].

<sup>121</sup> *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 609 per Deane J.

<sup>122</sup> *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 395 [19], citing *R v Davison* (1954) 90 CLR 353 at 368 per Dixon CJ and McTiernan J.

<sup>123</sup> *Cheatle v The Queen* (1993) 177 CLR 541 at 549, citing Castles, *An Australian Legal History*, (1982); Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Sup) 49 at 66.

<sup>124</sup> *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 581.

### Section 80: A limit on the exercise of judicial power

A more satisfying rationale, that does not depend upon a rights protective foundation, builds on *Brown* and may be found in Gaudron J's analysis in *Cheng*<sup>125</sup>. Her Honour characterised s 80 as a constitutional command limiting judicial power by preventing the trial of indictable offences by judge alone. 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. Respect for each is enhanced by placing the determination of criminal guilt in the hands of ordinary members of the community.

Other States have followed South Australia's example in making provision for the accused to elect to be tried by judge alone. In some jurisdictions the prosecution must agree to that course. In New South Wales the court may order trial by judge alone over the prosecution's opposition<sup>126</sup>. I do not propose to discuss the merits of trial by judge alone. It is sufficient to observe that it is not an option in the case of Commonwealth offences tried on indictment. No matter how much the accused may desire to have his or her guilt determined by a judge alone, and no matter how much the interests of justice in an individual case may favour that course, s 80 stands in the way. McHugh J rightly points out that the inability to waive the constitutional

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<sup>125</sup> (2000) 203 CLR 248 at 277-278 [78]-[82].

<sup>126</sup> *Criminal Procedure Act 1986* (NSW), s 132(4).

guarantee is no boon to the accused<sup>127</sup>. Not uncommonly, the accused would prefer the verdict of a judge to that of 12 of his or her peers.

Far from being a constitutional remnant, the command in s 80 denies to those tried on indictment for Commonwealth offences any capacity to dispense with trial by jury. Trial by jury is necessarily a cumbersome mode of trial that imposes considerable costs on the community and on the accused. Without questioning that it is the appropriate mode of trial for serious offences, it should not be overlooked that were the interpretation favoured by Dixon and Evatt JJ in *Lowenstein* adopted, a very large number of relatively minor offences would be subject to trial by jury, a consequence burdensome for many accused.

In light of *Brown*, s 80 can be seen as reflecting a judgment about the peculiar legitimacy of the verdict of the jury on a trial on indictment and the importance of community participation in the administration of Commonwealth criminal law. Critically, s 80 entrenches the essential features of the institution of trial by jury as understood under the common law at Federation<sup>128</sup>. Given the various and far-reaching statutory

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<sup>127</sup> *Cheng v The Queen* (2000) 203 CLR 248 at 299 [150].

<sup>128</sup> *Cheatle v The Queen* (1993) 177 CLR 541 at 549, citing *The King v Snow* (1915) 20 CLR 315 at 323 per Griffith CJ; *Brownlee v The Queen* (2001) 207 CLR 278 at 284 [5] per Gleeson CJ and McHugh J, 298 [54] per Gaudron, Gummow and Hayne JJ; *Ng v The Queen* (2003) 217 CLR 521 at 526 [9] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

modifications to the procedure of trial by jury enacted by the States and Territories, s 80 has assumed increasing importance.

### The essential features of the institution

In *Cheatle v The Queen*, the provision of the South Australian jury statute<sup>129</sup> which permits the return of a majority verdict was held to be inconsistent with s 80 and for that reason it was not picked up by s 68(1) of the *Judiciary Act* 1903 (Cth). Notwithstanding the absence of provision in any colonial legislation requiring unanimity, the Court considered that a basic principle of the administration of criminal justice in each of the colonies at the time of Federation was that the verdict of a jury in a criminal trial could be returned only by agreement of all the jurors<sup>130</sup>. The Court pointed to the difference between a deliberative process in which a verdict is the product of consensus and one in which a specified number of jurors can override any dissent and return a majority verdict<sup>131</sup>. It also noted the view of the Supreme Court of Canada that the jury exists as a collectivity and not as a group of individuals<sup>132</sup>.

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<sup>129</sup> *Juries Act* 1927 (SA), s 57.

<sup>130</sup> *Cheatle v The Queen* (1993) 177 CLR 541 at 551.

<sup>131</sup> *Cheatle v The Queen* (1993) 177 CLR 541 at 552.

<sup>132</sup> *Cheatle v The Queen* (1993) 177 CLR 541 at 552, citing *R v Bain* [1992] 1 SCR 91 at 128 per Gonthier, McLachlin and Iacobucci JJ.

The latter idea has a long pedigree. Pollock and Maitland explained the history this way<sup>133</sup>:

"[t]he verdict of the jurors is not just the verdict of twelve men; it is the verdict of a *pays*, a 'country', a neighbourhood, a community. ... especially in criminal procedure, the voice of the twelve men is deemed to be the voice of the country-side ... The justices seem to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the country." (citations omitted)

The determination of the essential features of the institution of trial by jury has served to highlight differences in approach to constitutional interpretation. They are exemplified in *Brownlee v The Queen*<sup>134</sup>. *Brownlee* involved a challenge to two provisions of the New South Wales statute: permitting the discharge of one or more jurors provided the number is not reduced below 10 and permitting the jury to separate during retirement<sup>135</sup>. Kirby J stated his view that constitutional expressions should be given a contemporary meaning befitting the character of a national basic law which must apply to new, unforeseen and possibly unforeseeable circumstances<sup>136</sup>. His Honour observed that the framers of the Constitution would not have contemplated separation during deliberation, a circumstance which was

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<sup>133</sup> Pollock and Maitland, *History of English Law*, 2nd ed (1898) vol 2 at 624.

<sup>134</sup> (2001) 207 CLR 278.

<sup>135</sup> *Jury Act 1977* (NSW), ss 22 and 54(b).

<sup>136</sup> *Brownlee v The Queen* (2001) 207 CLR 278 at 320 [123].

suggested to illustrate the dilemma for those adhering to "the 1900 criterion in construing our Constitution"<sup>137</sup>.

In the event, the Court was unanimous in holding that the provisions of the New South Wales statute did not trench on the essential characteristics of trial by jury. The other members of the Court came to that conclusion against the background of the functions of the institution at the time of Federation. As Gleeson CJ and McHugh J pointed out in their joint reasons, if the meaning of trial by jury were to be determined solely by reference to contemporary standards there would be nothing to argue about: contemporary standards are reflected in the jury statutes<sup>138</sup>. Their Honours acknowledged that s 80 speaks continually to the present and operates in and upon contemporary conditions, but said that this is not to ignore how the provision is to be construed in the light of its history and the common law.

Gaudron, Gummow and Hayne JJ in their joint reasons looked to the function served by sequestration, concluding that its purpose was directed to ensuring the jury's deliberations were uninfluenced by an outsider to the trial process<sup>139</sup>. Permitting the number of jurors to be reduced to 10 did not deny the

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<sup>137</sup> *Brownlee v The Queen* (2001) 207 CLR 278 at 325 [133], noting the further illustrations in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 522-525 [110]-[118] per Kirby J.

<sup>138</sup> *Brownlee v The Queen* (2001) 207 CLR 278 at 285-286 [9]-[11].

<sup>139</sup> *Brownlee v The Queen* (2001) 207 CLR 278 at 302 [65]-[67].

representative character of the jury<sup>140</sup>. However, a "real question"<sup>141</sup> would arise as to whether the trial of a Commonwealth offence might continue with a jury reduced to below 10 members<sup>142</sup>.

### Double jeopardy

The reach of Commonwealth criminal law has been extended very greatly in recent years. Each of the States has modified the common law rules against double jeopardy. New South Wales, South Australia and Western Australia have each conferred a right of appeal against a directed verdict of acquittal<sup>143</sup>.

In *R v LK*<sup>144</sup> the respondents unsuccessfully contended that the provision of the New South Wales statute conferring jurisdiction on the Court of Criminal Appeal to entertain an appeal by the Director of Public Prosecutions against a directed verdict of acquittal was not picked up by s 68(2) of the *Judiciary Act* 1903 (Cth) because it was inconsistent with s 80. They relied on *The King v Snow* for the proposition that the finality of a verdict of acquittal, even a directed verdict of acquittal, is an

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<sup>140</sup> *Brownlee v The Queen* (2001) 207 CLR 278 at 303 [71].

<sup>141</sup> *Brownlee v The Queen* (2001) 207 CLR 278 at 304 [73].

<sup>142</sup> As is provided for in *Jury Act* 1977 (NSW), s 22(a)(iii).

<sup>143</sup> *Crimes (Appeal and Review) Act* 2001 (NSW), s 107; *Criminal Law Consolidation Act* 1935 (SA), s 352(1)(ab)(ii); *Criminal Appeals Act* 2004 (WA), s 24(2)(e)(i).

<sup>144</sup> (2010) 241 CLR 177.

essential function of trial by jury protected by s 80<sup>145</sup>. As explained in *LK*, the question in *Snow* was not whether a law of the Commonwealth could validly authorise an appeal against a directed verdict of acquittal but whether s 73 of the Constitution authorised such an appeal<sup>146</sup>.

French CJ, with whose reasons the other members of the Court agreed, observed that *Snow* did not establish authoritatively that s 80 required s 73 to be read as excluding appeals against acquittals and a fortiori it did not determine the question respecting a directed verdict of acquittal on an indictment for an offence against Commonwealth law<sup>147</sup>. His Honour noted that although s 80 was modelled on Art III, s 2(3) of the Constitution of the United States, it did not incorporate a protection against double jeopardy as found in the Fifth and Seventh Amendments of the United States Constitution<sup>148</sup>.

Reference is made in *LK* to the commentary on s 80 in Quick and Garran<sup>149</sup>:

"Trial by jury, in the primary and usual sense of the term at common law and the American Constitution, is

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<sup>145</sup> *R v LK* (2010) 241 CLR 177 at 199 [37] per French CJ, citing (1915) 20 CLR 315.

<sup>146</sup> *R v LK* (2010) 241 CLR 177 at 199 [39] per French CJ.

<sup>147</sup> *R v LK* (2010) 241 CLR 177 at 199 [40].

<sup>148</sup> *R v LK* (2010) 241 CLR 177 at 198 [34], citing *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 581 per Dixon and Evatt JJ; *Cheatle v The Queen* (1993) 177 CLR 541 at 556.

<sup>149</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 810, slightly misquoting *Capital Traction Co v Hof* 174 US 1 at 13-14 (1899).

a trial by a jury of 12 men, in the presence and under the superintendence of a judge empowered to instruct them upon the law and to advise them upon the facts, and (except upon acquittal upon a criminal charge) to set aside their verdict if in his opinion it is against the evidence."

French CJ explained that the verdict of acquittal, which the judge could not set aside, clearly was an acquittal following trial<sup>150</sup>.

Each State has made provision in limited circumstances for the Court of Criminal Appeal or a Full Court of a State to order the re-trial of a person who has been acquitted by the verdict of a jury<sup>151</sup>. This approach adopted in each jurisdiction is modelled on the provisions of the English *Criminal Justice Act 2003*<sup>152</sup>. The approach provides for the Director of Public Prosecutions to apply to the appellate court for an order quashing the acquittal and directing a new trial in a case in which fresh and compelling evidence against the acquitted person is available and in which, in all the circumstances, it is in the interests of justice for the order to be made. Provision for the making of like orders is also made respecting "tainted" acquittals.

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<sup>150</sup> *R v LK* (2010) 241 CLR 177 at 198 [35].

<sup>151</sup> *Crimes (Appeal and Review) Act 2001* (NSW), ss 100 and 101; *Criminal Code* (Q), ss 678B and 678C; *Criminal Law Consolidation Act 1935* (SA), ss 336 and 337; *Criminal Code* (Tas), ss 393 and 394; *Criminal Procedure Act 2009* (Vic), ss 327L, 327M, 327N and 327O; *Criminal Appeals Act 2004* (WA), s 46H.

<sup>152</sup> See Part 10, "Retrial For Serious Offences".

In *Snow*, Gavan Duffy and Rich JJ identified as one of the benefits incidental to a trial by jury protected by s 80 that the verdict of "not guilty" is conclusive on the issue the jury is sworn to try<sup>153</sup>. The statement was not necessary to the decision. The question of whether a verdict of not guilty returned at the conclusion of a trial that has run its course is inviolate may yet arise for determination.

The right of a jury to return a verdict of not guilty, notwithstanding that the prosecution case has been proved beyond reasonable doubt, is well recognised. Deane J characterised it as the power to "side with a fellow-citizen who is ... being denied a 'fair go'"<sup>154</sup>. Viewed in this light, the inviolability of the verdict of not guilty is the feature of trial by jury that protects against oppression. It is a feature that was at the forefront of the discussion on the jury clause at the Melbourne Convention. Bernhard Wise argued for retention of the clause on the ground that jury nullification of an unpopular Commonwealth law afforded protection to the State and the citizen alike<sup>155</sup>.

### Conclusion

The essential features of the institution of trial by jury that have been acknowledged require that the jury be adequately representative of the community, act as the exclusive arbiter of

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<sup>153</sup> *The King v Snow* (1915) 20 CLR 315 at 365.

<sup>154</sup> *Kingswell v The Queen* (1985) 159 CLR 264 at 301, referencing Knittel and Seiler, "The Merits of Trial by Jury", (1972) 30 *Cambridge Law Journal* 316 at 320-321.

<sup>155</sup> *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 354.

the facts, be randomly selected and return a unanimous verdict<sup>156</sup>. Recently, the High Court has considered the incidents of the accusatorial criminal trial<sup>157</sup>. In *Lee v New South Wales Crime Commission* Kiefel J queried whether derogation in a fundamental respect from the accusatorial nature of the trial of a Commonwealth offence would raise an issue of validity under s 80<sup>158</sup>.

Professor Sawyer's estimate that s 80 had proved to be practically worthless has not been confirmed by the decisions of the High Court in the years since that assessment was made.

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<sup>156</sup> *Cheatle v The Queen* (1993) 177 CLR 541.

<sup>157</sup> *X7 v Australian Crime Commission* (2013) 87 ALJR 858; 298 ALR 570; *Lee v New South Wales Crime Commission* [2013] HCA 39.

<sup>158</sup> [2013] HCA 39 at [177].