HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

YU SHING CHENG APPLICANT

AND

THE QUEEN RESPONDENT

Cheng v The Queen [2000] HCA 53
5 October 2000
A8/1999

ORDER

Application dismissed.

On appeal from the Supreme Court of South Australia

Representation:

T A Gray QC with G J S Mancini, S F Stretton and S J Doyle for the applicant (instructed by George Mancini & Co)

M F Gray QC with F Propsting for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Intervener:

D M J Bennett QC, Solicitor-General of the Commonwealth with M Sloss intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

GANG CHENG APPLICANT

AND

THE QUEEN RESPONDENT

Cheng v The Queen
5 October 2000
A9/1999

ORDER

Application dismissed.

On appeal from the Supreme Court of South Australia

Representation:

T A Gray QC with G J S Mancini, S F Stretton and S J Doyle for the applicant (instructed by McGee & Associates)

M F Gray QC with F Propsting for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Intervener:

D M J Bennett QC, Solicitor-General of the Commonwealth with M Sloss intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

BACH AN CHAN APPLICANT

AND

THE QUEEN RESPONDENT

Chan v The Queen
5 October 2000
A25/1999

ORDER

Application dismissed.

On appeal from the Supreme Court of South Australia

Representation:

T A Gray QC with G J S Mancini, S F Stretton and S J Doyle for the applicant (instructed by George Mancini & Co)

M F Gray QC with F Propsting for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Intervener:

D M J Bennett QC, Solicitor-General of the Commonwealth with M Sloss intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Cheng v The Queen

Constitutional law (Cth) – Trial by jury – Trial on indictment for offence against law of the Commonwealth – Pleas of guilty following rejection of demurrer raising constitutional objection to information – Whether any issue for trial – Whether any infringement of s 80 of Constitution.

Customs – Offences – Prohibited imports – Narcotic goods – Differential punishment for trafficable and commercial quantities – Whether elements of offence – Whether in a trial on indictment must be decided by jury – Requirements of s 80 of Constitution.

Words and phrases – "trial on indictment", "any offence", "Court".

Constitution, s 80.
Customs Act 1901 (Cth), ss 233B, 235.

1 GLEESON CJ, GUMMOW AND HAYNE JJ. These three applications for special leave to appeal against a decision of the South Australian Court of Criminal Appeal[1] have been referred to the Full Court of this Court for hearing.

2 All three applications involve a challenge to the validity of the provisions of the *Customs Act* 1901 (Cth) under which the applicants were convicted and sentenced. In addition, the first two applicants, Yu Shing Cheng and Gang Cheng, rely upon an argument concerning the manner in which certain facts, said to be relevant to sentence, were dealt with by the Court of Criminal Appeal. It is convenient to consider first the principal issue, which is common to all three applications, and, for that purpose, to examine the facts of the cases, and the course of proceedings in the Supreme Court of South Australia.

The facts

3 In circumstances which will be described in more detail below, each applicant pleaded guilty to the offence of being knowingly concerned in the importation of a prohibited import.

4 Subject to a matter going to the subsidiary issue, the facts were not in dispute. The following summary is taken from the remarks on sentence made by Debelle J.

5 In November 1997, a quantity of 13,462 grams of heroin powder, of approximately 70 percent purity, said to have a street value of more than $13 million, arrived in Adelaide by air from Bangkok. Its ultimate destination was Sydney. The heroin was contained in five marble pedestals. The column of each pedestal was hollow, and filled with heroin. The pedestals were packed in five crates. On arrival in Adelaide, the crates attracted the attention of the authorities. The crates were opened and the pedestals were removed. Heroin was found inside. Federal police officers removed the heroin and replaced it with substitute powder, and then repacked the pedestals. Listening devices were placed in two crates and in one pedestal.

6 The crates were addressed to the first applicant, Yu Shing Cheng. The third applicant, Bach An Chan, had persuaded the first applicant to agree to be the person to whom the imported goods were addressed.

7 The first applicant went to the airport, and arranged for the crates to be delivered to his home address. The third applicant was informed of their arrival,

---

1 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502.

and went with another person to collect the crates from the first applicant's flat. On the following day, the second applicant rented a motor vehicle, and, on the day after that, he and another person drove the vehicle, with the crates loaded on board, to Sydney. In the meantime, the third applicant had flown to Sydney to meet the crates when they arrived there.

8 The second and third applicants were arrested in Sydney. The first applicant was arrested in Adelaide.

9 The first applicant maintained that he was unaware, when he went to the airport, that the imported goods, which had been addressed to him, and which he had agreed to collect, consisted of a large quantity of heroin. He said that he thought what was involved was only two small parcels of cocaine. He was to be paid $6,000 for his involvement.

10 The second applicant, who was to be paid $3,000, admitted that he knew drugs were involved, but said he did not know the quantity or nature of the drugs.

11 The third applicant was found to have had a substantial organisational role in the operation, and to have been more culpable than the first and second applicants.

The course of proceedings

12 The three applicants, and two other men, were jointly charged by an information laid by the Commonwealth Director of Public Prosecutions, which is agreed to have the status of an indictment. There were two counts in the indictment, but when pleas of guilty to the first count were entered by the three applicants, a nolle prosequi was filed in relation to the second count, which was an alternative charge.

13 The first count in the indictment was expressed as follows:

> "BEING KNOWINGLY CONCERNED IN THE IMPORTATION OF A PROHIBITED IMPORT
>
> (Section 223B(1)(d) Customs Act 1901)
>
> PARTICULARS OF OFFENCE
>
> SIU KEI ENG, YU SHING CHENG, BACH AN CHAN, SHIH-CHANG HSU AND GANG CHENG, between 1st day of November 1997 and the 9th day of November 1997 at Adelaide and other places in the said State, were knowingly concerned in the importation into Australia of a

prohibited import to which Section 233B of the *Customs Act* 1901 applies, namely about 9350 grams of heroin, being not less than the commercial quantity."

14 In the course of pre-trial proceedings, counsel for all five accused indicated an intention to raise an argument that s 233B(1)(d) of the *Customs Act* was invalid by reason of the provisions of s 80 of the Constitution. If that argument were correct, then the offence charged in the indictment was not an offence known to law. It was agreed that the appropriate course was to treat the argument as a demurrer to the indictment.

15 The notes on the indictment record the following sequence of events. On 2 November 1998, at a pre-trial hearing before Debelle J, after first arraignment, but before a jury was empanelled, the demurrer to the indictment was foreshadowed. Argument on the demurrer was heard on 6 November. Debelle J overruled the demurrer. All five accused were then re-arraigned. At that stage, the three applicants entered pleas of guilty. The two co-accused entered pleas of not guilty. A jury was empanelled, and the trial of the two co-accused proceeded until 13 November, when the jury acquitted the two co-accused. The jury was discharged. The sentencing proceedings of the three applicants commenced on 24 November and continued intermittently until 3 December. On 3 December the applicants were sentenced.

16 At no stage, following the applicants' pleas of guilty, did anyone suggest that there was any issue to be tried by a jury. As will appear, there was no issue as to any of the facts alleged in the indictment, either in the count or in the particulars.

17 The record of the sentencing proceedings indicates that, by consent, account was taken of a good deal of the evidence that had been given in the course of the trial of the two co-accused who pleaded not guilty. What had emerged at the trial gave a picture of the transaction which was, for the purpose of the sentencing proceedings, largely undisputed. In particular, there was no dispute that heroin was found in the pedestals, or that the quantity and purity was as alleged by the prosecution. Assertions were made from the bar table, by counsel for the first and second applicants, as to their state of knowledge or belief about some aspects of the importation. Those assertions, even if true, did not contradict any fact alleged in the indictment. It was accepted that, as a matter of objective fact, heroin was imported, and the quantity was as alleged in the indictment.

18 Debelle J sentenced the first applicant to imprisonment for 14 years and fixed a non-parole period of 7½ years. He sentenced the second applicant to imprisonment for 13½ years and fixed a non-parole period of 7½ years. He

sentenced the third applicant to imprisonment for 16 years and fixed a non-parole period of 11 years.

19 All three applicants appealed against convictions and sentences. The ground of appeal against conviction was the same point as had earlier been argued in support of the demurrers to the indictment. As to the sentences, it was contended that they were excessive.

20 The appeals against conviction failed. The appeals against sentence succeeded. Bleby J, with whom Doyle CJ and Wicks J agreed, held that the sentences were excessive[2]. The Court of Criminal Appeal resentenced each applicant. The first applicant was sentenced to imprisonment for 9 years, and a non-parole period of 5 years was fixed. The second applicant was sentenced to imprisonment for 10 years, and a non-parole period of 6 years was fixed. The third applicant was sentenced to imprisonment for 13 years, and a non-parole period of 9 years was fixed.

The legislation

21 So far as relevant, s 233B of the *Customs Act* provides:

> "233B(1) Any person who:
>
> …
>
> (d) … is in any way knowingly concerned in, the importation … into Australia of any prohibited imports to which this section applies …
>
> shall be guilty of an offence.
>
> …
>
> (2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods …
>
> (3) A person who is guilty of an offence against subsection (1) of this section is punishable upon conviction as provided by section 235."

22 So far as relevant, s 235 provides:

---

2 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 528.

"235 (1) …

(2) Subject to subsections (3) and (7), where:

(a) a person commits an offence against subsection 231(1), section 233A or subsection 233B(1); and

(b) the offence is an offence that is punishable as provided by this section;

the penalty applicable to the offence is:

(c) where the Court is satisfied:

(i) that the narcotic goods in relation to which the offence was committed:

(A) are a narcotic substance in respect of which there is a commercial quantity applicable; and

(B) consist of a quantity of that substance that is not less than that commercial quantity; or

(ii) that the narcotic goods in relation to which the offence was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to that substance and also that, on a previous occasion, a court has:

(A) convicted the person of another offence, being an offence against a provision referred to in paragraph (a) that involved other narcotic goods which consisted of a quantity of a narcotic substance not less than the trafficable quantity that was applicable to that substance when the offence was committed; or

(B) found, without recording a conviction, that the person had committed another such offence;

imprisonment for life or for such period as the Court thinks appropriate;

(d) where the Court is satisfied that the narcotic goods in relation to which the offence was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to the substance but is not satisfied as provided in paragraph (c):

(i) if the narcotic substance is a narcotic substance other than cannabis – a fine not exceeding $100,000 or imprisonment for a period not exceeding 25 years, or both; or

(ii) if the narcotic substance is cannabis – a fine not exceeding $4,000 or imprisonment for a period not exceeding 10 years, or both; or

(e) in any other case – a fine not exceeding $2,000 or imprisonment for a period not exceeding 2 years, or both.

(3) Where:

(a) the Court is satisfied that the narcotic goods in relation to which an offence referred to in subsection (2) was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to that substance, but is not satisfied as provided in paragraph (c) of that subsection in relation to those narcotic goods; and

(b) the Court is also satisfied that the offence was not committed by the person charged for any purposes related to the sale of, or other commercial dealing in, those narcotic goods;

notwithstanding paragraph (d) of that subsection, the penalty … for the offence is the penalty specified in paragraph (e) of that subsection.

(4) An offence referred to in subsection (1) or (2) may be prosecuted summarily or upon indictment or, where the law of the State or Territory in which the proceedings are

brought makes provision for an offender who pleads guilty to a charge to be dealt with by the Court otherwise than on indictment, the Court may deal with an offender in accordance with that law.

(5) Nothing in subsection (4) renders an offender liable to be punished more than once for the same offence.

(6) Where proceedings for an offence referred to in subsection (1) or (2) are brought in a court of summary jurisdiction, the court may commit the defendant for trial or to be otherwise dealt with in accordance with law or, if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent to it doing so, may determine the proceedings summarily.

(7) Where a court of summary jurisdiction determines proceedings summarily in accordance with subsection (6), it shall not impose a fine exceeding $2,000 or sentence the defendant to imprisonment for a period exceeding 2 years, but may impose both a fine and a period of imprisonment in respect of the offence.

(8) For the purposes of subsections (2) and (3), the narcotic substance of which narcotic goods in relation to which an offence has been committed consist is the narcotic substance that is specified in the relevant information, complaint, declaration, claim or indictment as the narcotic substance of which those goods consist."

23 Schedule VI to the Act provides that a commercial quantity of heroin is 1.5 kilograms.

24 A question of construction of the legislation which bears upon some of the issues raised in argument concerns the content of the expression "knowingly concerned", in s 233B(1), in relation to the quantities referred to in s 235.

25 A person may be knowingly concerned in the importation of heroin without knowing the quantity of heroin involved in the importation. In practice, many people who participate in the illegal importation of heroin would not know the quantity imported, and some would not even know the approximate quantity. Such information may be concealed from them, or it may simply be unnecessary for them to have it. The legislation does not provide that such knowledge is a necessary ingredient of the offence created by s 233B(1), or a necessary condition of being liable for sentence under s 235(2)(c) or (d). The language of

the statute is to the contrary. On sentencing, the facts raised for the court's consideration of its satisfaction under s 235(2)(c), (d) and (e) are objective facts. It is knowledge about the importation of a prohibited import that exposes a person to conviction under s 233B(1). Knowledge of the quantity involved is not required. On the question of penalty, it is the objective fact as to the quantity of narcotic goods in relation to which the offence was committed which, by virtue of s 235, determines the maximum penalty. That is not to say that, when it comes to sentencing, the state of an offender's knowledge or belief as to quantity may not be a factor in determining the actual penalty to be imposed. The scheme of the legislation, assuming validity, is that the objective facts determine the range of possible penalties, but, on ordinary sentencing principles, subjective knowledge or belief as to quantity may be material to a judgment as to the proper sentence to impose.

26 The indictment in the present case is to be read in that light, and in the light of the practice referred to below. It is not to be understood as containing the immaterial allegation that the applicants knew that the quantity of heroin involved in the importation was a commercial quantity. Their assertions as to their knowledge or belief, advanced during the sentencing proceedings, did not put in issue any fact alleged in the indictment.

The challenge to the validity of the legislation

27 If special leave to appeal were granted, the applicants would seek a range of relief. The orders sought in the draft Notices of Appeal include declarations that s 233B(1)(d) (pursuant to which they were charged) and s 235(2)(c) (pursuant to which they were sentenced) are invalid "as being contrary to s 80 of the Constitution", or that these provisions "do not create any offence known to law of the Commonwealth of Australia". The applicants also seek in the alternative orders (i) quashing the indictments and setting aside the convictions and sentences; (ii) setting aside the sentences and providing for resentencing under s 235(2)(e) (which provides for a fine not exceeding $2000, or imprisonment for a period not exceeding two years, or both); or (iii) setting aside the sentences and remitting the applicants "for sentencing according to the facts as found by Debelle J".

28 Section 80 of the Constitution states:

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

29 The text of s 80 gives rise to various issues of construction, some of which are concluded by authority, and others of which may still be open to debate. Before turning to those matters which the applicants would seek to agitate on appeals following grants of special leave, it should be noted that s 80 imposes various imperatives upon trials on indictment of offences against Commonwealth law.

30 For example, if a trial is not held in the State where the offence against Commonwealth law was committed (because the locus of the crime in question is determined not by the place where the physical act causing injury was done – the State of trial – but by the place where the injury was sustained) any conviction would be liable to be set aside on the ground that the trial had not been held in accordance with the command in s 80[3]. This result would not involve any holding that a particular law was invalid for non-compliance with s 80; rather, the trial process itself would have miscarried. On the other hand, a statute which stipulated in respect of trials on indictment of an offence against Commonwealth law a method of trial other than by jury would represent legislative disobedience to the constitutional command and therefore the law would be invalid.

31 One submission by the applicants is that this Court on their applications should re-open the authorities which deny to s 80 the effect of "a fundamental and substantive Constitutional guarantee of trial by jury" and which treat s 80 as not requiring a trial by jury in respect of offences which Commonwealth law does not specify as triable on indictment. In particular, the applicants rely upon the dissenting judgment of Deane J in *Kingswell v The Queen*[4].

32 Another submission which is not interdependent with the first and wider submission (as is demonstrated by the stance taken in *Kingswell* by Brennan J) fixes upon the meaning of "offence" in s 80. It was upon this issue that Brennan J dissented in *Kingswell*[5] whilst accepting the earlier authorities upon the wider submission. The second submission is that "offence" in s 80 is defined by the combination of the elements of the offence and the penalty which that combination attracts.

33 Some reference to the present position in the United States is appropriate. The Sixth Amendment to the Constitution requires that "[i]n all criminal

---

3 cf *Ward v The Queen* (1980) 142 CLR 308.

4 (1985) 159 CLR 264.

5 (1985) 159 CLR 264 at 292-293.

prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury". The term "offence", central to s 80, does not appear. Taken with the "due process of law" requirements of the Fifth and Fourteenth Amendments, the Sixth Amendment has been held to entitle a defendant indicted under federal or State law, to "a jury determination [of guilt] of every element of the crime with which [the defendant] is charged, beyond a reasonable doubt"[6]. This, in turn, led to discussion of the distinction between elements of an offence (to be determined by a jury) and sentencing factors (to be determined by a judge)[7], a distinction which in the United States must now be understood in light of the decision in *Apprendi v New Jersey*[8].

34 In *Apprendi*, the defendant and the prosecution had made a plea agreement whereby the defendant pleaded guilty to three of the 23 counts in the indictment. However, as part of the plea agreement, the prosecution reserved the right to seek from the court a higher sentence than that for which the laws of New Jersey otherwise provided on one of the three counts (count 18). The court had the statutory power to impose a higher or "enhanced" sentence if the offence was committed with a proscribed purpose. The trial judge heard sufficient evidence to establish the defendant's guilt on the three counts and accepted the guilty pleas. Then the judge heard evidence from which the judge concluded that the crime charged in count 18 had been motivated by racial bias so that "the hate crime enhancement applied"; the defendant had contested that he had been motivated in this way and had given evidence on the question himself and led evidence from eight witnesses[9].

35 By majority[10], the Supreme Court of the United States reversed the decision of the New Jersey Supreme Court[11] which had upheld the enhanced sentence. The majority held that in this case the New Jersey laws and procedures fell foul of a constitutional requirement that any fact that increases the penalty for

---

6 *United States v Gaudin* 515 US 506 at 510 (1995).

7 *Castillo v United States* 68 USLW 4475 (2000); *Jones v United States* 526 US 227 (1999); *Almendarez-Torres v United States* 523 US 224 (1998).

8 68 USLW 4576 (2000).

9 68 USLW 4576 at 4577 (2000).

10 Stevens, Scalia, Souter, Thomas and Ginsburg JJ; Rehnquist CJ, O'Connor, Kennedy and Breyer JJ dissenting.

11 731 A 2d 485 (1999).

a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt[12]. Their Honours stressed that this did not mean that it was impermissible for judges to take into account various factors relating both to offence and offender, when exercising a discretion within the range prescribed by statute[13].

36 A majority of this Court held in *Kingswell* that s 233B(1) of the *Customs Act* creates only one offence for which s 235(2) and (3) provides a range of penalties. It follows that acceptance of the applicants' contentions would require reconsideration of *Kingswell*. In particular, it would require examination of whether the relevant offence is defined in s 233B or is defined by a combination of s 233B *and* s 235. However, it should be noted that acceptance of the applicants' submissions would require only the conclusion that the relevant offence must be identified by reference to both s 233B and s 235. It would not require the conclusion that the sections create no offence known to law and there would be no ground for the making of any declaration to that effect.

37 Since *Kingswell* was decided in 1985, courts and prosecuting authorities throughout the Commonwealth have acted on the basis of that decision, and many people have been convicted and sentenced upon the assumption that the law was as declared in *Kingswell*. That is not fatal to the applicants, especially bearing in mind that their attack on *Kingswell* is based upon constitutional grounds. But it is a consideration not lightly to be disregarded.

38 In *Kingswell*, the appellant was charged under s 233B. He entered a plea of not guilty, was tried by a jury, and was convicted. He had previously been convicted of another offence against s 233B(1)(c). He was sentenced on the basis that, by reason of the previous conviction, and by reason of the quantity of heroin involved in the later conviction, s 235(2)(c) governed the penalty. It was argued that the legislative scheme, involving trial before a jury of the issues raised by s 233B, and a decision by a sentencing judge on the issues raised by s 235, contravened s 80 of the Constitution. From the report, it appears that the arguments of all counsel proceeded upon an acceptance of the view as to the meaning and effect of s 80 which has prevailed since Federation, that is to say, that the constitutional requirement of trial by jury only applies where there is a trial on indictment. On that view, the section does not provide that all serious offences shall be tried, on indictment, by a jury; it provides that, if there is to be a trial of an offence on indictment, it shall be by jury. In *Kingswell*, the point

---

12 68 USLW 4576 at 4583 (2000).

13 68 USLW 4576 at 4580 (2000).

argued was that the legislation provided for part of an offence against a law of the Commonwealth to be tried by a judge alone, and was invalid. The outcome of the case turned upon the meaning of the word "offence", and its application to s 233B and s 235.

39 A noteworthy point of difference between *Kingswell* and the present case is that, in the present case, there was no occasion for any trial by jury. The applicants entered pleas of guilty to the offence with which they were charged, and they did not dispute any of the facts alleged in the indictment.

40 In a number of Australian jurisdictions, including South Australia, current criminal trial practice involves a system of pre-trial hearings for purposes of case management. To enable that to occur, there is usually a first arraignment soon after committal. On that occasion, there is usually no jury present, and no expectation that a jury will be empanelled. Depending upon the number of pre-trial hearings, there may be two, or more, arraignments[14]. As an example of what occurs at pre-trial hearings, s 285A of the *Criminal Law Consolidation Act* 1935 (SA) provides that a court before which a person has been arraigned may, if it thinks fit, hear and determine any question relating to the admissibility of evidence, and any other question of law affecting the conduct of the trial, before the jury is empanelled. Pre-trial hearings are commonly used to narrow the issues for trial, and to minimise the time during which, if it becomes necessary to empanel a jury, the jury will be excluded from the courtroom.

41 Having failed to persuade Debelle J to quash the indictment on the ground that the legislation was invalid, the applicants entered pleas of guilty. Section 80 does not require that, where a person who is charged on indictment with an offence against a law of the Commonwealth pleads guilty, there shall be a trial by jury. In the ordinary case, if, instead of contesting a charge, an accused person, by a plea of guilty, enters a formal admission of the elements of the offence, no jury will be empanelled, for there will be no issue for the jury to try.

42 It was suggested in the course of argument that, on one possible view, there could have been a requirement for a jury to determine disputed facts relating to the knowledge or belief of the first two applicants as to the nature and amount of the prohibited import. That suggestion has no relationship to what actually occurred in the present case. Moreover, it is based on an erroneous construction of the legislation and a misinterpretation of the indictment. It was never contended that a jury should have been empanelled to decide anything relevant to sentencing. Following the pleas of guilty, it was accepted on all sides

---

14 See *R v Nicolaidis* (1994) 33 NSWLR 364 at 367.

that there was no function for a jury to perform, and the proceedings were correctly conducted on that basis.

43 Therefore, on the face of it, no command in s 80 was disobeyed in the present case. The applicants were prosecuted on informations having the status of indictments. If s 80 were to be re-interpreted as a constitutional requirement for trial by jury in the case of all serious Commonwealth offences, the occasion for doing so will be in a case, unlike the present, where there was a legislative denial of trial by jury and there arose in the conduct of the prosecution issues susceptible of trial by jury.

44 Nor, in the events that happened, is this an appropriate occasion to re-open *Kingswell* for the purpose of establishing that, in the case of a defendant who pleads not guilty, the statutory scheme mandates a division of functions between jury and sentencing judge which is inconsistent with s 80. For example, it is said that the statute is invalid because it leaves to the sentencing judge, following conviction, the decision as to whether the quantity of heroin involved is a commercial quantity. Here, the applicants pleaded guilty and did not dispute the quantity of heroin imported.

45 The majority in *Kingswell* considered that the statutory scheme was consistent with s 80. The offence was created by s 233B; s 235 provided the range of penalties. The factual matters referred to in s 235 were not elements of the offence. The effect of the decision in *Kingswell* was summarised in *R v Meaton* as follows[15]:

> "In *Kingswell v The Queen* the majority of this Court rejected an argument that the Parliament intended that s 235(2), read together with each paragraph of s 233B(1), should have the effect of creating a number of distinct offences whose elements are to be found described partly in s 233B(1) and partly in s 235(2). It was decided that each paragraph of s 233B(1) creates a separate offence and that the additional matters stated in s 235(2) are relevant to the maximum sentence that may be imposed but are not ingredients of the offence."

However, three of the four members of the majority in *Kingswell*, (Gibbs CJ, Wilson and Dawson JJ), were also of the opinion that, where a prosecutor relies upon circumstances of aggravation of the kind set out in s 235(2), they should be alleged in the indictment, and, if there is a dispute, they should be resolved by a jury, at least where there has been a plea of not guilty and a jury has been

---

15 (1986) 160 CLR 359 at 363 per Gibbs CJ, Wilson and Dawson JJ.

empanelled. (There was a presently immaterial qualification concerning previous offences).

46 The latter subject was taken further in *Meaton*[16], which explains the form of the indictment in the present case. Gibbs CJ, Wilson and Dawson JJ (with the same two dissentients as in *Kingswell*) decided that, in a case such as the present, the indictment should charge the circumstances of aggravation relevant to the application of s 235.

47 No submission has been made that this Court should reconsider, or decline to follow, *Meaton*, except, of course, in so far as it assumes the correctness of *Kingswell*. The applicants seek to challenge *Kingswell*, not *Meaton*. The practice as to the form of an indictment prescribed in *Meaton* was followed in this case. In accordance with *Meaton*, and with South Australian practice, the indictment alleged that a commercial quantity of heroin was involved in the importation. The South Australian practice was explained by the Full Court of the Supreme Court of South Australia in *R v Hietanen*[17]. If, in the present case, there had been a dispute as to the amount of heroin imported then, even though the applicants had entered pleas of guilty, there may have been an issue for determination by a jury. There was no such dispute. (That distinguishes the situation in this case from that in *Apprendi*[18] where there had been a dispute as to the facts necessary to attract the "enhancement" provision.) No issue was joined on any matter requiring resolution by a jury. In *Meaton*[19], the majority explained the various consequences that might flow from the practice to which reference has been made. By reason of the events that occurred, the present case does not provide an occasion for pursuing any problems, theoretical or practical, that might arise in that respect.

48 Further, an occasion to consider the questions presented by the applicants' contentions may be unlikely to arise if there continues the practice of charging and trying the aggravating circumstance of quantity or relevant prior conviction, as proposed in *Kingswell* and approved in *Meaton*. Where there is a trial of the offence and this practice is observed, any issue respecting aggravating circumstances mentioned in s 235 will be tried by jury. There will be no

---

16 (1986) 160 CLR 359.

17 (1989) 51 SASR 510.

18 68 USLW 4576 (2000).

19 (1986) 160 CLR 359 at 364.

disobedience to the command in s 80 and no such disobedience will be mandated by the statutory scheme.

49 We return to the invitation to re-examine what we identified above as the wider issue and to adopt the dissent of Deane J in *Kingswell*. Senior counsel for the applicants invited this Court to treat the present case as an appropriate occasion to reconsider that question. For the reasons that follow, the invitation should be declined. The occasion is inappropriate.

50 First, the decision in *Kingswell*, which is crucial to the outcome of the present case, and which we are asked to reconsider, did not turn upon the point. The point was not in contention in argument. One of the two dissentients in *Kingswell*, Brennan J, accepted, for the purposes of his reasoning, the received view of s 80.

51 Secondly, the present case is even further from the point than *Kingswell*. Here there were pleas of guilty. No issue was joined on any fact alleged in the indictment. There was nothing for a jury to try. In the events that occurred, whatever the content of the guarantee contained in s 80, it was not relevant to the present applicants, because they pleaded guilty.

52 Thirdly, when regard is had to the history of s 80, there is every reason for not embarking upon a consideration of a substantial re-interpretation of it unless and until a case arises which makes it necessary to do so.

53 In 1901 Quick and Garran's *The Annotated Constitution of the Australian Commonwealth* was published. In their commentary on s 80, the learned authors went directly to the point we are asked to re-examine. After referring to the drafting history they wrote[20]:

> "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 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.'"

---

20 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 808.

54 On 4 March 1898, immediately before Mr Isaacs made the statement quoted by Quick and Garran, Mr Barton referred to what was then cl 79, which began: "The trial of all indictable offences against any law of the Commonwealth shall be by jury … ." He moved that the words "of all indictable offences" be struck out, and that the words "on indictment of any offence" be substituted. He explained the object of the amendment, which he said was "simple"[21]. It was to avoid the consequence that all offences created by any Commonwealth enactment had to be tried by jury. He referred in particular to contempt, which although indictable, was often dealt with summarily. It was then that Mr Isaacs made his comment.

55 Isaacs J was a member of this Court when the point was first raised for its decision. In *R v Archdall and Roskruge; Ex parte Carrigan and Brown*[22] there was a challenge to the capacity of Parliament to provide that certain offences, punishable by imprisonment for one year, should be dealt with summarily. In a joint judgment, Knox CJ, Isaacs, Gavan Duffy and Powers JJ said[23]:

> "The suggestion that the Parliament, by reason of s 80 of the Constitution, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition."

Starke J described the argument as "untenable"[24]. Higgins J (who had also participated in the Convention Debates on the subject) said that s 80 merely provides that "if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment"[25].

56 The question was revisited in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[26] where a majority took the same view as had been taken in *R v*

---

21 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1894-1895.

22 (1928) 41 CLR 128.

23 (1928) 41 CLR 128 at 136.

24 (1928) 41 CLR 128 at 147.

25 (1928) 41 CLR 128 at 139-140.

26 (1938) 59 CLR 556.

Archdall and Roskruge. Later cases have adhered to that view. Those who have dissented have disagreed amongst themselves as to what the section means[27].

57 As we followed the argument for the applicants, we did not understand it to be suggested that developments since Federation have thrown new light upon the meaning of s 80, or have altered the context in which it operates so as to require or justify a fresh approach on the part of this Court. If anything, recent developments in relation to criminal trial practice in State jurisdictions which handle the greater part of the administration of criminal justice, might be argued to tend in the other direction. In *Brown v The Queen*[28], it was held that, in cases where it applies, s 80 is mandatory. It is not a provision which creates a right that can be waived by an accused. Thus, if there is a trial on indictment of an offence against a law of the Commonwealth, and therefore s 80 applies, the parties cannot agree to dispense with the jury. In a number of State jurisdictions the trend has been to give persons accused of indictable offences the right to elect to be tried by judge alone, at least if the prosecution consents. This is a right of which a significant number of accused people, charged with serious crimes, take advantage. In the area of commercial fraud (an area which would be of particular importance if the regulation of the conduct of those concerned with the management of corporations were to become a matter of Commonwealth law), the capacity to prosecute some serious offences summarily, at least with the agreement of the accused, can contribute, on occasion, to the more effective administration of justice. The provisions of sub-ss (4), (6) and (7) of s 235 of the legislation presently under consideration provide an example of the way the Parliament, under the present interpretation of s 80, can approach the problem. Presumably, the validity of such provisions would be called in question by the proposed re-interpretation of s 80.

58 In *Lambert v Weichelt*[29] Dixon CJ, speaking for the Court, said:

> "It is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties."

---

27 Compare Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 582 and Deane J in *Kingswell v The Queen* (1985) 159 CLR 264 at 310.

28 (1986) 160 CLR 171.

29 (1954) 28 ALJR 282 at 283.

The present case provides a good example of the wisdom underlying that approach to the proper discharge by this Court of its responsibilities.

The subsidiary issue

59 In large part, the argument on the subsidiary issue, which concerns the first two applicants depended upon a view of the meaning of the legislation, and the indictment, which has been considered and rejected above. Upon the erroneous assumption that proof of the offence involved, and the indictment alleged, actual knowledge on the part of the applicants of the quantity of heroin involved, it was argued that the issue raised by the assertion of the first two applicants, (or, more accurately, the assertion of their counsel), that they did not know that what was being imported was heroin, or that a large quantity was involved, should have been determined by a jury. For the reasons already given, there is no substance in this point.

60 Alternatively it was argued that the Full Court, in re-sentencing the applicants, (to lesser sentences than those imposed by Debelle J), was not entitled to take a view of the facts different in one respect from that taken by the trial judge.

61 Bleby J[30] noted that Debelle J had, with some diffidence, accepted that, when the first applicant went to the Adelaide airport, he believed that only two small parcels of cocaine were involved. However, as Bleby J pointed out, when he arrived at the airport, and saw five crates addressed to him, the applicant's misapprehension about that matter would have disappeared. In any event, in considering the applicant's involvement, both Debelle J at first instance, and Bleby J on appeal, attached more importance to the undisputed fact that he was to be paid $6,000.

62 As to the second applicant, whose involvement was in connection with the transportation of the pedestals to Sydney, both at first instance and on appeal it was found that it must have been obvious that a substantial quantity of illegal drugs was involved.

63 There is no error shown in the way these issues were dealt with.

Conclusion

64 The applications should be dismissed.

---

30 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 522-523.

65 GAUDRON J. The primary question in these applications for special leave to appeal, which have been argued as if they were appeals, is whether this Court should reconsider its decision in *Kingswell v The Queen*[31]. And that raises the question whether s 80 of the Constitution prevents the Parliament from legislating so as to create a single offence with a scale of maximum penalties differing according to facts or circumstances which do not constitute elements of that offence. If it does, further questions arise as to the construction and validity of ss 233B(1)(d) and 235(2) of the *Customs Act* 1901 (Cth) ("the Act").

The facts and the history of the proceedings

66 The applicants, together with two other persons, were charged on indictment[32] in the District Court of South Australia with being knowingly concerned in the importation of heroin contrary to s 233B of the Act. The indictment particularised the offence as follows:

> "between 1st day of November 1997 and the 9th day of November 1997 at Adelaide and other places in the [State of South Australia, the accused] were knowingly concerned in the importation into Australia of a prohibited import to which Section 233B of the Customs Act 1901 applies, namely about 9350 grams of heroin, being not less than the commercial quantity."

67 So far as is presently relevant, the applicants moved to quash the indictment on the basis that, by reason of s 80 of the Constitution, ss 233B(1)(d) and 235(2) of the Act are invalid. The application was dismissed. The applicants then pleaded guilty and convictions were entered. They were later sentenced. At no stage did they or their legal representatives challenge the quantity of heroin particularised in the indictment.

---

31 (1985) 159 CLR 264.

32 The applicants were charged on an "[i]nformation of the Commonwealth Director of Public Prosecutions". It was accepted by all parties upon the hearing of the applications for special leave to appeal that the "information was an indictment" for the purposes of s 80 of the Constitution. Pursuant to s 4A of the *Crimes Act* 1914 (Cth), an "indictment includes an information". Section 4G of the *Crimes Act* provides that offences against a law of the Commonwealth punishable by imprisonment for a period in excess of 12 months are "indictable offences", unless the contrary intention appears.

68 The applicants each appealed against conviction and, also, against sentence to the Court of Criminal Appeal[33]. With respect to their appeals against conviction, they again contended that, by reason of s 80 of the Constitution, ss 233B(1)(d) and 235(2) of the Act were invalid. The Court of Criminal Appeal dismissed their appeals against conviction, allowed their appeals against sentence and imposed fresh sentences[34]. The applicants now seek special leave to appeal from the decision and orders of that Court.

Section 80 of the Constitution and relevant legislative provisions

69 Section 80 of the Constitution provides:

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

70 Section 233B of the Act relevantly provides:

> "(1) Any person who:
>
> ...
>
> (d) aids, abets, counsels, or procures, or is in any way knowingly concerned in, the importation, or bringing, into Australia of any prohibited imports to which this section applies, or the exportation from Australia of any prohibited exports to which this section applies;
>
> ...
>
> shall be guilty of an offence.
>
> ...
>
> (2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods ...

---

33 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 506 [7] per Bleby J (Doyle CJ and Wicks J agreeing).

34 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 532 [120].

(3) A person who is guilty of an offence against subsection (1) of this section is punishable upon conviction as provided by section 235."

Section 235 relevantly provides, in sub-section (2), that:

" Subject to subsections (3) and (7), where:

(a) a person commits an offence against ... subsection 233B(1); and

(b) the offence is an offence that is punishable as provided by this section;

the penalty applicable to the offence is:

(c) where the Court is satisfied:

(i) that the narcotic goods in relation to which the offence was committed:

(A) are a narcotic substance in respect of which there is a commercial quantity applicable; and

(B) consist of a quantity of that substance that is not less than that commercial quantity; or

(ii) that the narcotic goods in relation to which the offence was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to that substance and also that, on a previous occasion, a court has:

(A) convicted the person of another offence, being an offence against a provision referred to in paragraph (a) that involved other narcotic goods which consisted of a quantity of a narcotic substance not less than the trafficable quantity that was applicable to that substance when the offence was committed; or

(B) found, without recording a conviction, that the person had committed another such offence;

imprisonment for life or for such period as the Court thinks appropriate;

(d) where the Court is satisfied that the narcotic goods in relation to which the offence was committed consist of a

quantity of a narcotic substance that is not less than the trafficable quantity applicable to the substance but is not satisfied as provided in paragraph (c):

(i) if the narcotic substance is a narcotic substance other than cannabis–a fine not exceeding $100,000 or imprisonment for a period not exceeding 25 years, or both; or

(ii) if the narcotic substance is cannabis–a fine not exceeding $4,000 or imprisonment for a period not exceeding 10 years, or both; or

(e) in any other case–a fine not exceeding $2,000 or imprisonment for a period not exceeding 2 years, or both."

Sub-section (3) of s 235 provides:

" Where:

(a) the Court is satisfied that the narcotic goods in relation to which an offence referred to in subsection (2) was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to that substance, but is not satisfied as provided in paragraph (c) of that subsection in relation to those narcotic goods; and

(b) the Court is also satisfied that the offence was not committed by the person charged for any purposes related to the sale of, or other commercial dealing in, those narcotic goods;

notwithstanding paragraph (d) of that subsection, the penalty punishable for the offence is the penalty specified in paragraph (e) of that subsection."

Sub-section (7) of s 235 is concerned with summary proceedings and has no relevance to the questions raised in these applications.

The decision in *Kingswell*

71 As with the present case, *Kingswell* was concerned with the validity of ss 233B(1) and 235 of the Act. It was held in that case that the specification in s 235 of different maximum penalties according to the quantity of narcotic goods involved did not have the effect of creating different offences with respect to the

importation of different quantities of narcotics[35]. Rather, there was but one offence (in that case, the offence of conspiracy to import heroin contrary to s 233B(1)(cb) of the Act), with different maximum penalties as provided in s 235 differing according to the "circumstances of aggravation"[36]. It was further held that ss 233B(1)(cb) and 235(2) did not contravene s 80 of the Constitution[37]. It will later be necessary to analyse the reasoning in *Kingswell* but, for the moment, it is sufficient to note that it was said in the joint judgment of Gibbs CJ, Wilson and Dawson JJ that:

> "Section 80 says nothing as to the manner in which an offence is to be defined. Since an offence against the law of the Commonwealth is a creature of that law, it is the law alone which defines the elements of the offence."[38]

72 The other matter that was in issue in *Kingswell* was whether the "circumstances of aggravation" by reference to which maximum penalties are set in ss 235(2) and (3) of the Act should be included in the indictment. In this regard, Gibbs CJ, Wilson and Dawson JJ referred to the rule of practice by which "questions of fact affecting the liability of the accused to punishment should be decided by the jury when the trial is on indictment" even though the "circumstances of aggravation ... do not change the offence"[39]. Their Honours were of the view that there was no reason why the satisfaction of a judge as to the matters specified in s 235(2) "should not be founded upon the findings of the jury" and that, where those "circumstances of aggravation ... are relied on, they should be charged in the indictment."[40]

73 Mason J, who was the other member of the majority in *Kingswell*, took a different view with respect to the inclusion in the indictment of the matters specified in s 235(2) of the Act. His Honour observed:

---

35 (1985) 159 CLR 264 at 273-274 per Gibbs CJ, Wilson and Dawson JJ, 282 per Mason J.

36 (1985) 159 CLR 264 at 273 per Gibbs CJ, Wilson and Dawson JJ.

37 (1985) 159 CLR 264 at 276-277 per Gibbs CJ, Wilson and Dawson JJ, 282 per Mason J.

38 (1985) 159 CLR 264 at 276.

39 (1985) 159 CLR 264 at 280.

40 (1985) 159 CLR 264 at 281.

> " It is theoretically possible for the Court's satisfaction to be based upon a prior finding by the jury, but such an interpretation poses a number of difficulties. What would happen if the jury was satisfied that the aggravating circumstances had been made out but the trial judge was of a different opinion, or conversely if the jury was of the view that those circumstances had not been made out but the trial judge thought they had? To take the view that the Court's opinion ought to prevail in such a case would be merely to affirm what is explicit in s 235(2)(c) – namely that the matter is one for determination by the Court and not the jury. Alternatively, to take the view that the jury's opinion should prevail is to discard the express words of the statute and substitute a requirement not envisaged by the legislature."[41]

74 In *Kingswell*, Brennan and Deane JJ would each have held that s 235(2)(c) of the Act was invalid. Accordingly, their Honours had no need to and did not consider the question whether the "circumstances of aggravation" specified in that paragraph should be included in the indictment. There was, thus, not a majority view in favour of the rule of practice advocated by Gibbs CJ, Wilson and Dawson JJ.

75 The question whether the "circumstances of aggravation" should be included in an indictment was again considered in *R v Meaton*[42]. In that case, a majority of the Court (Gibbs CJ, Wilson and Dawson JJ) stated a rule of practice requiring "the prosecution ... to lay one charge which includes the circumstances of aggravation"[43]. Their Honours allowed, however, that "the jury [could] ... be directed that it would be open to them (in appropriate circumstances) to find the accused guilty of the charge without those circumstances of aggravation"[44]. In the case of the "circumstances of aggravation" referred to in ss 235(2)(c)(ii)(A) and (B), namely, a previous conviction or a finding that a person committed an offence without a conviction being recorded, their Honours contemplated that, if there was any dispute, that question could be determined by the jury after conviction, although, in the case of a plea of guilty, the issue would have to be determined by the judge as no jury would have been empanelled[45].

---

41 (1985) 159 CLR 264 at 282-283.

42 (1986) 160 CLR 359.

43 (1986) 160 CLR 359 at 364.

44 (1986) 160 CLR 359 at 364.

45 (1986) 160 CLR 359 at 364.

76 The other members of the Court in *Meaton*, Brennan and Deane JJ, were of the view that the rule of practice laid down in the majority judgment was "wrong in principle and ... should not be followed"[46]. Their Honours observed:

> "If the s 235 matters are merely relevant to the sentencing of an offender ... and need not be charged in the indictment or found by the jury if not admitted by plea, the sentencing power conferred by pars (c) and (d) of s 235 does not and cannot be made to depend upon the jury's satisfaction of the existence of s 235 matters."[47]

Their Honours added:

> " To insist on the practice would be tantamount to amending the statute so that the jury would be charged with the responsibility of finding all the issues under s 233B(1) and s 235(2)(c) and (d). If that had been the intention of the legislature, there would have been no question in *Kingswell* of disconformity between those provisions and the requirements of s 80 of the Constitution."[48]

The practice proposed by Gibbs CJ, Wilson and Dawson JJ in *Kingswell* and laid down in *Meaton* was followed in the present case by the inclusion in the indictment of the particulars referred to earlier.

Section 80 of the Constitution: a guarantee

77 Although s 80 of the Constitution has been described as "a mere procedural provision"[49], it has been referred to in more recent decisions of this Court as a "constitutional guarantee"[50]. More precisely, it is a constitutional

---

46 (1986) 160 CLR 359 at 370.

47 (1986) 160 CLR 359 at 368.

48 (1986) 160 CLR 359 at 369.

49 See *Spratt v Hermes* (1965) 114 CLR 226 at 244 per Barwick CJ. See also *Brown v The Queen* (1986) 160 CLR 171 at 182 per Gibbs CJ, but note the view of Dawson J at 215 and the dissent of Deane J in *Kingswell v The Queen* (1985) 159 CLR 264 at 299, 312.

50 See *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 198, 202 per Murphy J; *Kingswell v The Queen* (1985) 159 CLR 264 at 299-300, 303, 312 per Deane J; *Brown v The Queen* (1986) 160 CLR 171 at 214 per Dawson J; *Cheatle v The Queen* (1993) 177 CLR 541 at 549; *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576 at 1596 [95] per Kirby J, 1606 [134] per Callinan J; 166 ALR 545 at 574, 587.

command. As such, it stands in the same position as s 92 of the Constitution, which mandates that "trade, commerce, and intercourse among the States ... shall be absolutely free"; and s 117, which mandates that a resident of a State "shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

78 Sections 92 and 117 have conveniently been described as constitutional guarantees[51]. So, too, has s 51(xxxi) of the Constitution which, in form, is a grant of legislative power but which has been construed as operating as a guarantee by abstracting power to legislate for the acquisition of property from other heads of legislative power except those which clearly envisage the acquisition of property other than on just terms (eg taxation)[52].

79 The only relevant difference between s 80 and the constitutional provisions that have been recognised as constitutional guarantees is that s 80 is a limitation on judicial power. As such, it prevents the trial of indictable offences by judge alone, even if an accused person so elects[53]. That is not to say that s 80 is simply a limitation on judicial power. It is to raise the question whether, by reason that it confines the exercise of judicial power on the trial on indictment of offences against a law of the Commonwealth, s 80 should be construed differently from other provisions that have been described as "constitutional guarantees".

80 Trial by jury is so deeply embedded in our judicial process that its importance in protecting the liberty of the individual from oppression and injustice needs no elaboration. However, what is not generally recognised is its importance to the rule of law and, ultimately, the judicial process and the judiciary itself. Respect for the rule of law and, ultimately, the judicial process and the judiciary is enhanced if the determination of criminal guilt is left in the

---

51 See with respect to s 92, *Cole v Whitfield* (1988) 165 CLR 360 at 387-388; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *AMS v AIF* (1999) 73 ALJR 927; 163 ALR 501; with respect to s 117, see *Street v Queensland Bar Association* (1989) 168 CLR 461.

52 See *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77; *Bank of NSW v The Commonwealth* ("the *Bank Nationalization Case*") (1948) 76 CLR 1 at 349-350 per Dixon J; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372 per Dixon CJ; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ.

53 See *Brown v The Queen* (1986) 160 CLR 171.

hands of ordinary citizens who are part of the community, rather than in the hands of judges who are perceived to be and, sometimes, are "remote from the affairs and concerns of ordinary people"[54].

81 The participation of the people of this country in the exercise of judicial power, through their service on juries, provides a basis for community acceptance of verdicts in criminal trials and, more broadly, an understanding of the judicial processes. As Deane J pointed out in *Kingswell*:

> "A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public"[55].

The participation of ordinary citizens, as jurors in the judicial process renders it necessary that criminal proceedings be understood by all, including the accused. It is, thus, fundamental to the law's guarantee of a fair trial.

82 The importance of jury trial to the individual and to the judicial system renders it imperative, in my view, that s 80 be approached in the same manner as those other provisions which have been recognised as constitutional guarantees. More precisely, that consideration necessitates that s 80 be construed by reference to the same canons of construction. And in this regard, it is well settled that constitutional guarantees are to be construed liberally and not pedantically confined[56].

83 In *Bank of NSW v The Commonwealth*, it was said by Dixon J of the guarantee in s 51(xxxi) that it "should be given as full and flexible an operation as will cover the objects it was designed to effect"[57]. Similarly, in *Street v*

---

54 *Kingswell v The Queen* (1985) 159 CLR 264 at 301 per Deane J.

55 (1985) 159 CLR 264 at 301.

56 See *Bank of NSW v The Commonwealth* ("the *Bank Nationalization Case*") (1948) 76 CLR 1 at 349 per Dixon J; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-371 per Dixon CJ; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 184 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 131 per Gaudron J.

57 (1948) 76 CLR 1 at 349.

Queensland Bar Association, it was said that because s 117 "was designed to enhance national unity", by providing for the equal rights of all residents in all States, it should be given "a liberal, rather than a narrow, interpretation ... an interpretation which will guarantee to the individual a right to non-discriminatory treatment in relation to all aspects of residence"[58]. In my view, the fact that s 80 was designed to protect the individual requires that that provision be construed no less liberally than the guarantees in s 51(xxxi) and s 117 of the Constitution.

Section 80: the meaning of "offence"

84 When determining whether legislation infringes a constitutional prohibition, this Court looks to the substantive operation of the legislation in question and not simply to the form in which it is cast[59]. So, too, constitutional guarantees are construed liberally so that their substantive effect is not undermined and the rights which they serve to protect are not depreciated by technical, legal or drafting devices[60].

85 To construe "offence" in s 80 in a way that permits the Parliament to define an offence by reference to acts or omissions and in disregard of "aggravating circumstances" which expose the offender to a higher maximum penalty and which are determined, in the event of dispute, by a judge and not the jury, is to invite the triumph of form over substance. And, given the present state of authorities, it is to render s 80's guarantee of trial by jury largely ineffective.

86 Although, in a number of cases, individual Justices would have held otherwise[61], this Court has consistently held that s 80 allows for Parliament to

---

58 (1989) 168 CLR 461 at 485 per Mason CJ.

59 See, for example, with respect to s 92 of the Constitution, *Cole v Whitfield* (1988) 165 CLR 360 at 399-400. See also the discussion in *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 433 per Mason CJ and Deane J, 449-450 per Brennan J; *Ha v New South Wales* (1997) 189 CLR 465 at 491, 498 per Brennan CJ, McHugh, Gummow and Kirby JJ.

60 See *Kruger v The Commonwealth* (1997) 190 CLR 1 at 123, 131 per Gaudron J and the cases there cited.

61 See *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 581-583 per Dixon and Evatt JJ; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 198 per Murphy J; *Kingswell v The Queen* (1985) 159 CLR 264 at 318-319 per Deane J; *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576 at 1596-1599 [95]-[104] per Kirby J; 166 ALR 545 at 574-578.

decide what offences are and what offences are not to be tried on indictment[62]. In that context, to allow that Parliament may also define an offence in such a way that "circumstances of aggravation", which expose an offender to a higher maximum penalty, are to be determined by a judge and not by the jury is to give s 80 a very restricted operation.

87 It is not in issue in this case that the offence with which the applicants were charged is an indictable offence to which s 80 applies. It is, thus, unnecessary to consider those authorities which hold that it is for Parliament to decide what offences are to be tried on indictment. It is, however, necessary to consider how those authorities influenced the majority decision in *Kingswell*.

88 In *Kingswell*, Mason J agreed with Gibbs CJ, Wilson and Dawson JJ with respect to the meaning and operation of s 80 of the Constitution[63]. Referring to the fact that it has been decided that s 80 "leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily"[64], Gibbs CJ, Wilson and Dawson JJ observed:

> "The fact that s 80 has been given an interpretation which deprives it of much substantial effect provides a reason for refusing to import into the section restrictions on the legislative power which it does not express."[65]

Their Honours added:

> "To understand s 80 as requiring the Parliament to include in the definition of any offence any factual ingredient which would have the effect of increasing the maximum punishment to which the offender would be liable would serve no useful constitutional purpose; indeed the Parliament might feel obliged to provide that some offences, which would otherwise be made indictable, should be triable summarily."[66]

---

62 See *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Kingswell v The Queen* (1985) 159 CLR 264; *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576; 166 ALR 545.

63 (1985) 159 CLR 264 at 282.

64 (1985) 159 CLR 264 at 277.

65 (1985) 159 CLR 264 at 276.

66 (1985) 159 CLR 264 at 277.

89 Their Honours' observations provide a compelling reason for reconsidering those decisions which have held that it is for Parliament to decide what offences are and are not to be tried on indictment. They do not provide a reason for holding that Parliament may define an offence so as to expose a person to higher penalties by reference to "aggravating circumstances" associated with the doing of the act which constitutes the offence and which, if put in issue, are determined by a judge and not the jury. And to construe s 80 in that way is to construe in a manner contrary to the established approach with respect to constitutional guarantees.

90 There is nothing novel in the idea that an offence is constituted by the combination of acts and attendant circumstances which expose a person to a specified penalty by way of punishment. Thus, for example, robbery and armed robbery are distinct offences under the criminal laws of the States and Territories[67], as are assault, assault occasioning actual bodily harm and assault occasioning grievous bodily harm[68]. Moreover, as Brennan J pointed out in *Kingswell*, "[a] criminal offence can be identified only in terms of its factual ingredients, or elements, and the criminal penalty which the combination of elements attracts."[69] His Honour added "[i]f a particular combination of elements attracting a particular penalty is one offence, a different combination of elements attracting a different penalty is another offence."[70]

91 In *Kingswell*[71], Brennan J referred to the statement of Lord Diplock in *R v Courtie* that:

> "where it is provided by a statute that an accused person's liability to have inflicted upon him a maximum punishment which, if the prosecution are

---

67 See *Crimes Act* 1900 (NSW), ss 94, 97; *Crimes Act* 1958 (Vic), ss 75, 75A; *Criminal Law Consolidation Act* 1935 (SA), ss 155, 158; *Criminal Code Act* 1899 (Q), ss 411(1), (2); *The Criminal Code* (WA), ss 391, 393; *Criminal Code Act* 1924 (Tas), ss 240(1), (3); *Criminal Code Act* (NT), ss 211(1), (2); *Crimes Act* 1900 (ACT), ss 100, 101.

68 See *Crimes Act* 1900 (NSW), ss 35, 59, 61; *Crimes Act* 1958 (Vic), ss 16, 18, 31; *Criminal Law Consolidation Act* 1935 (SA), ss 21, 39, 40; *Criminal Code Act* 1899 (Q), ss 320, 335, 339; *The Criminal Code* (WA), ss 223, 297, 306; *Criminal Code Act* 1924 (Tas), ss 170(1)(a), 172, 184; *Criminal Code Act* (NT), ss 181, 186, 188(1), (2)(a); *Crimes Act* 1900 (ACT), ss 19, 24, 26.

69 (1985) 159 CLR 264 at 292.

70 (1985) 159 CLR 264 at 293.

71 (1985) 159 CLR 264 at 292.

> successful in establishing the existence in his case of a particular factual ingredient, is greater than the maximum punishment that could be inflicted on him if the existence of that particular factual ingredient were not established, it seems to me to be plain beyond argument that Parliament has thereby created two distinct offences, whether the statute by which they are created does so by using language which treats them as being different species of a single genus of offence, or by using language which treats them as separate offences unrelated to one another."[72]

92 It was subsequently held by the House of Lords, in *Director of Public Prosecutions v Butterworth*[73], that *Courtie* was concerned with the construction of the legislation in issue in that case and that the question whether the legislature has created one offence with a range of penalties or several offences with different penalties is a question of construction of the particular legislation by which the offence is created. So much may be accepted. But that does not say anything as to the meaning of "offence" in s 80 of the Constitution. Certainly, it does not provide any basis for thinking that, in s 80, "offence" means anything that Parliament chooses to specify as an offence.

93 Section 80 of the Constitution was modelled on the guarantee of trial by jury contained in Art III of the United States Constitution[74]. It was held by the Supreme Court of the United States, in *Jones v United States*[75] that:

> "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[76]

In *Apprendi v New Jersey* the Supreme Court was called upon to decide whether the Due Process Clause in the Fourteenth Amendment to the United States

---

72 [1984] AC 463 at 471.

73 [1995] 1 AC 381.

74 See the discussion in La Nauze, *The Making of the Australian Constitution*, (1972) at 227-228.

75 526 US 227 at 243, n 6 (1999) per Stevens, Scalia, Souter, Thomas and Ginsburg JJ; Rehnquist CJ, O'Connor, Kennedy and Breyer JJ dissenting.

76 As cited in *Apprendi v New Jersey* 68 USLW 4576 at 4579 (2000) per Stevens, Scalia, Souter, Thomas and Ginsburg JJ. In *Apprendi* the same majority Justices affirmed their decision in *Jones*.

Constitution required that, in respect of a State statute, "a factual determination authorizing an increase in the maximum [penalty] for an offense ... be made by a jury on the basis of proof beyond a reasonable doubt."[77] It was held, again by majority, that it did[78]. In doing so the holding in *Jones* that "[i]t [was] unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed"[79] was confirmed.

94 It is true that the decision in *Jones v United States* was rested on the Fifth and Sixth Amendments to the United States Constitution. But, in my view, a similar result is directed by s 80 of the Constitution. The word "offence" in that section is clearly capable of bearing a meaning of the kind ascribed to it by Brennan J in *Kingswell*[80]. It does no violence to the language of s 80 to construe "offence" as an act or omission which exposes a person to a specified penalty by way of punishment and, also, as any combination of factual elements which directly pertain to an act or omission which exposes a person to a distinct penalty by way of punishment. And in my view it cannot be given any narrower meaning consistent with the settled approach to the construction of constitutional guarantees.

95 When "offence" is construed in the manner indicated, s 80 operates to deny to the Parliament the power to create a single offence with a range of different maximum penalties varying according to the circumstances of its commission which, if disputed, are to be determined by a judge and not the jury.

Construction and validity of ss 233B and 235 of the Act

96 In *Kingswell*, the majority construed ss 233B and 235 of the Act in a context in which s 80 of the Constitution was allowed no operation. Although the minority would have held that s 80 did apply in that case, they construed ss 233B and 235 as creating a single offence with a range of maximum penalties before turning to consider the operation of s 80. No one approached the construction of ss 233B and 235 on the basis that, if possible, legislative

---

77 68 USLW 4576 at 4577 (2000) per Stevens, Scalia, Souter, Thomas and Ginsburg JJ.

78 68 USLW 4576 at 4579 (2000) per Stevens, Scalia, Souter, Thomas and Ginsburg JJ.

79 68 USLW 4576 at 4583 (2000) per Stevens, Scalia, Souter, Thomas and Ginsburg JJ, citing *Jones v United States* 526 US 227 at 252-253 (1999).

80 (1985) 159 CLR 264 at 292-293.

provisions should be construed in a manner which ensures validity rather than invalidity[81].

97 It is true that, in form, s 233B of the Act is directed to creating offences, whilst s 235(2) is directed to identifying a range of sentences for those offences according, in the main, to the quantity of narcotics involved. And it is, I think, clear that, although nowhere defined for the purposes of s 235(2), "Court", in that sub-section means the sentencing judge. In this regard, it is sufficient to refer to the penalty specified in s 235(2)(c), namely "imprisonment for life or for such period as the Court thinks appropriate". Clearly, "Court" there refers to the sentencing judge. And given that s 235 is concerned with the maximum periods to which a person may be sentenced, there is no basis for construing "Court" differently in any other part of s 235.

98 Although s 235 must be construed on the basis that it is a sentencing provision and was intended as such, there is no reason in principle why it should be construed as no more than a sentencing provision. Subject to two matters to which I shall shortly refer, I see no reason why s 235(2) cannot be construed as also operating in combination with s 233B of the Act to create distinct offences attracting different penalties as specified in that sub-section.

99 The first of the two matters to which reference should be made is s 235(3) of the Act. Sub-section (3) operates to reduce the maximum penalty if "the Court is ... satisfied that the offence was not committed by the person charged for any purposes related to the sale of, or other commercial dealing in, [the] narcotic goods". That is a matter of mitigation and cannot sensibly be read as changing the nature of the offence charged.

100 The second matter to which it is necessary to refer is ss 235(2)(c)(ii)(A) and (B) which operate to expose an offender to a higher maximum penalty if he or she has previously been convicted of a narcotics offence or found guilty of an offence of that kind without a conviction being recorded. That paragraph concerns matters personal to the accused, rather than circumstances which pertain to an act or omission and which, because they expose the offender to a discrete penalty, should be treated as part of the offence for the purposes of s 80 of the Constitution.

---

81 See *Davies and Jones v The State of Western Australia* (1904) 2 CLR 29 at 43 per Griffith CJ; *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153 at 180 per Isaacs J; *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*") (1945) 71 CLR 237 at 267 per Dixon J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 14 per Mason CJ.

101 If it is accepted, as I think it should be, that s 235 is primarily a sentencing provision but that it is also capable of operating, in combination with s 233B of the Act, to create distinct offences attracting different penalties according to the different quantities of narcotic goods involved, there is no reason to construe either ss 235(2)(c)(ii)(A) and (B) or 235(3) as directed to anything but sentencing. Equally, there is no reason to construe those parts of s 235(2) which relate to the quantity of narcotic goods and which specify maximum penalties by reference to those amounts as relating solely to sentencing.

102 I would construe ss 233B and 235(2) as operating in combination to create distinct offences depending on the quantity of narcotic goods, in fact, involved. So far as is relevant to the present applications, they operate in combination to create the offence of being knowingly concerned in the importation of a quantity of narcotic goods which, in fact, is not less than the commercial quantity of those goods. So construed, no question arises as to an accused person's knowledge, belief or intention as to the quantity of the goods concerned[82]. And no question arises as to the infringement of the command in s 80 of the Constitution.

The indictment and convictions

103 Given the construction of ss 233B and 235(2) which I would adopt, there may have been some technical defect in the indictment presented in this case. Had that matter been raised at trial, however, the indictment could have been amended. Moreover, at no point have the applicants raised any matter of defence other than the contention that s 235(2) is either wholly or partly invalid. More particularly, they have not raised any issue as to the quantity of heroin specified in the indictment. That being so, their convictions involved no substantial miscarriage of justice such as would have warranted the Court of Criminal Appeal's allowing their appeals against conviction.

Sentences

104 So far as concerns sentence, the argument for the applicants in this Court was as follows: that, if s 235(2) were not wholly invalid, it was invalid save to the extent of the penalty provided by s 235(2)(e) of the Act. On that basis, it was contended that the sentences should be quashed and the applicants re-sentenced in accordance with that paragraph. Properly construed, s 235(2) is not, in my view, invalid in any respect. Accordingly that contention must fail.

---

82 As to the mental element required for offences of this kind, see *He Kaw Teh v The Queen* (1985) 157 CLR 523. See also *Kingswell v The Queen* (1985) 159 CLR 264 at 293-294 per Brennan J.

105 In addition to the argument as to the partial invalidity of s 235(2), the applicants contend that the Court of Criminal Appeal, in reducing the sentences of the applicants, was not entitled to take a view of the facts which was different from the view taken by the trial judge (Debelle J). For the reasons given by Gleeson CJ, Gummow and Hayne JJ, I can discern no error of principle on the part of the Court of Criminal Appeal in that respect.

Conclusion and orders

106 Special leave should be granted limited to the question whether ss 233B and 235(2) of the Act are invalid, but the appeal should be dismissed.

107 McHUGH J. In these proceedings, three persons convicted in the Supreme Court of South Australia of knowingly being concerned in the importation of a prohibited import seek special leave to appeal against their convictions.

108 The principal issue in the proceedings is whether the Parliament of the Commonwealth is free to define what constitutes an "offence" for the purpose of s 80 of the Constitution which declares that:

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

109 The applicants contend that *Kingswell v The Queen*[83] ("*Kingswell*"), which held that the Parliament was free to define what constitutes an "offence" for the purpose of s 80, was wrongly decided and that the decision should be overruled. If that contention is upheld, it follows, according to the applicants, that their convictions are void and of no effect, notwithstanding that they pleaded guilty to the charges upon which they were convicted. Also involved in the proceedings are issues as to whether the Crown must prove mens rea in relation to certain sections of the *Customs Act* 1901 (Cth) ("the Act") and whether the Court of Criminal Appeal of South Australia erred in its treatment of factual "findings" made by the sentencing judge.

110 In my view, *Kingswell* was correctly decided. Special leave should be refused not only in respect of whether it was correctly decided but also in respect of the other issues raised by the applicants.

Background

111 The applicants were indicted on an information which provided:

"Information of the Commonwealth Director of Public Prosecutions

[The applicants and others]

are charged with the following offence

---

83 (1985) 159 CLR 264.

1st Count STATEMENT OF OFFENCE

BEING KNOWINGLY CONCERNED IN THE IMPORTATION OF A PROHIBITED IMPORT

(Section 233B(1)(d) Customs Act 1901)

PARTICULARS OF OFFENCE

[The applicants and others], between 1st day of November 1997 and the 9th day of November 1997 at Adelaide and other places in the said State, were knowingly concerned in the importation into Australia of a prohibited import to which Section 233B of the Customs Act 1901 applies, namely about 9350 grams of heroin, being not less than the commercial quantity."

112 All parties at the hearing of this application for special leave accepted that the information was an "indictment" for the purposes of s 80[84].

113 Before Debelle J in the Supreme Court of South Australia, the applicants demurred to the indictment on the basis that s 233B(1)(d) of the Act was invalid. They contended that, although it was valid if *Kingswell*[85] was correctly decided, that case had been wrongly decided. Quite properly[86], Debelle J overruled the demurrer on the basis that his Honour was bound by the decision in *Kingswell*. Debelle J held that ss 233B(1)(d) and 235 of the Act were valid. The applicants then pleaded guilty and were sentenced by his Honour.

114 Notwithstanding that the applicants had pleaded guilty to the offences charged, they appealed to the Court of Criminal Appeal of South Australia against their convictions as well as their sentences[87]. The Crown did not assert that the appeals against their convictions were incompetent[88], but the Court of Criminal Appeal dismissed their appeals because, inter alia, of the decision in

---

84 Section 4A of the *Crimes Act* 1914 (Cth) provides that in a law of the Commonwealth "'indictment' includes an information", unless the contrary intention appears. Section 4G of the *Crimes Act* 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.

85 (1985) 159 CLR 264.

86 See *Ravenor Overseas Inc v Readhead* (1998) 72 ALJR 671 at 672 [3] per Brennan CJ; 152 ALR 416 at 416.

87 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 506 [7].

88 (1999) 73 SASR 502 at 507 [9].

Kingswell[89]. However, the Court allowed the appeals against sentence and reduced the sentences imposed[90].

The applicants' challenge to *Kingswell*

115 Before this Court, the applicants contended that the reasoning of the majority in *Kingswell* was based on the premise that s 80 of the Constitution is "a mere procedural provision, rather than a fundamental Constitutional guarantee", and that subsequent decisions[91] of this Court had falsified that premise. The applicants contended that, contrary to the judgments of the majority in *Kingswell*, s 80 restricts the Parliament's capacity to define what constitutes an "offence". In support of their argument, the applicants relied on the dissenting judgments of Brennan and Deane JJ in that case.

The decision in *Kingswell*

116 Kingswell had been convicted after a trial by jury[92] of conspiring to import a prohibited import, an offence under s 233B(1)(cb) of the Act. At an earlier time, he had been convicted of an offence against s 233B(1)(c)[93]. There was also evidence before the trial judge that Kingswell had conspired to import not less than the trafficable quantity of a narcotic substance[94]. The trial judge sentenced[95] Kingswell on the basis that the maximum penalty was imprisonment for life, because these two factors brought the case within s 235(2)(c)(ii) of the Act.

117 In this Court, Kingswell argued, inter alia, that s 235 was invalid – at least in part – because it contravened s 80 of the Constitution[96]. He contended that "offence" in s 80 means a combination of the facts which make the accused liable

---

89 (1999) 73 SASR 502 at 514 [32].

90 (1999) 73 SASR 502 at 532 [120].

91 For example *Brown v The Queen* (1986) 160 CLR 171; *Cheatle v The Queen* (1993) 177 CLR 541; *Katsuno v The Queen* (1999) 73 ALJR 1458; 166 ALR 159; *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576; 166 ALR 545.

92 (1985) 159 CLR 264 at 270.

93 (1985) 159 CLR 264 at 272.

94 (1985) 159 CLR 264 at 272.

95 (1985) 159 CLR 264 at 272.

96 (1985) 159 CLR 264 at 273.

to a criminal penalty and that, if the presence of another factor makes the accused liable to a heavier penalty than that which might be imposed without that factor, the existence of that factor creates a different offence[97]. His argument raised the issue whether, consistently with s 80 of the Constitution, the Parliament of the Commonwealth can legislate for an offence to be prosecuted on indictment and expose the accused to a range of penalties depending upon findings of fact made by the trial judge[98].

118 Gibbs CJ, Wilson and Dawson JJ[99] rejected Kingswell's argument. Their Honours held that, as a matter of statutory construction, the Parliament intended that s 233B(1)(cb) should create one offence with s 235(2) and (3) to provide for a range of penalties applicable to that offence depending on the existence or non-existence of various circumstances[100]. On this issue, Mason J agreed[101] with the reasons of Gibbs CJ, Wilson and Dawson JJ. The majority accepted that, where a statute provides for an accused to be exposed to a greater maximum penalty if a particular factor is present, a presumption arises that the legislature intended to create a separate offence from that which exists without that factor. However, the majority held that the words of the relevant sections rebutted that presumption[102]. The majority said that, s 80 aside, "there is no fundamental law that declares what the definition of an offence shall contain or that requires the Parliament to include in the definition of an offence any circumstance whose existence renders the offender liable to a maximum punishment greater than that which might have been imposed if the circumstance did not exist"[103]. They also said[104] that the fact that s 80 had been interpreted so as to leave it to the Parliament to determine whether any offence should be tried on indictment or summarily "provides a reason for refusing to import into the section restrictions on the legislative power which it does not express". That being so, the majority

---

97 (1985) 159 CLR 264 at 266.

98 (1985) 159 CLR 264 at 287-288 per Brennan J.

99 (1985) 159 CLR 264 at 276-277.

100 (1985) 159 CLR 264 at 273.

101 (1985) 159 CLR 264 at 282.

102 (1985) 159 CLR 264 at 275-276.

103 (1985) 159 CLR 264 at 276; see also at 285 per Mason J.

104 (1985) 159 CLR 264 at 276.

held that ss 233B(1)(cb) and 235(2) did not contravene s 80, as s 80 itself says nothing as to the manner in which an offence is to be defined[105].

119 Brennan J dissented. His Honour held that what constitutes an "offence" in s 80 "is not left to be defined by Parliament; in s 80 it has the meaning which it bears in the criminal law"[106]. In his Honour's view, Lord Diplock's definition of "offence" in *R v Courtie*[107] was both "manifestly right"[108] and applicable to s 80. That being so, Brennan J held that offences which attract the maximum penalties prescribed by s 235(2)(c) and (d) are offences distinct from s 233B offences: each element of each distinct offence is the subject of the s 80 guarantee[109]. As sub-s 2(c) and (d) and sub-s (3) of s 235 require a judge alone to determine the existence of facts which are "elements of an offence for the purpose of s 80", Brennan J held that those sections were invalid[110].

120 Deane J also dissented. His Honour held that, contrary to the view expressed by Barwick CJ in *Spratt v Hermes*[111], s 80 is not a mere procedural provision[112] and that the Parliament is not free to decide what offences are to be tried on indictment[113]. Deane J held that the "guarantee" in s 80 is applicable in respect of any trial of an accused charged with an offence against a law of the Commonwealth in circumstances where the charge is brought by the State or an agency of the State and the accused will, if found guilty, stand convicted of a "serious offence"[114]. His Honour found that, because s 235(2)(c) and (d) in substance created separate offences, elements of which were to be determined by

---

105 (1985) 159 CLR 264 at 276.

106 (1985) 159 CLR 264 at 292.

107 [1984] AC 463 at 471.

108 (1985) 159 CLR 264 at 292.

109 (1985) 159 CLR 264 at 293.

110 (1985) 159 CLR 264 at 295.

111 (1965) 114 CLR 226 at 244.

112 (1985) 159 CLR 264 at 319.

113 (1985) 159 CLR 264 at 318-319.

114 (1985) 159 CLR 264 at 319.

a judge and not a jury, those sections contravened s 80 of the Constitution and were invalid[115].

The dissent of Deane J in *Kingswell*

121 It is convenient to deal first with the dissenting judgment of Deane J because his Honour reasoned from the premise that s 80 requires all serious offences against laws of the Commonwealth to be tried by jury. Without overturning a long line of authority in this Court[116], however, it cannot be doubted that, consistently with s 80 of the Constitution, Parliament may declare which offences are to be prosecuted on "indictment" and which offences are to be prosecuted summarily. Thus, on the current interpretation of s 80, it is open to Parliament to declare that even treason or murder can be prosecuted summarily before a judge or magistrate appointed in accordance with s 72 of the Constitution or in a State court invested with federal jurisdiction. If that view of s 80 is accepted, the section serves little purpose and its object will not be advanced by holding that "offence" has a constitutional meaning which controls what the Parliament can describe as an offence. That is because, on the current interpretation of s 80, the Parliament can avoid the section altogether by making any particular offence one that is only punishable summarily.

122 Not surprisingly, some Justices of this Court have not liked the conclusion that Parliament can avoid trial by jury for an offence against a law of the Commonwealth by the simple device of making the offence a summary offence. Given the current interpretation of s 80, the section seems to serve little purpose. It certainly cannot be a guarantee of trial by jury: for on the current interpretation, it is for the Parliament to declare whether or not the offence is indictable, and no jury is required unless the offence is tried on indictment. At its highest, all that s 80 does is to guarantee that, once the Parliament makes an offence indictable, any trial on indictment must be by jury and not by a judge or magistrate and that the verdict of the jury must be unanimous[117]. Furthermore,

---

115 (1985) 159 CLR 264 at 321-322.

116 See eg *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 ("*Lowenstein*"); *Sachter v Attorney-General for the Commonwealth* (1954) 94 CLR 86; *Spratt v Hermes* (1965) 114 CLR 226; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Kingswell* (1985) 159 CLR 264 at 276-277 per Gibbs CJ, Wilson and Dawson JJ. But see the dissenting judgment of Dixon and Evatt JJ in *Lowenstein* (1938) 59 CLR 556; and the dissenting judgment of Deane J in *Kingswell* (1985) 159 CLR 264 at 318-319.

117 *Cheatle v The Queen* (1993) 177 CLR 541.

the trial must be by jury, notwithstanding that a trial of a different kind may be required by any other federal law or by the law of any State whose court is invested with federal jurisdiction to try the offence. So s 80 seems to be of minor importance, if the current interpretation of the section is accepted. It is understandable, therefore, that some Justices of this Court have been prepared to disregard the literal meaning of the section and to look for an interpretation which gives s 80 some efficacy as a guarantee of trial by jury for serious offences.

123 The importance of trial by jury was eloquently put by Lord Devlin in his book, *Trial by Jury*[118]:

> "Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives. To many of us the boundaries between Whitehall and Westminster are uncertain and confused. We are anxious that government should be strong and yet fearful lest the gathering momentum of executive power crush all else that is in our State. We look for some landmark that we may say that so long as it stands, we are safe; and if it is threatened, we must resist."

124 Lord Devlin echoed the view of Blackstone in his *Commentaries* who regarded the jury as the bulwark of liberty[119]:

> "So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the

---

118 Devlin, *Trial by Jury*, (1966) at 164.

119 Blackstone, *Commentaries*, (1769), bk 4 at 343-344.

> spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." (original emphasis)

125 I have concluded, however, that, if I rejected the traditional interpretation of s 80, I would not be interpreting the Constitution. I would be crossing the admittedly often uncertain line between constitutional interpretation and constitutional amendment and amending the Constitution by giving effect to my own values or beliefs.

The literal meaning of s 80 accords with its purpose

126 The literal meaning of s 80 is very clear: trial by jury is required only where the trial is on indictment. Because this meaning results in the section being a mere procedural provision, it is natural to look to its purpose to see if the literal meaning accords with the purpose of the section. It is always legitimate to give a constitutional or statutory provision a meaning which will give effect to its purpose even if that requires a departure from its literal meaning. It is legitimate even if it requires giving the provision a strained meaning[120]. But an examination of the purpose of s 80 leads to the conclusion, unlikely as it may have seemed, that the literal meaning of the section in fact gives effect to its purpose and intent.

127 No doubt s 80 contains a guarantee. But on its face it is only a guarantee of a jury trial when the trial is on indictment. It is not legitimate, therefore, to commence with the pre-supposition that s 80 guarantees trial by jury and then to disregard the literal meaning to give effect to that "purpose" or "object" of trial by jury. To do so is an exercise in circular reasoning.

128 Nor is there anything in the phrase "trial on indictment" which suggests a purpose other than that which the literal meaning suggests. No doubt that phrase indicates that the trial is the result of a decision of the Crown, a public authority such as a Director of Public Prosecutions, a magistrate or a grand jury to put the accused on trial by indictment. But that decision could not have been made unless the Parliament had made the offence an indictable one. So nothing is gained by identifying s 80 as having the purpose of requiring trial by jury when some public official has made a decision to put the accused on trial. It still allows the Parliament to avoid the operation of the section by refusing to classify the offence as indictable.

129 What, then, is the mischief at which s 80 is aimed? When the section is read in the light of its United States counterpart, its drafts and the discussion at

---

120 *Sutherland Publishing Co Limited v Caxton Publishing Co Limited* [1938] Ch 174 at 201; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 422.

the Constitutional Conventions, it is plain that it took the form that it did to avoid the mischief that would result if Parliament could not determine which offences against the laws of the Commonwealth were to be tried by juries. The words of s 80 were deliberately and carefully chosen to give the Parliament the capacity to avoid trial by jury when it wished to do so. The current and traditional interpretation of s 80, therefore, gives effect to the purpose of the section.

The origin of s 80

130 Section 80 has its origin in Art III, s 2 of the United States Constitution which provides inter alia:

> "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."

131 Although the makers of our Constitution were strongly influenced by the terms of the United States Constitution and "felt the full fascination of its plan"[121], their original draft of what became s 80 departed in one important respect from the United States counterpart. In the draft presented to the Constitutional Convention by Mr Barton on 12 April 1897 (the "12 April 1897 draft")[122], the phrase "all indictable offences" was used instead of "all Crimes"[123]. Some years earlier, the Supreme Court of the United States had said[124] of the term "all Crimes" in Art III, s 2:

---

121 Dixon, *Jesting Pilate*, 2nd ed (1997) at 113.

122 *Official Report of the National Australasian Convention Debates*, (Adelaide), 12 April 1897 at 428-429, 431-432. Professor La Nauze described this draft as the "official first Draft of [the] present Constitution": see La Nauze, *The Making of the Australian Constitution*, (1972) at 290 n 12.

123 Inglis Clark used the phrase "all Crimes" in his draft of the Constitution prior to the 1891 Convention. However, Sir Samuel Griffith changed this to "all indictable offences". See Sir Samuel Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia*, (1891); La Nauze, *The Making of the Australian Constitution*, (1972) at 227-228; Hanks, *Constitutional Law in Australia*, 2nd ed (1996) at 513. The draft adopted by the 1891 Convention used the phrase "all indictable offences": see cl 11 of Ch III of the "Draft of a Bill as adopted by the National Australasian Convention, 9th April, 1891", as reported in Sir Samuel Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia*, (1891).

124 *Callan v Wilson* 127 US 540 at 549 (1888).

> "In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen."

132 Given this interpretation of "all Crimes" and the substitution of the term "all indictable offences", it is clear that, from the beginning, the makers of our Constitution were concerned to avoid the rigidity of the United States counterpart. They wanted the Parliament, rather than the Constitution, to determine what offences against the laws of the Commonwealth should be tried by jury. However, the terms of the 12 April 1897 draft of s 80 (cl 78) meant that once an offence was made indictable, it had to be tried by jury even though the facts made it fit for summary disposal. Because that was so, at the Adelaide Convention, Mr Higgins said that he would vote against the clause. He said[125] that, although he thought all criminal cases should be tried by jury, "we should not tie the hands of the Federal Parliament, especially as there appear to be arising new conditions under which the whole system of trial by jury may be reorganised". His view did not prevail, and the clause was agreed to, apparently without further discussion.

133 At the Melbourne Convention in January 1898, Mr Higgins reiterated his objection. He had support from Mr Glynn who proposed[126], on behalf of the Legislative Assembly of South Australia, that the words "shall be by jury, and every such trial" be omitted from what had now become cl 79. In the course of the discussion on the amendment to cl 79, Mr Isaacs made the perceptive comment[127]:

> "[I]t is no fetter on the Federal Parliament, because, when it creates an offence, it may say it is not to be prosecuted by indictment, and immediately it does it is not within the protection of this clause of the Constitution."

---

125 *Official Report of the National Australasian Convention Debates*, (Adelaide), 20 April 1897 at 990-991.

126 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 350.

127 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 352.

134 Later, Mr Isaacs said that "[t]he moment the offence is not an indictable offence, then it ceases to be one which comes within the purview of this clause"[128]. This intervention may have been influential because the proposed amendment was lost by 17 votes to 8, Mr Isaacs being one of those voting against it.

135 When the Convention resumed in March 1898, however, Mr Barton moved an amendment to cl 79. He moved[129]:

> "That the words 'of all indictable offences' (line 1), be struck out, and that the words 'on indictment of any offence' be substituted."

136 In supporting the amendment, Mr Barton said[130]:

> "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, which would be a cumbrous thing, and would hamper the administration of justice of minor cases entirely."

137 Mr Isaacs said[131]:

> "When the clause was before us previously, I pointed out that I did not think it would have any real effect at all, because 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 to be an indictable offence, and therefore the right to try a person accused of murder would not necessarily be by jury."

---

128 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 352.

129 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1894.

130 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1895.

131 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1895.

138 He went on to say[132] that the proposed amendment "prevents the difficulty Mr Barton refers to, but I must say that I do not see much effect in the clause as it stands in regard to preserving in all circumstances trial by jury".

139 The amendment proposed by Mr Barton was agreed to, apparently unanimously, with the result that cl 79 was adopted in the form which later became s 80 of the Constitution.

140 The history of s 80 as evinced by the debates and amendments and the departure from the United States model is relevant in determining what s 80 means and what it was intended to achieve. As this Court said of the pre-1900 history of, and the Convention debates on, s 92 of the Constitution in *Cole v Whitfield*[133]:

> "Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged."

141 Here the history shows conclusively that the words "trial on indictment of any offence against any law of the Commonwealth shall be by jury" mean that a jury is required only when the trial is on indictment. It also shows that the subject to which that language was directed was the freedom of the Parliament to choose which offences should be classified as indictable and which should be classified as summary offences, so that the Parliament could control which offences against the law of the Commonwealth should be tried by jury.

142 In the light of this history, the only possible conclusion is that s 80 was enacted in the form in which it was for the purpose of enabling the Parliament to have the right to say whether an offence was to be indictable or punishable summarily and for ensuring that the right to trial by jury would depend on Parliament's classification of the offence.

143 Whether one looks at text, history or purpose, the answer is the same: the approach to the construction of s 80 accepted by the majority in *Kingswell* and by

---

132 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1895.

133 (1988) 165 CLR 360 at 385.

this Court in earlier cases is correct. Section 80 is not a great guarantee of trial by jury for serious matters. It guarantees trial by jury only when the trial is on indictment. Whether the offence is tried or triable on indictment depends in the first instance on Parliament's classification of the offence. Such a conclusion is unlikely to be acceptable to many civil libertarians or those who believe that serious criminal offences should be tried by juries. But it is what our Constitution mandates. A contrary result can only be reached, in my respectful opinion, by disregarding the plain meaning of s 80, its drafting history and its purpose.

144 Even if one came to the conclusion that s 80 had, or may have had, a purpose other than that which its plain words suggest, a real question would arise as to what meaning could be placed on the section to give effect to that purpose. Those Justices who have rejected the accepted interpretation of s 80 have conceded[134] that, read literally, it gives the Parliament a choice as to whether the offence is to be prosecuted on indictment or summarily. But they have asserted that s 80 is a constitutional guarantee and that it must be given efficacy. They have not been able to agree, however, as to the meaning that should be given to the phrase "trial on indictment" in s 80. Thus Dixon and Evatt JJ thought that it means a trial where a public authority is responsible for the accused being put on trial and the offence involves a liability "to a term of imprisonment or to some graver form of punishment"[135]. Deane J said that "the trial of a person charged with a *serious offence* at the suit of the State or an agency of the State is a 'trial on indictment'"[136]. His Honour was unable to accept the view of Dixon and Evatt JJ that "the criterion of what constitutes, for relevant purposes, a serious offence is that it be punishable by any term of imprisonment at all"[137]. Deane J thought an offence is a "serious offence" if "it is not one which could appropriately be dealt with summarily by justices or magistrates in that conviction will expose the accused to grave punishment"[138]. To decide *Kingswell* it was "unnecessary ... to identify more precisely the boundary between offences which are not and offences which are capable of being properly so dealt with"[139]. His Honour expressed a tentative view that the boundary will ordinarily be

---

134 See, for example, the remarks of Dixon and Evatt JJ in *Lowenstein* (1938) 59 CLR 556 at 584.

135 *Lowenstein* (1938) 59 CLR 556 at 583.

136 *Kingswell* (1985) 159 CLR 264 at 317 (emphasis added); see also at 319.

137 *Kingswell* (1985) 159 CLR 264 at 310.

138 *Kingswell* (1985) 159 CLR 264 at 319.

139 *Kingswell* (1985) 159 CLR 264 at 319.

identified by reference to whether the offence is punishable by a maximum term of more than one year. It would seem that, in his Honour's view, history and established practice would also assist in determining what could "appropriately be dealt with summarily" or what constituted a "grave punishment"[140]. Murphy J thought that s 80 guaranteed trial by jury in cases of "serious criminal offences"[141].

145 Not only are each of these formulations significantly different from each other, but each uses a category of indeterminate reference – "grave form of punishment", "serious matter", "grave punishment", "serious criminal offences", "serious offence", "appropriately be dealt with summarily". Each of them would provoke as much, probably more, uncertainty of application as the "not self-determining"[142] term "all Crimes" in the corresponding provision in the Constitution of the United States[143]. They would leave every Justice free to decide each case according to the opinion of the Justice as to whether the offence or the punishment was sufficiently serious or grave to require a jury trial. There would be no objective criteria to which the Justice could turn to determine the question. Contrary to what Deane J may have thought in *Kingswell*, history would give present-day Justices little assistance in determining whether the trial of an offence could "appropriately be dealt with summarily". At all events, history would authorise summary trials in many cases that would seem to modern eyes to require a jury trial if s 80 is to be regarded as a real guarantee of trial by jury.

146 Professor Frankfurter and his student[144], Thomas Corcoran, have shown in discussing the United States provision[145] that in 1776 over 100 offences were prosecuted summarily in England[146]. By the standards of today, many punishments that could be imposed after summary trial were "grave", particularly

---

140 *Kingswell* (1985) 159 CLR 264 at 309-310, 316, 319.

141 *Beckwith v The Queen* (1976) 135 CLR 569 at 585.

142 Frankfurter and Corcoran, "Petty Federal Offenses And The Constitutional Guaranty Of Trial By Jury" (1926) 39 *Harvard Law Review* 917 at 921.

143 See the discussion in Frankfurter and Corcoran, "Petty Federal Offenses And The Constitutional Guaranty Of Trial By Jury" (1926) 39 *Harvard Law Review* 917.

144 Lash, *From the Diaries of Felix Frankfurter*, (1975) at 135 n 1.

145 Article III, s 2.

146 "Petty Federal Offenses And The Constitutional Guaranty Of Trial By Jury" (1926) 39 *Harvard Law Review* 917 at 928.

having regard to the nature of the offence. Professor Frankfurter and Mr Corcoran pointed out[147]:

> "Nor did successive Parliaments shrink from the infliction of corporal punishment or imprisonment and hard labor for such offenses. The 'common player of interludes who should perform or cause to be acted any interlude, tragedy, opera, play, farce or other entertainment' was likely to be taken up as a vagabond and soundly whipped by the local justice before commitment to the house of correction, pending the Sessions. The smuggler's wharfhands, the keeper of the gaming house, the unmarried mother 'offending eftsoons again' might be committed indefinitely unless heavy surety were forthcoming for their indefinite good behaviour. The rum runner's scout caught waiting the arrival from sea of illicit goods, suffered a month at hard labor, with severe whippings occasionally added; the gamekeeper who poached on the side risked three months in jail; the dissenting preacher who had not taken the oath of allegiance, six months. The false prophet who 'advanced any fond fanatical or false prophecy to the disturbance of the realm,' the unmarried mother, the lottery agent, the servant assaulting his master, the destroyer of bent grass were incarcerated for a year."

147 Their discussion shows that the history of legislation concerning summary offences would furnish little if any guide to the application of s 80 in a modern society. Today, most people – given the views of the public concerning the inadequacy of sentences and capital punishment, I hesitate to say all people – would think that any offence that could result in corporal punishment was a "serious offence". Most people would think that a person should have a jury trial before being exposed to such punishment. Yet historically, whipping was one form of punishment for summary offences. Indeed, it was a common form of punishment for many offences in this country at the time of federation and has been ordered by a court in the lifetime of many people still living[148]. Of course, it is highly unlikely, to say the least, that any Parliament of the Commonwealth, or a State legislature whose sentencing laws applied in federal jurisdiction by reason of s 79 of the *Judiciary Act* 1903 (Cth), would now allow such a punishment to be inflicted whether summarily or for an indictable offence. But if it did, neither legal history nor "established practice" would necessarily determine whether the trial of an offence with such a punishment was in substance "a trial on indictment".

---

147 "Petty Federal Offenses And The Constitutional Guaranty Of Trial By Jury" (1926) 39 *Harvard Law Review* 917 at 932 (footnotes omitted).

148 See, for example, *O'Meally v The Queen* (1958) 98 CLR 13.

148 Undoubtedly there are many offences where courts would have no doubt that they were serious offences requiring trial by jury. Treason, murder and rape are examples. But in the regulatory State, there are many offences where judges and justices would probably often disagree as to whether they met the criteria laid down by Dixon, Evatt, Murphy or Deane JJ. History is unlikely to offer much of a guide. In the United States, the indeterminacy of the "cruel and unusual punishments" clause of that country's Constitution[149] has provoked much debate and corresponding uncertainty concerning its application. It seems likely that the suggestions of the above Justices as to the meaning of s 80 would create similar uncertainty as to the reach of the section. Would charges of indecent assault, indecent exposure, larceny, embezzlement, falsification of accounts, fraudulent misappropriation, false pretences, corruption, receiving, malicious injury or forgery require a trial by jury? They are merely some of the serious offences that are, or have been, able to be tried summarily in State courts, sometimes only with the consent of the accused and sometimes without his or her consent. Are these offences serious matters which would require trial by jury if enacted by the Commonwealth? Would it make a difference if the maximum sentence in respect of such offences is (say) two years? Is two or three years for corporate fraud such a serious matter involving such grave punishment that it would require a jury trial in the case of a federal offence? Would it be relevant that the facts of the case suggest a sentence of no more than one year? Would the length of sentences that could be imposed in State jurisdictions for summary offences be relevant in determining the application of s 80?

149 These questions suggest that to adopt the views of Dixon and Evatt JJ or Murphy J or Deane J would provoke much uncertainty as to the application of s 80 and create a new and fertile field of constitutional jurisprudence. Unsatisfactory consequences cannot alter constitutional meanings but they should make us hesitate before adopting the meaning of a constitutional provision which is contrary to its text, history and purpose.

150 Furthermore, because the rights conferred by s 80 cannot be waived by the accused[150], rejection of the current interpretation would mean that Parliament could not confer on an accused person the right to elect to have a non-jury trial. Many accused persons would not regard the mandatory requirement of a jury trial as conferring any benefit on them. Those charged with offences likely to arouse public indignation, such as cases involving sexual or other crimes against children, for example, or those accused who have raised mental illness as a defence, often prefer trial by judge to trial by jury when they are able to elect for trial by judge. To some accused, trial by jury is not a boon.

---

149 Eighth Amendment.

150 *Brown v The Queen* (1986) 160 CLR 171.

151 Even if I thought that the current interpretation of s 80 accepted by the majority in *Kingswell* was incorrect, the difficulties of judicially formulating a workable principle would make me hesitate before rejecting the authority of the cases that give effect to the current interpretation. My hesitation would be increased by the knowledge that in 1988 a substantial majority of the Australian people refused to approve an amendment to s 80. That amendment would have required a jury trial where the person was being tried "for an offence, where the accused is liable to imprisonment for more than two years or any form of corporal punishment"[151]. The proposed amendment made exceptions for a trial for contempt of court and certain cases tried before a court-martial. It is true that the amendment was defeated as part of a package of four amendments and that a majority of the people may have favoured it. But at least this much can be said: the people did not feel so strongly in favour of trial by jury that they were prepared to accept the remaining amendments so that they could have trial by jury "for an offence, where the accused is liable to imprisonment for more than two years or any form of corporal punishment".

152 In my opinion, the traditional interpretation of s 80 is correct. In any event, even if I had thought that interpretation was plainly wrong, it has stood for so long and been confirmed so often and so recently that I would hesitate to depart from it. Significantly, Sir Owen Dixon, who was one of the authors of the dissent in *Lowenstein*, was party to a judgment in which the Court "declined to reconsider" *Lowenstein*[152]. The applicants' reliance on the dissenting judgment of Deane J in *Kingswell* must be rejected.

The dissent of Brennan J in *Kingswell*

153 The principal difference between the judgment of Brennan J and that of Gibbs CJ, Wilson and Dawson JJ in *Kingswell* was whether a passage in the speech of Lord Diplock in *R v Courtie*[153] had authoritatively defined what constituted an offence for constitutional purposes or whether it merely stated a rule of construction. Brennan J thought it defined the elements of an offence. Gibbs CJ, Wilson and Dawson JJ thought[154] that it could not "have been intended to state an absolute rule of law, but rather a rule of construction or an indication of the way in which the courts will approach a question of this kind".

---

151 Constitution Alteration (Rights and Freedoms) Bill 1988.

152 *Sachter v Attorney-General for the Commonwealth* (1954) 94 CLR 86 at 88.

153 [1984] AC 463.

154 (1985) 159 CLR 264 at 276.

154 In *R v Courtie*[155], the House of Lords held that, because the *Sexual Offences Act* 1967 (UK) had modified s 12(1) and other sections of the *Sexual Offences Act* 1956 (UK) with the result that the maximum punishment for "buggery" varied depending on the facts, s 12(1), when read with the 1967 Act, should be treated as creating more than one offence. Lord Diplock gave the leading speech. His Lordship said[156]:

> "From the fact that the statutory definition of a criminal offence involves the existence of at least one of several necessary factual ingredients which differ from one another, it need not always follow that as many different statutory offences are created as there are necessary factual ingredients that are alternative to one another."

155 However, Lord Diplock went on to say[157] in the passage relied on by Brennan J in *Kingswell*:

> "My Lords, where it is provided by a statute that an accused person's liability to have inflicted upon him a maximum punishment which, if the prosecution are successful in establishing the existence in his case of a particular factual ingredient, is greater than the maximum punishment that could be inflicted on him if the existence of that particular factual ingredient were not established, it seems to me to be plain beyond argument that Parliament has thereby created two distinct offences ... "

156 In my opinion, Gibbs CJ, Wilson and Dawson JJ, with whose judgment Mason J agreed on this point, were right in holding that "'offence' has no fixed technical meaning in the law"[158]. Their Honours said[159]:

> "Putting aside, for the moment, s 80 of the Constitution, there is no fundamental law that declares what the definition of an offence shall contain or that requires the Parliament to include in the definition of an offence any circumstance whose existence renders the offender liable to a maximum punishment greater than that which might have been imposed if the circumstance did not exist. The existence of a particular circumstance may increase the range of punishment available, but yet not alter the

---

155 [1984] AC 463.

156 [1984] AC 463 at 470.

157 [1984] AC 463 at 471.

158 (1985) 159 CLR 264 at 276.

159 (1985) 159 CLR 264 at 276.

> nature of the offence, if that is the will of the Parliament. The rule of construction which Lord Diplock has enunciated is a salutary one, but must yield to an expression of a contrary intention. A contrary intention does appear in the provisions of the *Customs Act* with which we are concerned."

157 This view must be right. Judges frequently impose light or heavy sentences in respect of the same breach of the law depending on the presence or absence of particular circumstances. It cannot be right to think that the offenders have committed different offences merely because the presence of some factor has made one offender liable to a greater punishment than the other offender. What difference can it make that, instead of leaving punishment to the discretion of the judge, the legislature has said that, if the law is breached in particular circumstances, the offender should receive, or is liable to receive, a greater punishment? In Victoria, for example, s 6E of the *Sentencing Act* 1991 (Vic) provides that:

> "Every term of imprisonment imposed by a court on a serious offender for a relevant offence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender, whether before or at the same time as that term."

I cannot see how this section can be regarded as increasing the number of "relevant offences" because "serious offenders", as defined[160], may commit those offences. Section 6E exposes a "serious offender" to a greater punishment for committing a "relevant offence" than a person who is not a "serious offender". But it does not create a whole new series of offences.

158 If the legislature has made the breach of a law the "offence" and indicated that, while an aggravating feature calls for a heavier sentence, it is not part of the offence, that is the end of the matter. Nothing in the notion of "offence" requires the aggravating feature to be regarded as an element of the offence for the purpose of s 80 or otherwise. In my opinion, *Kingswell* was rightly decided on this point.

159 Moreover, the subsequent course of authority in the United Kingdom has treated the speech of Lord Diplock in *R v Courtie*[161] as laying down a rule of construction and not a fixed rule as to what constitutes an offence. The relevant line of authority relates to the offence created by s 7(6) of the *Road Traffic Act* 1988 (UK) ("the RT Act"). Section 7(1) of the RT Act gives a police constable,

---

160 See *Sentencing Act* 1991 (Vic) s 6B(3).

161 [1984] AC 463.

in the course of investigating whether a person had committed an offence pursuant to s 4 or s 5 of the RT Act, the power to require breath, blood or urine samples from that person for testing. Section 7(6) of the RT Act provides that:

> "A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section is guilty of an offence."

The penalty for the offence created by s 7(6) of the RT Act is set out in s 33 of, and Sched 2 to, the *Road Traffic Offenders Act* 1988 (UK) ("the RTO Act"). Schedule 2 to the RTO Act provides for different penalties in different factual situations. In particular, if the constable was investigating a possible offence that involved an accused driving (or attempting to drive) a car when drunk, a greater penalty is applicable than if the constable was investigating a possible offence that involved an accused being "in charge" of a car when drunk[162].

160 In *Director of Public Prosecutions v Corcoran*[163], Pill J, with whom McCowan LJ agreed[164], held that s 7(6) creates two offences, holding that "Lord Diplock's statement in *R v Courtie* … covers the present situation"[165]. *Corcoran* led to several applications for judicial review being made by those who had been convicted of a s 7(6) offence. These applications were heard together in *Shaw v Director of Public Prosecutions*[166], which held that *Corcoran* was wrongly decided. In *Shaw*, the English Court of Appeal held that s 7(6) created only one offence. The Court adopted counsel's submission that "Lord Diplock's dicta as to the effect of differences in maximum punishment have to be placed in their particular context and must not be treated as being of universal application"[167]. The Court also adopted counsel's submission that the reasoning in *R v Courtie* "does not apply to the present context, where the *statutory definition* of the offence is in the simple terms of s 7(6) and does *not* involve the existence of

---

162 See eg *Director of Public Prosecutions v Butterworth* [1995] 1 AC 381 at 388-389, 393.

163 [1993] 1 All ER 912.

164 There were only two judges in the case.

165 [1993] 1 All ER 912 at 917.

166 [1993] 1 All ER 918.

167 [1993] 1 All ER 918 at 929, 930.

different factual ingredients"[168]. In *Shaw*, the Court followed an earlier decision of Lord Diplock in *R v Curran*[169], which had *not* been cited in *Corcoran*.

161 The issue came before the House of Lords in *Director of Public Prosecutions v Butterworth*[170]. The first certified question before their Lordships was "[d]oes section 7(6) of the Road Traffic Act 1988 create more than one offence?"[171]. The defendant argued on the basis of *R v Courtie*[172] that the different penalties in different circumstances meant that distinct offences had been created[173]. Lord Slynn of Hadley, who gave the leading speech, rejected this argument and held that *Corcoran* was wrongly decided and that *Shaw* was correctly decided[174]. Lord Slynn said[175]:

> "The question whether the person was driving or in charge of the motor vehicle is not part of the inquiry into whether there has been a refusal for the purposes of section 7(6). That question only becomes relevant after conviction and goes to the appropriate penalty."

162 His Lordship said that this conclusion was not inconsistent with *R v Courtie*[176] or *R v Shivpuri*[177] (a case that involved drug offences), as those decisions[178]:

> "were both dealing with specific statutory provisions … *Each statute has to be considered separately to decide whether separate offences were created* …

---

168 [1993] 1 All ER 918 at 929, 930 (original emphasis).

169 [1976] 1 WLR 87; [1976] 1 All ER 162.

170 [1995] 1 AC 381.

171 [1995] 1 AC 381 at 388.

172 [1984] AC 463.

173 [1995] 1 AC 381 at 389.

174 [1995] 1 AC 381 at 395.

175 [1995] 1 AC 381 at 394.

176 [1984] AC 463.

177 [1987] AC 1.

178 [1995] 1 AC 381 at 394-395.

> In my opinion, *as a matter of construction of these particular statutory provisions*, it is clear that the relevant offence is one of refusing to give a specimen in the course of an investigation as to whether an offence under section 4 or 5 had been committed. Which offence it is said was committed [ie driving or attempting to drive a car while drunk or being in charge of a car while drunk] is only relevant to the appropriate penalty. … [T]he first certified question [should be] answered in the negative[.]" (emphasis added)

163 These cases show that the majority in *Kingswell* was correct in holding that *R v Courtie* established no more than a rule of construction and that "'offence' has no fixed technical meaning in the law"[179]. *Kingswell* was correct in holding that s 235(2) is not invalid. Moreover, in *R v Meaton*[180], this Court followed the suggestion of the majority in *Kingswell*[181] that "[w]here the circumstances of aggravation described in s 235(2) are relied on, they should be charged in the indictment". In *Meaton*, the majority of the Court said[182]:

> "The preferable course for the prosecution is to lay one charge which includes the circumstances of aggravation; the jury can then be directed that it would be open to them (in appropriate circumstances) to find the accused guilty of the charge without those circumstances of aggravation: see *Archbold's Criminal Evidence & Practice*, 42nd ed (1985), pars 4-459–4-461. Where the accused is alleged to have been convicted of a previous offence in respect of narcotic goods, in New South Wales the practice governed by ss 394 and 414 of the *Crimes Act* 1900 (NSW), as amended, should be adopted. In those States where the matter is not governed by express statutory provision, the practice which is set out in *Kingswell v The Queen*[183] should be followed."

164 This statement explains the form of information in the present case. No challenge in the present case was made to the correctness of this practice. The applicant challenged the correctness of *Kingswell*, not *Meaton*. But the decision in *Meaton* would provide a strong ground for declining to re-open the decision in *Kingswell* even if I had doubts about its correctness. Although only the correctness of the suggested practice and not the decision in *Kingswell* was in

---

179 (1985) 159 CLR 264 at 276.

180 (1986) 160 CLR 359.

181 (1985) 159 CLR 264 at 281.

182 (1986) 160 CLR 359 at 364.

183 (1985) 159 CLR 264 at 279-281.

issue in *Meaton*, it is clear that *Meaton* accepted that *Kingswell* was correctly decided. In addition, many criminal trials have subsequently taken place relying on *Kingswell's* holding that s 235(2) did not create additional offences. Those two matters make an overpowering case for refusing to re-open the decision in *Kingswell* irrespective of one's view as to its correctness.

165 However, the applicants contend that four cases involving s 80 show that the reasoning in *Kingswell* can no longer be supported. They contend that those cases establish, contrary to *Kingswell*, that s 80 is a constitutional guarantee of substance. They argue that, even if Parliament can determine which cases can be tried on indictment and which summarily, it cannot determine what is or is not an "offence" for the purpose of s 80. In my opinion, these contentions must be rejected.

166 The first of the four cases is *Brown v The Queen*[184] which established that a defendant cannot elect to be tried on indictment by a judge alone because s 80 mandates that a trial on indictment of any offence against any law of the Commonwealth must be by jury[185]. *Brown* was primarily concerned with whether the "right" conferred by s 80 can be waived by a defendant, which in turn involved consideration of who is the beneficiary of the "guarantee" in s 80. Dawson J expressed the view that "it is overstating the position to say that s 80 has been reduced to a procedural provision"[186]. However, his Honour formed part of the majority in *Kingswell*. It is unlikely that he intended to throw any doubt on the correctness of *Kingswell* decided only four months earlier. Moreover, his Honour was a party to the decision in *Meaton* which was decided only two months after *Brown*. In my opinion, nothing in *Brown* gives any reason to doubt the correctness of *Kingswell*.

167 The second case upon which the applicants rely is *Cheatle v The Queen*[187] which held that the requirement in s 80 that a relevant trial "shall be by jury" necessitated that the jury return a unanimous verdict. As Kirby J noted in *Re Colina; Ex parte Torney*[188], *Cheatle* is authority for the proposition that "where s 80 of the Constitution does apply, the essential elements of jury trial must be

---

184 (1986) 160 CLR 171.

185 (1986) 160 CLR 171 at 196-197, 201 per Brennan J, 205-207 per Deane J, 217 per Dawson J.

186 (1986) 160 CLR 171 at 215.

187 (1993) 177 CLR 541.

188 (1999) 73 ALJR 1576; 166 ALR 545.

observed"[189]. The issue in this case, however, is whether s 80 applies; that is, does s 235(2) contain elements of an offence which is to be tried on indictment but only partly by jury? That being so, nothing in *Cheatle* gives any reason to doubt the correctness of *Kingswell*.

168 The third decision upon which the applicants rely is *Katsuno v The Queen*[190]. *Katsuno* held that it was unlawful for the Commissioner of Police of Victoria to provide the Director of Public Prosecutions with details of convictions and other information concerning people summoned to serve as jurors in criminal trials[191]. The main judgment was delivered by Gaudron, Gummow and Callinan JJ. While their Honours quoted, with apparent approval, an "important" statement made by Deane J in *Kingswell*[192], they noted that that statement "has nothing to say about what occurred in this case"[193]. Moreover, the passage extracted from *Kingswell* does not contain anything inconsistent with the judgment of the majority in that case. It merely describes, in broad terms, one of the important functions served by the institution of trial by jury. Nothing in Katsuno gives rise to any doubt concerning the correctness of *Kingswell*.

169 The final case upon which the applicants rely is *Re Colina; Ex parte Torney*[194]. There the prosecutor submitted, inter alia, that s 80 of the Constitution prohibited charges of contempt of court made against him being tried summarily. He contended that a trial by jury was necessary[195]. Gleeson CJ and Gummow J rejected the submission on the ground that what was alleged against the prosecutor was not an offence against a law of the Commonwealth[196]. I rejected it on the ground that the prosecutor had not been charged on indictment[197]. Kirby J held that s 80 had the meaning that Deane J had given it in

---

189 (1999) 73 ALJR 1576 at 1596 [93]; 166 ALR 545 at 573.

190 (1999) 73 ALJR 1458; 166 ALR 159.

191 (1999) 73 ALJR 1458 at 1460 [10]; 166 ALR 159 at 161.

192 (1985) 159 CLR 264 at 301-302.

193 (1999) 73 ALJR 1458 at 1468 [49]; 166 ALR 159 at 171.

194 (1999) 73 ALJR 1576; 166 ALR 545.

195 (1999) 73 ALJR 1576 at 1579 [11]; 166 ALR 545 at 550.

196 (1999) 73 ALJR 1576 at 1581 [25]; 166 ALR 545 at 553; see also per Hayne J at (1999) 73 ALJR 1576 at 1600 [108], 1601 [113]; 166 ALR 545 at 578, 579.

197 (1999) 73 ALJR 1576 at 1586 [50]; 166 ALR 545 at 559.

Kingswell[198]. Callinan J held that, notwithstanding that he shared some of the concerns expressed by Dixon and Evatt JJ in *Lowenstein* and by Brennan J in *Kingswell*, s 80 did not require the result for which the prosecutor contended[199]. Only the judgment of Kirby J throws any doubt on the correctness of *Kingswell*. Not only is the view of his Honour contrary to a long line of authority in this Court concerning the meaning of s 80, it is, for the reasons which I have given, erroneous. Nothing in the other judgments in *Re Colina; Ex parte Torney*[200] throws any doubt on the correctness of *Kingswell.*

170 For all of these reasons, the applications for special leave to re-open *Kingswell* should be refused.

Other matters

171 For the reasons given by Gleeson CJ, Gummow and Hayne JJ under the heading – The subsidiary issue – nothing in the remaining points raised by the applicants warrants the grant of special leave to appeal.

Order

172 The applications for special leave to appeal should be dismissed.

---

198 (1999) 73 ALJR 1576 at 1596 [95]; 166 ALR 545 at 574.

199 (1999) 73 ALJR 1576 at 1606 [136]; 166 ALR 545 at 587.

200 (1999) 73 ALJR 1576; 166 ALR 545.

173 KIRBY J. Section 80 of the Australian Constitution, concerning trial by jury, has led to some of the sharpest divisions of opinion in the history of this Court. The present proceedings are no exception.

174 In the early days of the Court, the opinion prevailed that the section was no more than a procedural requirement[201], a position seemingly incompatible with its inclusion within the enduring provisions of Ch III of the Constitution. Yet, even in those dark days, there were occasional glimmers of light. Thus, in 1915, Griffith CJ suggested that s 80 was a "fundamental law of the Commonwealth"[202]. In 1936, Evatt J, extracurially, derided the prevailing view as tautological because it rendered illusory the protections of the Constitution and put them "at the will of the very Parliament whose action it was intended to restrict by safeguarding the rights of the citizen"[203]. In 1938, Dixon and Evatt JJ wrote a strong dissent castigating the opinion of their colleagues as one which attributed a "queer intention" to the Constitution and allowed it to be "mocked"[204]. Although individual Justices were from time to time persuaded to the minority view[205], the majority opinion remained that s 80 was not a constitutional guarantee but a mere procedural provision[206]. That view was expressed as late as 1985 in the decision that comes under re-examination in these proceedings: *Kingswell v The Queen*[207]. Again, there were strong dissenting opinions[208].

175 Then, it seemed, a change came over the Court's exposition of the requirements of s 80. In 1986, in *Brown v The Queen*, Deane J declared that the

---

201 *R v Bernasconi* (1915) 19 CLR 629 at 637 per Isaacs J; *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 139 per Higgins J.

202 *R v Snow* (1915) 20 CLR 315 at 323; cf *Brown v The Queen* (1986) 160 CLR 171 at 215 ("*Brown*").

203 Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Sup) 49 at 65.

204 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 581-582.

205 eg *Beckwith v The Queen* (1976) 135 CLR 569 at 585 per Murphy J.

206 *Spratt v Hermes* (1965) 114 CLR 226 at 244.

207 (1985) 159 CLR 264 ("*Kingswell*").

208 *Kingswell* (1985) 159 CLR 264 at 286 per Brennan J, 298, 310 per Deane J. See also *R v Meaton* (1986) 160 CLR 359 at 365 per Brennan and Deane JJ ("*Meaton*").

section was a "constitutional guarantee ... for the benefit of the community as a whole"[209]. Other members of the Court on that occasion acknowledged that s 80 afforded a meaningful guarantee protective of substantive rights[210]. In 1993, in *Cheatle v The Queen*[211], a unanimous Court declared that s 80 protected the essential features of criminal trial by jury. The survival of those features was not a matter for this Court but for the people of Australia, "for whose protection the guarantee, including the requirement of unanimity, was adopted"[212].

176 Then the earlier formalism returned. The most recent decisions on s 80, whilst sometimes containing a passing nod to the view of the section as a fundamental guarantee of the Constitution[213], have confined its operation to an ineffective hortation. The old view, it seems, is, for a time, to prevail again. The logic and necessity of giving a constitutional effect to s 80 is to be rejected. Whereas other provisions of Ch III are strictly invoked to strike down beneficial national legislation[214] or to invalidate longstanding national practice[215], s 80 of the Constitution is, it would appear, to be viewed as a withered "guarantee" of no substantive use to those facing trial for federal offences in Australian courts. It might just as well not have been included in the Constitution.

177 Because, respectfully, I cannot accept this view of the meaning of s 80 and because I reject a turning back to such a sterile opinion about its requirements, I must explain my point of difference in the context of the present proceedings.

---

209 (1986) 160 CLR 171 at 201.

210 *Brown* (1986) 160 CLR 171 at 178 per Gibbs CJ, 189 per Wilson J.

211 (1993) 177 CLR 541 ("*Cheatle*").

212 (1993) 177 CLR 541 at 562.

213 See eg *Katsuno v The Queen* (1999) 73 ALJR 1458 at 1468 [49], 1469 [52]; 166 ALR 159 at 171, 172 ("*Katsuno*"); cf *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576 at 1606 [134]; 166 ALR 545 at 587 ("*Colina*").

214 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

215 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

The facts, the initiating process and the applicable legislation

178 As the facts of the matter have been set out in the reasons of the other members of the Court[216], I will not repeat them. Without any exception relevant to the main issue for decision, the facts were undisputed.

179 The three applicants, Yu Shing Cheng ("the first applicant"), Gang Cheng ("the second applicant") and Bach An Chan ("the third applicant") were each charged, along with two other persons, with being knowingly concerned in the importation of a prohibited import, contrary to s 233B(1)(d) of the *Customs Act* 1901 (Cth) ("the Act"). The charge became the first count of the Information filed in respect of the applicants. The Information also contained a second count charging the second applicant and one other with the offence of possessing a prohibited import. However, at the commencement of the proceedings at first instance, a nolle prosequi was filed in respect of this count. It has not concerned this Court. I will not repeat the terms of the Information, which is also set out in the reasons of others[217].

180 The applicable provisions of the Act must be referred to. Although the Act was one of the first statutes enacted by the Parliament, it was not until 1910 that it was amended to include a provision which punished the introduction into Australia of prohibited imports. The amendment to the Act in that year provided for a single offence which carried a maximum penalty, upon conviction, of two years imprisonment[218]. In 1967, the Act was amended to introduce specific provisions with respect to "narcotic drugs" and to permit differential penalties depending upon whether the offence was prosecuted summarily or on indictment[219]. In 1971, for the first time, the Parliament introduced a provision for differential punishment for the importation of a "trafficable" quantity of narcotic goods, providing for a two-tiered system of punishment depending on the determination of quantity[220]. In 1979, the concept of a "commercial quantity"

---

216 Reasons of Gleeson CJ, Gummow and Hayne JJ at [3]-[11]; reasons of Gaudron J at [66]-[68]; reasons of McHugh J at [111]-[114]; reasons of Callinan J at [256].

217 Reasons of Gleeson CJ, Gummow and Hayne JJ at [13]; reasons of Gaudron J at [66]; reasons of McHugh J at [111]; reasons of Callinan J at [256].

218 *Customs Act* 1910 (Cth), s 11.

219 *Customs Act* 1967 (Cth), s 9.

220 *Customs Act* (*No 2*) 1971 (Cth), s 8.

was first introduced[221], thereby introducing the three-tiered penalty system for which the Act still provides[222].

181 Section 233B of the Act is titled "Special provisions with respect to narcotic goods" and is set out in the reasons of the other members of the Court[223]. Section 235, which governs the differential punishment of such offences, is titled "Penalties for offences in relation to narcotic goods". It is also set out in the reasons of other members of the Court[224]. Section 233B(3) states that a person guilty of an offence against s 233B(1) is to be punished as provided by s 235. The terms of s 80 of the Constitution are likewise set out in other reasons[225] and the reader can now be taken to be familiar with its language. I will not burden my reasons with the repetition of any of these provisions, but I incorporate them by reference.

The demurrer and pleas

182 In the Supreme Court of South Australia, the trial of the applicants (and of the two other accused) was assigned to Debelle J. In a pre-trial conference, his Honour ordered that the trial commence on 6 November 1998. Pursuant to r 8.01 of the Supreme Court Criminal Rules 1992 (SA)[226], he permitted each of the applicants to apply to quash the proceedings or to stay them on constitutional grounds. Notices were given pursuant to s 78B of the *Judiciary Act* 1903 (Cth). The trial was called on. The applicants were each arraigned. In accordance with standard practice, the jury panel was not present at the time. This practice avoids any prejudice to the applicants that might arise out of the panel hearing the ensuing argument. Counsel for each of the applicants moved the Court to quash the Information on the basis that the count prosecuted was dependent upon a statutory provision that was unconstitutional.

---

221 *Customs Amendment Act* 1979 (Cth), s 3.

222 The Act, s 235(2).

223 Reasons of Gleeson CJ, Gummow and Hayne JJ at [21]; reasons of Gaudron J at [70]; reasons of Callinan J at [260].

224 Reasons of Gleeson CJ, Gummow and Hayne JJ at [22]; reasons of Gaudron J at [70]; reasons of Callinan J at [260].

225 Reasons of Gleeson CJ, Gummow and Hayne JJ at [28]; reasons of Gaudron J at [69]; reasons of McHugh J at [108]; reasons of Callinan J at [263].

226 See *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 506.

183 These applications were treated by Debelle J as a demurrer to the Information[227]. The prosecutor joined issue on the demurrer. Put shortly, the applicants submitted that the offences with which they were charged were defined not only by s 233B of the Act, as set out in the Information, but also by s 235 of the Act, which is the section that purports to provide different penalties in relation to the importation of different prohibited imports under s 233B. The applicants argued that the provisions of the Act were invalid because they were inconsistent with s 80 of the Constitution. This was so, they contended, because, by s 235 of the Act, the determination of the nature and quantity of the prohibited import was to be decided by a judge, whereas s 80 of the Constitution required that any trial be by jury, including the determination of any relevant contested facts involving an element of the "offence".

184 The applicants acknowledged that the decision of this Court in *Kingswell* stood in the way of their argument. However, they submitted that decisions of this Court on s 80 since *Kingswell*[228], and dicta in other decisions of this Court[229], demonstrated that *Kingswell* was wrongly decided. Debelle J overruled the demurrer. He concluded, correctly, that he was bound by the decision of this Court in *Kingswell*[230]. In accordance with *Kingswell*, he upheld the validity of the provision of the Act under which the applicants were charged in the Information and thus of the Information itself.

185 Following this ruling, the applicants each pleaded guilty to the charge appearing in the first count of the Information. They thereby followed a course of conduct which had been foreshadowed in the pre-trial directions. According to the file note, that course was adopted "so the accused can reserve their capacity to argue the validity of s 233B(1)(d) of [the Act]". The further proceedings in relation to the applicants were stood over. The trial against the other two persons who were also accused proceeded to the verdict of a jury. Those persons were acquitted. On 3 December 1998, the applicants appeared for sentence before Debelle J. Although the third applicant gave oral evidence about how he had become involved in the importation (his part had been the most significant of the three), the other applicants gave no such evidence. They relied on statements made on their behalf by their counsel, a course not uncommon in sentencing procedure in Australia[231]. This course can often be efficient. It can

---

227 *Criminal Law Consolidation Act* 1935 (SA), s 281(1).

228 *Brown* (1986) 160 CLR 171; *Cheatle* (1993) 177 CLR 541.

229 eg *Ha v New South Wales* (1997) 189 CLR 465 at 498.

230 *R v Chan* unreported, Supreme Court of South Australia, 6 November 1998 at 3.

231 cf *Collins* (1993) 67 A Crim R 104.

save time where the stated facts are not disputed by the prosecution and where it involves no unfairness to the accused to adopt that course[232].

186 On behalf of the first applicant, three matters were put by counsel to Debelle J to ameliorate the seriousness of his involvement in the conduct charged. The first was that, although he knew that prohibited imports, in the form of narcotic goods, were being shipped to him from Bangkok, he believed that what was involved was "only two small parcels of cocaine"[233]. Secondly, this was said to be confirmed by the fact that he proceeded to the airport to collect the shipment in his motor vehicle, a standard sedan, which was quite unsuitable for delivery of five large crates. Thirdly, evidence was received by Debelle J that, on the evening he took delivery of the pedestals in which the heroin was concealed, the first applicant had said to a Mr Hills that he had to collect "two small parcels". "With some diffidence", Debelle J said that he was "prepared to accept what has been said on [the applicant's] behalf". The ultimate conclusion of Debelle J for the purpose of sentencing the first applicant was[234]:

> "Your role was limited to that of providing the address to which the goods would be sent and in collecting the goods. Not long after the crates arrived at your flat they were unpacked and the pedestals were removed ... You took no further part. Nevertheless, you [played] an important part in being the person to whom the goods were addressed and arranging for their collection".

187 Similarly, Debelle J found that the second applicant had driven the pedestals which he knew contained drugs to Sydney. On the basis of counsel's statement on his behalf, his Honour went on[235]:

> "However, you say you did not know the quantity of the drugs or what kind of drug it was. I am prepared to accept your explanation, although I add it must have been obvious to you that a substantial quantity of drugs was involved once you had seen the pedestals."

188 In respect of the third applicant, Debelle J rejected much of his oral evidence, and many of the assertions made on his behalf which sought to

---

232 *Collins* (1993) 67 A Crim R 104 at 107; cf *R v Vecsey* [1962] SASR 127 at 128; *R v Maitland* [1963] SASR 332; *R v Welsh* [1983] 1 Qd R 592; *R v Clayton* [1989] 2 Qd R 439 at 441; *Xiao Dong Liu* (1989) 40 A Crim R 468 at 474.

233 *R v Chan* unreported, Supreme Court of South Australia, 3 December 1998 at 3.

234 *R v Chan* unreported, Supreme Court of South Australia, 3 December 1998 at 3.

235 *R v Chan* unreported, Supreme Court of South Australia, 3 December 1998 at 3.

minimise his involvement in the offence. He proceeded to sentence the first applicant to fourteen years imprisonment with a non-parole period of seven and a half years, the second applicant to thirteen and a half years imprisonment with a non-parole period of seven and a half years, and the third applicant to sixteen years imprisonment with a non-parole period of eleven years.

The appeals against the convictions and sentences

189 Each of the applicants appealed to the Court of Criminal Appeal of South Australia against his conviction and each sought leave to appeal against his sentence[236]. The Court dismissed the appeals against the convictions. However, in light of consideration of the sentences imposed on other offenders who were involved in the transaction in New South Wales, tried and convicted in that State, the Court upheld the appeals against the sentences[237]. The first applicant was resentenced to imprisonment of nine years with a non-parole period of five years[238]. The second applicant was resentenced to imprisonment of ten years with a non-parole period of six years[239]. The third applicant was resentenced to imprisonment of thirteen years with a non-parole period of nine years[240].

190 Although the prosecution had raised no objection to the competency of the appeals against the convictions, a preliminary question arose in the course of disposing of those appeals. This concerned whether the appeals were competent, given the course which the proceedings had taken at first instance and in particular the plea of guilty which each applicant had entered when the demurrer to the Information was overruled. On this point, Bleby J[241] relied on the practice in South Australia[242], which was in turn derived from authority in England[243]. This holds that an appeal against conviction may be heard and determined where, relevantly, "upon the admitted facts [the prisoner] could not, in law, have been convicted of the offence charged ... or if to refuse to allow an appeal would result

---

236 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502.

237 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 530-532.

238 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 529.

239 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 529.

240 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 530.

241 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 507 (Doyle CJ and Wicks J agreeing).

242 *R v Frantzis* (1996) 66 SASR 558.

243 *R v Forde* [1923] 2 KB 400 at 403.

in a miscarriage of justice"[244]. The Court therefore satisfied itself that the appeals could be maintained. Treating the appeals as a challenge to the ruling on the demurrer[245], the Court affirmed that they were competent and proceeded to deal with them on their merits.

191 On that basis, whilst recording the submissions of the applicants, the Court of Criminal Appeal, like Debelle J, properly concluded that it was bound by the decision in *Kingswell* "to the effect that s 235 of the [Act] does not enlarge the number of offences prescribed by s 233B but is merely a method of fixing a penalty, and that s 235 is not rendered invalid by s 80 of the Constitution"[246]. It was on this footing that the appeals against the convictions were dismissed.

Fact-finding for resentencing on appeal

192 Both the first and second applicants complained that a different factual foundation for resentencing them was accepted by the Court of Criminal Appeal. They argued that the course adopted by the Court of Criminal Appeal was impermissible in a number of respects.

193 First, if the primary judge found that they were not aware of the quantity of the narcotic goods concealed in the pedestals, then the appellate court should have held that s 235(2)(c)(i) of the Act required proof by the prosecution that each of them had the requisite criminal knowledge and intent as to the existence of a commercial quantity of the narcotic goods imported and that neither the first nor second applicant possessed such knowledge and intent[247].

194 Secondly, the applicants argued that, in any case, the Court of Criminal Appeal should not have substituted its own findings for the findings of the primary judge, who had the responsibility of sentencing the two applicants and who was "prepared" to proceed on the basis stated. A strong and convincing reason would have been necessary to authorise the appellate court to reach a conclusion of its own in relation to such matters. The reason principally relied on (the size and number of the pedestals) was, so it was submitted, logically unconvincing. It was perfectly possible that large marble pedestals could contain a smaller than commercial quantity of narcotic goods. The quantity of the prohibited goods imported had no necessary relationship to the number and size of the pedestals containing them.

---

244 *R v Frantzis* (1996) 66 SASR 558 at 573.

245 As in *R v Howes* (1971) 2 SASR 293.

246 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 514.

247 Relying on *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 530 per Gibbs CJ.

195 Thirdly, the first and second applicants also complained that, if the Court of Criminal Appeal considered that the finding of the primary judge was unacceptable in relation to their supposed knowledge and intent, the proper course was not, in the absence of hearing from the applicants, to substitute a new finding as to their knowledge and intent based on nothing more than doubtful inference. If necessary, the matter should have been returned for formal determination at first instance[248]. In the event, for reasons which I will explain, it is unnecessary for me to decide these separate arguments.

The application for special leave is referred to a Full Court

196 Such were the issues when special leave was sought to appeal to this Court. All of the applications raised common issues concerning the validity of ss 233B(1)(d) and 235(2) of the Act which were said to be unconstitutional because they are contrary to s 80. Each applicant contended that their demurrer ought to have been upheld at first instance and that the Information should have been quashed. Additionally, in the case of the first and second applicants (but not the third), special leave was sought on the basis that the Court of Criminal Appeal should not have substituted its own findings in relation to the applicant's knowledge and intent. When the applications for special leave were returned, they were referred to a Full Court[249].

197 Before the Full Court, the Attorney-General of the Commonwealth intervened in support of the respondent. He tendered an affidavit, which was read without objection. This deposed to the large number of federal prisoners presently serving periods of imprisonment for offences against s 233B(1) of the Act, as that section had been construed and upheld in *Kingswell*[250]. The apparent purpose of this affidavit was to establish the serious inconvenience, cost and substantial injustice that would be caused if this Court were now to reverse *Kingswell*, and find that either ss 233B(1)(d) or 235(2) or both were invalid, as contravening s 80 of the Constitution.

---

248 *Allesch v Maunz* (2000) 74 ALJR 1206 at 1212 [31]-[32], 1216-1217 [55]-[59].

249 By order of Gaudron, Kirby and Hayne JJ on 8 October 1999. Note that in *Kingswell*, the Court was reconstituted by the addition of Wilson J: see (1985) 159 CLR 264 at 266. Only Murphy J did not participate.

250 According to the affidavit, there are 681 federal prisoners currently serving sentences in State and Territory prisons for offences against laws of the Commonwealth, of whom at least 470 have been convicted and sentenced for offences against s 233B(1) of the Act.

The issues

198 The following issues arise in the present applications:

1. Upon a true construction of the Act, is the alleged constitutional question avoided either by:

   (a) adopting a construction of "the Court" in s 235(2) as meaning, where the trial is had on indictment, the court constituted for the determination of disputed issues of fact by a jury as required in such a case by s 80 of the Constitution?

   (b) treating s 235(2)(c) and (d) of the Act as severable from par (e) of that sub-section, leaving par (e) as valid and providing the sole sentence applicable to a conviction by the jury of the single "offence" provided by s 233B(1)(d) of the Act?

2. Having regard to the applicants' pleas of guilty to the first count of the Information, as particularised, and the legal effect of such pleas, is the constitutional argument which the applicants tendered on the demurrer, and their motion to quash the Information, now unavailable to them because:

   (a) they lack the requisite interest or standing to raise the constitutional point?

   (b) the constitutional objection has been superseded by the plea to the offence charged and what that plea is taken, in law, to admit? or

   (c) by reason of the plea, the "trial" of the applicants did not commence and thus s 80 of the Constitution was not engaged?

3. If the answer to all of (2) is no, and having regard to the answer to (1), should the decision of this Court in *Kingswell* now be reopened in respect of the conclusion there stated as to the validity of the "offence" created by s 233B(1) of the Act in circumstances that a range of penalties is enacted by s 235(2) and (3) in respect of such "offence"?

4. If *Kingswell* should be reopened, what rule should be adopted governing the provision by the Parliament of an "offence", the trial on indictment of which must, by s 80 of the Constitution, be had by jury? Do ss 233B(1)(d) and 235(2) conform to such a constitutional requirement? Or do they amount to an impermissible attempt to circumvent the guarantee of trial by jury by purporting to exclude from the jury's consideration elements inherent in the "offence", and by impermissibly reserving determination of such elements to the judge who may apply a

different standard of proof than that governing the jury deciding contested questions of fact?

5. In the event that the Act may be construed so as to avoid the applicants' arguments as to the constitutional requirements of "offence", if the effect of their pleas of guilty is such as to deny the applicants in this case an entitlement to rely on the constitutional point, or if reopening of *Kingswell* is refused or its conclusion on the constitutional point is confirmed, are the first and second applicants nonetheless entitled to relief on their particular arguments noted above?

199 There was much common ground between the parties. The application for special leave was argued in full as on the hearing of an appeal. There was no contest that the Information was, for constitutional purposes, an "indictment" within s 80 of the Constitution. In this sense, the relevant constitutional issue in the proceedings was different from those presented by earlier cases such as *Brown*[251], *Cheatle*[252], *Katsuno*[253] and *Colina*[254]. It is beyond doubt that the proceedings for the trial of the applicants were for federal offences. Subject to what follows, the trial therefore undoubtedly attracted the requirements of s 80 of the Constitution. To that extent, the issue was not whether s 80 applied but the scope and obligations of the section in the circumstances which obtained.

The construction of the legislation

200 When questions of the constitutional validity of legislation are presented, it is usually essential to construe the legislation first. Until its operation is known, questions of validity cannot ordinarily be determined with confidence[255]. Sometimes a particular construction will avoid the necessity of invoking a constitutional prohibition or command which (were the construction otherwise) would strike down the legislation. So it has occasionally proved with s 80 of the Constitution. Thus in *Katsuno*, the view which I took about the unlawfulness of the practice of jury vetting disclosed by the evidence necessitated relief. On that

---

251 (1986) 160 CLR 171.

252 (1993) 177 CLR 541.

253 (1999) 73 ALJR 1458; 166 ALR 159.

254 (1999) 73 ALJR 1576; 166 ALR 545.

255 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *R v Hughes* (2000) 74 ALJR 802 at 816 [66]; 171 ALR 155 at 173-174; *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1030 [81]; 172 ALR 366 at 389.

approach, no question arose concerning the validity of the applicable laws[256]. Similarly, in *Colina*, the view taken by the majority of this Court, that contempt of a federal court did not constitute an indictable "offence against any law of the Commonwealth", relieved those members of the Court of any need to consider what would otherwise have been the requirements of s 80 of the Constitution[257].

201 There are two relevant points of construction in this instance: what the reference to "the Court" in s 235(2) of the Act means; and whether s 235(2)(e) of the Act may constitute the sole valid and universal punishment for the "offence" provided by s 233B(1). On the first point of construction, if "the Court" referred to in s 235(2) means, relevantly to a trial on indictment of an offence against any law of the Commonwealth, "the jury", for the purpose of resolving any disputed issues of fact, there could be no offence to s 80 of the Constitution. The purpose of that section, to protect trial by jury, would be achieved. However, in *Kingswell*, this Court unanimously dismissed that construction of s 235(2)[258]. It is sufficient for me to dispose of this first point of construction in this case by saying that the reasons of the members of the Court in *Kingswell* on this issue are compelling. The first point of construction should not be reopened. Reference to "the Court" means the judge sentencing the accused. It does not include the jury.

202 The second point of construction is likewise unavailing as a means of avoiding the constitutional problem. It was obviously the purpose of the Parliament to introduce differential punishments for the single "offence" provided by s 233B(1)(d) and to do so by reference to the variable considerations contained in s 235(2). Seen in the context of those provisions, par (e) of that sub-section was obviously enacted to afford a punishment at the lowest end of the scale. It was not meant to be a universal provision for the punishment of all offences against s 233B(1)(d). So much appears from the structure of s 235(2), the large disparity between the several maximum sentences enacted, and the express terms of par (e) which applies only "in any other case", that is, other than as provided elsewhere in s 235(2).

203 Nevertheless, if it became necessary to invalidate the provisions of s 235(2)(c) and (d) of the Act in order to preserve the constitutional validity of ss 233B(1)(d) and 235(2) (operating, as they are intended to do, together) the

---

256 *Katsuno* (1999) 73 ALJR 1458 at 1488 [138]; 166 ALR 159 at 198-199.

257 *Colina* (1999) 73 ALJR 1576 at 1581-1582 [25], 1606 [136]; cf 1586 [50]; 166 ALR 545 at 553, 587, 559.

258 (1985) 159 CLR 264 at 274 per Gibbs CJ, Wilson and Dawson JJ, 282 per Mason J, 286 per Brennan J, 296 per Deane J; cf *State v Kirsch* 268 NW 473 at 476 (1936).

provisions of s 235(e) alone might be upheld as constitutional. There would then be but one "offence" for constitutional purposes in s 233B(1)(d) and one punishment, provided by par (e), for that offence[259]. This course could be taken to uphold so much of the Act as was constitutionally valid[260]. However, such an interpretation of the Act does not avoid the constitutional problem. It presents it for decision.

The effect of the pleas

204 *The requisite standing:* The first of the three difficulties which the applicants' pleas of guilty were said to tender can be disposed of quite easily. Upon this point, the Court of Criminal Appeal was clearly correct. The applicants did not abandon the constitutional arguments that were raised on their behalf. It matters not whether their initial proceedings were by way of demurrer to, or motion to quash, the Information[261]. What occurred can only be understood in the context of what actually happened. That is why I have taken some pains to describe what took place before Debelle J. The undisputed description, contained in the reasons of the Court of Criminal Appeal[262], read with the record of the proceedings (noted apparently by the clerk of arraigns on and with the Information itself) make it clear beyond argument that the applicants explicitly reserved their arguments challenging the constitutional validity of the provisions of the Act pursuant to which they were later sentenced.

205 The applicants could, of course, have applied to the primary judge to delay their trial to permit them to apply for leave to appeal against his interlocutory ruling dismissing their arguments. Quite possibly, they could have sought relief in this Court under the Constitution itself directed to the prosecutor[263]. However, two other persons were being tried with the applicants before the primary judge. Neither of those persons had raised a constitutional objection. This Court has repeatedly and recently discouraged interlocutory intervention in criminal trials[264]. In the circumstances, the course followed was a prudent, and certainly

---

259 *Acts Interpretation Act* 1901 (Cth), s 15A.

260 cf *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 347-348; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 561.

261 *Criminal Law Consolidation Act*, s 281(1); Supreme Court Criminal Rules 1992 (SA), r 8.01.

262 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502 at 506-508.

263 Constitution, s 75(v).

264 eg *R v Elliott* (1996) 185 CLR 250 at 256-257.

an available, one. The applicants were, in effect, reserving their constitutional point before courts which were obliged by binding authority to overrule it. Their interest is clear. It remains. They now press their point. They are entitled to have it determined according to law.

206 *The legal effect of the pleas:* The second objection under this heading has more force. A plea of guilty is ordinarily taken to respond to all of the essential components of the charge brought against an accused and amounts to an admission of all of those components. As such, it is a confession formally entered in the record of the court[265]. However, the common law is tender to liberty. It is willing to look at the substance of the accused person's intention in entering a plea. Where it is shown that the accused "did not appreciate the nature of the charge or did not intend to admit he was guilty of it", it is the substance and not the form that concerns the court[266]. Therefore, three considerations must be borne in mind to identify the effect of the pleas in the present case.

207 First, the plea was only entered after the demurrer was overruled and the motion to quash the Information was dismissed. Secondly, the plea was only entered when the primary judge held himself bound to conform to the decision of this Court in *Kingswell* which held that a court, proceeding to sentence a person in accordance with the provisions of s 235(2)(c) who is convicted of an offence against s 233B(1)(cb) of the Act, is not concerned with the knowledge and intent of the accused as to the nature and quantity of the goods imported, but only with the objective facts disclosed in that regard[267]. Thirdly, were it not for these considerations, it would, at least arguably, have been open to the applicants to seek the separate determination of the relevant circumstance of aggravation by a jury in accordance with the rule of practice traced to *R v Bright*[268], apparently approved by the joint judgment in *Kingswell*[269], and endorsed by the majority of this Court in *Meaton*[270]. The circumstance of aggravation in question was the quantity of prohibited import, namely, narcotic goods, to which the section applied, and the extent to which the accused were aware of that quantity at the time of the importation.

---

265 As explained in *R v Massey* (1994) 62 SASR 481 at 482.

266 *R v Forde* [1923] 2 KB 400 at 403.

267 *Kingswell* (1985) 159 CLR 264 at 280.

268 [1916] 2 KB 441 at 444-445.

269 (1985) 159 CLR 264 at 280 per Gibb CJ, Wilson and Dawson JJ.

270 (1986) 160 CLR 359 at 363-364 per Gibb CJ, Wilson and Dawson JJ.

208 In South Australia, the rule of practice observed where there is a factual dispute about a relevant circumstance of aggravation was explained by King CJ in *R v Hietanen*[271]. His Honour said[272]:

> "It is open to an accused person to plead guilty to the charge but to deny any allegation in the charge that [constitutes a circumstance of aggravation]. If that occurs, the prosecution may, of course, accept the plea in satisfaction of the charge. If it does not do so, issue has been joined as to the existence of the relevant circumstance of aggravation and that issue must be tried by a jury. If the circumstance of aggravation consists of the commission of a prior offence [as in s 235(2)(c) of the Act], the procedure in that event referred to in *Kingswell v The Queen* at 281 would of course be followed."

209 At least in respect of the first and second applicants, the proper understanding of what occurred before Debelle J, when he was proceeding to sentence them, was that they tended their plea on the basis of an express denial of the circumstance of aggravation. Because the prosecution did not reject that denial in their cases, but accepted the plea in that context, Debelle J indicated (to the extent stated) that he was himself prepared to accept such pleas. It was only because he appeared to take the view that the determination of the factual matters important to the penalty was for him alone (constituting as he did "the Court"), that he did not treat the knowledge and intent of any of the applicants concerning the quantity of the prohibited import, in the language of the Act, as determinative of the loss of liberty to which each of the applicants was exposed. Instead, he regarded himself as governed by the objective facts about the nature of the substance and quantity in fact imported.

210 In the foregoing circumstances, I do not accept that the plea of any of the applicants deprived them of their entitlement to maintain their challenge to the constitutional validity of the provisions of the Act. A ruling was made on their demurrer and motion. It remains for this Court to decide the correctness of that ruling. Only this Court can do so having regard to the constitutional argument which the applicants have propounded.

211 *The "trial" had commenced:* The third suggested basis for depriving the applicants of their constitutional argument was that, by reason of the pleas, their "trial" never commenced. According to this argument, no occasion arose for the application of s 80 of the Constitution and no complaint could now be made of the deprivation of a jury. This contention should also be rejected.

---

271 (1989) 51 SASR 510.

272 *R v Hietanen* (1989) 51 SASR 510 at 514.

212 The point at which a "trial" commences, whether by statute or the common law, is often a subject of controversy[273]. In South Australia, it has been held that, ordinarily, a criminal trial commences "when the accused having been arraigned before the judge who is to try him, that judge embarks upon the hearing and determination of any preliminary questions or upon the empanelling of the jury"[274]. For the purposes of s 80 of the Constitution, no narrow view should be taken of the requirement which is addressed to a mode of trial "of any offence against any law of the Commonwealth". The repeated use of the word "any" indicates that the ambit of s 80 was intended to be very wide.

213 The plea that was taken from the applicants was, in my view, taken at their "trial" for the purposes of s 80. That trial was on "indictment". Thus the constitutional objection which the applicants tender remains to be determined. If it is a good objection, they have pleaded to an indictment containing an invalid offence. Such a plea would be a nullity. So would be the sentence imposed upon them in consequence. Constitutional relief could not then be denied. There can be no estoppel against the requirements of the Constitution by force of the plea. Accordingly, none of the arguments raised to repel the applicants' constitutional objection on the basis of their pleas of guilty succeeds.

Should *Kingswell* be reopened?

214 The focus here is therefore on the phrase "any offence" in s 80. About the requirements of those words, the only authority of this Court is *Kingswell* and the decision which reaffirmed it, *Meaton*[275]. Both decisions are by majority, with the same dissentients, Brennan and Deane JJ, expressing criticism of the majority views in each case. The respondent, supported by the Attorney-General, urged that this Court should not reopen *Kingswell*. In part, the submission contended that the decision was correct in all of its aspects. In part, it suggested that even if one were persuaded to the view expressed by the minority in *Kingswell*, reopening should nonetheless be refused.

215 In support of adhering to the authority in *Kingswell*, a number of arguments were deployed. First, it was submitted that the decision in *Kingswell* was harmonious with the long line of authority of this Court about s 80, extending over the better part of a century. Thus, if it is possible, as that

---

273 *Newell v The King* (1936) 55 CLR 707 at 712; *Director of Public Prosecutions, South Australia v B* (1998) 194 CLR 566 at 589-593 [49].

274 *Attorney-General's Reference No 1 of 1988* (1988) 49 SASR 1 at 5-6.

275 (1986) 160 CLR 359.

authority holds, in effect, to march out of the obligations of trial by jury, as mandated by s 80, by the simple device of providing that the trial in question should be otherwise than on "indictment", no objection could be raised to the legislative technique adopted in ss 233B(1) and 235(2) of the Act. All that those provisions did was to enact, in separate sections, what might otherwise be seen as distinct and separate offences defined by reference to specified circumstances of aggravation. In the s 80 cases, the Court might occasionally have used the rhetoric of describing s 80 as a "constitutional guarantee". However, properly analysed, s 80 was not a "guarantee" at all, except in the limited circumstances in which the Parliament chose to so provide. If such provision could be excluded by a legislative provision designating the initiating process for a particular federal offence as otherwise than by "indictment", the so-called "guarantee" could, by analogy, be excluded just as readily by a device that divorced the "offence" specified from the differential punishment provided for such an "offence"[276]. With respect to those of the contrary view, I regard such an approach to constitutional construction as completely erroneous. It is wholly inappropriate to the task entrusted to this Court to give meaning and real effectiveness to a constitutional charter of government, which is difficult to amend and intended to endure for an indefinite time[277].

216 Secondly, it was argued by the respondent that, in federal matters, any offence would have to be defined by or under a law of the Commonwealth. Therefore, by its terms, s 80 must have contemplated just such provisions defining the elements of the offence as ss 233B and 235 of the Act. Any attempt, such as that contended for by the applicants, to define the essential requirements of an "offence" in such a way as to prevent the drawing of distinctions between matters integral to the conduct constituting the "offence" and matters personal to the offender aggravating the seriousness of the offence would be bound, so it was put, to present acute practical problems. These were illustrated by the terms of the Act. Thus, difficult questions could arise, such as: would the circumstance of a prior conviction of another offence, as mentioned in the penalty provision in s 235(2)(c)(ii) of the Act, be classified only as conduct affecting the quality of the "offence" itself? Or would it be open for the Parliament to classify such a consideration as an element, the "offence" being established, which would attract differential, and heavier, punishment?

217 Self-evidently, the proposition advanced for the applicants would necessitate the drawing of lines and the classification of particular considerations.

---

276 *Kingswell* (1985) 159 CLR 264 at 277 per Gibbs CJ, Wilson and Dawson JJ, 285 per Mason J, 299 per Deane J; cf 294 per Brennan J. See also *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128.

277 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599-600 [186]-[187].

The applicants accepted this. Similar problems must be faced by construing the words on "indictment" as constitutionally equivalent to the specification of offences that are "serious"[278]. But the alternative to drawing such lines is the adoption of a construction of s 80 of the Constitution that deprives the section of any ultimate constitutional efficacy. In a choice between adjusting to a difficulty and surrender to the Parliament of untrammelled power, which the constitutional text, if it has a purpose, was designed to deny, the former will ordinarily be the correct path of constitutional construction. It is the path that the Court should take here.

218 Thirdly, the Attorney-General laid much emphasis upon the intention of the framers of the Constitution. Once again[279], this Court was taken through the debates at the Constitutional Conventions to show how many of the framers (some of whom later as Justices of the Court gave effect to their opinions) regarded the notion that s 80 of the Constitution was a guarantee of individual rights as "clap-trap"[280]. It was on this footing that the submission was advanced that it was perfectly possible, indeed affirmatively expected, that s 80 could be rendered nugatory by "mere drafting devices"[281]. Such an approach, deeply offensive to a principled construction of the Constitution, needs to be answered. It is my opinion that the framers of the Constitution did not intend, nor did they enjoy the power to require, that their subjective expectations, wishes or hopes should control all succeeding generations of Australians who live under the protection of the Constitution[282]. The history of s 80 and debates or writings about its expected operation may certainly be read for illumination and guidance. But the consideration that governs the meaning of the constitutional text is the ascertainment, with the eyes of the present generation, of the essential characteristics of the text read as a constitutional charter of government. We are not chained to the expectations of 1900.

---

278 *Colina* (1999) 73 ALJR 1576 at 1596 [92]; 166 ALR 545 at 573. There are equivalent requirements under the United States Constitution to define "petty" offences within Art III, s 2 of the Sixth Amendment: see *Colina* (1999) 73 ALJR 1576 at 1599 [103]; 166 ALR 545 at 577.

279 As in *Colina* (1999) 73 ALJR 1576 at 1597 [96]; 166 ALR 545 at 574.

280 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 351.

281 Based on *Ha v New South Wales* (1997) 189 CLR 465 at 498.

282 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599-600 [186]-[187]; *Colina* (1999) 73 ALJR 1576 at 1597-1598 [96]-[99]; 166 ALR 545 at 574-576; *Grain Pool of Western Australia v The Commonwealth* (2000) 74 ALJR 648 at 665 [90]; 170 ALR 111 at 133-134; Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?", (2000) 24 *Melbourne University Law Review* 1.

219 Fourthly, the respondent and the Attorney-General each argued that, although differing views had been expressed about the requirements of the phrase "any offence" in s 80 of the Constitution, a definitive interpretation had been established in *Kingswell*. That interpretation was entitled to respect on the principle of *stare decisis*. That principle was itself a feature of the Judicature established by the Constitution. It afforded stability to constitutional interpretations, the easy alteration of which could cause great inconvenience. Much emphasis was placed on the fact that, since 1985, when *Kingswell* was decided, hundreds of trials had been conducted and accused persons convicted and sentenced. Hundreds are currently serving their sentences. It was submitted that a proper sense of intellectual modesty commanded acceptance of some rulings even when there were personal doubts. Particularly was this so where, to upset them, would occasion disruption, cost, a sense of grievance and substantive injustice.

The authority of *Kingswell* should be reopened

220 I concede that the foregoing are powerful reasons for restraint. But they do not ultimately persuade me. The primary basis for this conclusion is that I regard the reasons of Brennan J, in the minority in *Kingswell*, to be compelling and clearly correct.

221 The practical difficulties which the holding of the joint judgment in *Kingswell* produced were immediately recognised. Those difficulties were reinforced soon afterwards, in a way that is both contrary to principle and impractical[283]. In *Kingswell*[284], the joint judgment accepted that some circumstances of aggravation, which expose an accused person to a greater maximum penalty, may create a separate offence; some may not create a separate offence; and some may simply provide considerations relevant to the exercise of the sentencing discretion[285]. In an attempt to deal with the problem presented by the second class of case (and because of certain statutory provisions in some parts of Australia) the joint judgment posited a "rule of practice" that would allow such an issue of aggravating circumstances to be adjudicated upon by the jury[286]. It is that rule of practice which is described by King CJ in *R v Hietanen*[287], set out earlier in these reasons.

---

283 *Meaton* (1986) 160 CLR 359 at 364; cf 368-369.

284 *Kingswell* (1985) 159 CLR 264 at 280 per Gibbs CJ, Wilson and Dawson JJ.

285 cf *Sabapathee v The State* [1999] 1 WLR 1836 at 1847.

286 *Kingswell* (1985) 159 CLR 264 at 280.

287 (1989) 51 SASR 510 at 514. See at [208].

222 This notion was rejected by Mason J, the other member of the majority in *Kingswell*. He regarded it as contrary to the view which he took that the Act assigned the determination and evaluation of all matters of aggravation to the judge sitting alone[288]. There is obvious force in this opinion. Nevertheless, the conclusion in the joint judgment led on to practices, later sanctioned by this Court in *Meaton*[289]. With every respect, those practices seem not only incompatible with the construction accepted in the joint judgment in *Kingswell*, but also with a principled operation of trial by jury, which s 80 was intended to preserve, at least in the trials to which that section applied.

223 If there is but one "offence" and it exists entirely in s 233B(1) of the Act, it is difficult to see what function a jury might properly have to render a verdict once a plea is taken to the count of the indictment charging that offence. What is the status of such a verdict? The improvisation that has led to this ungainly invention arises from a distaste at depriving an accused person, tried on indictment for a serious federal offence, of the jury's verdict on a contested circumstance of aggravation. Such distaste is perfectly understandable. Such a determination can convert the "offence" from one carrying a maximum penalty of two years imprisonment to one carrying the highest penalty known to our law, namely life imprisonment. But the distaste should have caused those participating in the joint judgment (and the majority in *Meaton*) to re-examine the correctness of their decisions about the requirements of the Constitution instead of trying to invent a way of circumventing those requirements.

224 All of this is put most clearly by the minority in *Meaton*[290]. It demonstrates the serious logical flaw that lies at the heart of the Court's holding in *Kingswell*. Unfortunately, that flaw has been carried over into State practice. Such practice is well intentioned[291]. But in criminal trials, a "practice cannot be adopted which is inconsistent with the substantive law"[292]. Yet this is what will continue to happen unless this Court moves to correct its earlier error.

225 Since *Kingswell*, there have been at least two cases where this Court has accepted (in the second unanimously) that s 80 of the Constitution should be given a construction that recognises its function as a real and substantive

---

288 *Kingswell* (1985) 159 CLR 264 at 285.

289 (1986) 160 CLR 359 at 364.

290 (1986) 160 CLR 359 at 368-369 per Brennan and Deane JJ.

291 *R v Hietanen* (1989) 51 SASR 510 at 514.

292 *Meaton* (1986) 160 CLR 359 at 369 per Brennan and Deane JJ.

guarantee of constitutional rights[293]. Even those Justices who had formerly been of the opposite view, and part of the majority in *Kingswell*, embraced language which acknowledged the role of s 80 as such a guarantee and so described it[294]. In *Cheatle*[295], the Court unanimously explained s 80 as a "fundamental law of the Commonwealth", reading back to what Griffith CJ had said nearly eighty years earlier in *R v Snow*[296]. Similar language can also be found in some of the reasons of the majority in *Katsuno*[297] and *Colina*[298]. This Court should not, in my respectful view, turn back the clock. In particular, it should not accept that a "mere drafting device" could circumvent the operation of s 80 as a "constitutional guarantee" and effectively permit the Parliament to expel s 80 from the Constitution.

226 As to the inconvenience that would be caused by now upholding the view of s 80 which was expounded by the minority in *Kingswell*, I remind myself of the way in which the Court has from time to time felt obliged to depart from past authority, despite the inconvenience and disturbance that this occasions[299]. In the end, this is an outcome inherent in a society living by the rule of law and especially one governed by a written constitution. If parties who claim that a constitutional norm has been breached establish that argument but cannot rely on the courts to uphold the law, where else can they go? With every respect, to suggest that an answer to a departure from a constitutional guarantee is that the Parliament has not so far misused its powers[300] is no answer at all. This Court, and not the Parliament, is the arbiter of constitutional requirements.

---

293 *Brown* (1986) 160 CLR 171; *Cheatle* (1993) 177 CLR 541.

294 Thus Gibbs CJ did in *Brown* (1986) 160 CLR 171 at 179, 201-202 per Deane J; cf 190 per Wilson J.

295 (1993) 177 CLR 541 at 549.

296 (1915) 20 CLR 315 at 323.

297 (1999) 73 ALJR 1458 at 1469 [52] per Gaudron, Gummow and Callinan JJ; 166 ALR 159 at 172.

298 (1999) 73 ALJR 1576 at 1606 [134], [136] per Callinan J; 166 ALR 545 at 587.

299 See *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1356 [152]; 165 ALR 171 at 215 and cases there cited; cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, which is a recent and clear illustration of the fact that even universally recognised advantages cannot govern the requirements of the Constitution or the duties of this Court, particularly where Ch III of the Constitution is concerned.

300 cf reasons of Callinan J at [283] referring to *Kingswell* (1985) 159 CLR 264.

227 If it is posited that *Kingswell* was incorrectly decided by the majority, the result has been a serious deprivation of important constitutional rights which this Court should now restore. The disadvantages and inconvenience of correcting earlier errors of constitutional doctrine are usually exaggerated so that they appear as "apocalyptic scenarios"[301] designed to "frighten" judges "into submission"[302]. Yet the horrible outcomes are rarely as bad as predicted. For example, the Court was informed that most of those convicted of the "offence" against s 233B(1) of the Act currently serving sentences were so convicted after a plea of guilty. Many of these might refrain from seeking to disturb sentences well advanced where the result of doing so would be a second trial for State offences or for any new federal offences for which the Parliament might lawfully provide. However that may be, "ghastly consequences"[303] did not deflect the Court in *Brown* or *Cheatle* from giving effect to the view which it took about the requirements of the Constitution. Nor did they deter the Court in *Re Wakim; Ex parte McNally*[304], where a majority was finally mustered to bring down most of the highly beneficial cross-vesting schemes. In a matter that properly establishes a serious mistake of interpretation of the Constitution, the only path consonant with the Court's duty is to acknowledge and eradicate the error. It should do so as quickly as possible. It should not turn a blind eye to such error.

228 To the extent that it is necessary, the applicants should have leave to reargue the correctness of *Kingswell*. The decision in *Kingswell* should be reopened. The holding of this Court in that case should be reconsidered, save for the unanimous opinion that "the Court" in s 235(2)(c) and (d) and (3)(a) and (b) refers to the judge sitting alone without a jury.

The constitutional requirement of "any offence"

229 I can deal briefly with what follows for, in my view, this Court should adopt the approach to the requirement of "any offence" in s 80 of the Constitution which Brennan J expressed in *Kingswell*[305]. This was a view informed by a basic presumption deeply entrenched in the common law that preceded, and has

---

301 cf *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1175.

302 *Spring v Guardian Assurance Plc* [1995] 2 AC 296 at 326.

303 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1357 [154]; 165 ALR 171 at 216.

304 (1999) 198 CLR 511.

305 *Kingswell* (1985) 159 CLR 264 at 294.

followed, the adoption of the Australian Constitution. That presumption is stated in *R v Courtie*[306]. Where a legislature has provided in a statute that an accused person's liability to punishment varies, depending upon whether the prosecution is successful in establishing the existence of a particular factual ingredient, that legislature is thereby ordinarily taken to have created distinct offences. It is not ordinarily taken to have created different species of a single offence.

230 The principle so stated is really a basic rule of procedural fairness applicable in criminal trials. Where differentiated consequences for punishment follow proof of particular and additional conduct on the part of the accused, differentiated offences are thereby provided. Such offences must be charged, particularised and proved separately. Where a jury is summoned, the accused who disputes a relevant circumstance of aggravation is ordinarily entitled to be charged separately in the indictment in respect of each offence. That person is then entitled to have the verdict of the jury upon each charge as so specified[307]. These are not absolute rules of law. Particular legislation, by clear language, may exclude them. But the capacity of the legislature to do so in the case of federal offences is necessarily subject to constitutional prescription to the contrary.

231 In *Kingswell*[308], by reference to the foregoing presumption, Brennan J concluded that "offences which attract the maximum penalties prescribed by s 235(2)(c) and (d) are offences distinct from s 233B offences and each element of the distinct offences is the subject of the s 80 guarantee". In my opinion, this is the correct analysis of the requirement of s 80 of the Constitution. This Court should accept it. It should give effect to it. To the extent that it does not do so, it permits the imposition of "condign punishment" without the observance of the "imperative requirements of s 80"[309]. It also undermines the Constitution which, in s 80, responds to Blackstone's warning against allowing[310]:

> "inroads upon this sacred bulwark of the nation ... fundamentally opposite to the spirit of our constitution; and ... though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern".

---

306 [1984] AC 463 at 471 per Lord Diplock.

307 *R v Bright* [1916] 2 KB 441.

308 *Kingswell* (1985) 159 CLR 264 at 293.

309 *Kingswell* (1985) 159 CLR 264 at 296.

310 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 344 cited by Brennan J in *Kingswell* (1985) 159 CLR 264 at 296.

232 It can hardly be doubted that conviction of an "offence" which attracts a maximum penalty of life imprisonment presents a question "of the most momentous concern". This Court should not accept an "offence" which, in a trial of a person accused on indictment of offending against a law of the Commonwealth, deprives that person of the verdict of a jury on an issue having such large consequences for that person's liberty[311].

233 No reason of principle could be advanced for such a provision that stands against s 80 when the latter is construed as a constitutional guarantee. The best that could be suggested was that some accused might occasionally "prefer" to retain an effective right to silence before a jury, divorcing the crime of importation from the matter exacerbating their sentence. However, that is hardly a reason to ignore a constitutional command. There can, in the case of some offences, be disputes concerning the fact and circumstances of past convictions. Sometimes, the element of a past conviction may properly be withheld from a jury until after a verdict is taken on the other ingredients of the offence[312]. But if a previous conviction is truly an essential element of the offence and is disputed, a proffered plea of guilty to the charge, with a contest about the past conviction, could not logically be accepted by the prosecutor in discharge of the count or by the presiding judge as a basis for convicting and sentencing the accused for the offence.

234 Similarly, any essential element of an offence which concerns conduct on the part of the accused must be proved if it is contested. Other considerations that concern matters personal to the offender may indeed affect sentencing once the offender is properly convicted. Such considerations do not need to be pleaded as elements of the offence or necessarily particularised in the initiating process. But where specified conduct on the part of an accused, if proved, renders that person liable to different, additional and particular punishment, the specification of such conduct constitutes an element of a separate "offence" for the purposes of s 80 of the Constitution. Where that element is contested, it attracts, in a trial on indictment, an obligation to have the jury's verdict upon it[313].

235 Because such an element appears in the Act, separately provided for in s 235(2)(c), that sub-paragraph cannot be classified, for constitutional purposes, as a mere *sentencing* provision concerned with nothing more than considerations

---

311 Such an offence exists in s 235(2)(c)(ii) of the Act.

312 *Kingswell* (1985) 159 CLR 264 at 281 per Gibbs CJ, Wilson and Dawson JJ referring to *Archbold's Criminal Pleading Evidence & Practice*, 41st ed (1982) at §4-50.

313 *Kingswell* (1985) 159 CLR 264 at 294 per Brennan J.

personal to the offender. It is, instead, a *substantive* provision defining an essential ingredient of a separate and more serious "offence". Because the Parliament has purported to deny the accused person the right to trial by jury in respect of that element of the offence, and to confine the decision upon that element to the satisfaction of "the Court" (the primary judge), the provisions of ss 233B(1)(d) and 235(2)(c) and (d) of the Act, in so far as they create a separate offence, are incompatible with s 80 of the Constitution. They are therefore invalid and cannot sustain the Information against the applicants.

236 It is not an answer to this conclusion to say that the applicants did not, in the events that ultimately occurred, contest the quantification of the "prohibited imports" involved in this case, or that such import was heroin, a variety of "narcotic goods". The language and structure of s 235(2) of the Act deprived the applicants, as was obviously intended by the Parliament, of their right to have a jury's verdict upon that element of the "offence" which concerned the "quantity" of the "substance" in question, specifically whether it was a "commercial" or a "trafficable" quantity. The section purported to reserve that question to "the Court", that is, the judge sitting alone proceeding to sentence the accused. This was a bifurcation of the "offence", for constitutional purposes, which was not permitted to the Parliament. It was properly contested in a timely way by the applicants' demurrer. Its resolution was critical to the loss of liberty to which each of the applicants was then exposed by the terms of the Act.

237 Had the applicants' demurrer been upheld, the offence as provided by the Parliament and as charged in the Information would have been invalidated as unconstitutional. The invalidity would have struck down the Information upon the basis of which the applicants were subsequently convicted and sentenced. The defect so revealed was not one liable to easy repair by amendment or reconstitution of the proceedings. Having properly reserved the point of constitutional law, the applicants are in my view entitled, in this Court, to have the benefit of it. Had it been upheld at trial, the plea of guilty and the acceptance of the quantity and nature of the import would not have arisen. The indictment would have collapsed at the threshold for failure to disclose an "offence" as contemplated by the Constitution. There can be no clearer miscarriage of justice than the erroneous rejection of a constitutional objection to the lawfulness of the offence charged shown to have been invalid. Although these conclusions were not open to Debelle J or to the Court of Criminal Appeal, they are open to this Court. This Court should so find.

United States analogies are confirmatory

238 Australia is not alone in facing legislative endeavours to derogate from constitutional guarantees of trial by jury of contested criminal accusations. Legislatures and executive governments elsewhere have sought to intrude upon such guarantees and to deprive accused persons of the promised right to have a

jury, and not some other decision-maker, determine contested factual questions affecting criminal liability and punishment.

239 The other decision-makers involved may be preferred by the state because they are considered more efficient than a jury. Or more reliable in giving effect to policies of condign punishment that may prove unacceptable to some jurors. In the Supreme Court of the United States, Scalia J has recently remarked that judges must sometimes be reminded that they are "part of the State" and "an increasingly bureaucratic part of it, at that"[314]. The constitutional guarantee of trial by jury, on the other hand, reflects a fundamental unwillingness to leave all issues of criminal justice to the state and its officials and a determination to reserve some aspects of criminal proceedings to civil society, as represented by citizen jurors. "It has never been efficient", Scalia J conceded. "[B]ut it has always been free"[315].

240 Although this observation was made in the context of the jury trial guarantees included by the "founders of the American Republic"[316] in the United States Constitution, the same idea, in my opinion, lies behind the guarantee in s 80 of the Australian Constitution. Many of the original inhabitants of the Australian colonies arrived as convicts as a result of the verdicts of English juries (often in the face of evidence to the contrary) holding that the crime proved was not one attracting capital punishment (then so common under English law) but only transportation to the colonies[317]. Had the English statute books at that time contained bifurcated offences of the kind found in ss 233B(1) and 235(2) of the Act, many of those early Australians would have been hanged. The convict ships to Australia would have been considerably lighter.

241 The role of the jury in our legal tradition, in mitigating the operation of laws sometimes considered excessive, would have been well known to the founders of the Australian Commonwealth. The last convicts to reach Australia arrived in Fremantle in 1868, precisely the time when the federal movement was stirring. Deriving guidance from United States authorities to assist in the exposition of s 80 of our Constitution involves some dangers, it is true. The guarantees of jury trial for serious crimes under federal or State law in that

---

314 *Apprendi v New Jersey* 68 USLW 4576 at 4585 (2000) ("*Apprendi*").

315 *Apprendi* 68 USLW 4576 at 4585 (2000).

316 *Apprendi* 68 USLW 4576 at 4585 (2000).

317 Blackstone described this as "pious perjury" on the part of juries: Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 238-239. See *Jones v United States* 526 US 227 at 245 (1999); *Apprendi* 68 USLW 4576 at 4580 (2000) per Stevens J, n 5.

country rest on the Fifth Amendment's due process clause, the Sixth Amendment's jury trial requirements and the Fourteenth Amendment's commands in respect of State legislation[318]. However, the purposes of these constitutional provisions are, in my view, basically so similar to those of s 80 of the Australian Constitution, governing the trial on indictment of federal offences, as to make it helpful to examine the way in which the Supreme Court of the United States has addressed similar attempts to circumvent trial by jury.

242 The dangers of undermining the constitutional guarantee are the same in both countries. So are the imputed purposes of those who make the attempt. The Supreme Court of the United States has, with few exceptions[319], insisted on a strict rule. Where a criminal defendant is entitled by the Constitution to jury determination of a criminal accusation, he or she is entitled to the verdict of the jury on every element of the crime constituted by the charge. Every such element must be proved to the jury's satisfaction beyond reasonable doubt[320]. It cannot be left to the determination of "the Court", that is, the judge.

243 The United States inherited, in virtually all jurisdictions, as did this country, the common law of England. It received the traditions and practices of English criminal procedure, including trial by jury. In sentencing, its judges ordinarily exercise discretions within a range of sentencing options prescribed by the legislature[321]. But these traditions and practices serve to demonstrate the novel and exceptional character of the new legislative schemes. Those schemes purport to remove from the jury's determination the decision upon facts which would expose an accused to a penalty exceeding the maximum that such person could receive if punished solely according to the facts reflected in the jury's verdict and nothing more[322].

244 In recent years, the United States Supreme Court on several occasions has had to consider the validity of so-called penalty enhancing factors[323]. These

---

318 *Apprendi* 68 USLW 4576 at 4579 (2000).

319 In *Apprendi* 68 USLW 4576 at 4582-4583 (2000) Stevens J, for the Court, suggested that the decision in *Almendarez-Torres v United States* 523 US 224 (1998), an apparent exception, may have been incorrectly decided and should be confined to its facts.

320 *In re Winship* 397 US 358 at 364 (1970).

321 *United States v Tucker* 404 US 443 at 447 (1972).

322 *Apprendi* 68 USLW 4576 at 4581 (2000).

323 *McMillan v Pennsylvania* 477 US 79 (1986); *Jones v United States* 526 US 227 (1999).

factors, legislatively prescribed, purport to empower judges to increase the punishment of an accused, convicted by a jury of a crime, although the jury has never been asked to determine whether the prosecution has proved the facts giving rise to the enhancement of punishment. The offensiveness of such provisions to constitutional guarantees of trial by jury, where such apply, is obvious. Differential offences carrying graduated punishments are, and have long been, features of a criminal justice system derived from England[324]. But bifurcating the "offence" from the penalty enhancing factors represents a new development. Although the decision on such "factors" may be critical to the loss of liberty of the accused, such provisions purport to confine the jury's role narrowly. They assign critical factual determinations to the judge in place of the jury. They thus increase the role of the state at the cost of the tribunal of citizens. If valid, they may also permit factual contests to be decided according to a standard of proof lower than that required to secure a jury's verdict of guilty[325].

245 In the United States, such endeavours have been struck down as incompatible with the constitutional entitlement to jury determination of guilt of every element of a crime, that is, the offence, with which the accused is charged[326]. In *Apprendi v New Jersey*[327], the most recent decision of the United States Supreme Court on this subject, Stevens J, writing for the Court, explained:

> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' ... trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours ...'.
>
> Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt ... [which] 'reflect[s] a profound judgment about the way in which law should be enforced and justice administered'."

---

324 Reasons of Gaudron J at [90].

325 cf *Jones v United States* 526 US 227 (1999).

326 *In re Winship* 397 US 358 at 364 (1970); *Sullivan v Louisiana* 508 US 275 at 277-278 (1993); *United States v Gaudin* 515 US 506 at 510 (1995); *Apprendi* 68 USLW 4576 at 4579 (2000).

327 68 USLW 4576 at 4579 (2000) (emphasis added).

246 The Supreme Court of the United States has been vigilant to maintain the guarantee of jury trial and to be alert to:

> "the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion'[328]. ... [P]ractice must at least adhere to the basic principles undergirding the requirements of trying [before] a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt"[329].

247 In *Apprendi*[330], after reviewing various attempts by legislatures, federal and State, to confine the role of the jury in determining factors enhancing criminal punishment, Stevens J concluded:

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in [*Jones v United States*][331]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt'".

248 In the result, the law in the United States in this matter is clear, although the determination of what may be an "element" of an offence can still present difficulties in particular cases. It is permissible, by legislation, to afford factors that mitigate punishment[332]. It is permissible to provide for enhancement of punishment by reference to the objective fact of prior convictions. But, in so far as other "sentencing enhancement"[333] factors are enacted (such as the commission of the crime for motives of racial hate considered in *Apprendi*), the existence or absence of such a factor is classified as an element of the crime. The accused who contests it is entitled to have the jury's verdict upon it. No judge may lawfully usurp the jury's function because that function is guaranteed by the Constitution.

---

328 *Jones v United States* 526 US 227 at 247-248 (1999).

329 *Apprendi* 68 USLW 4576 at 4581 (2000).

330 *Apprendi* 68 USLW 4576 at 4583 (2000).

331 526 US 227 at 252-253 (1999).

332 *Apprendi* 68 USLW 4576 at 4586, 4591 (2000) per Thomas J.

333 *Apprendi* 68 USLW 4576 at 4579 (2000).

249 It is true that the textual foundation for Australia's constitutional provision is different. But the concepts and history that underlie the United States jurisprudence are equally applicable here. They are relevant because the textual differences are immaterial. The trial in this case was one for a federal offence prosecuted on indictment. Thus the procedural means commonly said to allow the evasion of s 80 of the Constitution were, for once, irrelevant. What is relevant is that, by the Constitution, the trial "of any offence" must be by jury. What is the "offence"? It is the same as the "offense" or "crime" provided in United States law. As in that law, the attempt to separate the elements of the "offence" fails.

250 This is an unsurprising conclusion when one reflects for a moment on the huge consequences for the liberty[334] of the individual that may depend on the determination of factual disputes both as to the quantity of prohibited imports involved and as to the accused's knowledge of such quantity. The constitutional guarantee of trial by jury, in the trial of a federal crime on indictment, would be a puny thing indeed if the Parliament could so easily circumvent jury determination of matters in contest by classifying some facts as "sentencing enhancement" factors when in truth they constitute the ingredients of a much more serious variety of the "offence".

251 Section 80 appears in the Constitution. It has been mocked and evaded in Australia for too long. It is time for this Court to give the section a constitutional construction. The analogous decisions on United States constitutional law reinforce this resolve.

Consequential questions

252 Having reached this conclusion, the applicants are entitled to relief. It is not therefore necessary to decide whether, in accordance with the principles expressed in *He Kaw Teh v The Queen*[335], the "external elements" contained,

---

334 In the United States, the importance of the strict rule is emphasised by the purported legislative provision of sentencing enhancers giving rise to the imposition of the death penalty: *Walton v Arizona* 497 US 639 at 647-649 (1990), 709-714 per Stevens J (diss); cf *Almendarez-Torres v United States* 523 US 224 at 257 (1998) per Scalia J (diss), n 2 cited in *Apprendi* 68 USLW 4576 at 4585 (2000). In Australia, life imprisonment, provided for under the Act, is the highest punishment known to the law.

335 (1985) 157 CLR 523.

relevantly, in s 235(2)(c) of the Act, were intended by the Parliament to be accompanied by a mental element. As Brennan J pointed out in *Kingswell*[336]:

> "When a statute conforms to s 80, it is clear that all external facts the existence of which attracts a criminal penalty or a particular level of maximum penalty are elements of an offence, and therefore a presumption arises that a mental element must accompany each of those facts. When a statute does not conform to s 80, the mental state of the offender with respect to the facts which attract a greater penalty may be immaterial. It is not necessary now to resolve the question. It is sufficient to note that the guarantee given by s 80 with respect to the trial of each element of an 'offence' (in the sense which I attribute to the term in s 80) ensures a consistent application of the presumption with respect to mental states in relation to all external facts the existence of which attracts a particular level of maximum penalty."

253 On the view that I take of the constitutional requirement, it seems unlikely that the Parliament, or the prosecution, would have been content to leave the remaining provision of s 235(2), namely par (e), standing as a single punishment for all offences against s 233B(1) of the Act, assuming that severability was available in these circumstances. It would certainly be inappropriate for this Court to treat the applicants' pleas of guilty to the offence stated and particularised in the Information as one to a new composite offence (assuming it to survive) carrying only the maximum penalty provided by s 235(2)(e) of the Act. Instead, the Information being quashed, it should be left to the prosecution authorities to decide what new and possibly different (quite possibly State) offences should be charged in any new Information filed in the applicants' cases.

254 Because in my view the applicants' demurrer must be upheld, it is also unnecessary for me to decide the separate complaints of the first and second applicants concerning the substitution by the Court of Criminal Appeal of its findings on the facts for those which Debelle J was "prepared" to accept. To some extent, the course of the appellate proceedings to which those applicants object was the result of treating as a mere factual element for sentencing a consideration which the applicants disputed, a decision on which profoundly influenced the loss of liberty to which they were exposed. A re-expression of such offences, separately and in terms apt for the verdict of a jury, trying the matter as s 80 of the Constitution requires, might be expected to place such serious disputes where they should be: in the deliberations and verdict of the jury. By upholding that requirement of s 80 of the Constitution, the kind of complaint which the first and second applicants additionally make would be avoided. The Parliament would be obliged to provide separately for the several

---

336 (1985) 159 CLR 264 at 294.

"offences". Prosecutors would be required to plead such offences separately in an indictment. To secure a conviction of an aggravated offence, the prosecution would have to prove beyond reasonable doubt the relevant elements of aggravation in each offence, so specified, just as the prosecution routinely does where an accused is charged with several counts, each referring to different offences of graduated seriousness carrying different punishments. Only if the accused pleaded guilty to the offence, so constituted, would he or she confess all such elements. Considerations relevant to the conduct constituting the offence would then be accurately differentiated from considerations merely personal to the offender. The risk of error and confusion inherent in the present interpretation (and a risk of not insignificant injustice) would be obviated. Most importantly, the requirements of s 80 of the Constitution would be obeyed.

Orders

255 The applicants should each have special leave to appeal. The appeals should be upheld. In each case, the orders of the Court of Criminal Appeal of South Australia should be set aside. In place thereof, it should be ordered that the appeal by the appellants against their convictions and sentences be upheld. Such convictions and sentences should be set aside. The demurrer to the first count of the Information concerning the appellants should be upheld. The Information in relation to each appellant should be quashed. The proceedings should be returned to the Supreme Court of South Australia for such consequential orders as follow. The appellants should have liberty to apply to a judge of the Supreme Court of South Australia for any immediate relief that may be proper in the light of the foregoing orders.

256 CALLINAN J. The applicants, together with two other persons, were charged on information of being "knowingly concerned" in the importation of a prohibited import contrary to s 233B(1)(d) of the *Customs Act* 1901 (Cth) ("the Act"). The particulars of the offence alleged in the information were as follows:

> "[B]etween 1st day of November 1997 and the 9th day of November 1997 at Adelaide and other places in the said State, were knowingly concerned in the importation into Australia of a prohibited import to which s 233B of the Customs Act 1901 applies, namely about 9350 grams of heroin, being not less than the commercial quantity."

257 There was no suggestion by either party that there was any relevant difference between an information and an indictment[337].

258 The applicants moved to quash the indictment. The trial judge overruled what was effectively a demurrer implicit in the motion: that the provisions of s 233B(1)(d) and s 235 were constitutionally invalid. The applicants then pleaded guilty as charged. By their pleas the applicants could be taken to have admitted to participation in various ways, in the reception, collection, and movement of a quantity of the prohibited import, heroin, which had been despatched from Bangkok secreted in the hollow interiors of ornamental marble pedestals. Precisely what they should have been taken to have admitted, and the extent to which they were liable to penalties affected by the identity and quantity of the prohibited import, and their knowledge thereof, by those pleas are, however, very much in contention in this application, notwithstanding that the applicants made no application to the sentencing judge to have any issue as to these matters referred to the jury. Indeed, the sentencing judge was expressly requested by counsel on their behalf to decide the issue of knowledge of the relevant quantities of heroin, in respect of which, in two instances, he decided in favour of the applicants.

259 The applicants appealed to the Court of Criminal Appeal of South Australia against their convictions and against the sentences imposed[338]. The

---

337 Section 4A *Crimes Act* 1914 (Cth):

"**Meaning of certain words**

4A In a law of the Commonwealth, unless the contrary intention appears:

…

'**indictment**' includes an information and a presentment."

338 *R v Cheng, R v Chan, R v Cheng* (1999) 73 SASR 502.

Court (Doyle CJ, Bleby and Wicks JJ) dismissed the appeals against conviction but allowed the appeals against sentence on the basis that the sentences imposed were "substantially out of line with a sentence which might be considered to be appropriate to the amount of heroin involved … and the levels at which the various [applicants] were operating"[339].

The Application to this Court

260 The applicants then sought special leave to appeal to this Court. Their Honours Gaudron, Kirby and Hayne JJ ordered that the application be referred to an enlarged panel of the Court. The applications for special leave to appeal were amended to challenge expressly the validity of ss 233B(1)(d) and 235(2), or alternatively the validity of ss 235(2)(c) and (d) of the Act. These provisions are as follows:

"**Special provisions with respect to narcotic goods**

233B (1) Any person who:

…

(d) aids, abets, counsels, or procures, or is in any way knowingly concerned in, the importation, or bringing, into Australia of any prohibited imports to which this section applies, or the exportation from Australia of any prohibited exports to which this section applies; or

…

shall be guilty of an offence.

…

(3) A person who is guilty of an offence against subsection (1) of this section is punishable upon conviction as provided by section 235."

"**Penalties for offences in relation to narcotic goods**

235 (1) Where:

…

---

339 (1999) 73 SASR 502 at 528.

(2) Subject to subsections (3) and (7), where:

(a) a person commits an offence against subsection 231(1), section 233A or subsection 233B(1); and

(b) the offence is an offence that is punishable as provided by this section;

the penalty applicable to the offence is:

(c) where the Court is satisfied:

(i) that the narcotic goods in relation to which the offence was committed:

(A) are a narcotic substance in respect of which there is a commercial quantity applicable; and

(B) consist of a quantity of that substance that is not less than that commercial quantity; or

(ii) that the narcotic goods in relation to which the offence was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to that substance and also that, on a previous occasion, a court has:

(A) convicted the person of another offence, being an offence against a provision referred to in paragraph (a) that involved other narcotic goods which consisted of a quantity of a narcotic substance not less than the trafficable quantity that was applicable to that substance when the offence was committed; or

(B) found, without recording a conviction, that the person had committed another such offence;

imprisonment for life or for such period as the Court thinks appropriate;

(d) where the Court is satisfied that the narcotic goods in relation to which the offence was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to the substance but is not satisfied as provided in paragraph (c):

(i) if the narcotic substance is a narcotic substance other than cannabis – a fine not exceeding $100,000 or imprisonment for a period not exceeding 25 years, or both; or

(ii) if the narcotic substance is cannabis – a fine not exceeding $4,000 or imprisonment for a period not exceeding 10 years, or both; or

(e) in any other case – a fine not exceeding $2,000 or imprisonment for a period not exceeding 2 years, or both.

(3) Where:

(a) the Court is satisfied that the narcotic goods in relation to which an offence referred to in subsection (2) was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to that substance, but is not satisfied as provided in paragraph (c) of that subsection in relation to those narcotic goods; and

(b) the Court is also satisfied that the offence was not committed by the person charged for any purposes related to the sale of, or other commercial dealing in, those narcotic goods;

notwithstanding paragraph (d) of that subsection, the penalty punishable for the offence is the penalty specified in paragraph (e) of that subsection."

261 Yu Shing Cheng and Gang Cheng also sought to raise a question as to their knowledge of the nature and quantity of the narcotics, matters which were not the subject of submissions before their Honours Gaudron, Kirby and Hayne JJ.

262 The first argument of the applicants is that matters stated in the provisions as being relevant to penalty are in truth elements of the offence, and accordingly are matters which should be tried by a jury as required by s 80 of the

Constitution. The second argument is that to be convicted of the offence with which they were charged, the Court, properly constituted with a jury, would need to be satisfied of the intention of the applicants to import the stated quantity of the heroin in fact.

263 The applicants' first argument involves a direct challenge to the correctness of this Court's decision in *Kingswell v The Queen*[340] in which the majority (Gibbs CJ, Mason, Wilson and Dawson JJ; Brennan and Deane JJ dissenting) held that s 235(2)(c) and (d) of the Act did not infringe s 80 of the Constitution which provides:

> "80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

264 The applicants submit that the opinions of the minority in *Kingswell* are to be preferred. As to those they relied first on what Brennan J said in these terms[341]:

> "Although it has been held that s 80 guarantees trial by jury only in cases where an offence against a law of the Commonwealth is prosecuted on indictment (*Li Chia Hsing v Rankin*[342] and the cases there cited), the purpose of the guarantee is clear: a person should not be held liable to punishment as for an offence against a law of the Commonwealth when he is prosecuted on indictment and pleads not guilty unless the jury's verdict makes him liable to that punishment. The purpose of s 80 corresponds with the principle underlying s 564 of the *Criminal Code* (Q) and the decisions in *Summers*,[343] *Willis*,[344] *Weismantel*,[345] and *Courtie*,[346] namely, that an offender's liability to punishment or to a particular maximum

---

340 (1985) 159 CLR 264.

341 (1985) 159 CLR 264 at 294-295.

342 (1978) 141 CLR 182.

343 (1869) 1 CCR 182.

344 (1872) 1 CCR 363.

345 (1921) 21 SR (NSW) 240.

346 [1984] AC 463.

penalty depends on the facts determined by a plea or verdict of guilty. Accepting that a legislature unfettered by s 80 might enact a law that an offence committed with a circumstance of aggravation should not constitute an offence different from an offence committed without a circumstance of aggravation, I construe s 80 as prohibiting the Parliament from withdrawing issues of fact on which liability to a criminal penalty or to a particular maximum penalty depends from the jury's determination when any offence against a law of the Commonwealth is tried on indictment. If the Parliament creates what are distinct offences for the purpose of s 80, the Parliament cannot divide the offences into elements to be tried by the jury and elements to be tried by the judge and, by calling the former elements the 'offence', cast aside the constraints of the Constitution as to the mode of trial of the latter elements. The Parliament cannot treat facts on the existence of which liability to different maximum penalties depends as though they are not elements of an offence and withdraw from jury determination the issue of their existence."

265 Deane J summarised his dissenting opinion upon which the applicants also relied, in this way[347]:

"The relevant provision of s 80 is, in terms, confined to the trial on indictment of any alleged offence against a law of the Commonwealth. For practical purposes, any effective operation of that provision is as a restraint upon the legislative powers of the Commonwealth Parliament by precluding any legislative provision that such a trial should be otherwise than by jury. To treat the notion of a 'trial on indictment' in s 80 as involving the absence of any applicable statutory procedure providing for immediate determination by justices or magistrates (or a judge) would mean that the Parliament could effectively avoid the primary provision of s 80 by providing that the trial of any designated offence should be by way of such statutory procedure. The consequence would be that s 80 would not only contain no effective guarantee of trial by jury. What is worse, the designated method of avoiding the section's ostensible guarantee of trial by jury in the case of grave offences would be by way of legislative provision that such offences be dealt with by a statutory summary procedure devised to deal only with less serious offences: see *Munday v Gill*[348], quoting Blackstone. As Dixon and Evatt JJ commented in *Lowenstein*[349], there is high authority for the proposition that the Constitution is not to be so mocked."

---

347 (1985) 159 CLR 264 at 307.

348 (1930) 44 CLR 38 at 86.

349 *R v Federal Court of Bankruptcy; Ex Parte Lowenstein* (1938) 59 CLR 556 at 582.

266 Their Honours' opinions echoed what had been said by Dixon and Evatt JJ in *Lowenstein*[350]:

> "In this formula the difficulty lies not in the words 'any offence' but in the words 'trial on indictment'. In *R v Archdall*[351], Higgins J paraphrases the words as meaning – 'if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment.' It is a queer intention to ascribe to a constitution; for it supposes that the concern of the framers of the provision was not to ensure that no one should be held guilty of a serious offence against the laws of the Commonwealth except by the verdict of a jury, but to prevent a procedural solecism, namely, the use of an indictment in cases where the legislature might think fit to authorize the court itself to pass upon the guilt or innocence of the prisoner. There is high authority for the proposition that 'the Constitution is not to be mocked.' A cynic might, perhaps, suggest the possibility that sec 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory. No court could countenance such a suggestion, and, if this explanation is rejected and an intention to produce some real operative effect is conceded to the section, then to say that its application can always be avoided by authorizing the substitution of some other form of charge for an indictment seems but to mock at the provision."

267 The applicants contend that there has been a shift in thinking on the meaning and effect of s 80 of the Constitution since *Kingswell* was decided. *Brown v The Queen*[352] was said to exemplify this shift. There, the majority of the Court (Brennan, Deane and Dawson JJ; Gibbs CJ and Wilson J dissenting) held that a State law, which purported to provide accused persons with the right to waive trial by jury on indictment had no application to a trial on indictment of Commonwealth offences held in that State[353].

268 It is true that both the majority and the minority in *Brown* recognised the status of s 80 as a fundamental constitutional guarantee. The difference between them related to whether the guarantee gave rise to a personal right capable of waiver by the accused, or whether the guarantee looked to, and was a safeguard

---

350 (1938) 59 CLR 556 at 581-582.

351 (1928) 41 CLR 128 at 139-140.

352 (1986) 160 CLR 171.

353 (1986) 160 CLR 171 at 200-201 per Brennan J, 205-206 per Deane J, 218 per Dawson J.

of the public interest in the administration of justice. Brennan J explained his position in this language[354]:

> "Trial by jury is not only the historical mode of trial for criminal cases prosecuted on indictment; it is the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice. The verdict is the jury's alone, never the judge's. Authority to return a verdict and responsibility for the verdict returned belong to the impersonal representatives of the community. We have fashioned our laws governing criminal investigation, evidence and procedure in criminal cases and exercise of the sentencing power around the jury. It is the fundamental institution in our traditional system of administering criminal justice. Section 80 of the Constitution entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence. That section is not concerned with a mere matter of procedure but with the constitution or organization of any court exercising that jurisdiction."

269 Deane J said[355]:

> "It is true that the peremptory prescription of trial by jury as the method of trial on indictment of any offence against any law of the Commonwealth represents an important constitutional guarantee against the arbitrary determination of guilt or innocence. That constitutional guarantee is, however, for the benefit of the community as a whole as well as for the benefit of the particular accused. As Griffith CJ pointed out in *R v Snow*[356], the requirement of s 80 is 'a fundamental law of the Commonwealth' which should be prima facie construed as 'an adoption of the institution of "trial by jury" with all that was connoted by that phrase in constitutional law and in the common law of England.' The adoption of that institution reflected 'a fundamental decision about the exercise of official power' (see *Duncan v Louisiana*[357]) or, to repeat words I used in *Kingswell v The Queen*[358], 'a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases', namely that, regardless of the position or standing of the particular

---

354 (1986) 160 CLR 171 at 197.

355 (1986) 160 CLR 171 at 201-202.

356 (1915) 20 CLR 315 at 323.

357 391 US 145 at 156 (1968).

358 (1985) 159 CLR 264 at 298.

> alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community, at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment."

270 Dawson J in *Brown* also spoke of s 80 as a guarantee[359]. Having referred to the different views espoused as to the application of s 80, and the "forceful critics" of the interpretation, which permitted the Commonwealth Parliament to determine which matters should be charged on indictment, (namely Dixon and Evatt JJ in *Lowenstein* and Deane J in *Kingswell*), his Honour said[360]:

> "There has, however, been nothing in the Australian experience so far which would put the limits of this view of s 80 to any severe test.
>
> I express myself in this way because it seems to me, with respect, that it is overstating the position to say that s 80 has been reduced to a procedural provision or that it does not yet lay down in the words of Griffith CJ in *R v Snow*[361], 'a fundamental law of the Commonwealth'. At Federation, summary proceedings, which are the creature of statute, were reserved for less serious offences whereas trial on indictment was the ordinary method for the trial of all other offences, bearing in mind that trial on indictment has an extended meaning in this country which encompasses a 'trial ... initiated by some step taken by the Crown or some instrument or agent of government': see *Kingswell*[362]; see also *Lowenstein*[363]."

271 Gibbs CJ, although a member of the minority, accepted that s 80 should be regarded as a constitutional guarantee. His Honour said[364]:

> "It then becomes necessary to consider the purpose which the framers of the Constitution had, or must be supposed to have had, in including the provisions of s 80 in the Constitution. The requirement that

---

359 (1986) 160 CLR 171 at 208-212, 215.

360 (1986) 160 CLR 171 at 215.

361 (1915) 20 CLR 315 at 323.

362 (1985) 159 CLR 264 at 308.

363 (1938) 59 CLR 556 at 583.

364 (1986) 160 CLR 171 at 179.

> there should be a trial by jury was not merely arbitrary or pointless. It must be inferred that the purpose of the section was to protect the accused – in other words, to provide the accused with a 'safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge': *Duncan v Louisiana*[365]. Those who advocate the retention of the jury system almost invariably place in the forefront of their argument the proposition (sometimes rhetorically expressed but not without some truth) that the jury is a bulwark of liberty, a protection against tyranny and arbitrary oppression, and an important means of securing a fair and impartial trial."

272 Wilson J said that s 80 was "wholly directed to effectively securing to an accused person presented for trial on indictment the right to have the general issue between him and the Crown determined by the verdict of a jury"[366].

273 In *Cheatle v The Queen*[367] this Court held that a State law to make provision for a majority verdict contravened s 80 of the Constitution and had no application to a trial on indictment for an offence against a law of the Commonwealth. In so holding, the Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) referred to s 80 as a "fundamental law of the Commonwealth"[368] citing the decision of Griffiths CJ in *R v Snow*[369].

274 In *Katsuno v The Queen*[370], this Court gave consideration to a practice which had been adopted by the Chief Commissioner of Police in Victoria of providing to the Director of Public Prosecutions details of the convictions of persons summoned to serve as jurors. Gaudron, Gummow and Callinan JJ, in holding that this practice did not infringe s 80 of the Constitution, accepted that s 80 conferred a "constitutional right to trial by jury" upon an accused[371]. Gleeson CJ and McHugh J agreed with Gaudron, Gummow and Callinan JJ, and Kirby J referred to s 80 as a "fundamental law" of the Commonwealth[372].

---

365 391 US 145 at 156 (1968).

366 (1986) 160 CLR 171 at 190.

367 (1993) 177 CLR 541.

368 (1993) 177 CLR 541 at 549.

369 (1915) 20 CLR 315 at 323.

370 (1999) 73 ALJR 1458; 166 ALR 159.

371 (1999) 73 ALJR 1458 at 1469 [52]; 166 ALR 159 at 172.

372 (1999) 73 ALJR 1458 at 1471 [67]; 166 ALR 159 at 175-176.

275 The last case said by the applicants to mark a change in the thinking of this Court is *Re Colina; Ex parte Torney*[373]. In that case, this Court considered the question whether a charge of contempt of the Family Court could be dealt with summarily or whether trial by jury was necessary. Gleeson CJ and Gummow J referred to the difference of view between the majority in *Kingswell* and what had been said by Dixon and Evatt JJ in *Lowenstein.* However, their Honours expressly declined to reconsider *Kingswell* for the reason that the argument based on s 80 would fail as the charge (of contempt) was not a charge of an offence against a "law of the Commonwealth"[374].

276 Kirby J said[375]:

> "First, it appears as a constitutional provision in an instrument of government relatively difficult to amend, whose provisions were intended (unless expressed to the contrary) to apply indefinitely, perhaps for centuries, as the fundamental law of a new federal nation. Secondly, s 80 appears in Ch III of the Constitution which provides for the Judicature of the new nation. The provision is thus, on the face of things, a permanent provision and an important one controlling the conduct of trials by courts contemplated by Ch III."

277 In *Re Colina* although I regarded s 80 in the nature of a guarantee[376], I concluded that[377]:

> "The intention of the framers so clearly expressed, the long history of summary proceedings for contempt and the recent considered judgment of this Court in *Kingswell* bring me to the conclusion that s 80 of the Constitution does not require that the charge of contempt of the Family Court by scandalising it be tried by jury, notwithstanding that I share some of the concerns expressed by Dixon and Evatt JJ in *Lowenstein* and by Brennan J in *Kingswell* in the passage I have quoted."

278 The approach of McHugh and Hayne JJ in *Re Colina* involved no detailed consideration of the operation of s 80 of the Constitution.

---

373 (1999) 73 ALJR 1576; 166 ALR 545.

374 (1999) 73 ALJR 1576 at 1581-1582 [25]; 166 ALR 545 at 553.

375 (1999) 73 ALJR 1576 at 1589-1590 [69]; 166 ALR 545 at 564-565.

376 (1999) 73 ALJR 1576 at 1606 [134]; 166 ALR 545 at 587.

377 (1999) 73 ALJR 1576 at 1606 [136]; 166 ALR 545 at 587.

279 In *Kingswell*, three judges of this Court (Gibbs CJ, Wilson and Dawson JJ) in their joint judgment said that[378]:

> "[T]here is no fundamental law that declares what the definition of an offence shall contain or that requires the Parliament to include in the definition of an offence any circumstance whose existence renders the offender liable to a maximum punishment greater than that which might have been imposed if the circumstance did not exist."

280 Their Honours stated that "no useful constitutional purpose" would be served if s 80 required the Parliament to include in the definition of any offence any factual ingredient which would have the effect of increasing the maximum punishment to which the offender would be liable. Indeed, they cautioned, "the Parliament might feel obliged to provide that some offences, which would otherwise be made indictable, should be tried summarily"[379]. Nevertheless their Honours stated that as a rule of practice, where the Crown relies on the circumstances of aggravation described in s 235(2), those circumstances should be included in the indictment[380].

281 Mason J differed from the other members of the majority on the rule of practice, but expressed the same, or perhaps an even narrower, view of the operation of s 80, stating that the Parliament's power to define the offence was unfettered[381]:

> "The short answer to the argument is that it is open to Parliament to define the ingredients of offences and the circumstances to be taken into account in sentencing in whatever way it pleases. However cogent the reasons for treating the two cases on the same footing, it is entirely a matter for Parliament whether or not it will adopt that course."

282 *Kingswell* was effectively affirmed by this Court (Gibbs CJ, Wilson and Dawson JJ; Brennan and Deane JJ dissenting) in *Meaton*[382] which was decided in the following year in holding that in proceedings for offences under the Act involving narcotics, the prosecution should lay one charge alleging

---

378 (1985) 159 CLR 264 at 276.

379 (1985) 159 CLR 264 at 277.

380 (1985) 159 CLR 264 at 280-281.

381 (1985) 159 CLR 264 at 285.

382 *R v Meaton* (1986) 160 CLR 359.

circumstances of aggravation, the jury then being directed that, in appropriate circumstances, they could find the accused guilty of the charge without any circumstances, or a circumstance, of aggravation.

283 It is impossible not to feel disquiet about a proposition that might leave it entirely for the legislature to define what is, and what is not to be an offence charged on indictment, and its elements. However, as Gibbs CJ, Wilson and Dawson JJ implied in *Kingswell*[383], the Australian experience has not been of any oppressive misuse of the statutory power to define offences. I am not persuaded to any different view from the one I expressed in *Re Colina*[384], particularly with respect to the deliberate selection by the framers of the Constitution of the language to be used in s 80 of the Constitution. That, together with the decision in *Kingswell* which is a recent decision of this Court, its effective reaffirmation in *Meaton*[385], and the apparently satisfactory way in which the practice suggested in *Kingswell* and effectively prescribed in *Meaton* operates, lead me to reject the first argument of the applicants.

284 I would also reject the second argument. Quantity is a matter of objective fact based on analysis and weighing. That does not preclude of course an accused from raising mistake of fact or other like defences as to the elements of the offence on trial. Here, as the accused pleaded guilty the primary judge was asked to consider and determine the accuseds' relevant state of mind as to any circumstances of aggravation for the purposes of punishment only. No issue was raised as to any relevant circumstances of aggravation for resolution by a jury, and, it was not necessary for the practice referred to and explained in detail in *Meaton* to be followed.

285 Accordingly I would dismiss the applications for special leave.

---

383 (1985) 159 CLR 264 at 276.

384 (1999) 73 ALJR 1576 at 1606 [136]; 166 ALR 545 at 587.

385 (1986) 160 CLR 359 at 364 per Gibbs CJ, Wilson and Dawson JJ.