HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

HAMDI ALQUDSI APPLICANT

AND

THE QUEEN RESPONDENT

Alqudsi v The Queen
[2016] HCA 24
Date of Order: 10 February 2016
Date of Publication of Reasons: 15 June 2016
S279/2015

ORDER

1. *The question "Are ss 132(1) to (6) of the* Criminal Procedure Act 1986 *(NSW) incapable of being applied to the Applicant's trial by s 68 of the* Judiciary Act 1903 *(Cth) because their application would be inconsistent with s 80 of the Constitution", should be answered "Yes".*

2. *The motion is dismissed.*

Representation

J K Kirk SC with G J Williams and D P Hume for the applicant (instructed by Zali Burrows Lawyers)

R J Bromwich SC with A M Mitchelmore for the respondent (instructed by Director of Public Prosecutions (Cth))

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with C P O'Donnell and J S Stellios for the Attorney-General of the

Commonwealth, intervening (instructed by Australian Government Solicitor)

P J Dunning QC, Solicitor-General of the State of Queensland with A D Keyes for the Attorney-General of the State of Queensland, intervening (instructed by Crown Solicitor (Qld))

M E O'Farrell SC, Solicitor-General of the State of Tasmania with S K Kay for the Attorney-General of the State of Tasmania, intervening (instructed by Solicitor-General (Tas))

R M Niall QC, Solicitor-General for the State of Victoria with F I Gordon for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

M G Evans QC with F J McDonald for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

CATCHWORDS

Alqudsi v The Queen

Constitutional law (Cth) – Trial by jury – Trial on indictment for offence against Commonwealth law – Where applicant pleaded not guilty in Supreme Court to charges on indictment under *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth) – Where applicant sought trial by judge order under State law empowering State courts to order trial by judge alone – Whether application of State law to applicant's trial inconsistent with Constitution, s 80.

High Court – Stare decisis – Whether *Brown v The Queen* (1986) 160 CLR 171 should be re-opened and overruled.

Words and phrases – "elective mechanism", "indictment", "interests of justice", "shall be by jury", "State court principle", "trial by judge alone", "trial by judge order", "trial by jury", "trial on indictment", "waiver of trial by jury".

Constitution, s 80.
Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), ss 7, 9A.
Judiciary Act 1903 (Cth), s 68.
Criminal Procedure Act 1986 (NSW), s 132.

FRENCH CJ.

Introduction

1 The final and paramount purpose of the exercise of federal judicial power is "to do justice". Sir Isaac Isaacs said so in typically emphatic language in 1923 and added "[a]ll other considerations are means to that end. They are ancillary principles and rules."[1] The language may have been emphatic but it was not extravagant. It was quoted with approval by six Justices of this Court in 2011 in *Hogan v Hinch*[2].

2 The purpose of the exercise of federal judicial power in relation to the trial of charges for offences against laws of the Commonwealth is no less. Justice requires a fair trial according to law. Trial by jury is a time-honoured means of fulfilling that purpose. It has the inestimable advantage of involving the wider community in the judicial process. It was appropriately described by Alexis de Tocqueville as "a judicial, and as a political institution"[3]. In some cases, however, justice may be better served by a trial before a judge alone than by a trial before a judge and jury. That reality is recognised in the laws of Australian States and Territories, which allow courts to try some offences by judge alone which would ordinarily be tried by judge and jury[4].

3 This case concerns the interpretation of s 80 of the Constitution and, in particular, whether it prevents the Commonwealth Parliament from enacting a law to allow an accused person, charged on indictment with an offence against a law of the Commonwealth, to choose trial by judge alone where the prosecutor agrees or the court considers it to be in the interests of justice. The interpretive issue must be approached by reference to the text and context of s 80 and its purposes, including the final and paramount purpose of doing justice.

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1 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 549; [1923] HCA 39.

2 (2011) 243 CLR 506 at 552 [87] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2011] HCA 4.

3 de Tocqueville, *Democracy in America*, Bradley ed (1835), vol 1 at 280.

4 See eg *Criminal Procedure Act* 1986 (NSW), s 132; *Juries Act* 1927 (SA), s 7; *Criminal Code* (Q), Ch 62 Div 9A; *Criminal Procedure Act* 2004 (WA), Pt 4 Div 7; *Supreme Court Act* 1933 (ACT), s 68B.

4 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."

5 Section 68 of the *Judiciary Act* 1903 (Cth), which confers federal jurisdiction on State and Territory courts to try offences against laws of the Commonwealth, applies the laws of the State or Territory respecting the procedures for trials on indictment, subject to s 80 of the Constitution[5]. The particular question before the Court in this Cause Removed, heard on 10 February 2016, was whether a State law authorising a court to order trial by judge alone was incapable of being applied by s 68 to a prosecution for an offence against a law of the Commonwealth.

6 The State law the applicability of which was in issue is s 132 of the *Criminal Procedure Act* 1986 (NSW) ("the CPA"). It empowers the court, in trials for offences against the laws of the State, to make a trial by judge order where, as in the present case, the accused applies for such an order and the prosecutor agrees or the court considers it in the interests of justice to so order. However, the availability of the power conferred by s 132, when the accused is charged on indictment with a Commonwealth offence, depends upon whether s 80 of the Constitution precludes its application by s 68 of the *Judiciary Act* as a matter of federal law. That is the question which the applicant, Hamdi Alqudsi, who has been charged on indictment with offences against a law of the Commonwealth, put to this Court in this Cause Removed. The same constitutional question would arise if similar provision for an order for trial by judge alone were made by a Commonwealth law. If the Commonwealth Parliament could not enact such a law directly applicable to Commonwealth offences charged on indictment, then s 68 of the *Judiciary Act* could not do indirectly what could not be done directly.

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5 As to the operation of s 68 generally see *Williams v The King [No 2]* (1934) 50 CLR 551 at 558-559, 561-562 per Dixon J; [1934] HCA 19; *R v LK* (2010) 241 CLR 177 at 193 [24]-[25] per French CJ, 216 [88] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 17. See also *R v Bull* (1974) 131 CLR 203 at 258 per Gibbs J, 275 per Mason J; [1974] HCA 23; *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345 per Mason J; [1974] HCA 36; *R v Murphy* (1985) 158 CLR 596 at 617-618; [1985] HCA 50.

7 The reasoning of this Court in *Brown v The Queen*[6] stands against the proposition that the Commonwealth can so legislate and therefore stands against the proposition that s 68 of the *Judiciary Act* could pick up and apply in federal jurisdiction such a law enacted by a State Parliament. It was argued on behalf of the applicant that the decision in *Brown* should be distinguished and that if it could not be distinguished, it should be reconsidered.

8 At the conclusion of oral argument on 10 February 2016, the Court announced that at least a majority of the Court was of the opinion that the question should be answered "yes" and that the applicant's motion for a trial by judge alone should be dismissed. Orders were made accordingly, with reasons to be published at a later date. I took a different view from that of the majority. In my opinion the reasoning of the majority in *Brown* should not be followed and the question in the Cause Removed should be answered "no".

The procedural background

9 The applicant stood charged in the Supreme Court of New South Wales on an indictment dated 7 May 2015 with seven offences, allegedly committed in New South Wales, contrary to s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth) ("the *Foreign Incursions Act*")[7]. Section 7(1)(e) provided that:

> "A person shall not, whether within or outside Australia:
>
> ...
>
> (e) give money or goods to, or perform services for, any other person or any body or association of persons with the intention of supporting or promoting the commission of an offence against section 6".

The penalty is imprisonment for 10 years. Section 6 of the *Foreign Incursions Act* prohibited engagement in hostile activity in a foreign State and entry into a foreign State with intent to engage in such activity[8]. Section 9A(1) provided that,

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6 (1986) 160 CLR 171; [1986] HCA 11.

7 The *Foreign Incursions Act* was repealed by item 144 of Sched 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* 2014 (Cth), with effect from 1 December 2014. That did not affect the validity of the indictment, as the relevant conduct said to constitute the offences occurred between about 25 June 2013 and 14 October 2013.

8 *Foreign Incursions Act*, s 6(1).

subject to s 9A(2), a prosecution for an offence against that Act shall be on indictment. Section 9A(2), which concerned disposition after a plea of guilty, and s 9A(3), which was definitional, are not material for present purposes. It may be accepted therefore that, by force of s 9A, the trial of the applicant, whether by jury or by judge alone, was to be a trial on indictment.

10 The trial was listed to commence on 1 February 2016 before a judge and a jury in the Supreme Court. On 25 November 2015, the applicant filed a notice of motion in that Court for an order for a trial by judge alone, relying upon s 132 of the CPA, as applied by s 68 of the *Judiciary Act*. Section 132 relevantly provides:

> "(1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a ***trial by judge order***).
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> (2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.
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> (3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.
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> (4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so."

The section authorises the court to refuse to make an order if the trial involves the application of objective community standards such as reasonableness, negligence, indecency, obscenity or dangerousness[9]. It requires the accused person to have sought and received advice in relation to the effect of a trial by judge order from an Australian legal practitioner[10]. The court also has a general authority to make a trial by judge order despite any other provision of the section if it is of the opinion that there is a substantial risk of interference with jurors within the meaning of Div 3 of Pt 7 of the *Crimes Act* 1900 (NSW) and that the risk may not reasonably be mitigated by other means[11]. By operation of s 133 a judge sitting alone pursuant to a trial by judge order under s 132 "may make any finding that could have been made by a jury on the question of the guilt of the

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9 CPA, s 132(5).

10 CPA, s 132(6).

11 CPA, s 132(7).

accused person." Such a finding would have "for all purposes, the same effect as a verdict of a jury." If no trial by judge order were sought or made, then pursuant to s 130(3)(b), the trial would proceed with the re-arraignment of the accused at the empanelment of the jury.

11 By an order of this Court made on 15 December 2015 part of the cause in the criminal proceeding pending in the Supreme Court, being the notice of motion for a trial by judge order, was removed into this Court. Directions were made for a case to be stated for the consideration of a Full Court pursuant to s 18 of the *Judiciary Act*. The trial was adjourned to a callover on 17 February 2016 by reason of the orders made on 15 December 2015.

12 The question stated for the consideration of the Full Court was:

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

Section 80 — historical background

13 The drafting history of s 80 of the Constitution may be set out in brief compass. The draft Constitution prepared for the 1891 National Australasian Convention by Andrew Inglis Clark proposed, in cl 65, that "[t]he trial of all crimes cognisable by any Court established under the authority of this Act shall be by Jury"[12]. That draft clause echoed the language of the *Jury Trials Act* 1839 (NSW), which provided for trial by a jury of twelve inhabitants of the colony of "all crimes misdemeanors and offences cognizable in the said Supreme Court and prosecuted by information in the name of Her Majesty's Attorney General or other officer duly appointed for such purpose by the Governor of said Colony ...". The draft clause also reflected the terms of Art III §2 cl 3 of the United States Constitution, which begins: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury".

14 There was no equivalent in the first draft of the Constitution, nor in any subsequent draft, of the Sixth Amendment to the United States Constitution, which provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation ..."

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12 Williams, *The Australian Constitution: A Documentary History*, (2005) at 89.

The Sixth Amendment is expressed unambiguously in terms of an individual right to trial by jury. The absence of an equivalent provision in the Australian Constitution was relied upon in *Brown* to support the conclusion that the reasoning in the United States decisions, which construed Art III §2 as permitting waiver of trial by jury on the basis that trial by jury was an individual right, was inapplicable to s 80[13]. That reasoning, however, as appears below, did not support unilateral waiver amounting to a right to demand trial by judge alone.

15 Following a report by its Judiciary Committee, chaired by Andrew Inglis Clark, and without any recorded debate, the 1891 Convention substituted "indictable offences" for "crimes" in the draft which it adopted[14]. The words "on indictment of any offence", which appear in s 80 as it now stands, were substituted at the 1898 Convention for the words "of all indictable offences"[15]. The object of that substitution, as explained by Edmund Barton, was to avoid limiting the power of the Commonwealth Parliament to provide for summary trial of certain offences. He said[16]:

> "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."

Before that final amendment was made, a delegate from Tasmania, Adye Douglas MP, observed that "[t]here are many offences dealt with summarily which are indictable, and we must be careful not to do away with summary jurisdiction. That would not be at all desirable."[17]

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13 (1986) 160 CLR 171 at 195 per Brennan J, 204 per Deane J, 214 per Dawson J.

14 *Official Record of the Debates of the National Australasian Convention*, (Sydney), 9 April 1891 at 958. A copy of the Judiciary Committee Report is reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) 358 at 360.

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

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

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

16 Quick and Garran in their *Annotated Constitution of the Australian Commonwealth*, referring to colonial usage, treated "indictment" as extending to any information, presentment or indictment framed by a law officer in the name of the Attorney-General[18]. As explained in the judgment of this Court in *Sachter v Attorney-General for the Commonwealth*[19], that does not mean that a trial prosecuted by the Attorney-General represented by counsel is on that account a trial on indictment[20]. Nor does it mean that a law officer, authorised by statute, cannot institute a summary prosecution. There is no dispute that the applicant in this case was charged on an "indictment" within the meaning of that term in s 80[21]. The term "trial" was explained by Quick and Garran by reference to United States case law, albeit arising out of a statutory setting, as "the trying of the cause by the jury, and not the arraignment and pleading preparatory to such trial."[22] On that view, a trial on indictment in the constitutional sense did not commence upon arraignment. Whether that be right or not, as already observed, the trial of the applicant was, by operation of s 9A of the *Foreign Incursions Act*, to be a trial on indictment.

17 As appears from a line of cases in this Court on s 80 which are referred to below, and despite Barton's reference to "minor cases", the section has been interpreted as leaving the Commonwealth Parliament free to decide whether any offence shall be prosecuted on indictment or summarily and, accordingly, whether s 80 is engaged. The Parliament may also enact a law providing that an offence may be prosecuted summarily or on indictment and reposing in an appropriate authority the determination of which process shall be used.

18 There was little discussion of the purpose of s 80 at the Convention Debates. The common law character of trial by jury as a right of the subject was well established. In *Newell v The King*[23], Latham CJ spoke unambiguously of trial by jury at common law as "one of the fundamental rights of citizenship and not a mere matter of procedure"[24]. Dixon J, who agreed, added that the plea of

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18 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 980.

19 (1954) 94 CLR 86; [1954] HCA 43.

20 (1954) 94 CLR 86 at 89 per Dixon CJ.

21 *Foreign Incursions Act*, s 9A(1), referred to above.

22 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 978 citing *United States v Curtis* 4 Mason 232 (1826).

23 (1936) 55 CLR 707; [1936] HCA 50.

24 (1936) 55 CLR 707 at 711.

not guilty amounted to "a demand that [the accused] be tried by a jury, and he became entitled to be tried accordingly."[25] In similar vein, Evatt J said that "in common-law countries, trial by jury has been universally regarded as a fundamental right of the subject"[26]. All were cited by a unanimous Court in *Cheatle v The Queen*[27]. The concept of trial by jury as an entitlement was not a product of 20th century jurisprudence; it has a much older provenance. That concept does not preclude characterisation of s 80 of the Constitution as defining an institutional dimension of the exercise of judicial power in criminal cases with the purpose not only of entrenching the right of an accused person to trial by jury, but also of strengthening the judicial process by the involvement of the wider community. But that character and large purpose do not provide an answer to the question whether Parliament, consistently with s 80, may authorise election for trial by judge alone by an accused with the agreement of the prosecutor or the approval of the court.

19 The Court heard submissions about aspects of the common law history of trial by jury and legislative examples, predating Federation, of English statutes and statutes of the American and Australian colonies providing for prosecutorial choices to be made between summary trial and trial by jury. Some of those submissions were made in support of the Commonwealth's premise that s 80 accommodates parliamentary designation of procedure with the involvement of the accused and the wider community in a trial on indictment.

20 William Blackstone described trial by jury as "the grand bulwark of ... liberties"[28] at a time when all common law crimes (save for contempt) were tried on indictment which was found by a Grand Jury and presented to a Petty Jury[29]. Nevertheless, statutes providing for summary conviction of criminal offences, as observed by Professor FW Maitland, had become "considerable" by the 18th century[30]. English legislation creating summary criminal jurisdiction was also

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25 (1936) 55 CLR 707 at 712.

26 (1936) 55 CLR 707 at 713.

27 (1993) 177 CLR 541 at 558-559; [1993] HCA 44.

28 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 342.

29 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4, ch 23. Although some misdemeanours might be tried by a Petty Jury without any indictment by a Grand Jury: Maitland, *The Constitutional History of England*, (1908) at 230.

30 Maitland, *The Constitutional History of England*, (1908) at 231; see also Blackstone, *Commentaries on the Laws of England*, (1769), bk 4, ch 20.

introduced in the American colonies, although it met with considerable resistance[31].

21 Trial by jury did not travel to the Australian colonies with the common law of England. It was introduced by legislation[32]. Indictments in the sense of a presentment by a Grand Jury to a Petty Jury were not a common form of colonial criminal procedure. Summary jurisdiction was, however, a long-standing feature of the colonial criminal justice system at the time of the Conventions of the 1890s.

22 There was evidence, referred to in the Commonwealth's submissions, of provision for waiver of trial by jury even for serious offences in some American colonies at and after the time of the adoption of the United States Constitution. That evidence was discussed in an article by Erwin Griswold, published in 1934[33], which is mentioned later in these reasons. However, despite the familiarity of Andrew Inglis Clark and others present at the Conventions with the United States Constitution and judicial system, the "evidence" does not provide a clear cut basis for concluding that the availability of waiver of trial by jury in various of the American colonies was or was even reasonably likely to have been known to the Convention delegates responsible for the final form of s 80 in 1898. It was certainly not discussed on the Convention record.

23 As is reflected in the drafting history of s 80 and as Professor Maitland pointed out, a division between non-indictable offences, triable summarily, and indictable offences, capable of being heard by a jury, had been well established in England in the 19th century[34]. Procedures allowing for choice, involving the accused, between summary trial and trial by jury appeared in Australian colonial statutes in the late 19th century. Their models had emerged in England beginning, in 1847, with statutes allowing justices of the peace, with the consent of the accused, to deal summarily with some larceny offences[35]. One Australian colonial example of such a mechanism was s 150 of the *Criminal Law*

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31 Levy, *The Palladium of Justice: Origins of Trial by Jury*, (1999) at 85-86.

32 *Brownlee v The Queen* (2001) 207 CLR 278 at 286 [12] per Gleeson CJ and McHugh J; [2001] HCA 36, citing Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Supp) 49 at 52.

33 Griswold, "The Historical Development of Waiver of Jury Trial in Criminal Cases", (1934) 20 *Virginia Law Review* 655.

34 Maitland, *The Constitutional History of England*, (1908) at 473-475.

35 *Juvenile Offences Act* 1847 (10 & 11 Vict c 82), s 1; *Criminal Justice Act* 1855 (18 & 19 Vict c 126), s 1; *Summary Jurisdiction Act* 1879 (42 & 43 Vict c 49), s 2.

Amendment Act 1883 (NSW). Like its English models, it provided that a justice of the peace could, with the consent of the accused, deal with certain larceny offences summarily. That facility was extended to attempted suicide and some other theft offences by the *Criminal Law and Evidence Amendment Act* 1891 (NSW)[36]. The accused in such cases could insist that the case be tried by a jury. Other Australian colonies had also enacted statutory provisions allowing for election between summary trial and trial by jury[37]. It may be accepted therefore, that the availability of a consensual statutory election between trial on indictment and summary proceedings would have been known at the time that the text of s 80 was settled in 1898.

24 The Convention delegates left it to Parliament to determine whether, and in what circumstances, the factual issues in a trial would be dealt with by the jury on indictment or by a judge alone. That proposition is amply supported by the text of s 80 and by decisions of this Court which are briefly reviewed in the following paragraphs.

Section 80 — a conditional guarantee

25 On its established interpretation, s 80 is a weak conditional guarantee. The reasoning of this Court in *Brown* confers upon it an iron grip if the procedural condition for its engagement, a matter in the discretion of the legislature, is fulfilled. That discretion is not expressly or impliedly limited by any constitutional criterion for the selection of what shall be tried on indictment and what shall be the mechanisms for that selection.

26 The established interpretation of s 80 comes out of a number of decisions of the Court which began in 1915 with *R v Bernasconi*[38]. In his judgment in that case, Griffith CJ looked back to the Conventions, in which he had played a leading role, and explained the rationale of s 80[39]:

> "At that time the laws of all the States provided for the trial by jury of persons *tried on indictment*, and it was thought desirable to lay down the rule that the trial of persons charged with new indictable offences created

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36 *Criminal Law and Evidence Amendment Act* 1891 (NSW), s 18.

37 See eg Larceny Summary Conviction Ordinance 1856 (WA), s 2; *Criminal Law and Practice Statute* 1864 (Vic), s 67; *Minor Offences Procedure Act* 1869 (SA), s 3; *Criminal Law Consolidation Act* 1876 (SA). See also *Criminal Code* (Q), s 444.

38 (1915) 19 CLR 629; [1915] HCA 13.

39 (1915) 19 CLR 629 at 635.

> by the Commonwealth Parliament *should be tried in the same way*. Such a provision naturally found place in Chapter III of the Constitution dealing with the Judicature, of which sec 80 forms part." (emphasis added)

Isaacs J in the same case said that[40]:

> "If a given offence is not made triable on indictment at all, then sec 80 does not apply. *If the offence is so tried*, then there must be a jury." (emphasis added)

In the same year as *Bernasconi* this Court in *R v Snow*[41] considered whether an appeal from a directed verdict of acquittal was available under s 73 of the Constitution, read in the light of s 80. The Court refused the Crown special leave to appeal against a decision of the trial judge directing a verdict of acquittal. The discussion of s 80 was not central to the reasoning[42]. However, Griffith CJ construed the section 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."[43] Isaacs J more dismissively spoke of s 80 as taken from the United States Constitution to safeguard the subject from "some supposed tyranny of Judges under Crown control—a relic of a time that has now passed into history". He nevertheless added that "both sides must abide by its operation alike."[44] Gavan Duffy and Rich JJ rejected the proposition that the Court in its appellate jurisdiction under s 73 of the Constitution had any right to control the verdict of the jury. If it could, then s 80 would indeed be a "mockery, a delusion and a snare."[45] Powers J did not advert to s 80 at all, save to observe that[46]:

> "The right to 'trial by jury' has been specially preserved by the Constitution to British subjects within the Commonwealth (see sec 80),

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40 (1915) 19 CLR 629 at 637.

41 (1915) 20 CLR 315; [1915] HCA 90.

42 Cf *R v LK* (2010) 241 CLR 177 at 199-200 [37]-[40] per French CJ, in which it was held that s 68 picked up and applied a law of the State of New South Wales providing for an appeal to the Court of Criminal Appeal from a directed verdict of acquittal; Gummow, Hayne, Crennan, Kiefel and Bell JJ agreeing at 216 [88].

43 (1915) 20 CLR 315 at 323.

44 (1915) 20 CLR 315 at 352.

45 (1915) 20 CLR 315 at 365.

46 (1915) 20 CLR 315 at 374-375.

> and heretofore in all British communities, except Canada, a verdict of not guilty by a jury in a criminal trial has in every case been accepted as conclusive, although no Statute law prevents an appeal from judgments of acquittal."

27 The proposition that the Parliament can determine whether any class of offence, however grave, is to be tried summarily by judge alone or on indictment and therefore by judge and jury was established in a line of cases after *Bernasconi*. *R v Archdall and Roskruge; Ex parte Carrigan and Brown*[47] was concerned with s 12 of the *Crimes Act* 1914 (Cth), which provided that offences against that Act "other than indictable offences" were punishable "either on indictment or on summary conviction". The plurality, in brief compass, rejected an argument that by reason of s 80 of the Constitution, s 12 of the *Crimes Act* was beyond legislative power. The argument was said to have "no foundation" and its rejection to require "no exposition"[48]. Higgins J, only a little more forthcoming, observed, "if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment."[49]

28 The companion section, 12A, of the *Crimes Act*[50], which was not in issue in *Archdall*, related to offences declared to be indictable under the Act. It provided for charges of such offences to be heard and determined by a court of summary jurisdiction with the consent of the accused[51] or, if the court thought fit and the offence related to property the value of which did not exceed 50 pounds, upon the request of the prosecutor[52]. In the case of both ss 12 and 12A the maximum penalty on summary conviction was imprisonment for one year. In rejecting the attack on s 12, the Court in *Archdall* effectively held that the Parliament had power to determine whether any class of offence was triable on indictment and to provide for the same offence to be triable on indictment or summarily. A corollary of that holding, not discussed in *Archdall*, was that the Parliament could prescribe the conditions governing the determination of whether a particular offence would be tried summarily or on indictment. It could be a matter of the prosecutor's choice. The Parliament could provide, as did s 12A(1), that an offence could be triable on indictment or summarily with the

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47 (1928) 41 CLR 128; [1928] HCA 18.

48 (1928) 41 CLR 128 at 136 per Knox CJ, Isaacs, Gavan Duffy and Powers JJ.

49 (1928) 41 CLR 128 at 139-140 (citation omitted).

50 Inserted by *Crimes Act* 1926 (Cth), s 10.

51 *Crimes Act*, s 12A(1).

52 *Crimes Act*, s 12A(2).

consent of the accused. There is an incongruity between that consequence of *Archdall* and a construction of s 80 that would preclude trial on indictment by judge alone in the interests of justice notwithstanding the election of the accused and either the consent of the prosecutor or the satisfaction of the court that the interests of justice would be served by trial by judge alone.

29 Today, s 4J of the *Crimes Act* provides that indictable offences against a law of the Commonwealth, which are punishable by imprisonment for a period not exceeding 10 years, may be heard and determined by a court of summary jurisdiction with the consent of the prosecutor and defendant[53]. The decision in *Archdall* was relied upon in the Supreme Court of South Australia in *Mattner v Director of Public Prosecutions (Cth)*[54] to reject an attack upon the constitutional validity of s 4J. Kelly J described the constitutional validity of s 4J as having been settled by *Archdall* and cases which followed[55]. Her Honour held that the requirement for trial by jury imposed by s 80 only arises when an indictable offence proceeds to a trial on indictment[56]. That holding was, with respect, consistent with the decision of this Court in *Archdall* and the decisions which followed.

30 In *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[57], s 80 of the Constitution was not invoked in argument. Latham CJ, with whom Rich J agreed, nevertheless rejected a "suggestion" that a trial for an offence against the *Bankruptcy Act* 1924 (Cth) directed by the Court of Bankruptcy, pursuant to s 217, was a trial on indictment which must be by jury. Unable to find any authority to the effect that any prosecution initiated or directed by a court or some public authority is thereby a proceeding upon indictment, he said[58]:

> "It is only when the trial takes place on indictment (not when the offence is an offence which might have been prosecuted on indictment) that sec 80 applies."

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53 See also *Crimes Act*, s 4JA, which provides for summary disposition of certain indictable offences not punishable by imprisonment.

54 (2011) 252 FLR 239.

55 (2011) 252 FLR 239 at 247 [37].

56 (2011) 252 FLR 239 at 250 [51].

57 (1938) 59 CLR 556; [1938] HCA 10.

58 (1938) 59 CLR 556 at 571.

Starke J said nothing on the point and McTiernan J, noting that it was not argued, held that he was bound by the previous decisions of the Court[59]. The "suggestion" to which Latham CJ referred seems to have been the inconclusive observations on s 80 offered by Dixon and Evatt JJ, who dissented in the result. They considered the absence of any requirement for a procedure by indictment to be "a queer intention to ascribe to a constitution"[60] and said[61]:

> "We should not have taken the view that sec 80 was intended to impose no real restriction upon the legislative power to provide what kind of tribunal shall decide the guilt or innocence on a criminal charge."

That view did not prevail, although it was taken up by Murphy J in *Beckwith v The Queen*[62] and *Li Chia Hsing v Rankin*[63], by Deane J in dissent in *Kingswell v The Queen*[64] and later by Kirby J in *Re Colina; Ex parte Torney*[65] and *Cheng v The Queen*[66]. An attempt to reopen *Lowenstein* in relation to s 217 of the *Bankruptcy Act* was rejected in *Sachter*[67]. As noted earlier, a particular argument rejected in that case was that the appearance of the Attorney-General by counsel, and amendments to the charges procured by his counsel, somehow transformed the proceedings into a trial upon indictment[68].

31 What was said in *Archdall* was cemented in *Zarb v Kennedy*[69], in which Barwick CJ, with whom Kitto and Taylor JJ agreed, described as "untenable" the

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59 (1938) 59 CLR 556 at 591.

60 (1938) 59 CLR 556 at 581.

61 (1938) 59 CLR 556 at 583.

62 (1976) 135 CLR 569 at 585; [1976] HCA 55.

63 (1978) 141 CLR 182 at 197-198; [1978] HCA 56.

64 (1985) 159 CLR 264 at 310; [1985] HCA 72.

65 (1999) 200 CLR 386 at 422 [95], 427 [104]; [1999] HCA 57.

66 (2000) 203 CLR 248 at 307 [177], 323-324 [225]; [2000] HCA 53.

67 (1954) 94 CLR 86 at 89.

68 (1954) 94 CLR 86 at 89.

69 (1968) 121 CLR 283; [1968] HCA 80.

proposition that Parliament was unable to provide that any offence shall be tried summarily. On that point the Chief Justice said[70]:

> "The question of the scope of s 80 has, in my opinion, not only been long settled but ought not now to be reopened."

McTiernan, Menzies and Owen JJ also rested their conclusions as to s 80 on the correctness of *Archdall*[71]. Windeyer J agreed generally on that point with the other Justices[72]. Consistently with *Archdall* and *Zarb*, the Court in *Li Chia Hsing* rejected a proposition that s 80 required the trial on indictment of all "serious" offences against a law of the Commonwealth. Barwick CJ observed that it was "not possible to conclude, apart of course from the expressed intention of the Parliament in the relevant statute, that an offence is of its nature 'indictable'."[73] The Court's settled interpretation of s 80 had been acted on by Parliament over a very long time and should not be reopened. Gibbs J reasoned briefly to similar effect[74].

32 The interpretation of s 80 established by the preceding line of cases was applied in *Kingswell*[75]. It was argued in that case that a section of the *Customs Act* 1901 (Cth) providing for factual circumstances to be determined by a sentencing judge in order to determine the penalty ranges applicable upon conviction for conspiring to import narcotic goods contravened s 80. The Court rejected that argument. Gibbs CJ, Wilson and Dawson JJ did so on the basis that the established interpretation of s 80, depriving it of much substantial effect, provided "a reason for refusing to import into the section restrictions on the legislative power which it does not express."[76] Their Honours referred to *Archdall*, *Lowenstein*, *Sachter*, *Zarb* and *Li Chia Hsing*. As noted earlier, Deane J dissented and favoured the approach of Dixon and Evatt JJ in *Lowenstein*. Later, in *Cheng*, discussed below, the Court declined to reopen *Kingswell*. The approach of Gibbs CJ, Wilson and Dawson JJ raises the question

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70 (1968) 121 CLR 283 at 294.

71 (1968) 121 CLR 283 at 297 per McTiernan J, 298-299 per Menzies J, 312 per Owen J.

72 (1968) 121 CLR 283 at 303.

73 (1978) 141 CLR 182 at 190.

74 (1978) 141 CLR 182 at 193.

75 (1985) 159 CLR 264.

76 (1985) 159 CLR 264 at 276.

why s 80 should impose a restriction on Commonwealth legislative power, precluding absolutely trial on indictment by judge alone, which is inexplicably inflexible relative to other constitutional guarantees or prohibitions.

33 The applicant in the present case contended that an absolutist construction of the mandate reposing in the word "shall" in s 80 was inconsistent with the Court's approach to other guarantees in the Constitution. Reference was made to s 92, which provides that "trade, commerce, and intercourse among the States ... shall be absolutely free", and s 117, which provides that "[a] subject of the Queen, resident in any 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." Sections 7 and 24 of the Constitution, requiring that the House of Representatives and the Senate "shall be composed of [persons] directly chosen by the people" of the relevant polity, were also cited, as was the implied freedom of communication on political and government matters founded substantially on those provisions. The judicial exegesis of those express and implied constitutional limitations on legislative power has depended upon their particular terms and purposes. The word "shall" in s 92 is perhaps less significant for its operation than the words "absolutely free". Qualifications on the restrictions which s 117 imposes do not imply some definition of "shall" with soft edges, but reflect the scope of the prohibition by reference to its subject matter of disability and discrimination. An absolutist literal application of that prohibition would be likely to yield absurd results having nothing to do with its purpose.

34 The strongest and most uncontroversial point to be taken from the examples proffered by the applicant is that in interpreting a constitutional provision a formal rigidity which runs wider than the evident purpose of the provision is not a sensible or preferable constructional choice. The question then is whether an interpretation of s 80 that precludes Parliament from legislating for trial on indictment by a judge alone in appropriate circumstances imposes that kind of rigidity.

35 It does not appear from the record of the Convention Debates of the 1890s that waiver of trial by jury on a trial on indictment was discussed by the delegates or was even present to their minds, any more than it was present to the minds of, or discussed by, those who framed Art III §2 cl 3 of the United States Constitution, discussed in the next section of these reasons. This Court had not, before its decision in *Brown*, considered whether the requirement imposed by s 80 would be infringed by legislation allowing for waiver by the accused, or by the accused with the consent of the prosecutor or the approval of the court. The issue has arisen as the result of State and Territory statutes so providing, the first of which was that considered in *Brown*.

36 The rhetorical question might well be asked — given the flexibility accorded to the Parliament by the established interpretation of s 80 in designating

the mode of trial as summary or on an indictment, even to the extent of involving election by the accused, what further need is there for flexibility where trial on indictment is prescribed? One answer may be to ask another rhetorical question — what principle, built upon existing authority other than *Brown's* case, requires an interpretation of s 80 which would preclude the Parliament from providing that a trial process commenced by presentation of an indictment can proceed, without any change to the initiating process, as a trial by judge sitting alone, where the accused so elects and the prosecution agrees or the court approves? Against that background it is necessary to consider the decision of this Court in *Brown*. Before turning to *Brown*, however, some reference should be made to the decisions of the Supreme Court of the United States considered in *Brown*, which interpreted Art III §2 cl 3 of the United States Constitution as allowing for waiver of the guarantee of trial by jury in certain cases.

Waiver of trial by jury in the United States

37 At the time of the Australian Convention Debates there was no settled position in the United States on whether the trial by jury guaranteed under Art III of the United States Constitution could be waived. The first decision of the Supreme Court of the United States on waiver was not delivered until 1930. In *Patton v United States*[77], the Supreme Court considered whether the effect of Art III §2 cl 3 and the Sixth Amendment to the United States Constitution was to "guaranty a right or establish a tribunal as an indispensable part of the government structure"[78]. The question arose in a case in which the accused and prosecutor agreed to the continuance of a trial by eleven jurors when one of the original twelve had been discharged for serious illness. The Eighth Circuit Court of Appeals certified a question for consideration by the Supreme Court asking whether the defendant could "waive the right to a trial and verdict by a constitutional jury of twelve men?"[79]. The Court rejected, from the outset, any distinction between the effect of a complete waiver of a jury and a consent to be tried by a lesser number than twelve[80]. Both were treated as in substance amounting to the same thing.

38 The Court observed that the record of English and colonial jurisprudence antedating the Constitution did not disclose evidence that trial by jury in criminal cases was regarded as a part of the structure of government as distinct from a right or privilege of the accused. Rather it was seen as "a valuable privilege

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77 281 US 276 (1930).

78 281 US 276 at 288 (1930).

79 281 US 276 at 287 (1930).

80 281 US 276 at 290 (1930).

bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court."[81] Blackstone's characterisation of trial by jury as a "privilege" was cited for that proposition[82]. Judge Story, also cited, had referred to trial by jury incorporated in State Constitutions with respect to criminal cases as a "great privilege" and "a fundamental right"[83].

39 The Court rejected the proposition that the framers of the United States Constitution had, as one of their purposes, the establishment of the jury for the trial of crimes as an "integral and inseparable part of the court"[84]. Nothing to that effect had appeared in contemporaneous literature or in any of the debates or innumerable discussions of the time[85]. The same may be said of the limited debate in relation to s 80.

40 The Sixth Amendment, relied upon by members of the majority in *Brown* to distinguish *Patton* and other United States cases, was not central to the construction of Art III. It was said in *Patton* that it did not modify or alter the meaning of that Article but reflected its meaning[86]. Importantly, however, the Court recognised the institutional dimension of trial by jury when it said[87]:

> "the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any

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81 281 US 276 at 296-297 (1930).

82 Blackstone, *Commentaries on the Laws of England*, (1768), bk 3 at 379.

83 Story, *Commentaries on the Constitution of the United States*, 5th ed (1891), §1779. See also *Johnson v Zerbst* 304 US 458 (1938), which held that the Sixth Amendment right of an accused to counsel's assistance, similar to the right to trial by jury, was a "fundamental constitutional right" only avoidable if "competently and intelligently" waived by an accused — a point affirmed in *Adams v United States; Ex rel McCann* 317 US 269 at 275 (1942) in which it was said:

> "The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury".

84 281 US 276 at 297 (1930).

85 281 US 276 at 297 (1930).

86 281 US 276 at 298 (1930).

87 281 US 276 at 312 (1930).

> waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."

As is apparent, *Patton* cannot be characterised as founding a simple right of waiver based upon a simple rights-protective construction of Art III.

41 An influential paper supportive of the decision in *Patton*, and mentioned earlier in these reasons, was published by Erwin Griswold in 1934[88]. At the time *Patton* was decided the weight of opinion in the lower federal courts in the United States was to the effect that provisions of the Constitution relating to trial by jury were intended to establish a tribunal as a part of the framework of government which neither the defendant nor anyone else had the power to change[89]. A similar view of the guarantee in s 80 was to inform the approach of the majority in this Court in *Brown*. For the contrary view, Griswold looked to evidence of waiver prior to the adoption of the United States Constitution and to common law indicators that made the consent of the accused the basis of trial by jury in England, even if it had to be extracted by the torture of *peine forte et dure* from those not willing to proffer it voluntarily[90]. There was little evidence of waiver or any analogous practice in the 17th and 18th centuries save for a precursor of the plea later known in the United States as *nolo contendere*[91]. He referred also to decisions of courts in some of the American colonies allowing a defendant to waive the right to jury trial[92]. He concluded[93]:

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88 Griswold, "The Historical Development of Waiver of Jury Trial in Criminal Cases", (1934) 20 *Virginia Law Review* 655.

89 Griswold, "The Historical Development of Waiver of Jury Trial in Criminal Cases", (1934) 20 *Virginia Law Review* 655 at 655-656.

90 Griswold, "The Historical Development of Waiver of Jury Trial in Criminal Cases", (1934) 20 *Virginia Law Review* 655 at 657-658.

91 Griswold, "The Historical Development of Waiver of Jury Trial in Criminal Cases", (1934) 20 *Virginia Law Review* 655 at 659 citing, inter alia, Comyns, *A Digest of the Laws of England*, (1765), vol 3 at 513 which suggested that a defendant could "*ponere Se in Gratiam Regis*".

92 Griswold, "The Historical Development of Waiver of Jury Trial in Criminal Cases", (1934) 20 *Virginia Law Review* 655 at 669.

93 Griswold, "The Historical Development of Waiver of Jury Trial in Criminal Cases", (1934) 20 *Virginia Law Review* 655 at 669.

> "The evidence is sufficient to show plainly enough that waiver of jury, even in trials for serious offences, was not unknown at the time of the adoption of the Constitution."

Assuming the correctness of that historical proposition, there is no warrant for inferring that there was an awareness on the part of the delegates to the Australian Constitutional Conventions of the 1890s of waiver practices in pre-revolutionary America or their slight analogues at common law.

42 In 1965 in *Singer v United States*[94], Warren CJ, delivering the opinion of the Court, did not depart from *Patton* but, relevantly for present purposes, after reviewing the history of the English common law, observed that as late as 1827 it gave criminal defendants no option as to the mode of trial[95]. He acknowledged that before a defendant could be subjected to jury trial, his consent was required but added, referring to the practice of torture by *peine forte et dure* to extract consent, "the Englishmen of the period had a concept of 'consent' somewhat different from our own."[96] Warren CJ concluded, after referring to the Griswold paper, that history did not establish the proposition that at common law defendants had the right to choose the method of trial in all criminal cases. He quoted from the 1898 edition of Thayer, *A Preliminary Treatise on Evidence at the Common Law*[97]:

> "By its intrinsic fairness as contrasted with older modes, and by the favor of the crown and the judges, [trial by jury] grew fast to be regarded as the one regular common-law mode of trial, always to be had when no other was fixed."

43 There were provisions in American colonial Constitutions which permitted waiver of jury trial, particularly the Constitutions of Massachusetts and Maryland[98]. The colonial examples did not show any general recognition of a defendant's right to be tried by the court instead of by jury. The Chief Justice added[99]:

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94 380 US 24 (1965).

95 380 US 24 at 28 (1965).

96 380 US 24 at 27 (1965).

97 380 US 24 at 28 (1965) citing Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 60.

98 380 US 24 at 28-29 (1965).

99 380 US 24 at 31 (1965).

> "Indeed, if there had been recognition of such a right, it would be difficult to understand why Article III and the Sixth Amendment were not drafted in terms which recognized an option."

The Chief Justice pointed to the particular question and answer to the question given in the judgment of the Court in *Patton*. He observed that the answer given in *Patton* "dispelled any notion that the defendant had an absolute right to demand trial before a judge sitting alone"[100]. So, the Chief Justice concluded[101]:

> "there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton*, in some instances waive his right to a trial by jury. The question remains whether the effectiveness of this waiver can be conditioned upon the consent of the prosecuting attorney and the trial judge."

The government as a litigant had a legitimate interest in seeing that cases in which it believed a conviction was warranted were tried before the tribunal which the Constitution regarded as most likely to produce a fair result[102]. That observation recognised the institutional dimension of Art III. On that basis the Court upheld a federal rule of criminal procedure governing proffered waivers of jury trials, conditioning them upon the consent of the government and the approval of the courts.

44 A rights based analysis of the guarantee under the United States Constitution was reflected strongly in *Duncan v Louisiana*[103]. That was not surprising because it was a case in which trial by jury was found to have been wrongly denied by a court in Louisiana. The Louisiana Constitution granted jury trials only in cases where capital punishment or imprisonment with hard labour could be imposed. The Supreme Court decision involved an application of the Fourteenth Amendment to the Constitution, read with the Sixth Amendment. The Court said, inter alia[104]:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the

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100 380 US 24 at 34 (1965).

101 380 US 24 at 34 (1965).

102 380 US 24 at 36 (1965).

103 391 US 145 (1968).

104 391 US 145 at 156 (1968).

> defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

That being said, the Court would not assert that a defendant might never be as fairly treated by a judge as by a jury[105]:

> "Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial." (footnotes omitted)

45 As appears from the decisions of the Supreme Court of the United States referred to above, that Court has recognised both an institutional and a rights protective dimension to the trial by jury mandated in Art III, which are not inconsistent with trial by judge alone in appropriate cases. Those decisions are not to be understood as simply giving effect to a proposition that trial by jury, being a right, can be waived by the person upon whom that right is conferred.

Brown v The Queen — the unavailability of waiver

46 The question whether an accused person charged on indictment with an offence against Commonwealth law could, with the approval of the court, elect trial by judge alone was first considered by this Court in *Brown* and answered in the negative. The appellant had been presented for trial in the Supreme Court of South Australia on an information of the Commonwealth Director of Public Prosecutions charging him with an offence against s 233B(1)(ca) of the *Customs Act*. He elected, pursuant to s 7(1) of the *Juries Act* 1927 (SA), to be tried by a judge alone. Before allowing the trial to proceed without a jury, the presiding judge had to be satisfied that the appellant had sought and received advice in relation to the election from a legal practitioner. There was no requirement that the prosecutor agree to the appellant's election. The election provision could only apply to the trial of the federal offence by operation of s 68 of the *Judiciary Act*, as explained earlier in these reasons.

47 The trial judge ruled that s 80 of the Constitution precluded the election. After a trial before the judge and a jury the appellant was convicted. So much of his appeal to the Full Court of the Supreme Court as concerned the question whether s 80 had precluded his election was removed into this Court under s 40(1) of the *Judiciary Act*. This Court, which heard the removed question sitting five Justices, divided three/two[106].

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105 391 US 145 at 158 (1968).

106 Neither Mason J nor Murphy J sat.

48 The Director of Public Prosecutions argued that the jury was "an indispensable element in trials on indictment of federal offences even if a federal statute provides to the contrary."[107] As an alternative position he submitted that if a federal statute could authorise the waiver of the guarantee the right to be waived was that of the accused and the Crown[108]. As appears below, the majority decided the case on the basis of the primary submission.

49 The majority in *Brown* comprised Brennan, Deane and Dawson JJ. The appellant relied upon the decisions of the Supreme Court of the United States on the availability of waiver of trial by jury under Art III §2 cl 3. Their Honours rejected that argument. They did so on the basis that there was no equivalent in the Australian Constitution of the Sixth Amendment to the United States Constitution "which might compel a departure from the primary meaning of the mandatory words in s 80"[109]. Brennan J also relied upon the absence of a long history of judicially recognised waiver of trial by jury[110]. His Honour observed that in Australia there had been no suggestion in cases on s 80 that its language permitted waiver of trial by jury[111]. That being said, none of the earlier cases concerned the question of waiver. The reference to the mandatory language of s 80 in those judgments was directed to different contentions.

50 The history of trial by jury at common law was said to be antithetical to the idea of waiver, the law of England for centuries having "compelled an accused to plead and thereby to put himself upon the country" as "an essential preliminary to trial and conviction by jury."[112] Each of their Honours characterised the function of the jury, entrenched by s 80, in institutional terms. It was an essential constituent of a court exercising the jurisdiction described by the section[113] or part of the structure of government rather than the grant of a privilege to individuals[114].

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107 (1986) 160 CLR 171 at 174.

108 (1986) 160 CLR 171 at 175.

109 (1986) 160 CLR 171 at 195 per Brennan J; see also at 204 per Deane J, 214 per Dawson J.

110 (1986) 160 CLR 171 at 195.

111 (1986) 160 CLR 171 at 196.

112 (1986) 160 CLR 171 at 196 per Brennan J; see also at 211-212 per Dawson J.

113 (1986) 160 CLR 171 at 197 per Brennan J.

114 (1986) 160 CLR 171 at 202 per Deane J, 214 per Dawson J.

51 Gibbs CJ and Wilson J dissented. Gibbs CJ acknowledged that the words of s 80 were "clear and mandatory" but pointed to the principle of statutory interpretation dating back to the time of Sir Edward Coke that a person can waive a statutory provision intended entirely for his or her own benefit[115]. The Chief Justice observed in an important passage[116]:

> "The same principle applies to the interpretation of constitutional enactments, and perhaps with even greater force. A constitutional guarantee restricts the power of the legislature, and may last indefinitely, and a guarantee given for the benefit of a class of individuals, such as accused persons, might, in an unforeseen set of circumstances, cause the members of that class hardship rather than benefit if it prevented an accused person, whom it was intended to protect, from exercising some other right; in those circumstances, what was contrived for the protection of the accused would be turned into fetters". (footnote omitted)

Adopting the words of the United States Supreme Court in *Duncan*, cited earlier, the Chief Justice identified the purpose of s 80 as to protect the accused[117]. Looking to the text of s 80, he also pointed to the discretion in the Parliament to determine whether any particular offence, however serious, could be tried summarily. He said[118]:

> "It would give a most capricious operation to s 80 if it were held that that section requires the trial to be by jury only when the prosecution in fact proceeds on indictment but nevertheless forces the accused person to accept trial by jury, notwithstanding that there exists an alternative procedure which the accused would prefer to adopt."

Arguments about the absence of waiver at common law were rejected with the observation that[119]:

> "the Constitution was framed to endure and to be capable of application to changing circumstances which the framers of the Constitution could not

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115 (1986) 160 CLR 171 at 178.

116 (1986) 160 CLR 171 at 178 echoing the words of Frankfurter J in *Adams v United States; Ex rel McCann* 317 US 269 at 279 (1942).

117 (1986) 160 CLR 171 at 179.

118 (1986) 160 CLR 171 at 182.

119 (1986) 160 CLR 171 at 183.

be expected to foresee, and it would be contrary to all principle to confine the operation of any of its provisions to matters known to exist in 1901."

52 As to the United States decisions, the Chief Justice pointed out that the presence of the Sixth Amendment was only one consideration supporting the conclusion which the Supreme Court of the United States reached after considering the history and purposes of Art III §2[120]. At the time the Australian Constitution was framed there was no accepted interpretation of Art III §2 which the framers must have intended should apply to s 80[121].

53 Wilson J, also in dissent, observed that the Supreme Court of the United States in *Patton* had not relied in the first instance upon the wording of the Sixth Amendment, which, as he noted, is clearly expressed in terms of privilege[122]. Like the Chief Justice, he pointed out that as the *Patton* decision was not made until 1930, there was a variety of State Supreme Court decisions in the United States on the question of waiver at the time the Australian Constitution was framed[123]. Moreover, at common law it had always been possible for an accused person to consent to a trial continuing even if one of the jury had become incapacitated, or to the discharge of one jury after charge, to allow the trial to continue before a fresh jury[124].

54 Wilson J held that the words of s 80 did not in terms deny the right of an accused person to waive trial by jury. The common law rationale for trial by jury was protective of the liberty of the citizen. The provision had been referred to in the very brief Convention Debates as "a necessary safeguard to the individual liberty of the subject in every state."[125] Like Gibbs CJ, he pointed to the character of the Constitution as an instrument of government intended to endure through changing circumstances.

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120 (1986) 160 CLR 171 at 180.

121 (1986) 160 CLR 171 at 181.

122 (1986) 160 CLR 171 at 186.

123 (1986) 160 CLR 171 at 187-188.

124 (1986) 160 CLR 171 at 188.

125 (1986) 160 CLR 171 at 189 quoting Bernhard Wise: *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 350.

55 The formal ruling in *Brown* was expressed in the following terms[126]:

> "*Answer the question removed under s* 40(1) *of the Judiciary Act as follows:*
>
> *Section* 80 *of the Constitution precluded the appellant from electing pursuant to s* 7(1) *of the Juries Act* 1927 *(SA) to be tried by judge alone for the offence with which he was charged.*"

The matter was then remitted to the Supreme Court of South Australia.

56 The applicant submitted that the ratio decidendi of *Brown* was confined to its ruling in relation to s 7(1) of the *Juries Act* 1927, which, unlike s 132 of the CPA, required trial by jury on the unilateral election of the accused. On that basis it was suggested that the decision could be distinguished from the present case. As the respondent submitted, however, the construction of s 80 upon which the applicant relies is contrary to the reasoning of the majority which led to the ruling in *Brown*. *Brown* cannot be distinguished on the basis that the text of the South Australian statute differs from the text of s 132 of the CPA. However, as explained later in these reasons, if *Brown* is not to be followed, it should not be followed on the basis that the reasoning of the majority was too broad albeit the conclusion about s 7 was correct.

Decisions after *Brown*

57 In *Cheng* a majority of this Court refused to reopen *Kingswell* and rejected a challenge to the validity of provisions of the *Customs Act* providing for fact-finding by a sentencing judge for the purpose of determining the range of punishments applicable to a person convicted of an offence against s 233B (amongst others). It was not a case about whether an accused person, being tried on indictment, could elect trial by judge alone. In the course of their joint judgment, however, Gleeson CJ, Gummow and Hayne JJ referred to *Brown* in rejecting an argument that developments since Federation had thrown new light on the meaning of s 80. Their Honours noted the increasing availability in State jurisdictions of provisions for an accused to elect trial by judge alone, at least if the prosecution consented. They characterised *Brown* as holding that where it applies, s 80 is mandatory and said "[i]t is not a provision which creates a right that can be waived by an accused."[127] They accepted that it was a right of which a significant number of people charged with serious offences took advantage. They also accepted that in the area of commercial fraud, which would be of particular importance if the regulation of the conduct of managers of corporations

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126 (1986) 160 CLR 171 at 219.

127 (2000) 203 CLR 248 at 270 [57].

were to become a matter of Commonwealth law, the capacity to prosecute some serious offences summarily, at least with the agreement of the accused, could contribute, on occasion, to the more effective administration of justice[128]. The impugned provisions of s 235 of the *Customs Act* were said, however, to provide an example of the way in which the Parliament under the then present interpretation of s 80 could approach the problem. Their Honours' reasons invoked a tangential connection between the decision in *Brown* and the question in *Cheng*. *Brown* did not play a central part in their reasoning.

58 Gaudron J characterised s 80 as a constitutional guarantee or command important to the rule of law, the judicial process and the judiciary itself. Her Honour said[129]:

> "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 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'." (footnote omitted)

It was imperative that s 80 be approached in the same manner as other constitutional guarantees: construed liberally, and not pedantically confined[130]. Notwithstanding the structural "rule of law" theme in her Honour's reasoning, she concluded that the fact that s 80 was designed to protect the individual required that it be construed no less liberally than the guarantees in ss 51(xxxi) and 117 of the Constitution[131].

59 McHugh J also referred to *Brown* simply to say that nothing in that decision threw any doubt upon the correctness of *Kingswell*[132]. Callinan J identified the difference between the majority and minority in *Brown* as turning on whether the guarantee in s 80 gave rise to a personal right capable of waiver by the accused, or whether it looked to and was a safeguard of the public interest in the administration of justice[133]. His Honour's discussion of *Brown*, like that of the other Justices in *Cheng*, except Kirby J, supported his rejection of the

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128 (2000) 203 CLR 248 at 270 [57].

129 (2000) 203 CLR 248 at 277-278 [80].

130 (2000) 203 CLR 248 at 278 [82].

131 (2000) 203 CLR 248 at 279 [83].

132 (2000) 203 CLR 248 at 304-305 [166].

133 (2000) 203 CLR 248 at 340 [268].

proposition that there had been a change in the thinking of the Court about s 80 since *Kingswell*[134].

60 Kirby J, in dissent, thought that *Kingswell* should be reopened. His Honour considered that the holding of the joint judgment in that case had given rise to practical difficulties, and that this Court's decisions in *Brown* and *Cheatle* accepted that s 80 should be given a construction that "recognises its function as a real and substantive guarantee of constitutional rights."[135]

61 *Brownlee v The Queen*[136] was a case in which leave to reopen *Brown* was refused. That refusal should be viewed in light of the fact that the question of waiver was never reached in *Brownlee*. The case concerned two questions. The first was whether a trial was still a trial by jury for the purposes of s 80 where two of the twelve jurors empanelled at the beginning of the trial had been discharged and the trial commenced with the remaining 10 jurors. The second question was whether a trial in which the jury was permitted to separate before returning its verdict, after each day of the hearing and over the weekend, was a trial by jury for the purposes of s 80. The continuance of a jury with 10 of its members after two had been discharged and the separation of the jury before verdict were permitted by provisions of the *Jury Act* 1977 (NSW). The constitutional question was whether s 80 would permit the application of those provisions, via s 68 of the *Judiciary Act*, to a trial on indictment for a Commonwealth offence in New South Wales.

62 The accused person, who had been convicted of conspiracy to defraud the Commonwealth contrary to s 86A of the *Crimes Act*, applied for special leave to appeal, on the constitutional question, from a decision of the Court of Criminal Appeal of the Supreme Court of New South Wales affirming his conviction. This Court refused leave, sought by the applicant, to reopen *Bernasconi* and *Kingswell*[137]. It also refused leave, sought by the Attorney-General of the Commonwealth, intervening, to reopen *Brown*[138]. The application to reopen *Brown* was made on the basis that the facts of the case gave rise to a question whether the accused had waived his right to trial by jury[139].

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134 (2000) 203 CLR 248 at 340-345 [267]-[283].

135 (2000) 203 CLR 248 at 322-325 [220]-[228] (footnote omitted).

136 (2001) 207 CLR 278.

137 (2001) 207 CLR 278 at 279.

138 (2001) 207 CLR 278 at 281.

139 (2001) 207 CLR 278 at 281.

63 This Court in *Brownlee* held that the relevant provisions of the *Jury Act* 1977 were not inconsistent with the meaning of trial by jury in s 80 of the Constitution. On that basis, no question of a waiver by the applicant arose. Gleeson CJ and McHugh J observed[140]:

> "If the question of waiver had arisen, the decision of this Court in *Brown v The Queen* would have concluded the issue adversely to the respondent, unless the Court had been persuaded to reconsider, and overrule, that decision." (footnote omitted)

Their Honours went on simply to record that leave to reopen *Brown* had been refused[141]. Gaudron, Gummow and Hayne JJ noted that the special leave application, referred to the Full Court, had been argued on the footing that as a consequence of *Brown*, if reduction in jury numbers below 10 could not stand with the requirement of s 80 for "trial by jury" then that deficiency could not be remedied by waiver[142]. Concerning the refusal to reopen *Brown*, their Honours said[143]:

> "No issue concerning the application to this case of the reasoning in *Brown* or the correctness of *Brown* itself would arise for decision unless in either or both of the respects urged by the applicant for special leave the conduct of his trial had failed to meet what was required by s 80."

The impugned provisions of the *Jury Act* 1977 were compatible with the command in s 80[144]. Kirby J took the view that there had been a relevant waiver by the applicant. His Honour held that contrary to *Brown* the existence of a privilege to waive "trial by jury" was not incompatible with the essential characteristics of jury trial or with the purposes for which s 80 of the Constitution provided that mode of trial[145]. Callinan J did not discuss *Brown*.

64 The argument advanced by the Commonwealth Attorney-General in *Brownlee*, in seeking to reopen *Brown*, was evidently unsuccessful, at least in part because the argument about waiver was at best contingent and, in the event,

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140 (2001) 207 CLR 278 at 290 [30].

141 (2001) 207 CLR 278 at 291 [30].

142 (2001) 207 CLR 278 at 295 [47].

143 (2001) 207 CLR 278 at 295 [48].

144 (2001) 207 CLR 278 at 295 [48].

145 (2001) 207 CLR 278 at 319-320 [120].

was never reached. Neither of the decisions in *Cheng* or *Brownlee*, in which *Brown* was discussed, depended upon the correctness of *Brown*. There is no line of decisions of this Court which can be said to have been founded upon its decision in *Brown*.

Overruling an earlier decision of the Court

65 Counsel for the applicant was permitted to argue that *Brown* should be overruled.

66 The criteria for reconsidering an earlier decision of the Court on any matter were set out in *John v Federal Commissioner of Taxation*[146]:

1. Whether the earlier decision rested upon a principle carefully worked out in a significant succession of cases.

2. Whether there was a difference between the reasons of the Justices constituting a majority in the earlier decision.

3. Whether the earlier decision had achieved a useful result or on the contrary caused considerable inconvenience.

4. Whether the earlier decision had been independently acted upon in a way which militated against reconsideration, as in *Queensland v The Commonwealth* ("the *Second Territory Senators Case*")[147].

The approach to reconsideration of constitutional cases must take into account that the only other way in which the effect of a particular interpretation of the Constitution can be altered, if at all, is by constitutional amendment pursuant to s 128 of the Constitution. In the *Second Territory Senators Case*, Aickin J set out general considerations relevant to whether a previous constitutional decision should be overruled. They were[148]:

1. Whether the error of the prior decision had been made manifest by later cases which had not directly overruled it.

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146 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1989] HCA 5 citing the judgment of Gibbs CJ, with whom Stephen J and Aickin J agreed, in *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58; [1982] HCA 13.

147 (1977) 139 CLR 585; [1977] HCA 60.

148 (1977) 139 CLR 585 at 630.

2. Whether the prior decision went with a "definite stream of authority" and did not "conflict with well established principle".

3. Whether the prior decision could be confined as an authority to the precise question which it decided or whether its consequences would extend beyond that question.

4. Whether the prior decision was isolated as receiving no support from other decisions and forming no part of a stream of authority.

5. Whether the prior decision concerned a fundamental provision of the Constitution, or involved a question of such "vital constitutional importance" that its consequences were likely to be far reaching although not immediately foreseeable in detail.

His Honour referred to the abolition of appeals to the Privy Council and said[149]:

> "The fact that error can no longer be corrected elsewhere must change our approach to the overruling of our own decisions, at least to some extent. It remains however a serious step, not lightly to be undertaken."

A related consideration was that constitutional decisions cannot generally be remedied by legislative amendment.

67 As I observed in *Wurridjal v The Commonwealth*[150], it is not always necessary to make a finding that a prior decision was "erroneous" in order to justify overruling it. It may be that in some cases subsequent decisions have made clear that the decision which the Court is asked to overrule not only stands isolated but has proven to be incompatible with the ongoing development of constitutional jurisprudence. Thus, Dixon CJ spoke of the possibility that an earlier decision had been "weakened" by subsequent decisions or in the light of experience[151]. The taxonomy of "correctness" and "error" is not always required to justify an overruling. An overruling may reflect an evolved understanding of the Constitution. Overarching all these considerations is a conservative cautionary principle against overruling earlier decisions without very good cause. The principle is manifested in the Court's practice from time to time of declining to entertain argument that one of its previous decisions should be overruled.

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149 (1977) 139 CLR 585 at 630.

150 (2009) 237 CLR 309 at 353 [71]; [2009] HCA 2.

151 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370; [1961] HCA 21.

Whether *Brown* should be reopened and overruled

68 The division of views in *Brown* reflected to some extent a division between the characterisation of s 80 as structural in its application to the exercise of federal judicial power and its characterisation as conferring a right or entitlement upon an accused person tried on indictment. That division was apparent in the arguments put to the Court in that case. There was, of course, a textual debate about the word "shall" in the section and an argument advanced by South Australia, intervening, that the State law itself was structural, going to the organisation of State criminal courts, and that the Commonwealth, investing them with federal jurisdiction, had to take them as it found them[152].

69 The principal division between the parties in *Brown* offered a binary choice. The starkness of that choice was no doubt informed by the simplicity of the State statute providing as it did for mandatory trial by judge alone upon the unilateral election of the accused. The case did not throw up for consideration legislation under which an informed accused, conscious of his or her own interests, and a prosecutor, conscious of the wider public interest, and a court, conscious of the interests of justice generally, might be permitted to determine that a trial on indictment should proceed before a judge without a jury.

70 As the majority held in *Brown*, s 80 has an institutional dimension. It can be read as defining the repository of judicial power on a trial on indictment for an offence against a law of the Commonwealth. However, it also has a rights protective dimension. Having regard to the common law concept of trial by jury as a right, even if not amenable to waiver, it could hardly lack that character. As the Commonwealth submitted in this case, the institutional dimension of s 80 does not conclude the inquiry into its application to provisions for trial by judge alone of the kind set out in s 132 of the CPA.

71 The absolute institutional or structural construction adopted by the majority in *Brown* was not typical of the construction of other constitutional guarantees. It raises a question about the internal coherence of s 80 given the flexibility which, on its existing interpretation, it leaves to the Parliament in determining how, and with respect to which offences, there should be trial on indictment and allowing, in that flexibility, for the Parliament to involve the accused, the prosecutor and the court in that determination.

72 Applying the criteria for reopening and overruling a previous decision of the Court in *John's* case, the following observations can be made:

1. The majority judgments in *Brown* depended in part upon an application of a text-based interpretation of the mandate in s 80 in earlier decisions

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152 (1986) 160 CLR 171 at 174.

which had not been concerned with the question of elective mechanisms. The earlier cases did not in terms or by way of necessary logical extension require the outcome reached in *Brown*. To that extent it cannot be said that *Brown* rested upon a principle carefully worked out in a significant succession of cases.

2. The reasons of the Justices constituting the majority in *Brown* were broadly similar although, as the Commonwealth submitted, Deane J went further than Brennan and Dawson JJ in suggesting that the jury necessarily operates to protect against "the arbitrary determination of guilt or innocence".

3. As to whether the decision in *Brown* has achieved a useful result or instead caused inconvenience, the Commonwealth submitted that it places the administration of federal criminal justice on a different footing from the administration of justice in relation to State offences. With the increasing overlap in federal and State criminal offences, this is likely to produce increasing inefficiency and prejudice in the administration of justice. It is, however, difficult for the Court to make a judgment on that kind of contention. It could be countered by the observation that in the case of trials on indictment of Commonwealth offences *Brown* provides a requirement applicable throughout the nation, of trial by jury. The arguments going to utility and inconvenience are inconclusive.

4. Subsequent decisions of this Court have not involved the application of *Brown*. Its application was never reached in *Cheng* or *Brownlee*.

73 Referring to the criteria for reconsideration of constitutional decisions set out by Aickin J in the *Second Territory Senators Case*, it cannot be said that *Brown* has been shown to be erroneous by later cases which have not directly overruled it. It can be said that it did not "conflict with well established principle". However, as already observed, it was not a necessary consequence of established principle. Further, as already observed, it cannot be confined as an authority to the precise question which it decided. Undoubtedly, its consequences extend beyond that question. It can be said to have formed part of a stream of authority but only in the sense that it involved an available application of the established construction of s 80. And while s 80 is a provision of considerable importance in the Constitution, there is a question whether, given the flexibility accorded to the Parliament by operation of s 80, its consequences are likely to be far reaching.

74 In the end, as Isaacs J observed, the final and paramount purpose of the exercise of federal judicial power is "to do justice". On the authority of *Brown*, as it presently stands, no matter how much the interests of justice in an individual case may favour trial by judge alone and regardless of the views of the accused, the prosecutor and the court in that respect, the trial must proceed as a trial by

jury. There is no constitutional imperative which requires that degree of rigidity. It is a rigidity which may in particular cases defeat the interests of justice. It is a rigidity which is incongruous when placed alongside the flexibility otherwise accorded to the Parliament upon the established interpretation of s 80.

75 The mandate in s 80 can accommodate a qualification which recognises both its institutional and rights protective dimensions. The Supreme Court of the United States in *Patton* and in *Singer* recognised as much in relation to Art III. The discourse of "waiver or no waiver" does not adequately respond to those two dimensions. Consistently with its institutional dimension, the mandate in s 80 cannot be qualified so as to confer a right on the accused to demand trial on indictment by judge alone. On the other hand, a law allowing for trial by judge alone, where accused and prosecutor agree, may be taken as sufficiently limited to classes of case in which the interests of justice favour such a proceeding. That is on the basis that the contending interests of the individual and the State are best served by that mode of trial. Similarly, if the accused applies for trial by judge alone and the court regards it as in the interests of justice to so order, both the institutional and rights protective dimensions of s 80 would be respected.

76 In my opinion the decision in *Brown* should be reopened. For the reasons which I have given, that does not involve any suggestion that the formal ruling in *Brown* was wrong. However, the principle which underpinned that ruling was too broad, imposing an unwarranted rigidity upon the construction of s 80. On that basis the decision should not be followed. I would have answered the question stated for the consideration of the Full Court in this case as follows:

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

Answer: No.

77 KIEFEL, BELL AND KEANE JJ. The applicant is charged on indictment with seven offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth) ("the CFIR Act"). Each count charges him with performing services in New South Wales for another person with the intention of supporting or promoting the commission of an offence against s 6 of the CFIR Act, particularised as the entry by that person into a foreign State, Syria, with intent to engage in armed hostilities in that State.

78 Section 9A of the CFIR Act provides that a prosecution for an offence against that Act shall be on indictment. Jurisdiction to try a person on indictment for an offence against Commonwealth law is conferred on the Supreme and District Courts of New South Wales under s 68(2)(c) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). The conferral is expressly stated to be subject to s 80 of the Constitution[153].

79 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."

80 The laws of New South Wales with respect to the procedure for the trial of a person on indictment are applied, so far as those laws are applicable, by s 68(1)(c) of the Judiciary Act to a person charged with any offence against any law of the Commonwealth. The trial of a person on indictment before the Supreme and District Courts of New South Wales is governed by Ch 3 of the *Criminal Procedure Act* 1986 (NSW) ("the CPA"). Chapter 3 provides for the court to order that the accused be tried by a judge alone ("a trial by judge order") in certain circumstances[154].

81 On 8 May 2015, the applicant was arraigned on the indictment in the Supreme Court of New South Wales and he pleaded "not guilty" to each count. His trial on the indictment was listed to commence on 1 February 2016 before Adamson J and a jury.

82 On 25 November 2015, the applicant filed a notice of motion in the Supreme Court of New South Wales, seeking a trial by judge order. On

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153 Judiciary Act, s 68(2).

154 CPA, s 132.

15 December 2015, French CJ ordered that the notice of motion be removed into this Court. On 22 December 2015, French CJ stated a case for the consideration of the Full Court in these terms:

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

83 At the conclusion of the hearing, the Court answered the question "yes" and dismissed the applicant's motion. These are our reasons for joining in the making of those orders.

The scheme of the CPA

84 Section 130(2) is in Ch 3 of the CPA and provides that the Supreme Court or the District Court "has jurisdiction with respect to the conduct of proceedings on indictment as soon as the indictment is presented and the accused person is arraigned". An accused who is arraigned on an indictment and who enters a plea of "not guilty" is "taken to have put himself or herself on the country for trial, and the court is to order a jury for trial accordingly."[155] The proceedings are to be tried by a jury except as otherwise provided in Pt 3 of Ch 3[156]. Other provision is made in s 132 in Pt 3 of Ch 3.

85 Section 132 empowers the Supreme and District Courts of New South Wales to make a trial by judge order in three circumstances. The court must make a trial by judge order if the accused and the prosecutor agree to the accused being tried by a judge alone (s 132(2)). If the prosecutor does not agree to the accused being tried by a judge alone, the court may nonetheless make a trial by judge order if it considers that it is in the interests of justice to do so (s 132(4)). The court must make a trial by judge order if it is of the opinion that there is a substantial risk of acts being committed that may constitute an offence under Div 3 of Pt 7 of the *Crimes Act* 1900 (NSW) in respect of any jury or juror and that the risk may not reasonably be mitigated by other means (s 132(7)). That Division sets out offences against public justice, which include offences involving interfering with jurors[157].

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155 CPA, s 154.

156 CPA, s 131.

157 *Crimes Act* 1900 (NSW), ss 321(1)(b), (2)(b), 322(b), 323(b), 324, 325(2), 326(1)(a), (2).

86 Save for an order under s 132(7), the court may only make a trial by judge order with the consent of the accused[158]. In exercising its discretion not to make a trial by judge order under s 132(4), the court may take into account that the trial will involve a factual issue requiring the application of objective community standards including an issue of reasonableness, negligence, indecency, obscenity or dangerousness[159].

The applicant's case

87 The applicant submitted that s 132 of the CPA is picked up and applied by s 68(1)(c) of the Judiciary Act to the trial on indictment of a Commonwealth offence as the making of a trial by judge order is not incompatible with s 80 of the Constitution. The constitutional command was said to be subject to exception where it is in the interests of justice that the trial on indictment of a Commonwealth offence be by a judge alone. The applicant's argument assumed that the making of a trial by judge order serves the interests of justice in every case. This includes those cases in which the court is required under s 132(2) to make the order because the accused and the prosecutor agree that the trial should be by a judge alone. It was suggested that, in these cases, the prosecutor is to be understood as representing the community's interests. Where the prosecutor and accused are agreed on trial by judge alone, it is to be taken that it is in the interests of justice to adopt that mode of trial. In any event, the applicant pointed out that his application engages s 132(4). Should s 132 be applicable to the applicant's trial, it remains for the trial judge to determine whether it is in the interests of justice to make a trial by judge order.

88 The Attorney-General of the Commonwealth ("the Commonwealth"), the Attorney-General of Tasmania and the Attorney-General for Victoria intervened in support of the applicant, submitting that the question asked in the case stated should be answered "no". In substance, the Attorney-General of Queensland did likewise. The Attorney-General for South Australia confined his submissions to the construction of s 80. In these reasons, references to the interveners do not include a reference to the Attorney-General for South Australia. The respondent, the Director of Public Prosecutions for the Commonwealth ("the Director"), was alone in submitting that the question should be answered "yes".

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158 CPA, s 132(3).

159 CPA, s 132(5).

Brown v The Queen

89 In *Brown v The Queen*, this Court held that s 80 precludes an accused who is tried on indictment for an offence against Commonwealth law from making an election to be tried by a judge alone under s 7 of the *Juries Act* 1927 (SA) ("the Juries Act")[160]. Section 7(1) provided for that mode of trial in a case in which the accused elected to be tried by judge alone and the presiding judge was satisfied that, before making the election, the accused had sought and received advice in relation to it. The applicant and the Commonwealth submitted that the ratio decidendi of *Brown* is confined to the "unilateral waiver" of trial by jury. The applicant argued that the broader statements of principle in *Brown* should not be followed because the majority's "somewhat literalistic approach" to the interpretation of s 80 gives rise to "potential absurdities and inconvenience". If *Brown* is not distinguishable, the applicant and the Commonwealth invited the Court to re-open the decision and overrule it. Generally, they submitted that the authority of *Brown* is weak because it was decided by a bare majority of three Justices whose reasoning was not wholly consistent.

90 Mr Brown was arraigned in the Supreme Court of South Australia on an indictment that charged him with an offence against Commonwealth law. Before the jury was empanelled, Mr Brown purported to elect to be tried by a judge alone. The trial judge ruled that s 80 of the Constitution precluded the election where the indictment charged an offence against Commonwealth law.

91 Following his conviction, Mr Brown appealed to the Full Court of the Supreme Court of South Australia, contending, among other things, that the trial judge erred in refusing his election for trial by judge alone. The question of whether s 80 precluded s 7(1) of the Juries Act being applied by s 68(1) of the Judiciary Act to the trial of a person on indictment for a Commonwealth offence was removed into this Court[161].

92 The Commonwealth intervened in *Brown* and, in an argument adopted by Mr Brown, contended that s 80 is to be construed as conferring a right or privilege to trial by jury on the accused which, as a benefit personal to the accused, is capable of voluntary and informed waiver[162]. The argument drew on a line of authority in the United States, commencing with *Patton v United States*,

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160 (1986) 160 CLR 171; [1986] HCA 11.

161 Pursuant to s 40(1) of the Judiciary Act.

162 (1986) 160 CLR 171 at 172-173.

interpreting Art III §2 of the Constitution of the United States, which provides that "[t]he Trial of all Crimes ... shall be by Jury"[163].

93 Brennan, Deane and Dawson JJ, who together formed the majority, in separate reasons rejected the applicability of the United States' Art III §2 jurisprudence. Their Honours took into account the choice made by the framers of the Commonwealth Constitution to adopt the model of Art III §2 but not to adopt the Sixth Amendment to the Constitution of the United States[164]. That Amendment confers on the accused "the right to a speedy and public trial, by an impartial jury". Brennan J surveyed the history of trial by jury under the common law, observing that there was no common law right to waive jury trial for offences tried on indictment[165]. By contrast, the practice of waiver of jury trial in several of the States at the time the Union was formed informed the reasoning in *Patton*[166].

94 Each of the Justices in the majority in *Brown* saw s 80 as integral to the structure of government and to the distribution of judicial power and not as a right or privilege personal to the accused[167]. Its unqualified terms did not allow that a trial on indictment for an offence against Commonwealth law might be by a judge alone. Gibbs CJ and Wilson J, in dissent, did not question that the command of s 80 is unqualified; their Honours differed by their acceptance of the Commonwealth's argument[168].

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163 *Patton v United States* 281 US 276 (1930); *Adams v United States; Ex rel McCann* 317 US 269 (1942); *Singer v United States* 380 US 24 (1965).

164 *Brown v The Queen* (1986) 160 CLR 171 at 195 per Brennan J, 204 per Deane J, 211-212 per Dawson J.

165 *Brown v The Queen* (1986) 160 CLR 171 at 196-197 per Brennan J; see also at 211-212 per Dawson J.

166 281 US 276 at 290-291 (1930).

167 *Brown v The Queen* (1986) 160 CLR 171 at 197 per Brennan J, 202 per Deane J, 214 per Dawson J.

168 *Brown v The Queen* (1986) 160 CLR 171 at 178-179 per Gibbs CJ, 187-193 per Wilson J.

Is *Brown* distinguishable?

95 The reasoning of the majority in *Brown* did not depend upon the particular provision made under South Australian law for trial on indictment by a judge alone. Nor are there material differences in their Honours' reasoning. Central to the reasons of each is the recognition of the jury as an essential constituent of a court exercising jurisdiction to try an accused charged on indictment with any offence against Commonwealth law[169]. The unqualified command that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury" did not, in their Honours' analysis, allow the trial on indictment of any offence against any Commonwealth law without a jury[170]. The question asked in the case stated could only be answered favourably to the applicant by overruling *Brown*.

The arguments for overruling *Brown*

96 The applicant and the interveners did not embrace the reasoning of the dissentients in *Brown*. The applicant's and interveners' arguments accepted that s 80 operates as more than the conferral of a personal right for the benefit of the accused. They submitted that, in line with other express and implied constitutional guarantees, the command of s 80 should not be understood as absolute. It should not extend to any case in which trial by jury would undermine the purposes that s 80 is intended to serve. Those purposes were identified as the protection of the liberty of the accused and the public interest in the administration of justice. They submitted that *Brown* should be overruled because the majority's focus on the text was divorced from considerations of context and purpose. Before turning to these arguments, it is convenient to address criticisms made by the applicant and the Commonwealth of the consideration of history in *Brown*.

An incomplete appreciation of history?

97 The applicant's criticism of the majority's historical focus was one strand in his broader, purposive challenge to the *Brown* construction of s 80. The Commonwealth mounted a more vigorous attack on the sufficiency of the historical analysis. This was in support of a submission that arraignment on indictment and the entry of a plea of "not guilty" do not trigger the command in

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169 *Brown v The Queen* (1986) 160 CLR 171 at 197 per Brennan J, 202 per Deane J, 214 per Dawson J.

170 *Brown v The Queen* (1986) 160 CLR 171 at 196 per Brennan J, 201 per Deane J, 208 per Dawson J.

s 80. These arguments are addressed in turn. The Commonwealth's argument requires that there also be reference to this Court's decision in *R v Archdall and Roskruge; Ex parte Carrigan and Brown*[171].

98 The applicant complained of the *Brown* majority's "undue emphasis [on] the state of evolution of jury trials in 1900". This was by way of contrast with the reasons of Gaudron, Gummow and Hayne JJ in *Brownlee v The Queen*[172], which referred with approval to observations made by Professor A W Scott in an article published in 1918. Professor Scott discussed the evolution of trial by jury from its origins in the Frankish and Norman inquisition to its present form, expressing the hope that constitutional entrenchment should not stifle further development[173]. The applicant called these observations in aid of his submission that provision for trial on indictment by a judge alone is not so much a departure from the institution of the jury as "a qualification relating to its operation". It suffices to observe that whether one characterises trial on indictment by judge alone as a qualification relating to the operation of the evolving institution of trial by jury or not, trial by judge alone is not trial by jury.

The history of elective mechanisms for non-jury criminal justice

99 The Commonwealth's criticism of the historical analysis in *Brown* is of the asserted failure to "sufficiently grapple with the Parliamentary history of mechanisms for non-jury criminal justice pre and post 1900". The Commonwealth traced uncontroversial developments in England and the Australian colonies in the 19th century providing for the summary trial of some indictable offences[174]. In light of this history and the circumstance that indictments were generally found by a law officer or Crown Prosecutor and not by a grand jury, the Commonwealth submitted that by the 1880s, "the historical assimilation between an indictable offence, a trial on indictment, a presentment by a grand jury and determination by a petty jury, had broken down in the Australian colonies." Building on this large proposition, the Commonwealth contended that s 80 is to be understood against a background at Federation of

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171 (1928) 41 CLR 128; [1928] HCA 18.

172 (2001) 207 CLR 278 at 291-292 [34]; [2001] HCA 36.

173 *Brownlee v The Queen* (2001) 207 CLR 278 at 291-292 [34] per Gaudron, Gummow and Hayne JJ, citing Scott, "Trial by Jury and the Reform of Civil Procedure", (1918) 31 *Harvard Law Review* 669 at 669-670.

174 10 & 11 Vict c 82, s 1; *Criminal Justice Act* 1855 (18 & 19 Vict c 126), s 1; *Summary Jurisdiction Act* 1879 (42 & 43 Vict c 49), s 12.

"legislative mechanisms providing for judge alone criminal trials". This submission, it will be observed, equates trial on indictment before a judge and jury with the summary trial of an indictable offence before two justices or a magistrate.

100 Nothing in the Commonwealth's argument makes it necessary to recount the history of the introduction of trial by jury into the Australian colonies[175]. Nor is it necessary to recount the allied history of statutory provision for the Attorney-General, or other duly appointed officer, to find a bill of indictment, variously described as an "indictment", "presentment" or "information"[176]. It is sufficient to note the three features of the history of trial by jury that are explained in the unanimous reasons in *Cheatle v The Queen*[177]. First, by the time of Federation the common law institution of trial by jury had been adopted in all the Australian colonies as the method of trial of serious criminal offences. Secondly, the reference to "trial by jury" in s 80 was to that common law institution. Thirdly, s 80's requirement that the trial on indictment of any offence against any law of the Commonwealth shall be by jury represents a "fundamental law of the Commonwealth", which "ought *prima facie* to be 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."[178]

101 At Federation there existed a well-understood distinction in substance and practice between trial on indictment and summary proceedings. Proceedings on

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175 See *R v Valentine* (1871) 10 SCR (NSW) (L) 113 at 122-123 per Stephen CJ; *Kingswell v The Queen* (1985) 159 CLR 264 at 298-300 per Deane J; [1985] HCA 72; *Wu v The Queen* (1999) 199 CLR 99 at 112-113 [42]-[43] per Kirby J; [1999] HCA 52; Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Supp) 49; Bennett, "The Establishment of Jury Trial in New South Wales", (1961) 3 *Sydney Law Review* 463; Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 6; and see generally Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900*, (2002) and Castles, *An Australian Legal History*, (1982).

176 See *Australian Courts Act* 1828 (Imp) (9 Geo IV c 83), s 5 and the discussion in *Barton v The Queen* (1980) 147 CLR 75 at 88-93 per Gibbs ACJ and Mason J; [1980] HCA 48 and in *Kingswell v The Queen* (1985) 159 CLR 264 at 304-305 per Deane J.

177 (1993) 177 CLR 541 at 549; [1993] HCA 44.

178 *R v Snow* (1915) 20 CLR 315 at 323 per Griffith CJ; [1915] HCA 90, cited in *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

indictment following committal for trial, or upon ex officio information, were pleas of the Crown prosecuted in the higher courts before a judge and jury. Summary offences, creatures of statute, were prosecuted as a proceeding between subject and subject before justices of the peace or a magistrate. As Dixon J explained the distinction in *Munday v Gill*, proceedings on indictment "are solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected" whereas summary offences "are disposed of in a manner adopted by the Legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of society."[179]

102 Before Federation the Australian colonies had enacted legislation allowing for the summary trial of certain indictable offences following the English model[180]. Generally, summary disposition required the accused's consent and the justices' or magistrate's determination that the prosecution was "fit" to be determined in this way[181]. From its enactment, s 12 of the *Crimes Act* 1914 (Cth) ("the Crimes Act") provided for certain offences against that Act to be punishable either on indictment or on summary conviction. Where proceedings for such an offence were brought in a court of summary jurisdiction, the court was given the discretion either to determine the proceedings or to commit the defendant for trial[182].

103 The provision for the summary disposition of offences against the Crimes Act was extended in 1926 by the insertion of s 12A, which permitted proceedings in respect of offences against the Crimes Act, although declared indictable, to be heard and determined summarily with the consent of the defendant[183]. Offences involving property of relatively small value, if thought fit by the court, might be determined summarily at the request of the prosecutor[184]. Before and after the enactment of s 12A, when a court of summary jurisdiction agreed to hear and determine a charge instead of committing the defendant for trial, the court was

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179 (1930) 44 CLR 38 at 86; [1930] HCA 20.

180 See, eg, *Criminal Law Amendment Act* 1883 (NSW), s 150.

181 See *Hall v Braybrook* (1956) 95 CLR 620; [1956] HCA 30.

182 Crimes Act, s 12(2).

183 Crimes Act, s 12A(1), inserted by *Crimes Act* 1926 (Cth), s 10.

184 Crimes Act, s 12A(2).

not empowered to impose a sentence of imprisonment for a period exceeding one year[185]. Like provision is now made by ss 4J and 4JA of the Crimes Act.

Archdall

104 The validity of ss 12 and 12A was challenged in *Archdall*. Two union officials were convicted by a police magistrate of an offence against s 30K of the Crimes Act, which proscribed obstructing or hindering the provision of any public service by the Commonwealth. Among the unsuccessful arguments mounted in *Archdall* was the contention that ss 12, 12A and 30K were beyond legislative power because they were incompatible with s 80 of the Constitution[186]. The suggestion that s 80 prevented the Parliament from providing that the s 30K offence might be punishable summarily was peremptorily dismissed[187]. In a frequently quoted passage, Higgins J explained s 80 in this way[188]:

> "Sec 80 merely says: 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury' – that is to say, if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment".

105 *Archdall* has been criticised for eviscerating the constitutional guarantee of trial by jury, rendering it "a mere procedural provision."[189] The applicant's argument accepted the force of that criticism. He submitted that recognition that the Parliament may circumvent the guarantee by declaring an offence to be not

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185 Crimes Act, s 12(3).

186 (1928) 41 CLR 128 at 135 per Knox CJ, Isaacs, Gavan Duffy and Powers JJ.

187 *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 136 per Knox CJ, Isaacs, Gavan Duffy and Powers JJ.

188 *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 139-140.

189 *Spratt v Hermes* (1965) 114 CLR 226 at 244 per Barwick CJ; [1965] HCA 66; see also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580-585 per Dixon and Evatt JJ; [1938] HCA 10; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 197-202 per Murphy J; [1978] HCA 56; *Kingswell v The Queen* (1985) 159 CLR 264 at 298-320 per Deane J; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 422-427 [95]-[104] per Kirby J; [1999] HCA 57; *Cheng v The Queen* (2000) 203 CLR 248 at 306-308 [173]-[177] per Kirby J; [2000] HCA 53.

triable on indictment makes unsupportable a construction of s 80 that does not allow exception to its command where the interests of justice so require.

The Commonwealth's construction

106 The Commonwealth's argument sees the criticisms of *Archdall* as misconceived. It submitted that *Archdall* recognises "the accommodation of values between parliamentary designation, the accused's participation and the community's involvement in trial on indictment which underlie the terms of s 80." Section 80 leaves it in the hands of the Parliament to determine the conditions upon which it is engaged, including by providing that a court may agree to the summary trial of an indictable offence. The Commonwealth submitted that no meaningful distinction can be drawn between an elective mechanism for the summary trial of an indictable offence and an elective mechanism for trial by judge alone. A provision such as s 132 of the CPA, on the Commonwealth's argument, is functionally and substantively the successor to the provision for the summary trial of an indictable offence which was sanctioned in *Archdall*.

107 Against this background, the Commonwealth argued that there is no "trial on indictment" enlivening s 80 until all the conditions specified by Parliament, including those of the kind for which s 132 of the CPA provides, have been worked through and the accused is placed in the charge of the jury. The presentation and arraignment of the accused on an indictment charging an offence against Commonwealth law, in the Commonwealth's submission, may but need not engage s 80. It is a construction that reads s 80 as commanding that "the trial on indictment of an accused in the charge of a jury … shall be by jury". There are two reasons why this is said not to be as Carrollian as may appear. First, s 80 ensures that where the trial of a Commonwealth offence is to be by jury, the jury must possess the essential features of that institution. Secondly, at a "deeper" level, the Commonwealth submitted that s 80 constrains the Parliament's power to designate the conditions on which a trial may proceed by judge alone by reference to the value of community involvement in the process of fact-finding and the protection of the particular accused. The limits of this constraint on legislative power are defined by the case-specific "interests of justice" criterion which the applicant proposes.

108 The Commonwealth's construction does not sit with the drafting history to which it referred in its written submissions[190]. The first draft of the Constitution

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190 A summary of the convention debates on s 80 is set out in *Cheng v The Queen* (2000) 203 CLR 248 at 292-295 [130]-[141] per McHugh J.

provided in cl 65 that "[t]he trial of all crimes ... shall be by Jury"[191]. The draft was taken directly from Art III §2 of the United States Constitution[192]. By the 1898 Melbourne Convention, the draft had been revised and the reference to "all crimes" had been deleted in favour of the formulation "the trial of all indictable offences" in what had become cl 79[193]. The revision took into account the United States' experience of difficulty in providing for the summary trial of minor offences given the constitutional entrenchment of trial by jury for "all crimes". When the revised draft was debated at the Melbourne Convention, Mr Barton successfully moved a further amendment. This was to delete the words "of all indictable offences" in favour of the formulation "on indictment of any offence". Mr Barton explained that the amendment was to enable contempts and other minor indictable offences to be dealt with promptly by way of a summary procedure[194], the object of cl 79 being to "preserve trial by jury where an indictment has been brought"[195].

109 The relevant parts of the scheme of the CPA have been outlined above. Section 132 is in Ch 3, which applies "to or in respect of proceedings for indictable offences (other than indictable offences being dealt with summarily)."[196] By the time consideration of the making of a trial by judge order arises, the proceeding is on indictment. The making of a trial by judge order does not alter that the trial is a trial on indictment. The Commonwealth's construction requires that the words "trial on indictment" in s 80 do not have the same meaning as the words "trial on indictment" in s 68(1) of the Judiciary Act. Acceptance of the Commonwealth's construction produces the unlikely result that there are trials on indictment for offences against Commonwealth law that are subject to the command of s 80 and trials on indictment for offences against Commonwealth law that are outside its command. This strained, ahistorical and somewhat improbable construction provides no reason to doubt the correctness of *Brown*.

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191 Williams, *The Australian Constitution: A Documentary History*, (2005) at 107.

192 La Nauze, *The Making of the Australian Constitution*, (1972) at 227.

193 La Nauze, *The Making of the Australian Constitution*, (1972) at 227-228.

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

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

196 CPA, s 45(1).

The purposive challenge to Brown

110 The applicant criticised the majority's "literalistic" construction of s 80 in *Brown* as being out of keeping with the contemporary approach to the construction of express and implied constitutional guarantees. The latter approach was said to be exemplified in *Cole v Whitfield*[197], where the "powerful language" of s 92 was held not to preclude some restriction on interstate trade and commerce. To allow, as *Archdall* does[198], that the Parliament may designate whether an offence is triable on indictment but not to allow any exception to the requirement for a jury where the trial is on indictment was submitted to be incongruous and to divorce s 80's guarantee from the broader objects of Ch III.

111 In assessing the argument based on incongruity, it is as well to recall Dawson J's pointed observation in *Brown* that there has been nothing in the Australian experience to date that has put the limits of the *Archdall* interpretation to any severe test[199]. The Parliament has not legislated to provide for serious offences to be tried other than on indictment in an evident attempt to circumvent the operation of s 80.

112 The Commonwealth's alternative argument also contended that the *Brown* construction is divorced from constitutional context and purpose. The Commonwealth submitted that the provisions of s 132 of the CPA are not in conflict with s 80 because they are "fully respectful of the individual and community values that underpin the guarantee under s 80 while also ensuring the due administration of justice within Chapter III".

113 The invocation of *Cole v Whitfield*[200] does not advance the applicant's or the Commonwealth's argument. Plainly enough, s 92 requires consideration of from what interstate trade and commerce is to be immune. By contrast, s 80 imposes two imperatives upon the trial on indictment of offences against Commonwealth law. The first is that the trial shall be by jury. The second is that the venue of the trial is the State in which the offence is committed, and if not committed within any State, at such place or places as the Parliament prescribes. Neither command is ambiguous or qualified. Nothing in the decisions of this Court since *Brown* supports the proposition that the plain words of s 80 may be

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197 (1988) 165 CLR 360 at 394-396; [1988] HCA 18.

198 See above at [104] of these reasons.

199 *Brown v The Queen* (1986) 160 CLR 171 at 215.

200 (1988) 165 CLR 360 at 394-396.

read as subject to exception when a court assesses it is in the interests of justice that the trial on indictment of an offence against any law of the Commonwealth be by judge alone.

114 The applicant's and the interveners' arguments invite attention to Gummow J's statement in *SGH Ltd v Federal Commissioner of Taxation*[201]:

> "[Q]uestions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago. Nevertheless, those considerations are not irrelevant; it would be to pervert the purpose of the judicial power if, without recourse to the mechanism provided by s 128 and entrusted to the Parliament and the electors, the Constitution meant no more than what it appears to mean from time to time to successive judges exercising the jurisdiction provided for in Ch III of the Constitution."

115 The command that the trial on indictment of any offence against any law of the Commonwealth "shall be by jury" admits of no other mode of trial on indictment for a Commonwealth offence. This is a sufficient reason for rejecting the invitation to re-open and to overrule *Brown*. However, the contention that the *Brown* construction neglects consideration of constitutional context and purpose should not go unremarked. Each member of the majority in *Brown* was mindful of the place of s 80 in Ch III as part of the structure of government and the analysis of each is consistent with the object of the provision being to prescribe how the judicial power of the Commonwealth is engaged in the trial on indictment of Commonwealth offences[202]. That analysis should be accepted.

116 In *Cheng v The Queen*, Gaudron J observed that to emphasise trial by jury as a protection of the liberty of the individual is apt to overlook the importance of the institution of the jury to the administration of criminal justice more generally[203]. Her Honour's observation echoed Deane J's analysis in *Brown*. His Honour emphasised the benefit to the community of having the determination of guilt in serious cases made by a representative body of ordinary and anonymous

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201 (2002) 210 CLR 51 at 75 [44]; [2002] HCA 18.

202 *Brown v The Queen* (1986) 160 CLR 171 at 197 per Brennan J, 202 per Deane J, 214 per Dawson J.

203 *Cheng v The Queen* (2000) 203 CLR 248 at 277-278 [80].

citizens[204]. This view was adopted by the joint reasons in *Katsuno v The Queen*[205].

117 It is not to the point to observe, as the applicant did, that the great majority of criminal cases are determined by courts of summary jurisdiction. Public interest in, and concern about, the administration of criminal justice is commonly focused on the prosecution of serious crime in the higher courts. The verdict of the jury has unique legitimacy. As the Director submitted, the determination of guilt by jury protects the courts from controversy and secures community support for, and trust in, the administration of criminal justice. As the Director also submitted, were the command of s 80 subject to exception based on a court's assessment of the "interests of justice" criterion, it is likely that its application would vary between individual judges and, perhaps, between jurisdictions.

118 No attempt was made in *Brown* to assess the desirability from the viewpoint of the community generally, or of a particular accused, of allowing an election to be tried by judge alone[206]. As Deane J explained, the assessment and balancing of the advantages and disadvantages of trial by jury in general, or of permitting the trial by a judge alone in a particular case, were not to the point. What was to the point were the clear terms in which the Constitution ordained that the trial on indictment of any offence against any law of the Commonwealth "shall be by jury"[207]. Here, the applicant's and the interveners' submissions assumed that in particular cases the interests of justice require trial by a judge alone. Adverse pre-trial publicity, complex expert evidence and lengthy trials with the attendant risk of juror frustration and disengagement were among the circumstances relied on in those submissions.

119 It is notable that the Director did not contend that trial by jury was ill-suited to long trials or to trials involving complex expert evidence. The Director pointed to the discipline that trial by jury imposes upon all the participants. If a case cannot be made comprehensible to a jury, the Director

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204 *Brown v The Queen* (1986) 160 CLR 171 at 201; see also *Kingswell v The Queen* (1985) 159 CLR 264 at 301 per Deane J.

205 (1999) 199 CLR 40 at 63-64 [49] per Gaudron, Gummow and Callinan JJ; [1999] HCA 50.

206 *Brown v The Queen* (1986) 160 CLR 171 at 207 per Deane J.

207 *Brown v The Queen* (1986) 160 CLR 171 at 207 per Deane J.

asked how it can be made comprehensible to the accused and to the public, who must ultimately support the criminal process[208].

120 The trial judge has mechanisms available to him or her to deal with adverse pre-trial publicity. These include adjourning the proceedings for a period and giving appropriately tailored directions to the jury[209]. The administration of criminal justice proceeds upon acceptance that a jury, acting in conformity with the instructions given by the trial judge, will render a true verdict in accordance with the evidence[210]. The applicant's and the interveners' assumption that the interests of justice will, on occasions, be advanced by the trial on indictment of an offence against Commonwealth law by a judge alone should not be accepted.

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208 See *Cheng v The Queen* (2000) 203 CLR 248 at 278 [81] per Gaudron J.

209 *Dupas v The Queen* (2010) 241 CLR 237 at 248-249 [29]; [2010] HCA 20.

210 *R v Glennon* (1992) 173 CLR 592 at 603 per Mason CJ and Toohey J; [1992] HCA 16.

121 GAGELER J. The proposition for which *Brown v The Queen*[211] is authority was succinctly stated in *Cheng v The Queen*[212]: "where it applies, s 80 [of the Constitution] is mandatory". The applicant argued to the contrary of that proposition. The Attorney-General of the Commonwealth argued that s 80 does not apply here. The other interveners did not materially add to either argument.

122 Rejecting both arguments, I joined in making orders affirming that material sub-sections of s 132 of the CPA are incapable of being applied by s 68 of the Judiciary Act to the applicant's trial of offences against s 7(1)(e) of the CFIR Act and dismissing the applicant's motion for an order that he be tried by a judge alone. These are my reasons.

Where it applies, s 80 is mandatory

123 The applicant's argument that s 80 of the Constitution is not mandatory did not rely on the view of the minority in *Brown* that s 80 confers an individual right which is capable of waiver. The argument proceeded instead by ascribing purposes to s 80's prescription that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury" and by postulating that the prescription has no application to a trial on indictment of an offence against a law of the Commonwealth where a court is able to determine that those purposes would not be served were that trial to be by jury. The purposes which the applicant identified as explaining and limiting the application of the prescription were: "a purpose of protecting the liberty of those who are accused"; and "a broader public interest in the administration of justice".

124 There is nothing unusual about ascribing purposes to the prescription in s 80 that the trial on indictment of any offence against any law of the Commonwealth is to be by jury and going on to expound the content of that prescription in light of those purposes. The novelty of the applicant's argument lies in the notion that the prescription itself has no application where a court can determine that the application of the prescription would not serve the purposes ascribed to it.

125 There is no difficulty in accepting that a constitutional prescription which is expressed in unqualified mandatory terms might be shown in light of its purpose or purposes to have a more confined operation than might be apparent from its language. Section 41 of the Constitution is an example. That section's prescription that "[n]o adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting

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211 (1986) 160 CLR 171; [1986] HCA 11.

212 (2000) 203 CLR 248 at 270 [57]; [2000] HCA 53.

at elections for either House of the Parliament of the Commonwealth" is expressed neither to be transitional nor to be subject to temporal limitation. Yet, in *R v Pearson; Ex parte Sipka*[213], the section was identified as having the limited purpose of ensuring that those who enjoyed the constitutional franchise should not lose out when the statutory franchise was introduced. Section 41 was interpreted in light of that purpose to preserve only those rights which were in existence before the enactment of the *Commonwealth Franchise Act* 1902 (Cth).

126 The difficulty is in moving from the abstract to the concrete. To accept that the prescription that *the* trial on indictment of *any* offence against *any* law of the Commonwealth shall be by jury is to be read as impliedly admitting that *some* trials on indictment of *some* offences against *some* laws of the Commonwealth might be by judge alone, would be to accept (to say the least) a linguistic contortion. But the difficulty is not merely a linguistic one.

127 The deeper flaw in the applicant's argument is that the two purposes which the applicant ascribes to the relevant prescription are simply too limited. Not only does confining the prescription by reference to those two purposes fail to accommodate the sweeping and unqualified language in which the prescription is couched. It fails to explain the content of the prescription. And it fails to heed the full significance of trial by jury within our constitutional tradition.

128 Neither the purpose of protecting the liberty of those who are accused nor the broader public interest in the administration of justice are sufficient comprehensively to explain what *Cheatle v The Queen*[214] identified and *Brownlee v The Queen*[215] confirmed to have been in 1900, and to remain, the "essential feature or requirement of the institution" of trial by jury: "that the jury be a body of persons representative of the wider community".

129 The long political struggle in New South Wales which resulted towards the middle of the nineteenth century in the legislative introduction of trial by a jury of 12 inhabitants of the colony, initially as an alternative to trial by a military jury available at the option of an accused[216] and ultimately as the standard method of trial of "all crimes misdemeanours and offences cognizable in the … Supreme Court and prosecuted by information in the name of Her Majesty's Attorney General or other officer duly appointed for such purpose by

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213 (1983) 152 CLR 254; [1983] HCA 6.

214 (1993) 177 CLR 541 at 560; [1993] HCA 44.

215 (2001) 207 CLR 278 at 299 [56]; [2001] HCA 36.

216 *Jury Trials Act* 1833 (NSW).

the Governor"[217], was part of a larger struggle for self-government. It was much less about the civil right of a member of the populace to be tried by jury than it was about the political right of a section or enlarged section of the populace to sit on a jury[218]. It took place against the background of recognition by supporters and opponents of the introduction and expansion of trial by jury alike of the insight to which Alexis de Tocqueville gave contemporaneous expression when he wrote that the institution of the jury "places the people, or at least a class of the people in the judgment seat" and "in fact, therefore, places the direction of society in the hands of the people, or of the class from which the juries are taken"[219]. De Tocqueville's insight was taken up as a theme of the first major academic work on trial by jury, published soon afterwards in the United Kingdom by William Forsyth[220].

130 Writing extra-judicially on the topic of the jury system in Australia in 1936, Evatt J referred to the study by Forsyth. He said that "[i]t would seem that in modern times the jury system is to be regarded as an essential feature of real democracy" and that "[t]he mere right (or duty) to put a piece of paper in a ballot-box once every three years is not proof of the reality of self-government"[221].

131 Lord Devlin gave expression to the same understanding 30 years later when he described the jury within the common law tradition as a "little parliament" serving to ensure a measure of democratic participation, and therefore democratic legitimacy, not in the making of criminal law but in its administration[222]. Lord Devlin later went on to develop that theme[223]:

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217 *Jury Trials Act* 1839 (NSW).

218 See generally Atkinson, *The Europeans in Australia*, (2004), vol 2 at 62; Barker, *Sorely tried: Democracy and trial by jury in New South Wales*, (2003) at 91-136; Neal, *The Rule of Law in a Penal Colony*, (1991) at 166-187; Neal, "Law and Authority: The Campaign for Trial by Jury in New South Wales", (1987) 8 *The Journal of Legal History* 107.

219 De Tocqueville, *Democracy in America*, (1835), as quoted in Macarthur, *New South Wales: Its Present State and Future Prospects*, (1837) at 111.

220 Forsyth, *History of Trial by Jury*, (1852) at 415-450.

221 Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Supp) 49 at 67.

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

223 Devlin, *The Judge*, (1979) at 127.

> "The jury is the means by which the people play a direct part in the application of the law. It is a contributory part. The interrelation between judge and jury, slowly and carefully worried out over several hundred years, secures that the verdict will not be demagogic; it will not be the simple uninhibited popular reaction. But it also secures that the law will not be applied in a way that affronts the conscience of the common man. Constitutionally it is an invaluable achievement that popular consent should be at the root not only of the making but also of the application of the law. It is one of the significant causes of our political stability."

132 Lord Devlin's explanation of the democratic role of the jury was described in a publication prepared under the auspices of the Australian Institute of Judicial Administration as identifying "the central themes which underpin jury ideology": "the jury involves community participation and lay involvement; the verdict arises out of a democratic understanding between judge and jury, beyond populism and demagogy; the jury ensures the application of the law consonant with the community conscience; the democracy of the legislative process is maintained in its courtroom application through the jury; and this protects the body politic"[224]. The extent to which that deep-seated ideology conforms to contemporary practice is not the present concern. The present concern is that the applicant's argument fails to accommodate it at all.

133 The conception of the institution of trial by jury as serving to ensure a measure of democratic participation in the administration of criminal law cannot be taken to have been overlooked by the framers of the Constitution when, rejecting the suggestion of Henry Bournes Higgins that the earlier impetus to ensure trial by jury had been overtaken by the advent of parliamentary democracy in the second half of the nineteenth century[225], they voted to adopt the text of what was to become s 80 of the Constitution[226]. Nor can it be taken to have been accidental that the text of s 80 was modelled on the structural imperative contained in Art III, §2 of the United States Constitution as distinct from the guarantee of individual right contained in the Sixth Amendment to the United States Constitution. To the Imperial Parliament juries had been weathervanes of local sentiment within pre-revolutionary American colonies[227],

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224 Findlay, *Jury Management in New South Wales*, (1994) at 1.

225 *Official Report of the National Australasian Convention Debates*, (Adelaide), 20 April 1897, at 990-991. See also *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 351.

226 See generally *Cheng v The Queen* (2000) 203 CLR 248 at 292-294 [130]-[139].

227 See generally Olson, "Parliament, Empire, and Parliamentary Law, 1776", in Pocock (ed), *Three British Revolutions: 1641, 1688, 1776*, (1980) 289.

and the role of the jury in ensuring popular participation in the administration of government was a topic which had divided federalists and anti-federalists in the framing of the United States Constitution[228].

134 More importantly, the democratic participation in the administration of criminal justice which had come by the nineteenth century to be connoted by trial by jury within the Australian colonies cannot be taken to have been lost on the Australian people "when, by referenda, they authorized the formal enactment of – or, in the case of the people of Western Australia, the proclamation of adherence to – the terms upon which they 'agreed to unite in one indissoluble Federal Commonwealth'"[229]. Within the federal structure of the Constitution, the second clause of s 80 reinforces and particularises the nature of the democratic participation involved in compliance with the express and unqualified prescription in the first clause that any trial on indictment of any offence against any law of the Commonwealth shall be by jury. By prescribing that "every such trial shall be held in the State where the offence was committed", the second clause has the result that the democratic participants in the requisite trial by jury will ordinarily in practice be people of that State.

135 The democratic purpose of s 80's prescription of trial by jury was given emphasis by Deane J in *Kingswell v The Queen* where he referred to s 80 as reflecting "a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases", noted that "[i]n the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government", and adopted the description of s 80 as reflecting "a fundamental decision about the exercise of official power"[230]. The prescription that the trial on indictment of an offence against a law of the Commonwealth is to be by jury, Deane J went on to observe, serves to enhance the administration of Commonwealth criminal law not only because it necessitates in practice that the trial be "comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just" but also because "[t]he nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who

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228 See generally Amar, "Jury Service as Political Participation Akin to Voting", (1995) 80 *Cornell Law Review* 203 at 218-221.

229 *New South Wales v The Commonwealth* (1990) 169 CLR 482 at 504; [1990] HCA 2, quoting the preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp).

230 (1985) 159 CLR 264 at 298-299, 301; [1985] HCA 72.

might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people"[231].

136 Although made in the course of a dissent, those observations of Deane J in *Kingswell* were not contradicted by the reasoning of the majority in that case. They were quoted and applied by Dawson J as a member of the majority in *Brown*[232]. They were incorporated by reference into Deane J's own reasons for judgment as one of the majority in *Brown*.

137 In *Brown*, Deane J unpacked what he had identified in *Kingswell* as the "deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases" that is reflected in s 80. The conviction reflected in that section, he explained, is that "regardless of the position or standing of the particular 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"[233]. He added, after referring without repetition to his more general observations in *Kingswell*, that "[i]t suffices to say that the advantages of trial by jury to the community generally serve to reinforce what the plain words of the Constitution convey, namely, that the general prescription of trial by jury as the method of trial on indictment of any offence against any law of the Commonwealth constitutes an element of the structure of government and distribution of judicial power which were adopted by, and for the benefit of, the people of the federation as a whole"[234].

138 The relationship between the democratic purpose and the structural imperative of s 80's prescription of trial by jury was given similar emphasis by Brennan J in *Brown* when, after referring to trial by jury as "the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice", he explained that "[a]uthority to return a verdict and responsibility for the verdict returned belong to the impersonal representatives of the community"[235]. Following on from that explanation, he concluded that s 80 "entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence", having

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231 (1985) 159 CLR 264 at 301.

232 (1986) 160 CLR 171 at 216.

233 (1986) 160 CLR 171 at 202.

234 (1986) 160 CLR 171 at 202.

235 (1986) 160 CLR 171 at 197.

as its concern "the constitution or organization of any court exercising that jurisdiction"[236].

139 The structural implications of the unqualified prescription of trial by jury as the method of trial on indictment of any offence against any law of the Commonwealth had much earlier been spelt out by Isaacs J in *R v Bernasconi*[237]:

> "By force of the various sections of Chapter III other than sec 80 and aided by sub-sec XXXIX of sec 51, Parliament might have enacted, or might have enabled Courts to provide by rules, that all offences whatever should be tried by a Judge or Judges without a jury. Sec 80 places a limitation on that power. Neither Parliament nor Courts may permit such a trial. If a given offence is not made triable on indictment at all, then sec 80 does not apply. If the offence is so tried, then there must be a jury."

140 The democratic participation in the administration of Commonwealth criminal law guaranteed by the prescription of trial by jury as the method of trial on indictment of an offence against a law of the Commonwealth is confined in its scope, but not contradicted, by the repeatedly acknowledged capacity of the Commonwealth Parliament to lay down rules for the determination of whether or not an offence is to be tried on indictment, within limits which legislative restraint in practice has avoided being subjected to "any severe test"[238]. That constitutional guarantee of democratic participation would be flouted by a capacity, on the part of one or more parties in a trial on indictment or on the part of the court, to determine that the protection of the liberty of the accused and the public interest in the administration of justice were sufficient to justify the court being constituted by a judge alone.

141 The proposition for which *Brown* is authority is good law, for good reason. Where it applies, s 80 is mandatory.

Section 80 applies here

142 The Commonwealth's separate argument relied on *R v Archdall and Roskruge; Ex parte Carrigan and Brown*[239] and *R v Federal Court of*

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236 (1986) 160 CLR 171 at 197.

237 (1915) 19 CLR 629 at 637; [1915] HCA 13.

238 *Brown v The Queen* (1986) 160 CLR 171 at 215.

239 (1928) 41 CLR 128; [1928] HCA 18.

Bankruptcy; Ex parte Lowenstein[240] to support the proposition that s 80 admits of such flexibility on the part of the Commonwealth Parliament in the establishment of a process for the determination of the conditions under which an offence against a law of the Commonwealth is to proceed with or without a jury that there is no "trial on indictment" within the meaning of the section until the whole of the process that has been established by the Commonwealth Parliament has been worked through to produce a determination that a particular trial is to be by jury and not by judge alone. Those cases cannot, in my opinion, be read as supporting the proposition for which the Commonwealth contends.

143 As highlighted by the minority in *Lowenstein*[241], the proposition on which the decisions in *Archdall* and *Lowenstein* turned and for which they remain authority is that captured by the second part of the aphorism of Higgins J in *Archdall* that "if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment"[242]. The proposition was repeated in *Kingswell* with a little more elaboration in the statement of the plurality that "the section … leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily"[243] and in the statement of Brennan J (dissenting in the result but not relevantly in principle) that "s 80 guarantees trial by jury only in cases where an offence against a law of the Commonwealth is prosecuted on indictment"[244].

144 The first part of the aphorism of Higgins J in *Archdall* – "if there be an indictment, there must be a jury" – is consistent with s 80 operating as a structural impediment to the Commonwealth Parliament providing for a court to have power to determine that the trial of an offence which the Parliament has determined is to be prosecuted on indictment is nevertheless to proceed before a judge alone. That is made plain by the fact that Higgins J cited *Bernasconi*[245]. The second part of the aphorism – "but there is nothing to compel procedure by indictment" – cannot be read as expressing a proposition so broad that it swallows up the first part. Nothing in the reasoning of the majority in *Lowenstein* suggested that it should.

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240 (1938) 59 CLR 556; [1938] HCA 10.

241 (1938) 59 CLR 556 at 581-582.

242 (1928) 41 CLR 128 at 139-140.

243 (1985) 159 CLR 264 at 277.

244 (1985) 159 CLR 264 at 294.

245 (1928) 41 CLR 128 at 140.

145 This is not the occasion to reconsider *Archdall* and *Lowenstein* or to attempt to spell out definitively the meaning of "trial on indictment" in s 80. That is not least because any such exercise could not be undertaken without engaging with the reasoning of the dissentients in *Lowenstein* and the dissent of Deane J in *Kingswell*. The Court has refused to reopen *Archdall*, *Lowenstein* and *Kingswell* in the absence of being persuaded that the occasion is appropriate[246]. There has been no application to reopen them now.

146 The Commonwealth's argument that s 80 is not engaged in the present case is to be rejected on the basis that it leads to a conclusion that is inconsistent with the acknowledged application to "trial on indictment" in s 80[247] of the conception of a trial on indictment expounded by Dixon J when he referred in *Munday v Gill* to the "great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment"[248]:

> "Proceedings upon indictment ... are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject. The former are solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed. The latter are disposed of in a manner adopted by the Legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of society."

147 The Commonwealth Parliament determined in s 9A(1) of the CFIR Act that all prosecutions for offences against the CFIR Act "shall be on indictment". In conformity with that legislative determination, the Director has charged the applicant with offences against s 7(1)(e) of the CFIR Act in an information styled an "indictment" which he has presented in the principal proceeding in the Supreme Court of New South Wales in the performance of his statutory function "to institute prosecutions on indictment for indictable offences against the laws of the Commonwealth"[249]. That presentment has occurred in the principal

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246 See, after *Kingswell, Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 396-397 [23]-[25]; [1999] HCA 57; *Cheng v The Queen* (2000) 203 CLR 248 at 268 [49], 270 [58]. And see, before *Kingswell*, *Sachter v Attorney-General for the Commonwealth* (1954) 94 CLR 86 at 88; [1954] HCA 43; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 193, 195-196; [1978] HCA 56.

247 Eg *Clyne v Director of Public Prosecutions* (1984) 154 CLR 640 at 657; [1984] HCA 56.

248 (1930) 44 CLR 38 at 86; [1930] HCA 20.

249 Section 6(1)(a) of the *Director of Public Prosecutions Act* 1983 (Cth).

proceeding in accordance with the procedure laid out in the CPA, which is applied in the principal proceeding by s 68(1)(c) of the Judiciary Act on the basis that it is a procedure for "trial and conviction on indictment". The Supreme Court is exercising jurisdiction to hear and determine the principal proceeding conferred by s 68(2)(c) of the Judiciary Act on the basis that it is jurisdiction with respect to "trial and conviction on indictment".

148 There is a prosecution of an offence against a law of the Commonwealth, and the prosecution has given rise to what is unquestionably, in substance and nomenclature, a proceeding "on indictment" according to the conception in *Munday v Gill*.

149 The applicant has been arraigned in that proceeding on indictment and has pleaded not guilty of the offences of which he has been charged in the indictment. In accordance with procedures of the CPA applied by s 68(1) of the Judiciary Act, he is thereby "taken to have put himself … on the country for trial"[250].

150 The trial which must now occur in the Supreme Court will be a trial on the indictment, for which the Commonwealth Parliament has provided in s 9A(1) of the CFIR Act. That trial will be a "trial on indictment" within the meaning of s 80 of the Constitution. Section 80 applies.

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250 Section 154 of the CPA.

151 NETTLE AND GORDON JJ. The applicant has been charged on indictment with seven offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth) ("the CFIR Act"). The basis of each alleged offence is that he performed services in New South Wales for a person (a different person for each offence) with the intention of supporting or promoting the commission of an offence against s 6 of the CFIR Act, being the entry by that person into a foreign State with intent to engage in armed hostilities in that foreign State.

152 Section 9A(1) of the CFIR Act states that a prosecution for an offence against the CFIR Act "shall be on indictment"[251]. An offence against s 7(1)(e) of the CFIR Act carries a maximum penalty of imprisonment for 10 years[252]. It may be noted that, more generally, the Commonwealth Parliament has provided that offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are to be "indictable offences, unless the contrary intention appears"[253]. Far from the CFIR Act showing any contrary intention, it makes plain that any offence against the CFIR Act, including against s 7(1)(e), is indictable.

153 Section 80 of the Constitution, entitled "Trial by jury", provides 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." (emphasis added)

154 As the offences were alleged to have occurred in New South Wales, s 80 requires that the trial of the applicant be held in New South Wales. The issue is whether s 80 of the Constitution requires the trial of the applicant to "be by jury".

155 Jurisdiction to try offences against a law of the Commonwealth is conferred on the courts of a State or Territory – including New South Wales – by s 68(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). As the applicant is to be tried in New South Wales, the procedure in New South Wales for trial and conviction on indictment applies "so far as … applicable to persons who are charged with offences against the laws of the Commonwealth"[254]. Here, the

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251 Subject to s 9A(2) of the CFIR Act, which is not presently relevant.

252 s 7 of the CFIR Act.

253 s 4G of the *Crimes Act* 1914 (Cth).

254 s 68(1)(c) of the Judiciary Act.

relevant State procedure includes various provisions of the *Criminal Procedure Act* 1986 (NSW) ("the CP Act").

156 Section 132 of the CP Act, entitled "Orders for trial by Judge alone", relevantly provides:

> "(1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a ***trial by judge order***).
>
> (2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.
>
> (3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.
>
> (4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.
>
> (5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.
>
> (6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner."

157 On 8 May 2015, the applicant was arraigned on the indictment in the Supreme Court of New South Wales and pleaded "not guilty" to each count. His trial was listed to commence on 1 February 2016.

158 On 25 November 2015, the applicant filed a notice of motion in the Supreme Court seeking a trial by judge order pursuant to s 132(1) of the CP Act. On 15 December 2015, upon application by the Attorney-General of the Commonwealth[255], a single Justice of this Court made orders removing into this Court that part of the cause before the Supreme Court comprising the motion for

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255 Under s 40(1) of the Judiciary Act.

trial by judge alone. A case was stated for the consideration of the Full Court[256] with one question stated:

> "Are ss 132(1) to (6) of [the CP Act] incapable of being applied to the Applicant's trial by s 68 of [the Judiciary Act] because their application would be inconsistent with s 80 of the Constitution?"

159 At the end of the oral argument before the Full Court, the Court announced that at least a majority of the Court were of the opinion that the question should be answered "Yes" and dismissed the applicant's motion for a trial by judge order. These reasons will explain that result.

Structure

160 These reasons will set out the contentions put forward by the parties and the intervening Attorneys-General and then consider the federal form of government in Australia including Ch III and s 80 of the Constitution. These reasons will then analyse the proper construction of s 80. Finally, these reasons will consider s 132(1) to (6) of the CP Act, whether this Court's decision in *Brown v The Queen*[257] should be distinguished or overturned and then Victoria's contention that to render a State law that permits, in specified circumstances, criminal offences to be tried by judge alone inoperative in federal jurisdiction is contrary to what Victoria described as the "State court principle".

Contentions

161 The applicant accepted that s 80 of the Constitution is "facially mandatory". However, he contended that s 80 did not preclude trials on indictment for an offence against a law of the Commonwealth proceeding by judge alone in exceptional cases of the kind provided for in s 132(1) to (6) of the CP Act. The applicant's contention was that, as a matter of construction, and subject to s 80, s 68 of the Judiciary Act could pick up and apply s 132(1) to (6) of the CP Act to the trial of the applicant.

162 That contention was supported, in various ways, by the Attorneys-General of the Commonwealth, Tasmania and Queensland, and for Victoria, all intervening. The Attorney-General of the Commonwealth submitted that, as a matter of construction, there is no "trial on indictment" to enliven s 80 unless and until all the conditions specified by Parliament which may lead to a judge alone trial (including s 132 of the CP Act) have been exhausted; that s 132(1) to (6) of

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256 Pursuant to s 18 of the Judiciary Act.

257 (1986) 160 CLR 171; [1986] HCA 11.

the CP Act provide an "elective mechanism" that did not conflict with s 80 because the mechanism was functionally and substantively no different from those employed before s 80 was enacted; and, further, that s 132(1) to (6) of the CP Act fully respect the individual and community values that underpin the guarantee under s 80 whilst ensuring the due administration of justice within Ch III of the Constitution.

163 The Attorney-General for South Australia, intervening, submitted that it is for the Commonwealth Parliament to determine which, if any, Commonwealth offences are to be tried on indictment and that it is within the power of the Commonwealth Parliament to determine whether an offence to be tried on indictment is contingent on the satisfaction of certain stipulated conditions. South Australia did not seek to make any submissions on whether s 132 of the CP Act, through s 68 of the Judiciary Act, provides that the trial of the offence under s 7(1)(e) of the CFIR Act can be otherwise than "on indictment".

164 Finally, the applicant and the interveners (other than South Australia) contended that, if s 132 of the CP Act does not provide that the offence under s 7(1)(e) of the CFIR Act may be heard and determined otherwise than by trial on indictment, then leave should be given to reopen the decision of this Court in *Brown* and that decision should be overturned.

165 The respondent, the Director of Public Prosecutions (Cth), contended that s 80 of the Constitution does not permit trial on indictment for an offence against the laws of the Commonwealth to be by judge alone and requires that all trials on indictment against the laws of the Commonwealth be by jury.

166 Many contentions of the applicant and the interveners were directly contrary to principles which underpin our federal system of government and which have stood since at least *R v Kirby; Ex parte Boilermakers' Society of Australia*[258]. Those principles should be restated.

Australian federal form of government, Ch III and s 80

167 Australia has a federal form of government with a demarcation of powers[259]. An essential part of that federal form of government is "The Judicature", dealt with in Ch III of the Constitution[260]. The role of the

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258 (1956) 94 CLR 254 at 267-268; [1956] HCA 10.

259 *Boilermakers* (1956) 94 CLR 254 at 267-268; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 569 [94]; [1999] HCA 27.

260 *Boilermakers* (1956) 94 CLR 254 at 267-268; *Re Wakim* (1999) 198 CLR 511 at 574-575 [111].

federal judicature in the Australian federal system has been described in the following way[261]:

> "The demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. … The powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained. These very general considerations explain the provisions of Ch III of the Constitution which is entitled 'The Judicature' and consists of ten sections."

168 Chapter III is an exhaustive statement of the manner in which the judicial power of the Commonwealth can be exercised[262]. The judicial power of the Commonwealth is not defined in the Constitution[263]. However, the subject matter of its exercise is defined with some particularity. The existence in the Constitution of Ch III, and the nature of its provisions, means that there can be no resort to the judicial power of the Commonwealth except under, or in conformity with, ss 71 to 80[264]. This strong negative implication accompanies the positive provisions of Ch III[265]. Put in other terms, no part of the judicial power of the Commonwealth can be conferred otherwise than in accordance with the provisions in Ch III[266].

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261 *Re Wakim* (1999) 198 CLR 511 at 574-575 [111] quoting *Boilermakers* (1956) 94 CLR 254 at 267-268.

262 *Boilermakers* (1956) 94 CLR 254 at 270; *Re Wakim* (1999) 198 CLR 511 at 575 [111].

263 See, eg, *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; [1991] HCA 58.

264 *Boilermakers* (1956) 94 CLR 254 at 269.

265 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; [1921] HCA 20; *Boilermakers* (1956) 94 CLR 254 at 270; *Re Wakim* (1999) 198 CLR 511 at 541-542 [8], 555 [52], 557 [56]-[57], 574-575 [111].

266 *Boilermakers* (1956) 94 CLR 254 at 270.

169 These principles reinforce the importance of the federal compact[267], the essential part played by Ch III in that compact and that there can be no resort to the judicial power of the Commonwealth except under, or in conformity with, Ch III.

170 A number of matters follow. First, the power of the judiciary, which has its source in Ch III of the Constitution, is to give effect to the meaning of the Constitution[268]. Judges have no power to formulate, declare or exercise the judicial power of the Commonwealth otherwise than in accordance with Ch III.

171 Second, subject to the Constitution, it is for the Commonwealth Parliament to provide for and regulate the exercise of federal jurisdiction, not the States.

172 Third, those principles apply equally, without qualification, to s 80 in Ch III of the Constitution. Therefore, once s 80 is engaged, the Commonwealth Parliament cannot avoid its mandatory terms by attempting to rely on s 68 of the Judiciary Act to pick up and apply State laws which are inconsistent with s 80.

Section 80 of the Constitution

Text of the section – "trial on indictment"

173 Section 80 of the Constitution relevantly provides that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury". It is in absolute terms. The command is unqualified. It is not possible, as a matter of construction, to interpret that absolute and unqualified requirement as consistent with the idea that a trial on indictment for an offence against a law of the Commonwealth does not have to be before a jury.

174 Section 80 "imposes various imperatives upon trials on indictment of offences against Commonwealth law"[269]. Section 80 is not concerned with a mere matter of procedure[270]. It imposes a limitation on judicial power[271].

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267 *Re Wakim* (1999) 198 CLR 511 at 574 [110].

268 *Re Wakim* (1999) 198 CLR 511 at 569 [94]; *Brownlee v The Queen* (2001) 207 CLR 278 at 286 [11]; [2001] HCA 36.

269 *Cheng v The Queen* (2000) 203 CLR 248 at 263 [29]; [2000] HCA 53.

270 *Brown* (1986) 160 CLR 171 at 197, 215. cf *Brown* (1986) 160 CLR 171 at 182; *Spratt v Hermes* (1965) 114 CLR 226 at 244; [1965] HCA 66.

It "entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged *on indictment* with a federal offence"[272] (emphasis added). It does not extend to all offences against the laws of the Commonwealth. That it was limited to trial on indictment was a choice made by the framers of the Constitution[273].

175 Section 80 also operates as a limitation on legislative power[274]. When a law of the Commonwealth provides that the trial of an offence against a law of the Commonwealth shall be on indictment, the Commonwealth Parliament cannot permit that trial to be heard by a judge or judges without a jury[275].

176 The limitations in s 80 on federal judicial and legislative power are unsurprising. The indictment had, and continues to have, a significant role in the prosecution of criminal offences. In relation to specific offences against the laws of the Commonwealth, a legally effective indictment provides the foundation on which a defendant is to stand trial[276]. As Lord Bingham of Cornhill said in *R v Clarke*[277], "if the state exercises its coercive power to put a citizen on trial for a serious crime a certain degree of formality is not out of place". The Convention Debates in relation to s 80 identified the relationship between the nature and seriousness of the offence and the form of the criminal process – in the sense that, typically, a more serious offence will be tried on indictment – and that these two subjects were not mutually exclusive[278]. That remains the position.

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271 *Cheng* (2000) 203 CLR 248 at 277 [79]; *R v LK* (2010) 241 CLR 177 at 193 [24], 216 [88]; [2010] HCA 17.

272 *Brown* (1986) 160 CLR 171 at 197.

273 *Cheng* (2000) 203 CLR 248 at 268-269 [53]-[54].

274 *LK* (2010) 241 CLR 177 at 193 [24], 216 [88].

275 *R v Bernasconi* (1915) 19 CLR 629 at 637; [1915] HCA 13; *LK* (2010) 241 CLR 177 at 193 [24], 216 [88].

276 *R v Clarke* [2008] 1 WLR 338 at 342 [4]; [2008] 2 All ER 665 at 670 citing Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 274. See also *Ayles v The Queen* (2008) 232 CLR 410 at 414-415 [10]-[12]; [2008] HCA 6.

277 [2008] 1 WLR 338 at 350 [17]; [2008] 2 All ER 665 at 677. See also [2008] 1 WLR 338 at 351 [24]-[25], 354 [38], 356 [42]-[43]; [2008] 2 All ER 665 at 678-679, 682-683.

278 See, eg, *Cheng* (2000) 203 CLR 248 at 293-295 [132]-[142].

177 Although s 80 contemplates the existence of offences against a law of the Commonwealth which are to be tried on indictment, its terms do not require that there be such offences. It was left to the Commonwealth Parliament to determine which, if any, offences against a law of the Commonwealth are to be tried on indictment[279]. That position has not changed. The Commonwealth Parliament has the power to provide that a given offence against a law of the Commonwealth is not triable on indictment[280]. If that course is adopted, then s 80 is not engaged because an essential aspect, trial on indictment, is absent. The Commonwealth Parliament may also enact laws that provide that certain indictable offences may be dealt with summarily on specific conditions being satisfied[281]. If the specified conditions are satisfied, the matter proceeds summarily, the trial is not on indictment and s 80 is not engaged. That election is again left to the Commonwealth Parliament. The power of the Commonwealth Parliament to legislate in these ways provides a means of disengaging the operation of s 80 of the Constitution. However, if, as in the CFIR Act[282], the Commonwealth Parliament prescribes that the trial of the offence shall be on indictment, s 80 of the Constitution is engaged and the trial must be by jury.

178 The mandatory terms of s 80 cannot be ignored. Section 80 cannot be read as if it provided that "[t]he trial on indictment of any offence against any law of the Commonwealth shall [*sometimes* or *unless waived by the accused* or *unless the law otherwise provides*] be by jury". Yet, that in the end is the effect of what the applicant and the interveners (except South Australia) contended.

179 The further submissions of the Attorney-General of the Commonwealth that an indictment is merely functional and that "trial on indictment" in s 80 is a matter of mere technicality that can be sidestepped by Parliament should not be

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279 *Cheng* (2000) 203 CLR 248 at 268-269 [53] citing Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 808.

280 *Kingswell v The Queen* (1985) 159 CLR 264 at 277; [1985] HCA 72. See also *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 136, 139-140; [1928] HCA 18; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 571; [1938] HCA 10; *Zarb v Kennedy* (1968) 121 CLR 283 at 294, 297, 298-299; [1968] HCA 80; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 190, 193; [1978] HCA 56; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 396 [24], 439 [136]; [1999] HCA 57; *Cheng* (2000) 203 CLR 248 at 289-290 [121]-[122], 291 [125], 295 [143], 344-345 [283].

281 See, eg, ss 4J and 4JA of the *Crimes Act* 1914 (Cth) and s 30(6)-(7) of the *Australian Crime Commission Act* 2002 (Cth).

282 See [152] above.

accepted. The further submission of the Attorney-General of the Commonwealth that there is no "trial on indictment" to enliven s 80 unless and until all the conditions specified by the Commonwealth Parliament which may lead to a judge alone trial have been exhausted (which include s 132 of the CP Act as picked up by s 68(1) of the Judiciary Act) is contrary to the express words of s 80 and inconsistent with the limitations that s 80 places on the legislative and judicial power of the Commonwealth. The submission also ignores s 9A(1) of the CFIR Act, which states that a prosecution for an offence against the CFIR Act "shall be on indictment". There is no basis for finding that the Commonwealth Parliament intended that the phrase "on indictment" in s 9A(1) of the CFIR Act was used in a way different from that used in the Constitution and the Judiciary Act.

Section 80 not flexible

180 The applicant and some of the interveners submitted that s 80 of the Constitution should be construed as granting the Commonwealth Parliament the flexibility to specify conditions which employ "prescriptive" or "elective" mechanisms that allow criminal justice to be administered by judge alone where an offence against a law of the Commonwealth is to be tried on indictment.

181 A label like "prescriptive" or "elective" is not determinative and can be misleading. If the ability of the Commonwealth Parliament to stipulate that certain defined crimes can be tried by judge alone is a "prescriptive mechanism", then, as has been seen earlier, that mechanism has existed since Federation because the Commonwealth Parliament is permitted to prescribe that a given offence against a law of the Commonwealth is not triable on indictment. That reflects the legislative power of the Commonwealth Parliament. Section 80 is not engaged because an essential aspect of s 80, trial on indictment, is absent. That "mechanism" is not inconsistent with s 80. Indeed, it was the mechanism identified by the framers of the Constitution in the course of the Convention Debates[283] – that the Commonwealth Parliament would be trusted, when creating a Commonwealth offence, to determine whether it would be prosecuted on indictment and therefore subject to s 80.

182 The phrase "elective mechanism" is more problematic. It was defined by the Attorney-General of the Commonwealth as a situation where "the legislature created a set of conditions under which various choices or decisions by one or more of the prosecution, accused and court, made in the context of the particular

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283 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 352-353 and 4 March 1898 at 1894-1895.

case, would determine whether there would be judge alone trial" for the trial on indictment of an offence against the laws of the Commonwealth.

183 These "elective mechanisms" are inconsistent with the mandatory terms of s 80 of the Constitution. These "elective mechanisms" are inconsistent with and contradict the principles which underpin our federal system of government[284]. It is for the Commonwealth Parliament to determine whether an offence against a law of the Commonwealth is to be tried on indictment. Once that choice is made, s 80 is engaged and imposes limitations on the exercise of the legislative and judicial power of the Commonwealth.

184 Those limitations cannot be avoided by granting to the States the flexibility of enacting provisions which permit trial by judge alone in certain circumstances. Section 80 of the Constitution allows the Commonwealth Parliament, not the State Parliaments, to choose when a jury is required for particular offences against the laws of the Commonwealth. It does that in the manner described above, not by giving the power to the States to decide how a trial on indictment might proceed. The "elective mechanisms" cannot be determined by the State Parliaments.

185 Moreover, once s 80 is engaged, the Commonwealth Parliament cannot then avoid those limitations by attempting to rely on s 68 of the Judiciary Act to pick up and apply State laws which contain "elective mechanisms". As explained further below, s 68 of the Judiciary Act itself is subject to s 80.

186 The applicant (and some of the interveners) also contended that because s 80 is a constitutional guarantee, it can and should be subject to restrictions so long as those restrictions are consistent with the constitutional systems and purposes of the guarantee in a way not dissimilar to that taken in relation to s 92[285] or s 117[286] of the Constitution. That submission should be rejected. The validity of the several premises from which the submission proceeded need not be considered at length. It is sufficient to observe that, although s 92 requires that interstate trade and commerce "shall be absolutely free", it does not specify of what it is to be absolutely free. Thus, that section's application has been held to require identification of its purpose and consequently an understanding that it is directed to measures which impose or result in discriminatory burdens of a

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284 See [167]-[172] above.

285 See, eg, *Cole v Whitfield* (1988) 165 CLR 360 at 394; [1988] HCA 18.

286 See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 490-491, 512-513, 528-529, 548; [1989] HCA 53.

protectionist nature[287]. That is why, if it is alleged that a provision contravenes s 92, it is necessary to establish whether the impugned provision is inconsistent with that purpose. Similarly with s 117, which provides in open-textured terms that a resident in one State shall not be subjected to a disability or discrimination in another State which would not apply equally to him if he were resident in that other State, it is necessary to recognise that the individual right which is thereby conferred is grounded in a purpose of achieving national unity while maintaining the place of the States in the federal compact[288]; and, therefore, that there are limits to the protection which s 117 confers[289].

187 It is different with s 80[290]. There is nothing open-textured or undefined about its terms. Its purpose is to ensure that a trial on indictment proceeds before a jury, and it imposes a clear and unqualified mandatory requirement to that effect. The applicant's submission that the operation of s 80 should somehow be equated with the operation of s 92 or s 117 is contrary to the express terms of s 80, inconsistent with the limitations which s 80 places on the judicial and legislative power of the Commonwealth[291] and contrary to established constitutional principle[292].

Criminal trials in the 21st century – trial by jury or by judge alone

188 Extensive reference was made to the history of criminal procedure before and after Federation with a view to demonstrating that not all criminal offences were tried on indictment. So much may be accepted. That history may emphasise that the text of s 80 reflected a deliberate and unqualified choice between known and available forms of procedure. But once that is recognised, the detail of that history may be put aside.

189 Nevertheless, the applicant contended that despite the "mandatory" requirement in s 80 for trials on indictment of Commonwealth offences to be by jury, s 80 should be construed as an instrument of government that was "capable

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287 *Cole v Whitfield* (1988) 165 CLR 360 at 408.

288 *Street* (1989) 168 CLR 461 at 488-489.

289 *Street* (1989) 168 CLR 461 at 492, 512; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362; [2006] HCA 8.

290 cf *Cheng* (2000) 203 CLR 248 at 278-279 [82]-[83].

291 See [174]-[176] above.

292 See [167]-[172] above.

of responding to changing circumstances and conditions over time" and that the essential features of the s 80 requirement were "to be discerned with regard to the purpose which s 80 was intended to serve and to the constant evolution, before and since federation, of the characteristics and incidents of jury trial"[293]. That submission hid more than it revealed.

190 That the institution of trial by jury has gradually evolved[294], and in some State jurisdictions is now qualified by statute, may be accepted. Trial by judge alone of indictable offences is permitted (in certain circumstances) in a number of States[295], one Territory[296] and some other common law jurisdictions[297]. The reasons why judge alone trials are sought, and sometimes granted[298], are not uniform[299].

191 That the Constitution "speaks continually to the present and it operates in and upon contemporary conditions"[300] and that "it speaks in the language of the text, which is to be 'construed in the light of its history, the common law and the

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293 *Ng v The Queen* (2003) 217 CLR 521 at 526 [9]; [2003] HCA 20 (footnotes omitted).

294 *Brownlee* (2001) 207 CLR 278 at 286 [12], 291-292 [33]-[34], 300 [59]; Scott, "Trial by Jury and the Reform of Civil Procedure", (1918) 31 *Harvard Law Review* 669 at 669-670.

295 See s 132 of the CP Act; s 7 of the *Juries Act* 1927 (SA); Div 9A of Ch 62 of the *Criminal Code* (Q); Div 7 of Pt 4 of the *Criminal Procedure Act* 2004 (WA).

296 s 68B of the *Supreme Court Act* 1933 (ACT).

297 *Criminal Code* RSC 1985, c C-46, ss 473(1), 536(2)-(3) and Pt XIX; *Criminal Procedure Act* 2011 (NZ), ss 50, 102-103; *Criminal Justice Act* 2003 (UK), Pt 7; Federal Rules of Criminal Procedure (US), r 23(a) and *Patton v United States* 281 US 276 at 312-313 (1930).

298 For example, in Western Australia in 2008, 11 out of 579 criminal trials in the District Court and the Supreme Court were tried by judge alone: Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper, Project No 99, (2009) at 11-12.

299 For an overview of some of the differences across several jurisdictions, see *R v Belghar* (2012) 217 A Crim R 1 at 16-22 [39]-[74].

300 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 143-144; [1994] HCA 46.

circumstances or subject matter to which the text applies'"[301] may also be accepted.

192 Changes to jury trials designed to meet the exigencies of modern criminal trials have been considered by this Court and found not to be inconsistent with the requirement in s 80 that a trial on indictment of any offence against any law of the Commonwealth be by jury[302] because the essential features of a trial by jury have remained unaffected.

193 But the essential features of a trial by jury have a "constitutionally entrenched status"[303]. The applicant and the interveners (except South Australia) do not seek to retain the essential features of a trial by jury. They seek to have the entire process or institution of trial by jury in s 80, with its constitutionally entrenched essential features[304], removed or rendered ineffective. The contentions of the Attorney-General of the Commonwealth (supported by the applicant) that it was, and remains, possible to enact or adopt elective mechanisms which were functionally and substantively no different from those employed before s 80 was enacted and which fully respected the individual and community values that underpin the guarantee in s 80 whilst ensuring the due administration of justice within Ch III of the Constitution turn principle on its head.

194 That "criminal trials today typically last longer, are more expensive and involve more complex issues"[305] may also be accepted. That the decision making function of juries may be at risk of being affected by adverse influences, including prejudice, may also be accepted. But ignoring the text and constitutional context of s 80 is not a solution. These issues can be, and have been, addressed legislatively and through a variety of mechanisms designed to reinforce the institution of the jury trial. As seen earlier, the Commonwealth

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301 *Brownlee* (2001) 207 CLR 278 at 286 [10] quoting *Theophanous* (1994) 182 CLR 104 at 143-144. See also *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.

302 See, eg, the procedures considered in *Brownlee* (2001) 207 CLR 278 and *Ng* (2003) 217 CLR 521.

303 *Ng* (2003) 217 CLR 521 at 526 [9] citing *Cheatle* (1993) 177 CLR 541 at 549 and *Brownlee* (2001) 207 CLR 278.

304 *Brown* (1986) 160 CLR 171 at 197; *Brownlee* (2001) 207 CLR 278 at 303 [71].

305 *Ng* (2003) 217 CLR 521 at 526 [10] referring to *Brownlee* (2001) 207 CLR 278 at 330-331 [148].

Parliament can designate which offences are to be by "trial on indictment"[306]. The Commonwealth Parliament can also determine that whether an offence is to be tried on indictment is contingent on the satisfaction of certain conditions. It is neither necessary nor appropriate to determine whether there are other mechanisms or alternatives within the power of the Commonwealth Parliament.

195 The criminal justice system is not naïve. While the law assumes the efficacy of the jury trial, it does not assume that the decision making of jurors will be unaffected by matters of possible prejudice[307]. What "is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations"[308]. Legislative[309] and procedural[310] mechanisms have evolved to *reinforce* the fairness and integrity of a jury trial. That is unsurprising. But those mechanisms *reinforce*, not destroy or detract from, a trial by jury.

Section 68 of the Judiciary Act

196 Section 68 of the Judiciary Act addresses not only the vesting of federal criminal jurisdiction in State courts[311] but the manner in which those courts will exercise the jurisdiction[312].

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306 See [177] above. See also former s 235(4), (6) and (7) of the *Customs Act* 1901 (Cth) (considered in *Cheng* (2000) 203 CLR 248) and former ss 12 and 12A of the *Crimes Act* 1914 (Cth) (considered in *Archdall* (1928) 41 CLR 128).

307 *Dupas v The Queen* (2010) 241 CLR 237 at 248 [29]; [2010] HCA 20 citing *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13]; [2000] HCA 15. See also *R v Glennon* (1992) 173 CLR 592 at 603; [1992] HCA 16.

308 *Dupas* (2010) 241 CLR 237 at 248-249 [29].

309 See, eg, in relation to jury tampering or intimidation, ss 29, 54(1), 68 and 68A of the *Jury Act* 1977 (NSW).

310 Such as temporary or, in extreme cases, permanent stays.

311 s 68(2) of the Judiciary Act subject to s 80 of the Constitution.

312 s 68(1) of the Judiciary Act subject to s 68(2) of the Judiciary Act and s 80 of the Constitution.

197 The construction of s 80 that has been described is reflected in s 68(2) of the Judiciary Act, by which jurisdiction to try a person charged on indictment with federal offences is conferred on a State court[313]. Section 68(2) of the Judiciary Act relevantly provides:

> "The several Courts of a State … exercising jurisdiction with respect to:
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> (a) the summary conviction; or
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> (b) the examination and commitment for trial on indictment; or
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> (c) the trial and conviction on indictment;
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> of offenders or persons charged with offences against the laws of the State …, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, *subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth*." (emphasis added)

198 Various aspects of s 68(2) should be noted. It itself identifies different classes of offences. It (and the conferral of federal jurisdiction) is expressly subject to s 80 of the Constitution[314]. Again, that is not surprising. Even if it were not expressly subject to s 80, covering cl 5 of the Constitution makes Ch III (including s 80) binding on the courts of every State[315].

199 Further, s 68(2) relies upon s 77(iii) of the Constitution (in Ch III) as the head of legislative power to support an investing of federal jurisdiction in a State court which sometimes sits to exercise its non-federal jurisdiction without a jury. It would be absurd if an exercise of legislative power under s 77(iii) (itself subject to other provisions of the Constitution) could be relied upon to circumvent the requirements of s 80.

200 Section 68(2) must also be read with s 68(1) of the Judiciary Act. Section 68(1) identifies different classes of offences and provides that the State laws as to arrest, custody and procedure for trial and conviction are to apply, but that the picking up of State procedure is subject to s 68 and those State laws are

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313 *Brown* (1986) 160 CLR 171 at 198.

314 *Brown* (1986) 160 CLR 171 at 198.

315 *Brown* (1986) 160 CLR 171 at 197.

to be applied "*so far as they are applicable*" (emphasis added). But s 68(1) of the Judiciary Act also is subject to s 80 because, on its terms, it is only relevant to the extent that jurisdiction has been conferred by s 68(2).

201 One further aspect of s 68 of the Judiciary Act should be noted. Like s 80 of the Constitution, s 68 uses the phrase "trial on indictment". The Judiciary Act, and s 68 in particular, is of course subject to s 80 of the Constitution. If the submissions of the Attorney-General of the Commonwealth were to be accepted, the phrase "trial on indictment" in s 68 of the Judiciary Act and s 80 of the Constitution would have different meanings. That cannot be so.

Section 132(1) to (6) of the CP Act

202 It is then necessary to say something more about the so called "elective mechanism" in issue in this case – s 132(1) to (6) of the CP Act.

203 The relevant question becomes: do s 132(1) to (6) of the CP Act, as a matter of statutory construction, permit a trial on indictment to be by judge alone? If so, then s 68(1) of the Judiciary Act cannot operate to apply those provisions to a trial on indictment because it would be inconsistent with the mandatory terms of s 80 of the Constitution.

204 Section 132[316], in Ch 3 of the CP Act, entitled "Indictable procedure", applies "to or in respect of proceedings for indictable offences (other than indictable offences being dealt with summarily)"[317]. It allows for trial on indictment to proceed without a jury.

205 Under s 5(1) of the CP Act, an offence must be dealt with on indictment unless it is an offence that is permitted or required to be dealt with summarily. Section 8(1) of the CP Act provides that "[a]ll offences shall be punishable by information (to be called an indictment) in the Supreme Court or the District Court, on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions". That section does not apply to offences required to be dealt with summarily[318]. Nor does it affect any law or practice that provides for an indictable offence to be dealt with summarily[319]. An offence that is permitted or required to be dealt with summarily is to be dealt with by the

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316 See [156] above.

317 s 45(1) of the CP Act.

318 s 8(3) of the CP Act.

319 s 8(4) of the CP Act.

Local Court[320]. Separate provision is made for procedure with respect to summary offences in Ch 4 of the CP Act, including indictable offences which are being dealt with summarily[321].

206 Part 3 of Ch 3 of the CP Act is entitled "Trial procedures". When Pt 3 applies, there has usually been a committal proceeding[322], following which a magistrate has decided to commit the accused person for trial[323] and the papers have been sent to the appropriate officer of the court with jurisdiction to try the matter[324]. In Pt 3, s 121 of the CP Act defines "criminal proceedings" to include "proceedings relating to the trial of a person before the Supreme Court or the District Court", being the two courts in New South Wales before which all indictable offences are to be heard[325].

207 The Supreme Court or the District Court "has jurisdiction with respect to the conduct of proceedings on indictment as soon as the indictment is presented and the accused person is arraigned"[326]. An accused person who is arraigned on an indictment and pleads "not guilty" is "taken to have put himself or herself on the country for trial, and the court is to order a jury for trial accordingly"[327].

208 Section 131 of the CP Act stipulates that "[c]riminal proceedings [as defined] are to be tried by a jury, except as otherwise provided by this Part". Section 132 of the Act contains two presently relevant exceptions to that requirement. Section 132(2) requires the court to make an order that the accused person be tried by judge alone where the accused person and the prosecution agree to that course (subject to being satisfied that the accused person has received legal advice as to the effect of the order). Section 132(4) allows the court to make an order that the accused person be tried by judge alone if the court considers it is "in the interests of justice" to make such an order, in circumstances

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320 s 7(1) of the CP Act.

321 s 170(1) of the CP Act.

322 Pt 2 of Ch 3 of the CP Act.

323 s 65 of the CP Act.

324 s 111 of the CP Act.

325 s 46 of the CP Act.

326 s 130(2) of the CP Act.

327 s 154 of the CP Act.

where the accused person applies for, but the prosecution does not agree to, such an order being made (again, subject to the accused person having received legal advice).

209 Under Ch 3, by the time s 132 arises for consideration the trial of the accused person is already on indictment. Both s 132(2) and (4) enlist the court that has jurisdiction to hear the trial in a determination as to how *that* trial (a trial on indictment) is to proceed. Under s 132(4), the application of the discretion will vary from case to case. However, an order of the court under s 132(2) or (4) does not alter the nature of the trial as one ultimately proceeding on indictment. In fact, an order under s 132 operates to alter the constitution of the court that will be hearing the trial on indictment.

210 Where the trial on indictment is with respect to an offence against a Commonwealth law, an order under s 132(2) or (4) of the CP Act, and the involvement of the court in altering the trial process to be other than trial by jury, is inconsistent with the mandatory terms of s 80 of the Constitution.

211 For the same reasons, the further contention of the Attorney-General of the Commonwealth that, as a matter of construction, there is no "trial on indictment" to enliven s 80 of the Constitution unless and until all the conditions specified by Parliament which may lead to a judge alone trial (including s 132 of the CP Act) have been exhausted should be rejected.

Conclusion on stated question

212 Section 132 of the CP Act does not provide a mechanism whereby an offence under s 7(1)(e) of the CFIR Act may be heard and determined otherwise than by trial on indictment before a jury in accordance with s 80 of the Constitution. Section 132 is not applicable to persons charged on indictment with offences against the laws of the Commonwealth because such application would give s 132 an operation inconsistent with s 80[328]. It therefore cannot be picked up by s 68(1) of the Judiciary Act.

213 The power of the judiciary, which has its source in Ch III of the Constitution, is to give effect to the meaning of the Constitution. Judges have no power to formulate, declare or exercise the judicial power of the Commonwealth otherwise than in accordance with the provisions in Ch III[329]. The Court cannot

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328 *Brown* (1986) 160 CLR 171 at 200.

329 *Re Wakim* (1999) 198 CLR 511 at 569 [94]; *Brownlee* (2001) 207 CLR 278 at 286 [11].

dispense with s 80 and the parties cannot agree to dispense with s 80[330]. That is sufficient reason to require that the answer to the question stated for the Full Court be answered "Yes".

Reopening *Brown*

214 The applicant and the interveners (except South Australia) contended that *Brown* should be distinguished from the present case because it dealt only with the particular provision in that case, which permitted unilateral waiver by the accused of a trial by jury. And if the decision in *Brown* could not be distinguished, they submitted that leave should be given to reopen the decision and the decision should be overturned. These submissions should not be accepted.

215 *Brown* considered s 7(1) of the *Juries Act* 1927 (SA), a provision introduced in 1984[331]. If picked up and applied by the Judiciary Act, s 7(1) would permit a person charged on indictment with an offence against a law of the Commonwealth to elect for trial by judge alone, despite s 80 of the Constitution. *Brown* is authority for the proposition that where the Commonwealth Parliament determined that there was to be a trial on indictment of an offence against a law of the Commonwealth, trial by jury could not be waived by an accused.

216 The bases of the conclusion in *Brown* remain good law. As seen earlier, the submissions of the applicant and the interveners (except South Australia) must be rejected because they are contrary to the mandatory terms of s 80 and not only fail to engage with, but are inconsistent with, fundamental principles. These were the same principles addressed, and relied upon, by the majority in *Brown*[332] in concluding that s 80 of the Constitution precluded an accused charged with an indictable offence against a law of the Commonwealth from electing pursuant to s 7(1) of the *Juries Act* 1927 (SA) to be tried by judge alone. No party or intervener sought to challenge those fundamental principles. There is no basis for distinguishing *Brown* from the present case. Leave should not be granted to reopen the decision.

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330 *Cheng* (2000) 203 CLR 248 at 270 [57].

331 (1986) 160 CLR 171 at 188.

332 *Brown* (1986) 160 CLR 171 at 196-200 per Brennan J, 201-203, 205-207 per Deane J, 208-209, 211, 214, 216 per Dawson J.

State court principle

217 Victoria submitted that to render a State law that permits, in specified circumstances, criminal offences to be tried by judge alone inoperative in federal jurisdiction altered the constitution or organisation of the courts of that State, contrary to what Victoria described as the "State court principle". The State court principle was described by Victoria as the "States' freedom to constitute and organise their courts as they see fit". Victoria's submission should be rejected. It proceeds from a false premise. It is contrary to the Australian federal system of government and stands established constitutional principle on its head. Those statements require further explanation.

218 Section 77(iii) does not authorise the Commonwealth Parliament to affect or alter the constitution or organisation of a State court which it invests with jurisdiction[333]. The Commonwealth Parliament must vest jurisdiction in a State court as it finds it[334]. State laws on criminal procedure are applied in federal jurisdiction by s 68(1) of the Judiciary Act. But that does not mean that if a State adopts a procedure for the trial of criminal proceedings, that procedure must be used in the exercise of federal jurisdiction by a court of that State. The Commonwealth cannot pick up State laws, such as s 132 of the CP Act, which are inconsistent with s 80.

219 The question was and remains – is the State court an available repository of federal criminal jurisdiction? In the context of a trial on indictment, does the State court provide for trial by jury?

220 Where (as in this case) a State court can be organised or constituted in more than one way to exercise its State jurisdiction, the Commonwealth Parliament is not constrained when investing that State court with federal criminal jurisdiction to follow the State law which prescribes the circumstances in which the court is to be constituted or organised in one way or another. The investing of federal jurisdiction in a State court under s 68(2) of the Judiciary Act is subject to s 80 of the Constitution. If a State court is constituted or organised to exercise its State jurisdiction in such a way that it can also be a repository for the exercise of federal jurisdiction for a trial on indictment, then that does not alter the constitution or organisation of that State court invested with federal jurisdiction. The Commonwealth Parliament simply takes the State court as it finds it and determines that it may be a repository of federal jurisdiction for a trial on indictment. If the State court is constituted or organised

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333 Except as permitted by s 79 of the Constitution.

334 *Brown* (1986) 160 CLR 171 at 198; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598-599 [37], 599-600 [39]; [2004] HCA 46.

to exercise its State jurisdiction in such a way that it cannot be a repository for the exercise of federal jurisdiction for a trial on indictment, then that aspect of the court's constitution or organisation is not engaged in the exercise of federal jurisdiction. Again, that does not alter the constitution or organisation of that State court. A State court exercising jurisdiction with respect to a trial on indictment of a State offence, where that trial may be by jury, is vested with, and capable of exercising, jurisdiction with respect to the trial on indictment of offences against a law of the Commonwealth.

Disposition

221 It is for those reasons that the question:

> "Are ss 132(1) to (6) of [the CP Act] incapable of being applied to the Applicant's trial by s 68 of [the Judiciary Act] because their application would be inconsistent with s 80 of the Constitution?"

was answered "Yes".

222 Accordingly, the Court ordered that the applicant's motion for a trial by judge order be dismissed.