HIGH COURT OF AUSTRALIA

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

RE HERMIE GENEROSO COLINA & ANOR RESPONDENTS

EX PARTE PRESIDENT TREVOR
DONALD TORNEY PROSECUTOR

Re Colina; Ex parte Torney [1999] HCA 57
21 October 1999
M85/1998

ORDER

Application dismissed with costs.

Representation:

D A Perkins with A M Paszkowski for the prosecutor (instructed by Kuek & Associates)

H J Langmead for the respondents (instructed by Australian Government Solicitor)

Interveners:

R F Redlich QC with H J Langmead intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish intervening on behalf of the Attorney-General of the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Re Colina; Ex parte Torney

Contempt of court – Family Court of Australia – Scandalising the court – Source of power to punish – Whether such offence must be prosecuted upon indictment.

Constitutional law – Contempt of court – Trial by jury – Whether indictable offence – Whether an offence against a law of the Commonwealth.

Courts and judges – Bias – Reasonable apprehension – Family Court of Australia – Speech by Chief Justice responding to criticisms of Court – Independence of members of the judiciary – Whether conduct or opinions of Chief Justice gives rise to a reasonable apprehension of bias on the part of trial judge.

Words and phrases – "law of the Commonwealth".

The Constitution, Ch III, ss 71, 80.
Family Law Act 1975 (Cth), ss 21, 21B, 35, 112AP.
Family Law Rules (Cth), O 35.
Judiciary Act 1903 (Cth), s 24.

1 GLEESON CJ AND GUMMOW J. Proceedings are pending in the Family Court of Australia, before the second respondent, Burton J, in which the first respondent, the Marshal of that Court, alleges that Mr Torney, on specified occasions in July and August 1998, committed the offences of contempt of court.

2 The alleged offences took the form of what is usually described as "scandalising the court"[1]. The essence of such an offence was stated by Rich J in *R v Dunbabin; Ex parte Williams*[2] as follows:

> "Any matter is a contempt which has a tendency to deflect the Court from a strict and unhesitating application of the letter of the law or, in questions of fact, from determining them exclusively by reference to the evidence. But such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office."

3 An example of conduct held to amount to contempt of this kind is to be found in *Gallagher v Durack*[3], where a person attributed the decision of a court to pressure put upon the court by the influence of an outside body.

4 The policy of the common law in this area has been the subject of controversy[4]. The nature and scope of possible defences, and the effect of developments in the law concerning freedom of expression and political discussion, may be matters to be determined if the charges against Mr Torney proceed. One of the most commonly debated aspects of the law on the subject has been the practice of dealing summarily with alleged offenders. The reason for the practice was explained by Dixon J in *Dunbabin*[5]:

> "It is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method

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1 See Borrie & Lowe, *The Law of Contempt*, 3rd ed (1996), Ch 9.

2 (1935) 53 CLR 434 at 442.

3 (1983) 152 CLR 238.

4 See Australian Law Reform Commission, *Contempt*, Report No 35, (1987) at par 67; *R v Kopyto* (1987) 39 CCC (3d) 1; *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887 at 908.

5 (1935) 53 CLR 434 at 447.

of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority."

5 Nevertheless, it is accepted that a procedure whereby a court deals, in a summary way, with a challenge to its own integrity and authority, should be exercised sparingly, and only when necessity demands[6].

6 Because the proceedings against Mr Torney have yet to be heard, it is desirable to say nothing about the merits of the case against him, or about any defences he may seek to raise, and to confine an outline of the facts to the minimum necessary to explain the nature of the application which he makes to this Court. As to possible defences, it has been foreshadowed that reliance will be placed upon recent authorities concerning freedom of speech and constitutional implications, but that will be a matter for the trial, if it proceeds.

7 It is alleged that, during July and August 1998, Mr Torney demonstrated outside the Family Court building in Melbourne, distributing written material to members of the public, and making abusive remarks about the Family Court and its members. Some of the comments attributed to Mr Torney were expressed in very strong terms, blaming the court and its judges for the deaths of people and for instances of child abuse, describing the judges as being "terrorised" by women's organizations, and claiming that "decisions are being made on a daily basis destroying the lives of innocent children". The literature said to have been handed out by Mr Torney complained of bias against men. It asserted that if people knew the nature of orders made by judges, the likely consequence would be violent action towards the judges. Judges were said to make decisions "based on their twisted morals" and are "protected by … secrecy".

8 When the proceedings for contempt came before Burton J, in September 1998, counsel for Mr Torney submitted that the matter could not be dealt with summarily, but that s 80 of the Constitution required that the charges be tried, as on indictment, by a jury. Burton J gave an ex tempore judgment rejecting that submission. However, he did not then hear the evidence against Mr Torney, but acceded to an application for an adjournment, on grounds that are not presently material.

9 Before the charges came on for hearing, a national conference of the Family Court was held in Melbourne, on 20 October 1998. At that conference, the Chief Justice, Nicholson CJ, made a speech which received widespread media attention. The Chief Justice was also interviewed about matters raised in the

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6 *Maslen v The Official Receiver* (1947) 74 CLR 602 at 610-611.

speech. In the speech, and in the interviews, Nicholson CJ vigorously defended the Family Court against public attacks on the institution. He said:

> "The most strident critics of the court emanate from groups of men who regard themselves as having been badly treated by the family court system.
>
> Many of their concerns relate to child support issues over which this Court has little or no control. Others relate to enforcement of court orders for contact and there is an overall concern that the system is in some way loaded against them.
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> In the property area, many men find it difficult to accept that a woman's contribution as a homemaker and parent is valued as highly as their economic contribution.
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> There are no doubt many cases where the end result is one that is not as satisfactory as each party would want. There are no doubt some where opinions could differ as to the result. There is a natural tendency to blame the institution, in this case the court that has the task of deciding what should happen when people are unable to agree about their children. It is rarely recognised that the problem is not one of the court's making but that of the people involved.
>
> There are unreal expectations as to what a court can do. A court cannot make people act contrary to their nature or experience. A court cannot make children want to go on contact visits. A court cannot create assets or income where none exist.
>
> All courts can do and the judges who make them up, is to do their best in each case to arrive at the fairest result possible.
>
> In this country there is very much a culture, if unsatisfied with a family court outcome, to complain to a Member of Parliament. Federal members tell me and I have no reason to doubt them, that most of the complaints that they receive from constituents relate to family court matters or child support matters. The better informed realise that this is inevitable, but others begin to feel that there must be something wrong if this volume of complaints occurs. The pressure groups are well aware of this and do their best to swell the volume. When you only hear one side of the story it is all too easy to conclude that there has been a glaring injustice. When the transcript of the case is obtained, a very different story usually emerges. I am tired of listening to armchair experts, some of whom are in the media, who listen to one side of a very complex story and jump to a conclusion of injustice or worse.

> It must be remembered that the Family Court is the busiest court in the country and has far more customers than do any other State or Federal courts.
>
> As I said at the 1995 conference there is a more sinister element at work. I have absolutely no doubt that there are many persons associated with men's groups in particular who have an agenda to change the law to the disadvantage of women. To many of these people, women's emancipation has either not occurred or should not have done so. A feature of their rhetoric is a complete absence of concern for children other than as objects of their rights and entitlements. They frequently engage in the grossest form of harassment of their former partners and their children. Many demonstrate in strident terms outside the Court. Some even stand for Parliament, with a signal lack of success.
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> These people undoubtedly do themselves and their children a great disservice. There are issues relating to men and families that deserve to be aired. There are people who could receive better and more caring results from the system. More could no doubt be done but these people actually stand as an obstruction to change. Their own bitterness and their inability to look beyond their own cases and the supposed injustices that they have suffered, stand in the way of a sensible dialogue.
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> For those who are interested I commend the paper to be given by Julia Tolmie of Sydney University at this Conference. It is on Friday afternoon at 2 pm and the session is somewhat obscurely entitled 'Empirical Research in Decision Making'. Ms Tolmie has conducted an extensive study of men's groups and her research is most interesting and informative. It should be required reading for some of the more strident critics of this Court."

10 Mr Torney contends that one would have little difficulty in identifying him as being amongst the "strident critics" referred to, or as being a representative of the "sinister element" said to be "at work". At the time the address was made, Mr Torney was facing contempt charges arising out of conduct of the kind denounced by the Chief Justice. In the result, he says, there has been created:

> "an appearance, apprehension, or actuality of –
>
> (a) institutional bias in the Family Court of Australia;
>
> (b) a lack of judicial independence;
>
> (c) irredeemable unfairness and prejudice."

11 Mr Torney seeks, from this Court, a writ of prohibition preventing Burton J from proceeding to hear and determine the contempt allegations. He does so on

grounds which may conveniently be summarized as follows. First, he pursues the argument, considered and rejected by Burton J, that the charges against him may not be dealt with summarily and that trial by jury is necessary. Secondly, he claims that the statements made by Nicholson CJ have produced the result that Burton J is disqualified from hearing the charges, or alternatively, that it is no longer possible for there to be a fair trial.

Is trial by jury necessary?

12 Although the offence of contempt by scandalising the court was originally triable on indictment, since the latter part of the 18th century, courts have adopted the general practice of punishing all contempts by summary procedure, which has largely superseded trial by jury. Thus, in 1987, the New South Wales Court of Appeal said that "the proper procedure by which to prosecute criminal contempt is now by summary proceedings, and not by indictment"[7]. The practice had its origin in an undelivered draft judgment of Wilmot J in *R v Almon*[8]. The soundness of that opinion has been subjected to scholarly criticism[9], but the practice is well-established[10], and was so at the time of Federation. In 1900 the Queen's Bench Division, in *R v Gray*[11], held that the publication of a newspaper article which contained scurrilous abuse of a judge was a contempt punishable on summary process. It is not necessary for present purposes to decide whether Hutley AP was strictly correct when he said, in 1984, that an indictment in respect of contempt was for all practical purposes obsolete[12]. It is sufficient to observe that summary procedure is, and has been for at least a century, the usual procedure.

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7 *Director of Public Prosecutions v Australian Broadcasting Corporation* (1987) 7 NSWLR 588 at 595. See also *Attorney-General for New South Wales v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695; *Registrar of Court of Appeal v Willesee* [1984] 2 NSWLR 378 at 379.

8 (1765) Wilm 243 [97 ER 94].

9 Fox, *The King v Almon* (1908) 24 *Law Quarterly Review* 184; Fox,"The Summary Process to Punish Contempt" (1909) 25 *Law Quarterly Review* 238.

10 Borrie & Lowe, *The Law of Contempt*, 3rd ed (1996) at 469-473; Walker, "Scandalising in the Eighties" (1985) 101 *Law Quarterly Review* 359.

11 [1900] 2 QB 36.

12 *Registrar of Court of Appeal v Willesee* [1984] 2 NSWLR 378 at 379.

13 In *James v Robinson*[13], an appeal from the Supreme Court of Western Australia, this Court rejected the submission that at common law the only available procedure was by way of information and indictment. Windeyer J[14] described the historical argument in support of the submission as interesting and informative but ineffectual.

14 Dixon CJ, Fullagar, Kitto and Taylor JJ, in *John Fairfax & Sons Pty Ltd v McRae*[15] said:

> "We have expressed our opinion that the scope of the summary jurisdiction to punish for contempt is wide, and extends to the punishment of contempts of any court, and we have referred to its history. Its practical justification lies in the fact that in general 'the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy'[16]."

15 That helps to explain the terms of the relevant provisions of the *Family Law Act* 1975 (Cth) ("the Family Law Act") and the Family Law Rules in force under that statute ("the Rules"). Section 21 of the Family Law Act creates the Family Court as a superior court of record, s 35 states that it has "the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court", and the relevant effect of s 112AP is to authorize provisions as to practice and procedure by the Rules[17] and to specify the forms of punishment. Section 24 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") states that the Court shall have the same power to punish contempts of its power and authority as was possessed at the commencement of that statute by the Supreme Court of Judicature in England.

16 Section 24 of the Judiciary Act and s 35 of the Family Law Act are not expressed to confer federal jurisdiction in respect of a particular species of "matter". They set out particular powers of this Court and the Family Court and should read as declaratory of an attribute of the judicial power of the Commonwealth which is vested in those Courts by s 71 of the Constitution. The acts constituting the alleged contempts by Mr Torney are not offences against any

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13 (1963) 109 CLR 593 at 600-602, 612-614.

14 (1963) 109 CLR 593 at 612.

15 (1955) 93 CLR 351 at 370.

16 per Wills J in *R v Davies* [1906] 1 KB 32 at 41, citing *R v Almon* (1765) Wilm 243 at 256 [97 ER 94 at 100].

17 Provision in that regard is made by O 35 of the Rules.

law of the Commonwealth. That which renders such acts (if proved) liable to punishment has its source in Ch III of the Constitution. The power to deal summarily with contempts is, to use Isaacs J's phrase "inherent" and is "a power of self-protection or a power incidental to the function of superintending the administration of justice"[18].

17 The subject was considered recently by the Judicial Committee of the Privy Council in *Ahnee v Director of Public Prosecutions*[19] in the context of the Constitution of Mauritius. In delivering the reasons of their Lordships, Lord Steyn said[20]:

> "[T]he Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary [and] in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it."

18 Lord Steyn went on to approve a recent statement to like effect by the Supreme Court of Canada in *MacMillan Bloedel Ltd v Simpson*[21].

19 In this respect Ch III of the Constitution is informed by the common law[22], including, as Dixon CJ and McTiernan J put it in *R v Davison*, that which forms "part of the exercise of judicial power as understood in the tradition of English law"[23]. It may be that the content of the judicial power in this respect is not permanently fixed by reference to a particular past date such as 1903[24]. It is unnecessary further to consider that question. There is no challenge to the validity

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18 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 443. See also *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248 at 257.

19 [1999] 2 WLR 1305.

20 [1999] 2 WLR 1305 at 1311.

21 [1995] 4 SCR 725 at 754.

22 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566.

23 (1954) 90 CLR 353 at 368.

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

of s 24 of the Judiciary Act or s 35 of the Family Law Act in identifying the present content of this attribute of the judicial power of the Commonwealth.

20 The power possessed at the commencement of the Judiciary Act by the Supreme Court of Judicature in England is illustrated by the case of *R v Gray* referred to above. It included a power to punish contempt in the form of scandalising the court by summary process. Section 112AP of the Family Law Act provides for the making of rules of court concerning the practice and procedure for dealing with contempts of the kind presently in question. Order 35 sets out the procedure that has been followed in the present case. The procedure is summary, and is commenced by the filing of an application.

21 The procedure that has been adopted in this case is in accordance with the ordinary practice in Australia and with the Family Law Act and Rules. It is contended, however, that the practice is contrary to s 80 of the Constitution, and that, if the Act and Rules purport to permit the practice, then they are to that extent invalid.

22 Section 80 provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury.

23 There is, in the present case, no indictment. There is an application framed in accordance with O 35 of the Rules. An attempt was made to argue that, because the application alleges offences, it constitutes, for relevant purposes, an indictment. The argument is without substance. The history of the procedure followed in relation to contempt charges, summarized above, negates the conclusion that any written allegation of contempt amounts to an indictment. So also does the history of this Court's interpretation of s 80. That history was considered, for example, in *Kingswell v The Queen*[25].

24 It has been held in a series of cases, of which *Kingswell* is an example, that s 80 is not a guarantee of trial by jury for all serious offences against a law of the Commonwealth, but applies only where there is a trial by indictment, and leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily[26]. That interpretation has not commanded universal

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25 (1985) 159 CLR 264.

26 *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 189-190, 193, 196, 203; *Clyne v Director of Public Prosecutions* (1984) 154 CLR 640; *Brown v The Queen* (1986) 160 CLR 171.

assent. In *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[27] Dixon and Evatt JJ disagreed with it, and, in *Kingswell*[28], Deane J disagreed both with the accepted view and also, to an extent, with that of Dixon and Evatt JJ.

25 Counsel for Mr Torney invited the Court to reconsider this issue but, even if the Court were otherwise minded to do so, the present would not be an appropriate case. The reason is that the argument based on s 80 must in any event fail on another ground. What is alleged against Mr Torney is not an "offence against [a] law of the Commonwealth"[29]. The term "law of the Commonwealth" refers to laws made under the legislative powers of the Commonwealth. This meaning is settled by a long line of authority[30]. In particular, an obligation or liability which has its source in the Constitution itself does not arise under a law of the Commonwealth[31]. The fact that there are laws made by the Parliament which are declaratory of the power implicit in Ch III of the Constitution or which make provision under s 51 (xxxix) of the Constitution incidental to the exercise of that power does not bring the case within s 80.

26 The procedural challenge has not been made out.

Perception of bias

27 In argument, counsel for Mr Torney disclaimed any allegation of actual personal bias on the part of Burton J. Accordingly, the question to be asked is whether the facts disclosed justify a reasonable apprehension that Burton J might not bring a fair and unprejudiced mind to the resolution of the issues that will arise in the contempt proceedings[32]. It is not suggested that Burton J has said or done anything that could possibly justify such an apprehension. It is the conduct of

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27 (1938) 59 CLR 556.

28 (1985) 159 CLR 264 at 298-322.

29 *In the Marriage of Schwarzkopff* (1992) 106 FLR 274 at 283.

30 eg *R v Bernasconi* (1915) 19 CLR 629 at 635; *Jerger v Pearce* (1920) 27 CLR 526 at 531; *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431; *Sankey v Whitlam* (1978) 142 CLR 1 at 91-92; *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 436-437.

31 *Sankey v Whitlam* (1978) 142 CLR 1 at 29-30, 72-74, 91-93, 104-105.

32 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262; *Webb v The Queen* (1994) 181 CLR 41 at 47, 67, 86.

Nicholson CJ that is relied upon. However, the relevant apprehension must be one concerning Burton J.

28 The speech made by Nicholson CJ, and his remarks in media interviews, conveyed an emphatic response to allegations that the Family Court manifests a systemic bias against men. It is not surprising that the Chief Justice saw it as his right, and his duty, to make such a response. In the course of his defence of the court, Nicholson CJ addressed the merits of the allegations made against the court, and answered such allegations with detailed argument. In doing so, it is contended, he expressed opinions on matters that may well arise for decision by Burton J. Furthermore, it is argued, he made it clear that he regarded attacks on the court of the kind he addressed as very serious, and as having the potential to undermine the integrity and authority of the court. These are questions that could be of importance both as to guilt, and, (should guilt be established), as to punishment, in the contempt case.

29 The flaw in the argument is that it assumes a relationship between a Chief Justice and a member of his or her court which is contrary to fundamental principles of judicial independence. It is frequently overlooked that the independence of the judiciary includes independence of judges from one another. The Chief Justice of a court has no capacity to direct, or even influence, judges of the court in the discharge of their adjudicative powers and responsibilities. The Chief Justice of the Family Court has, by virtue of s 21B of the Family Law Act, responsibility for ensuring the orderly and expeditious discharge of the business of the court. That administrative responsibility does not extend to directing, or influencing, or seeking to direct or influence, judges as to how to decide cases that come before them. As a member of an appellate bench, the Chief Justice may be a party to decisions which are authoritative or influential in relation to the decision-making of single judges, but that is a different matter, and is of no present relevance.

30 Corresponding to the Chief Justice's lack of capacity to control or influence Burton J's exercise of judicial power, there is a duty upon Burton J to act independently, and in accordance with his judicial oath.

31 There is no ground for any reasonable apprehension that Burton J might not bring a fair and unprejudiced mind to the performance of the judicial task ahead of him. Nor is there any reason to doubt that Mr Torney will receive a fair trial. It is not yet known exactly what the issues in the trial will be. Some of them may involve topics about which Nicholson CJ expressed an opinion in his speech. There is no reason to doubt that Burton J will be able to evaluate the evidence and arguments on all issues in the case, and make an independent and impartial judgment about them in accordance with his duty.

32 It is not entirely clear what is involved in the suggestion of "institutional bias". The claim appears to be that no judge of the Family Court would be in any better position than Burton J. That may be so; but it is not relevant. The only respondents to these proceedings are Burton J and the Marshal of the Family Court, who instituted the contempt charges. The considerations outlined above answer the claim that Burton J is disqualified, and the position of any other member of the court is not presently in issue.

Conclusion

33 The application should be dismissed with costs.

34 McHUGH J. The facts and issues in this case are set out in the judgment of Gleeson CJ and Gummow J. Subject to what appears below, I agree with their Honours' reasons for dismissing the application of the prosecutor.

35 Gleeson CJ and Gummow J take the view that the offence alleged against Mr Torney is not an offence against a "law of the Commonwealth" because Mr Torney is charged with breaching a law that is merely declaratory of the Constitution. But it seems to me with respect that the offence with which Mr Torney is charged is a breach of the common law rules of contempt which are picked up by s 35 of the *Family Law Act* 1975 (Cth) and that an offence against s 35, assuming it is valid, is an offence against a law of the Commonwealth within the meaning of s 80 of the Constitution.

36 The content of s 35, if it is valid, can only be ascertained by reference to the common law as it existed in 1903. That is because s 35 declares that the Family Court shall have the same power to publish contempts as the High Court of Australia has, and s 24 of the *Judiciary Act* 1903 (Cth) states that the High Court shall have the same power to publish contempts of its power and authority as the Supreme Court of Judicature in England possessed at the commencement of the *Judiciary Act*. The content of s 35 therefore purports to be identical with the common law of contempt in England in 1903. For the purpose of this case, it is unnecessary to determine whether that is merely a reference to the principles of the common law as recognised in 1903 so that account may be had of subsequent judicial modification or development of those principles, or whether it is an attempt to freeze the law applied by s 35 to those rules that the Supreme Court of Judicature would have applied if a case of contempt had come before it in England in 1903. As I later indicate, the constitutional validity of s 35 may depend on which of those constructions is chosen.

37 Assuming that s 35 is valid, the reference to the common law does not mean that the offence with which Mr Torney is charged is a common law offence. If Mr Torney is guilty of contempt, it is because he is in breach of the common law rules of contempt which are picked up by s 35 of the *Family Law Act*, a law enacted by the Parliament of the Commonwealth. It is true that the content of that law can only be identified by reference to the common law. But that does not prevent s 35 being a law of the Commonwealth.

38 It is well established that Parliament may pick up the provisions of a State statute – even all relevant State statutes – and declare that they apply in federal court proceedings. If Parliament does so, the federal court is exercising federal, and not State, jurisdiction[33], and any breach of the terms of the State enactment is a breach

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33 *Pedersen v Young* (1964) 110 CLR 162 at 165.

of federal law, not State law. As this Court pointed out in *Western Australia v The Commonwealth (Native Title Act Case)*[34]:

> "There can be no objection to the Commonwealth making a law by adopting as a law of the Commonwealth a text which emanates from a source other than the Parliament[35]. In such a case the text becomes, by adoption a law of the Commonwealth and operates as such."

39 If the Commonwealth adopts the text of a State law and a breach of the text occurs within the State whose law is picked up, then subject to the operation of s 109 of the Constitution, the breach may contravene both State and federal law. But breach of a federal law which uses State law as the criterion of rights and duties does not necessarily involve a breach of State law. Thus, at the time of the events giving rise to this Court's decision in *Re Nolan; Ex parte Young*[36], s 61 of the *Defence Force Discipline Act* 1982 (Cth) made it a "service offence" to do or omit to do an act or thing, the doing or omission of which was a "Territory offence", or would have been a "Territory offence", if done in the Australian Capital Territory. Offences against the *Crimes Act* 1900 (NSW) in its application to the Australian Capital Territory were "Territory offences". As a result, a person, subject to the *Defence Force Discipline Act*, whose conduct would have been a breach of the *Crimes Act* if carried out in New South Wales, was guilty of an offence against a law of the Commonwealth wherever the offence was committed[37]. But that person would not have been in breach of the law of New South Wales unless the offence had been committed in that State and only then if the application of the *Crimes Act* was not made inoperative by s 109 of the Constitution.

40 Where a law of the Commonwealth purports to enact a law of the Commonwealth by reference to the common law, however, difficulties exist which are not present when the Parliament of the Commonwealth has merely picked up the text of a State statute and applied it as federal law. Indeed, there are considerable constitutional difficulties in the way of Parliament legislating by reference to the common law,

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34 (1995) 183 CLR 373 at 484-485.

35 *Hooper v Hooper* (1955) 91 CLR 529 at 536-537. The law of the States that was picked up as a law of the Commonwealth in that case was statute law, not common law. Where a State statute is thus picked up and enacted as a law of the Commonwealth, the common law which has affected the construction of the text or has attached doctrines to its operation continues to have the same effect on the law of the Commonwealth as it has or had on the law of the State subject to contrary provision.

36 (1991) 172 CLR 460.

37 *Re Nolan; Ex parte Young* (1991) 172 CLR 460.

as is shown by this Court's decision in the *Native Title Act Case*[38] declaring s 12 of the *Native Title Act* 1993 (Cth) invalid[39]. In that case, Mason CJ, Brennan, Deane, Toohey, Gaudron JJ and I said[40]:

> "If s 12 be construed as an attempt to make the common law a law of the Commonwealth, it is invalid either because it purports to confer legislative power on the courts or because the enactment of the common law relating to native title finds no constitutional support in s 51(xxvi) or (xxiv). A 'law of the Commonwealth', as that term is used in the Constitution, cannot be the unwritten law. It is necessarily statute law, for the only power to make Commonwealth law is vested in the Parliament[41]."

41 The prosecutor of the present charge in the Family Court may be facing a rocky constitutional road. If, by enacting s 35 of the *Family Law Act* the Parliament has sought to give the Family Court jurisdiction to apply the common law of contempt, as common law, the attempt must be invalid because the Family Court can only determine rights and liabilities pursuant to a law made by the Parliament. The jurisdiction of federal courts is defined by s 77(i) of the Constitution with respect to the matters specified in ss 75 and 76 of the Constitution. If the jurisdiction of a federal court is validly conferred, it is exercising, and can only exercise, federal jurisdiction pursuant to a law of the Commonwealth. When such jurisdiction is conferred federal courts can only enforce laws of the Commonwealth or the Constitution. They cannot enforce the common law as such. Sometimes in the course of exercising the accrued jurisdiction of a federal court, that court may have to apply the common law, but it does so as an exercise of federal jurisdiction.

42 If, on the other hand, s 35 purports to define the content of a law of the Parliament by reference to the doctrines of judge made common law, arguably it cannot do so. In the *Native Title Act Case*, Mason CJ, Brennan, Deane, Toohey, Gaudron JJ and I said[42]:

> "If the 'common law' in s 12 is understood to be the body of law which the courts create and define, s 12 attempts to confer legislative power upon the judicial branch of government. The attempt must fail either because the

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38 (1995) 183 CLR 373 at 484-488.

39 Section 12 declared: "Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth."

40 (1995) 185 CLR 373 at 486-487.

41 Constitution, s 1; see also covering cl 5 and ss 51 and 52.

42 (1995) 183 CLR 373 at 485.

> Parliament cannot exercise the powers of the Courts or because the Courts cannot exercise the powers of the Parliament."

43 It may be, however, that, upon its proper construction, s 35 does no more than pick up and apply as Commonwealth law the precise content of the rules of contempt which were recognised by the Supreme Court of Judicature in England as at the commencement of the *Judiciary Act*. It is true that s 35 operates by conferring a power or authority on the Family Court. But like the section considered by this Court in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[43]:

> "it must be taken to perform a double function, namely to deal with substantive liabilities or substantive legal relations and to give jurisdiction with reference to them. It is not unusual to find that statutes impose liabilities, create obligations or otherwise affect substantive rights, although they are expressed only to give jurisdiction or authority, whether of a judicial or administrative nature."

On that view, the law applied by s 35 is that body of rules which can be identified as existing as at that date and not any judicial development of them after that date. If that is so, s 35 may be a valid law of the Parliament and escape the fate of s 12 of the *Native Title Act* because its content does not depend upon judicial development but is frozen as at a particular date.

44 In these proceedings, the prosecutor has not sought to challenge the constitutional validity of s 35 except by reference to s 80 of the Constitution. This Court must therefore proceed on the basis that s 35 is valid unless s 80 strikes it down.

45 The question then is whether, in the present proceedings, the Family Court is enforcing an offence against a law of the Commonwealth, or enforcing the Constitution. If it is enforcing the Constitution, it is not enforcing an offence against a law of the Commonwealth[44]. However, I cannot accept that the present proceedings do not involve the enforcement of an offence against a law of the Commonwealth, assuming that s 35 is valid. A law of the Commonwealth is simply a law made under or by the authority of the Parliament of the Commonwealth. This case is far removed from *Sankey v Whitlam*[45] where this Court held that a borrowing in breach of the Financial Agreement 1927, which was made binding on the Commonwealth and the States by s 105A(5) of the

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43 (1945) 70 CLR 141 at 165-166.

44 *Sankey v Whitlam* (1978) 142 CLR 1 at 29-30 per Gibbs ACJ, 72-74 per Stephen J, 91-93 per Mason J, 104-105 per Aickin J.

45 (1978) 142 CLR 1.

Constitution, was not "unlawful under a law of the Commonwealth" within the meaning of s 86(1)(c) of the *Crimes Act* 1914 (Cth) as it then stood. As Gibbs ACJ said[46] in that case, "[t]he Constitution is not a law made by or under the authority of the Parliament of the Commonwealth." But s 35 of the *Family Law Act* is made by the Parliament and that makes it a law of the Commonwealth for the purpose of ss 80 and 109 of the Constitution whether it is merely declaratory of the powers implicit in Ch III of the Constitution or, as I think, an exercise of substantive law making by the Parliament.

46 Section 35 also creates an offence against a law of the Commonwealth within the meaning of s 80 of the Constitution because, if it is valid, it picks up the common law rules of contempt as substantive rules of law and empowers the Family Court to punish a person for breach of those rules[47]. It therefore creates an offence. If Mr Torney had been prosecuted on indictment in the present case, I think that it would be clear that he was being prosecuted for an offence against a law of the Commonwealth.

47 If s 35 of the *Family Law Act* or s 24 of the *Judiciary Act* had not been enacted, it is not open to doubt that the Family Court and this Court would have jurisdiction to punish a contempt of their proceedings. That jurisdiction would have arisen as a necessary incident of their creation as courts exercising the judicial power of the Commonwealth. But because the jurisdiction would arise by necessary implication, the grant of jurisdiction would be limited by the need for it[48].

48 I do not think that there is any ground for supposing that, in enacting s 35 of the *Family Law Act* or s 24 of the *Judiciary Act*, the Parliament was simply intending to put the necessity jurisdiction into statutory form. The most convincing reason for thinking that the Parliament was not intending to pass a law that was declaratory of the necessity power in Ch III of the Constitution is that the Parliament has chosen to make the content of its law depend not upon Ch III but upon the common law of England as at a particular date. It would be almost a miracle if the content of the necessity jurisdiction was identical with power which the Supreme Court of Judicature in England possessed at the commencement of the *Judiciary Act* to punish contempts of its power and authority. Almost certainly the latter jurisdiction is wider than the necessity jurisdiction. For example, it might be difficult at the present time to say that the offence of scandalising the court was part of the necessity jurisdiction. The very terms of s 24 of the *Judiciary Act* and the implied reference to that section in s 35 of the *Family Law Act* indicate that the

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46 *Sankey v Whitlam* (1978) 142 CLR 1 at 31.

47 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166.

48 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118.

Parliament was doing something more than declaring that the High Court and the Family Court had all the powers necessarily given to them by Ch III of the Constitution. It is hard to imagine why the Parliament would have bothered to do that and even harder to imagine why it would have done so in such a convoluted way.

49 But in any event, if Parliament chooses to pass a law which gives statutory effect to a power or obligation that is expressly or implicitly granted or imposed by the Constitution, what ground is there for denying to the enactment of the Parliament the description of a law of the Commonwealth? What ground is there for saying that it is not a law of the Commonwealth for the purpose of s 109 or s 80 of the Constitution? It is not an answer to say that because a power or obligation arises under or is imposed by the Constitution, Parliament cannot make a breach of the obligation an offence against a law of the Commonwealth for the purpose of s 80 or cannot make the power or obligation a law of the Commonwealth for the purpose of s 109 of the Constitution. Nothing in *Sankey v Whitlam*[49] or any other case lends any support for the proposition that the Parliament of the Commonwealth cannot do so. Section 119 of the Constitution, for example, imposes a duty on the Commonwealth to protect every State against invasion and the imposition of that duty carries with it every power necessary to fulfil the duty, without the need for legislation. But if Parliament chooses to use the combination of s 119 and the incidental power in s 51(xxxix) to pass a law to further the carrying out of its duty under s 119, surely the law is a law of the Commonwealth. Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen and permits the Commonwealth to do many things without the backing of legislation. But if Parliament decides to put some aspect of executive power in statutory form, as it has on numerous occasions, the law is surely a law of the Commonwealth. By reason of "the nature of the Commonwealth as a government of the Queen"[50], for example, the Commonwealth is entitled to priority of payment when debts of equal degree due to the Commonwealth come into competition with the debts due to other creditors in any administration of assets. That is a right which arises out of the creation of the Commonwealth under the Constitution. But if the Commonwealth legislates, as it often has, to give its debts priority in a bankruptcy or winding up, the legislation creates statutory rights in the Commonwealth and constitutes a law of the Commonwealth for the purpose of s 109 of the Constitution[51]. Indeed, by enacting a law of the Commonwealth, the

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49 (1978) 142 CLR 1.

50 *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372 at 377.

51 *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372 at 378 per Dixon CJ, 386 per Taylor J; see also Menzies J at 389-390.

Parliament may even take away from the Commonwealth its prerogative right arising from the Constitution to priority of payment for its debts[52].

50 In my opinion, s 35 was not intended to be declaratory of the powers implicit in Ch III of the Constitution, but if it was it would still be a law of the Commonwealth for the purpose of ss 80 and 109 of the Constitution. I think that s 35 is a law of the Commonwealth which has a dual purpose – a conferring of jurisdiction on the Family Court and the creation of substantive legal obligations. The content of those obligations is defined by reference to the common law. That means that s 35 also creates an offence. On that basis, Mr Torney is charged with an offence against a law of the Commonwealth within the meaning of s 80 of the Constitution, as counsel for Mr Torney contended. However, because Mr Torney has not been charged on indictment, s 80 has no application in this case[53].

51 The application must be dismissed.

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52 *In re KL Tractors Pty Ltd* (1961) 106 CLR 318 at 336 per Dixon CJ, McTiernan and Kitto JJ.

53 *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Brown v The Queen* (1986) 160 CLR 171.

52 KIRBY J. The prosecutor, Mr Torney, stands charged in the Family Court of Australia with contempt of court. The contempt alleged against him is not of the usual variety (breach of an order of a court; misconduct in the face or the hearing of the court; or interference with a particular case). Instead, it is that form of contempt "which is so colourfully described as scandalising the court"[54]. The prosecutor challenges the jurisdiction of the Family Court to hear and determine the proceedings against him. An application for a writ of prohibition, pursuant to s 75(v) of the Constitution, has been referred by Hayne J for determination by a Full Court[55]. In my opinion, one of the prosecutor's challenges is made good.

The facts and issues in the proceedings

53 The background facts are stated in the reasons of Gleeson CJ and Gummow J. The grounds for relief, stated in the prosecutor's process were somewhat repetitious. However, reduced to their essence, and as originally framed, they were:

1. That the proceedings against the prosecutor were required by s 80 of the Constitution to be tried by a jury and not (as was proposed) by a judge of the Family Court sitting alone (grounds 1-4);

2. That by reason of statements of, and opinions expressed by, the Chief Justice of the Family Court (Nicholson CJ), a reasonable observer might apprehend bias against the prosecutor on the part of the judge of that Court assigned to hear and determine the charge (Burton J) and against all other judges of the Family Court on the basis that that Court itself, and all of the judges thereof, were affected by "institutional bias" (grounds 5 and 6);

3. That the proceedings for contempt impermissibly called into question the prosecutor's freedom to speak about matters of legitimate public comment and debate and were, for that reason, an abuse of process which should be terminated (ground 7); and

4. That the offence of contempt in the form of scandalising the court was obsolete or the use of summary procedures for such contempt was obsolete and for that reason too the proceedings should be terminated (ground 8).

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54 *Ahnee v DPP* [1999] 2 WLR 1305 at 1309.

55 14 December 1998, pursuant to O 55, r 2 of the High Court Rules.

54 During argument, the issues were further refined. The prosecutor abandoned the argument that the offence of scandalising the court was obsolete[56]. However, he maintained his objection to the use of summary procedures for that purpose. He withdrew any suggestion of actual bias on the part of the trial judge. But he maintained his complaint about the reasonable apprehension of bias to be inferred from the statements of Nicholson CJ and imputed to all judges of the Family Court.

55 So far as the prosecutor's argument regarding s 80 of the Constitution was concerned, he did not contend that the reference in that section to "indictment" was to be confined to the original historical meaning of that word, being a "written accusation … of a crime or misdemeanour, preferred to, and presented upon oath by, a grand jury"[57]. He suggested no disturbance of State law for the prosecution of contempts by way of scandalising a court falling within State jurisdiction. However, he insisted that, properly construed, the Constitution imposed the requirement of trial by jury for the resolution of contested charges of contempt within federal jurisdiction, such as he faced. He accepted that, at federation, English and Australian colonial courts had the power to punish contemnors found guilty of scandalising the courts by summary process and without jury trial. But he asserted that, in Australia, after 1901, the Constitution demanded a different legal regime. Neither the *Family Law Act* 1975 (Cth) ("the Family Law Act")[58] nor the *Judiciary Act* 1903 (Cth)[59] ("the Judiciary Act"), nor any other statute of the Federal Parliament could override the requirement of jury trial because it was mandated by the Constitution.

56 Whilst no explicit challenge was expressed as to the constitutional validity of s 35 of the Family Law Act, the simple proposition advanced by the prosecutor was that the trial of any such charge must be by jury, as s 80 of the Constitution obliged. It could not be held by a judge sitting alone. To the extent that the Family Law Act, O 35, r 3(2) of the Family Law Rules or any practice of the Family Court purported to permit a mode of trial otherwise than by jury, they were constitutionally invalid.

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56 cf *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 31-33; *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150; *Re Duncan* [1958] SCR 41; *R v Kopyto* (1987) 47 DLR (4th) 213; *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225; *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48.

57 Blackstone, *Commentaries on the Laws of England*, (1769) vol 4 at 299; cf Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 6.

58 s 35.

59 s 24.

Three procedural points

57 Three points of procedure should be mentioned. The first concerns an obstacle said to lie in the path of the argument based on s 80 of the Constitution. It was suggested to the prosecutor during argument that the authority of this Court stood in the way of the meaning of s 80 of the Constitution for which he contended. On this basis, it was questioned whether he would not require the leave of the Court to reopen the question determined by authority so that the point might be reconsidered in terms of his submissions.

58 It is true that such a view about the practice of this Court has been expressed by members of the Court[60]. With respect, I consider that a party does not require the permission of the Court to present, or to continue to present, argument that is relevant to a decision in a matter before the Court. This includes argument which seeks to show that a previous decision of the Court (including one on the meaning of the Constitution) is wrong and should not be followed[61]. Once a matter is before the Court, it is my view that the Constitution requires the Court to dispose of the controversy which it presents in accordance with law. No rule of practice can shackle or limit the judicial obligation in that regard[62]. The present matter is now before the Court as the referral of an application for a writ of prohibition. It is therefore necessary to dispose of it.

59 If, contrary to my opinion, leave were required, I would unhesitatingly grant it. As will be demonstrated, there has been a consistent stream of opinion within this Court concerning the meaning of s 80 of the Constitution which lends support to the prosecutor's contentions. The application of s 80 of the Constitution to a case of contempt by way of scandalising a court has not previously been decided by this Court. The issue is an important one of constitutional principle. Any leave necessary to permit full argument upon it should therefore be given.

60 A secondary point of procedure was raised that the notice issued under s 78B of the Judiciary Act was inadequate to signal a challenge in these proceedings to the past authority of the Court on the meaning of s 80 of the Constitution. I do not agree. The prosecutor's notice adequately indicates the questions to be argued. Therefore, no inhibition in the Court's practice, or in the statute's requirement of

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60 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

61 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316 per Deane J (dissenting); cf *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 409 per Deane J.

62 *Ha v NSW* (1996) 70 ALJR 611 at 614; 137 ALR 40 at 43-44.

notice, should prevent the hearing and determination of those questions according to law.

61 There was more substance in an objection to a belated attempt on behalf of the prosecutor, in these proceedings, to challenge the validity of the charge brought against him upon the basis that the law upon which it purportedly rested was inconsistent with the constitutionally protected freedom of communication on matters of political concern[63]. The authority of this Court upholds the proposition that the Constitution protects freedom of communication between people concerning political or governmental matters relevant to the free and informed exercise of their rights as electors. Some judicial remarks have suggested that such freedom of communication is not incompatible with the law of contempt[64]. However, that question has not been decided by this Court. One day it might be[65].

62 Whether the particular aspect of the law of contempt in question in these proceedings is the common law, a law made by the Parliament or a law derived from the implications of Ch III of the Constitution, it would seem arguable that in every case it has to "yield to the constitutional norm"[66]. However that may be, the present matter is not one suitable for the resolution of that issue. In the ground upon which the prosecutor relied for relief by reference to "legitimate public comment and debate" (ground 7) the only legal foundation nominated for such relief was that the proceedings were an abuse of process. There was no mention, as such, of the Constitution. Therefore, the matter was not clearly signalled in the notices issued under s 78B of the Judiciary Act. The validity of that section was not contested. It was for that reason that I joined with the other members of the Court in refusing to permit the constitutional argument to be advanced in these proceedings. It would, of course, be open to the prosecutor to raise an argument on that point in defence of any proceedings lawfully brought against him. But it was not open on the process filed in these proceedings.

The Constitution, s 80 and its requirements

63 If the prosecutor succeeds in his argument based on s 80 of the Constitution, he is entitled to immediate relief. It is then unnecessary to consider his other

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63 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

64 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 187 per Deane J; cf *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81 at 107-109.

65 cf *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at 754; *R v Kopyto* (1987) 47 DLR (4th) 213; *Ahnee v DPP* [1999] 2 WLR 1305.

66 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

arguments. It is therefore appropriate to deal with the s 80 question first. The provision of the Constitution in question is brief. It 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."

64 Three obstacles were said to lie in the way of a successful invocation of this section in the present matter. They were:

(1) That a charge of contempt, including by scandalising a court, did not amount to an "offence" within the section;

(2) If it did, it was not in this case an offence "against any law of the Commonwealth"; and

(3) If it was, the trial of the prosecutor was not "on indictment". It was neither so in terms of the document which initiated the proceedings that would result in the trial of the prosecutor nor did the law of the Commonwealth require that such trial be "on indictment". It was left to the Parliament to specify which offences should be tried "on indictment" and which not. In the context of federal crimes, the Parliament had so specified[67]. There was no such specification with respect to a trial for contempt. Accordingly, this was not a trial which attracted the obligation imposed by s 80 of the Constitution. That trial could be held before a judge sitting alone provided there was no other impediment in law to that judge's conducting the trial.

65 The idea for s 80, appearing as it does within Ch III of the Constitution ("The Judicature"), can clearly be traced to the provisions of Art III, s 2 of the Constitution of the United States of America. The latter provision relevantly reads:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

66 The foregoing provision is supplemented, in the United States Constitution, by the Sixth Amendment. That provision guarantees to the accused, in all criminal prosecutions, a right to a "speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed".

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67 *Crimes Act* 1914 (Cth), ss 4(1) and 4A (definition of "indictment").

67 The first draft of the proposed federal constitution for the Australian Commonwealth, prepared by the Judiciary Committee of the 1891 Australasian Constitutional Convention, contained a clause which required that jury trial be had "of all indictable offences"[68]. It has been suggested that the adjective "indictable" probably derived from the knowledge which the Chairman of that Committee (Mr Inglis Clark) had of the problems which had arisen in the United States from judicial attempts to confine jury trials to "serious" offences as distinct from "petty" or trivial ones suitable to summary disposal[69]. However that may be, the original draft was adopted without debate in 1891. It contained the clause as proposed.

68 In the third session of the 1898 Convention, its leader, Mr Edmund Barton, moved to amend the provision to insert the words now appearing. In his argument against the phrase "indictable offences" Mr Barton cited the example of contempt of court. He said that this was an "indictable offence" but it was one which was usually punished summarily[70]. One delegate, Mr Patrick Glynn, urged that the clause should be struck out completely on the basis that it amounted to fetter to the omnipotence of the Parliament[71]. Another delegate, Mr Isaac Isaacs, criticised the provision on the basis that it was futile. He argued that, under the clause as drafted, it would be left to the Parliament to "say it is not to be prosecuted by indictment, and immediately it does it is not within the protection of this clause"[72]. The only delegate who spoke for the clause (Mr Bernhard Wise) referred to the virtues of trial by jury[73] exciting a contemptuous statement from another future Justice of

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68 Report from the Committee appointed to consider Establishment of a Federal Judiciary, its Powers and Functions, s 11 recorded *Official Record of the Proceedings and Debates of the National Australasian Convention*, (Sydney), March and April 1891 at clxiv.

69 See eg *Callan v Wilson* 127 US 540 at 552-555 (1888); Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury", (1926) 39 *Harvard Law Review* 917.

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

71 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 350, 353.

72 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 352. See also the remarks of Mr Higgins at 350-353.

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

this Court, Mr Henry Bournes Higgins[74]. Despite this debate, the clause was carried into the Constitution. As will be seen, the sceptical critics at the Convention appear to have maintained their opinions of s 80 in the early decisions of this Court about its meaning in which some of them participated[75].

69 Five textual points may be made, without immediate elaboration, concerning s 80 of the Constitution. First, it appears as a constitutional provision in an instrument of government relatively difficult to amend, whose provisions were intended (unless expressed to the contrary)[76] to apply indefinitely, perhaps for centuries, as the fundamental law of a new federal nation. Secondly, s 80 appears in Ch III of the Constitution which provides for the Judicature of the new nation. The provision is thus, on the face of things, a permanent provision and an important one controlling the conduct of trials by courts contemplated by Ch III. In specified cases, such courts were to perform the trial function constituted by a judge and jury and not simply by judges for whom the Constitution elsewhere in Ch III provided[77]. Thirdly, within its own terms, s 80 clearly and expressly allowed for free parliamentary prescription of a matter relevant to jury trial, namely specification of the place or places at which such trial should take place where the offence was not committed within any State[78]. Fourthly, the phrase "law of the Commonwealth" appears elsewhere in the Constitution[79]. It is to be contrasted with the similar but not identical expression "laws made by the Parliament" appearing there[80]. Fifthly, elsewhere in the Constitution, where there was a purpose to identify an offence of a particular kind which would attract a

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74 He said that, in the mouth of anyone else, Wise's remarks would be "mere clap-trap": *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 351.

75 eg *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 136, 139-140.

76 Such as in ss 87, 89, 93, 96.

77 Constitution, s 72. This point is made by Dawson J in *Brown v The Queen* (1986) 160 CLR 171 at 210-211.

78 cf *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 614-615; *Brown v The Queen* (1986) 160 CLR 171 at 197 per Brennan J who described trial by jury as the "fundamental institution in our traditional system of administering criminal justice. Section 80 of the Constitution entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence." See also *Patton v United States* 281 US 276 at 297-298 (1930).

79 eg ss 41, 44(ii) and 109. See also s 120 which refers to "laws of the Commonwealth".

80 s 76(ii).

significance thought apt to the occasion, the text did so in relatively clear terms[81]. It would have been easy to so provide in s 80 of the Constitution. Yet despite its critics at the Convention, the section was adopted in the present language. It must be given meaning in order to deal with the objection which the prosecutor now raises.

Contempt is an "offence"

70 The casebooks abound with discussion of the peculiarities of contempt law and the extent to which proceedings for contempt defy classification as criminal or civil but are to be regarded as *sui generis*. At least so far as contempt involving disobedience to the order or process of a court is concerned, this Court has held that such contempts are not criminal[82]. The Supreme Court of the United States (in the context of Art III, s 2) also concluded that contempt cases were "*sui generis* - neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms"[83]. In its most recent consideration of this matter, the Privy Council has also described contempt as *sui generis* and not part of the ordinary criminal law[84]. That conclusion did not necessarily mean, however, that contempt is not an "offence" for particular purposes. Their Lordships so described it in the case before them[85]. The unsatisfactory nature of the traditional distinction between civil and criminal contempts has been acknowledged by this Court[86]. The anomalies associated with the distinction have been remarked upon.

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81 eg s 44(ii).

82 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 364; *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483; *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106; *Jendell Australia Pty Ltd v Kesby* [1983] 1 NSWLR 127; cf *Scott v Scott* [1913] AC 417 at 456.

83 *Myers v United States* 264 US 95 at 103 (1924). See also *In re Debs* 158 US 564 (1895); *Gompers v United States* 233 US 604 (1914); *Green v United States* 356 US 165 (1958). However in *United States v Barnett* 376 US 681 at 695 n 12 (1964), the Court held that if jury trial was not given a court could not impose a punishment more severe than would be proper to a "petty" offence not attracting the constitutional right to jury trial.

84 *Ahnee v DPP* [1999] 2 WLR 1305 at 1314.

85 *Ahnee v DPP* [1999] 2 WLR 1305 at 1314.

86 *AMIEU v Mudginberri* (1986) 161 CLR 98 at 107.

71 Such anomalies led Deane J in *Hinch v Attorney-General (Vict)*[87] to express the view that proceedings which could result in a fine or imprisonment in "consequence of a finding of contempt … must realistically be seen as essentially criminal in nature". In his Honour's view this would be so whether the proceedings were "brought by the Attorney-General or some other official acting in the public interest or by a private individual for the indirect or coercive enforcement of a civil order"[88]. Plainly, these remarks apply with greater force to proceedings such as the present which have been brought, ostensibly "in the public interest to vindicate judicial authority or maintain the integrity of the judicial process"[89]. In *Witham v Holloway*[90], this Court concluded that the distinction between civil and criminal contempt was based on illusory differences[91]:

> "[T]he fact that the usual outcome of successful proceedings is punishment, no matter whether primarily for the vindication of judicial authority or primarily for the purpose of coercing obedience in the interest of the individual, make it clear as Deane J said in *Hinch,* that all proceedings for contempt 'must realistically be seen as criminal in nature'."

72 Although these remarks were not addressed to the characterisation of contempt as an "offence" for the purposes of s 80 of the Constitution, they assist (as do other more recent observations of the Court[92]) to classify a contempt of the kind with which the prosecutor has been charged. It is not a matter of purely private concern. Indeed, it is not of private concern at all, except to the prosecutor. It relates, in its nature, to an alleged affront against the administration of justice harmful to the whole community. It is prosecuted by a public official in purported compliance with the Family Law Act or Family Law Rules. Were the prosecutor to be convicted, he would be liable to punishment, including imprisonment. I would therefore hold that the trial of a person on a charge of contempt in the nature of scandalising a court is a trial of an "offence" within s 80 of the Constitution. Nothing in its nature takes it out of the concept of an "offence". Indeed, the word "offence" in s 80 may be broad enough to embrace certain civil as well as criminal

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87 (1987) 164 CLR 15.

88 (1987) 164 CLR 15 at 49.

89 *Witham v Holloway* (1995) 183 CLR 525 at 531; cf *AMIEU v Mudginberri* (1986) 161 CLR 98 at 106.

90 (1995) 183 CLR 525.

91 (1995) 183 CLR 525 at 534. See also at 548-549 per McHugh J.

92 eg *Pelechowski v Registrar, Court of Appeal* (1999) 73 ALJR 687 at 696; 162 ALR 336 at 349.

offences[93]. Therefore, if the other preconditions for the application of s 80 are established, the requirements of the section must be complied with[94].

The offence is against a "law of the Commonwealth"

73 Clearly, an offence created by, or under[95], a statute validly enacted by the Parliament would be an offence against "any law of the Commonwealth". What is less clear is whether an offence against the common law could, in certain circumstances, be an offence against "any law of the Commonwealth" within s 80. The first respondent (the Marshal of the Family Court) argued that s 35 of the Family Law Act conferred on the Family Court the power to deal with contempt and s 112AP provided that the Court has only to deal with what is known as the common law proceeding of criminal contempt. But it was submitted that these sections merely preserved the common law relating to contempt and did not themselves create the offences with which the prosecutor was charged.

74 There is little authority of direct application that helps to resolve this controversy. In *R v Bernasconi*[96], the Court was faced, in war-time, with the unpalatable prospect of applying trial by jury in the Territory of Papua, with the inevitable consequence that the rule would be available to native peoples and also to newly acquired German settlers in the former German colony of New Guinea. So far as Isaacs J was concerned, such people could be left to "Parliament's sense of justice and fair dealing … without fencing them round with what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system"[97]. Griffith CJ likewise concluded that s 80 of the Constitution had no application to the exercise of judicial power in federal territories. He said that s 80 "relates only to offences created by the Parliament by Statutes passed in the

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93 *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 201.

94 cf *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 where Art 14.5 of the *International Covenant on Civil and Political Rights* was considered. The Covenant provides for certain rights to "[e]veryone convicted of a crime …". It was held that this was applicable to a civil contempt. See my own reasons at 277 and 290 per Handley JA.

95 *Hume v Palmer* (1926) 38 CLR 441; *Spratt v Hermes* (1965) 114 CLR 226 at 247; *Sankey v Whitlam* (1978) 142 CLR 1 at 91.

96 (1915) 19 CLR 629.

97 (1915) 19 CLR 629 at 638; cf *Ffrost v Stevenson* (1937) 58 CLR 528 at 592.

execution of those functions, which are aptly described as 'laws of the Commonwealth'."[98]

75 Despite these remarks, six months after the opinion in *Bernasconi* was rendered, Griffith CJ in *R v Kidman*[99], noticed (as many Justices have since) the differing ways in which phrases similar to "law of the Commonwealth" are used throughout the text of the Constitution. He said[100]:

> "Sec. 76 of the Constitution authorises the Parliament to make laws conferring original jurisdiction on the High Court in any matter (*inter alia*) '(II) arising under any laws made by the Parliament'. The *Judiciary Act* 1915 (No. 4) amends sec. 30 of the Principal Act of 1903 by adding words conferring jurisdiction on the High Court 'in trials of indictable offences against the laws of the Commonwealth.' It is plain that this Act was passed in intended execution of the power conferred by sec. 76. There was, indeed, no other power under which it could be passed … The variation of language between 'the laws of the Commonwealth' and 'laws made by the Parliament' certainly does not suggest that the latter expression was intended to be synonymous with the former. And, having regard to the sense in which the term 'the laws of the Commonwealth' is used in the Constitution, *e.g.*, in secs. 61 and 120, and the term 'any law of the Commonwealth' in sec. 80, I think it is impossible to contend successfully that they can be treated as synonymous."

76 Some judicial opinions have tended to favour the narrow view, regarding "law of the Commonwealth" in s 80 as synonymous with "laws made by the Parliament" or under and pursuant to such laws[101]. Other authorities have drawn to notice the breadth of the expression in s 80 of the Constitution. Specifically, they have referred to the amplitude of the words "*any* offence against *any* law of the Commonwealth" (emphasis added). Thus in *Li Chia Hsing v Rankin*[102], Barwick CJ observed that the language of s 80 was relevantly unqualified. The repeated use of the word "any" led him to say[103]: "It seems to me to be impossible

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98 (1915) 19 CLR 629 at 635.

99 (1915) 20 CLR 425.

100 (1915) 20 CLR 425 at 438.

101 *Spratt v Hermes* (1965) 114 CLR 226 at 276.

102 (1978) 141 CLR 182.

103 (1978) 141 CLR 182 at 189.

by any process of construction to treat the section as relating only to some offences against some laws, or to offences of a particular nature against any law."

77 The need for care in approaching the meaning of the phrase "law of the Commonwealth" in the Constitution requires that attention be focussed on the context. This point was made in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*[104]. In that case, attention was directed to the meaning of the phrase "the laws of the Commonwealth" in s 61 of the Constitution. Because, in that section, a distinction is drawn between the "execution and maintenance of this Constitution" and "of the laws of the Commonwealth", it was said there that "whatever may be the meaning of the expression elsewhere"[105], the context in s 61 left no room for doubt that the reference was to laws made by the Parliament. A similar view was taken, in the same context, in *Sankey v Whitlam*[106]. In that case, Stephen J acknowledged that the "core of the phrase" was clear enough, "namely offences against enactments of the federal legislature". He conceded that it was "at its periphery that doubts may exist"[107].

78 Whereas Quick and Garran[108] were of a view that the phrase "any law of the Commonwealth" in s 80 of the Constitution included the Constitution itself, that view did not prevail in *Sankey v Whitlam*[109], in relation to s 61 of the Constitution. However, the meaning of the phrase that may be appropriate in the context of a section such as s 61 (where there is explicit reference to "this Constitution") may not be apt in a context such as s 80 where the noun "law" is in the singular but elaborated by the repeated use of the word "any".

79 The phrase in s 80 of the Constitution, and others like it elsewhere in the Constitution, have not attracted a uniform construction. Nor do such phrases reflect a single theory. Whilst much authority within this Court supports the proposition that the phrase "law of the Commonwealth" in s 80 refers to laws made by, or under, statutes of the Federal Parliament, it has not been necessary, at least for s 80 purposes, to explore wider questions. These would include whether the expression, in the context of s 80, extends to references to the common law as

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104 (1922) 31 CLR 421 at 431-432 per Knox CJ and Gavan Duffy J.

105 (1922) 31 CLR 421 at 432.

106 (1978) 142 CLR 1.

107 (1978) 142 CLR 1 at 72. See also at 91-92 per Mason J.

108 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 809.

109 (1978) 142 CLR 1 at 72-73 per Stephen J, 104-105 per Aickin J.

applicable in matters relating to the Commonwealth[110]. True, the notion of a common law of the entire Commonwealth has been considered on a number of occasions. The usual starting point for the examination of that question is *R v Kidman*[111]. But the decision in that case was written at a time before this Court had the unquestioned constitutional authority as the only final appellate court of Australia. It is that authority which has given rise to the concept of a unitary common law throughout the Commonwealth of Australia[112]. It is an authority which necessitates great caution in importing into Australia the jurisprudence of United States courts. In that country there is no constitutional equivalent to the power and function which this Court has in relation to the expression of the common law for all parts of the country[113].

80 I am far from convinced that the authority of this Court on the meaning of phrases similar to "any law of the Commonwealth", appearing in other contexts of the Constitution, requires a conclusion that expels the application of s 80 of the Constitution from the trial of an alleged offence originating (directly or indirectly) from the Constitution itself or from the common law. Given the unique width of the expression in s 80 and the purposes of that section to which I will shortly come, it is by no means certain that such offences would fall outside the application of s 80[114]. However, it is not necessary to express a concluded opinion on this point in the present proceedings. This is because I agree with McHugh J that the

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110 cf *Huddart Parker Ltd v Cotter* (1942) 66 CLR 624 at 653-654 per Williams J; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 468 per Murphy J (in the context of s 109 of the Constitution); cf *Jackson v Gamble* [1983] 1 VR 552 at 559; Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 12.

111 (1915) 20 CLR 425 at 436, 445.

112 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-564; cf *Thompson v The Queen* (1989) 169 CLR 1 at 34-35; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 487; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 111-115; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 492.

113 cf Willoughby, *The Constitutional Law of the United States*, 2nd ed (1929) at 1320 discussed Renfree, *The Federal Judicial System of Australia*, (1984) at 311-313 referring to *Bond v The Commonwealth of Australia* (1903) 1 CLR 13 at 22-23; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 785.

114 This was the view of Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 809 and of Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 12. See also *Ahnee v DPP* [1999] 2 WLR 1305 at 1313.

offences with which the prosecutor is charged can only be breaches of s 35 of the Family Law Act.

81 It is true that, in common with a frequently used legislative device[115], the content of that section could only be ascertained by reference to the common law[116]. However, the law which purports to make the prosecutor liable to be punished for the contempt of court for which he stands charged, is not the Constitution. Nor is it the common law, as such. It is, and is only, s 35 of the Family Law Act. That section is undoubtedly a law of the Commonwealth within all of the authorities[117]. Therefore, if the trial of the prosecutor were to proceed, it would be for an "offence" against a "law of the Commonwealth". Subject to the remaining question presented by the words "on indictment" any such trial must accordingly be by jury.

The initiating process was not an indictment

82 The prosecutor then sought to avoid the differences of opinion within this Court about the requirement of an "indictment". He did so by an argument suggesting that the process which had purportedly initiated his trial was, in fact and law, an indictment and so attracted s 80 of the Constitution. The argument went thus. The meaning of the expression "on indictment" must, relevantly, be ascertained for the purposes of the Australian Constitution and not for other purposes. It could not be controlled by historical meanings or meanings suggested by the practice of courts in England or Australia, whether at the time the Constitution was adopted or at any earlier or later time. As already noticed, the historical meaning of "indictment" was that of a written accusation of a crime or misdemeanour preferred to, or presented upon oath or affirmation by, a grand jury legally invoked[118]. In Australia, the grand jury procedure has rarely been used[119].

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115 The same technique was used in Mauritius: Courts Ordinance 1945 (Mauritius) s 15 noted *Ahnee v DPP* [1999] 2 WLR 1305 at 1310.

116 cf Judiciary Act, s 24.

117 See esp *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166; cf reasons of McHugh J at [43].

118 Blackstone, *Commentaries on the Laws of England*, (1769) vol 4 at 299.

119 The grand jury existed in New South Wales (then extending to present day Victoria and Queensland) between 1823 and 1828. See *R v McKaye* (1885) 6 NSWR 123 at 127-130 per Martin CJ. Prosecution by information was provided for by 9 Geo IV c 83 s 5. The grand jury procedure operated in South Australia until abolished by Act No 10 of 1852, s 1 and in Western Australia until abolished by the *Grand Jury Abolition Act Amendment Act* 1883 (WA), s 4. In Victoria provision is made for the possibility of summoning a grand jury: see *Crimes Act* 1958 (Vic), s 354. However

(Footnote continues on next page)

Therefore, so the prosecutor argued, the words "on indictment" in s 80 of the Constitution must mean something other than the original or strict historical connotation. On this footing the invocation of the jurisdiction of the Family Court by a written application filed in that Court by the first respondent sufficiently answered to the constitutional description of an "indictment". It was a written accusation. It was signed by an officer of the Commonwealth in pursuance of his official duties. It was purportedly executed under legal authority[120]. It charged the prosecutor with specific offences of contempt. It thereby sought to have him dealt with for contempt of court pursuant to s 35 of the Family Law Act. He was in this way exposed to the risk of punishment, including the serious punishment of imprisonment.

83 The first respondent's application, as exhibited, is not called an "indictment". Nor is it in the form familiar to process of that kind in Australia. However, I agree with the submission that a constitutional requirement cannot be circumvented by the manner or terms in which a form is expressed. The task of constitutional characterisation requires one to look beyond nomenclature and like formalities. Yet neither when the Constitution was adopted, nor in the years since, has the word "indictment" been extended to such a document as the first respondent filed in these proceedings. A trial on indictment is a trial of the person accused, ordinarily of a serious offence, commenced by a written accusation signed by a law officer of the Crown, the Director of Public Prosecutions or some other official authorised by law for that purpose[121]. Used as it is in the Constitution, the word "indictment" would not, in my view, assume a meaning frozen in time by reference to the procedures observed in 1901 or any other time before or since. But it would be a distortion of language to describe the first respondent's application form as an "indictment". It neither purports to be nor, more importantly, is such an instrument. Valid or otherwise, the application is a purported invocation of

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the power has not been used in "more than half a dozen cases in the whole history of this State": See *R v McInnes, Erskine and Calwell* [1940] VLR 416 at 420 per Lowe J. Grand juries were abolished in England by *Administration of Justice (Miscellaneous Provisions) Act* 1937 (UK), s 1. See also *Criminal Justice Act* 1948 (UK), s 31(3) and Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 7-8.

120 Family Law Rules, O 35, rr 10, 13. See also Family Law Act, Pt XIIIA, Div 3.

121 cf Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 808-809; Quick and Groom, *The Judicial Power of the Commonwealth*, (1904) at 196; Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 8.

summary process[122]. It was not, and did not purport to be, a plea of the Crown for the bringing of an accused to trial[123]. Whether, under the Constitution, such a process was necessary to a case of contempt comprising scandalising a court, remains to be determined. But the first argument of the prosecutor to attract s 80 of the Constitution fails.

The suggested federal power to define "indictment"

84 The first respondent, supported by the Attorney-General for the Commonwealth who intervened, propounded a construction of the words "on indictment" in s 80 of the Constitution which has certainly enjoyed the support of the majority of Justices of this Court who have considered the matter. This is that it was wholly left to the Federal Parliament to specify those "trials" and any "offences" which must proceed "on indictment". In default of a legal requirement providing for such procedure, the trial does not have to be "by a jury". According to this view, there is no implication in the mandatory language of the section ("shall") nor in its purpose as a constitutional guarantee of rights, nor in its place in Ch III, nor any other aspect of the matter that would require that the trial of some offences *must* be on indictment and thus by a jury and not by judge alone.

85 The consideration of the section by this Court began, promisingly enough, with the acknowledgment by Griffith CJ that it reflected a fundamental law of the Constitution[124]. It is unfortunate that the first detailed consideration of its requirements arose in the unpromising context of *Bernasconi*[125] where it was invoked by an offender convicted in the Territory of Papua in 1915. That regrettable decision has blighted more than s 80 of the Constitution in the intervening years[126]. Although in that case it was unnecessary to comment on the meaning of "trial on indictment" in s 80, Isaacs J took the first opportunity that fell to him to repeat, in effect, the opinion which he had expressed at the

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122 *Maslen v The Official Receiver* (1947) 74 CLR 602 at 610; *R v Gray* [1900] 2 QB 36; *Director of Public Prosecutions v Australian Broadcasting Corporation* (1987) 7 NSWLR 588 at 595.

123 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1937) 57 CLR 765.

124 *R v Snow* (1915) 20 CLR 315 at 323; cf *Brown v The Queen* (1986) 160 CLR 171 at 215 per Dawson J.

125 (1915) 19 CLR 629.

126 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 650, 656; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1340; 165 ALR 171 at 192-193.

Conventions:[127] "If a given offence is not made triable on indictment at all, then sec. 80 does not apply."

86 The suggestion that s 80 might have a larger purpose and that (from its origins, language and context in the Constitution) more might be inferred, was curtly dismissed in *Archdall*[128]. There, Isaacs J participated in the majority reasons. The joint reasons of Knox CJ, Isaacs, Gavan Duffy and Powers JJ remarked[129]: "The suggestion that the Parliament, by reason of sec. 80 of the Constitution, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition." Higgins J, referring with approval to *Bernasconi*, also repeated the view which he had reflected at the Melbourne Convention[130]: "[I]f there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment".

87 It was in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[131] that the contrary view was propounded for the first time in this Court. Although the issue does not appear to have been argued by counsel, Dixon and Evatt JJ published reasons explaining the unacceptability of a construction of s 80 that would allow the Constitution to be "mocked"[132]. Latham CJ[133], on the other hand, accepted the authority of *Archdall.* A later attempt to reopen *Lowenstein*, after Dixon J had become Chief Justice[134], was refused. By 1968, in *Zarb v Kennedy*, Barwick CJ felt able to describe the interpretation of s 80 as "long settled"[135]. He accepted the logic of the reasoning in *Archdall*[136]: "[I]n my opinion, the proposition that the Parliament is unable to provide that any offence shall be tried summarily is

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127 (1915) 19 CLR 629 at 637.

128 (1928) 41 CLR 128.

129 (1928) 41 CLR 128 at 136.

130 (1928) 41 CLR 128 at 139-140.

131 (1938) 59 CLR 556.

132 (1938) 59 CLR 556 at 581-582.

133 (1938) 59 CLR 556 at 571. See also at 591 per McTiernan J.

134 *Sachter v Attorney-General for the Commonwealth* (1954) 94 CLR 86 at 88-89.

135 (1968) 121 CLR 283 at 294. See also *Spratt v Hermes* (1965) 114 CLR 226 at 244 where Barwick CJ observed that s 80 was not a "great constitutional guarantee" but a "mere procedural provision".

136 (1968) 121 CLR 283 at 294.

untenable". Even if a person were charged with murder, he concluded, that person could be tried without a jury if the Parliament provided that murder was not an indictable offence.

88 Although this interpretation of the Constitution has remained the one accepted by a majority of the Justices of this Court, dissenting voices have continued to be expressed from time to time. In *Li Chia Hsing v Rankin*[137] Murphy J observed that s 80 should be read as "a guarantee of a fundamental right to trial by jury in criminal cases (at least in serious ones)". But the majority of the Court continued to say that the interpretation of s 80 was "settled"[138]. In *Kingswell v The Queen* Deane J dissented[139]. So did Brennan J, although on a different basis not necessarily inconsistent with the application of the holding in *Archdall* and *Lowenstein*[140].

Arguments for adhering to the majority view of s 80

89 The analysis of the foregoing decisions supports the submission that the authority of the Court, as it presently stands, favours the contentions of the first respondent and the Attorney-General for the Commonwealth. Nevertheless, the prosecutor has invited this Court to reconsider its past authority. For the reasons which I have given, there is no procedural impediment to our doing so. My conclusions about the meaning and application of s 80 of the Constitution oblige me to respond to the prosecutor's request. But it is appropriate to begin my reconsideration by acknowledging a number of reasons of legal principle which, apart from the state of authority, support adherence to the conclusion previously expressed.

90 First, in so far as light is shed on the meaning of s 80 by the history of the successive drafts and the debate about its provisions in the constitutional Conventions in the 1890s[141], they certainly support the argument that the substitution of the words "trial on indictment" for the characterisation of qualifying offences as "indictable" was intended to afford the Parliament a measure of

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137 (1978) 141 CLR 182 at 198.

138 (1978) 141 CLR 182 at 190 per Barwick CJ. Gibbs J, at 193, appeared to acknowledge the possibility of further consideration of the state of authority if presented in a suitable case.

139 (1985) 159 CLR 264 at 296.

140 (1985) 159 CLR 264 at 285.

141 *Cole v Whitfield* (1988) 165 CLR 360 at 385; cf *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 577-578 where the previous law is stated.

flexibility in deciding which offences would qualify for jury trial and which would be capable of proceeding summarily[142].

91 Secondly, the Constitution was not written on a blank page of Australian legal history. It was drafted by people who had some knowledge of the problems which had arisen in the construction of the United States precursors. The framers were also aware of the large number of offences for which summary trial was deemed appropriate and just at the time s 80 was adopted. Given that prosecutions for contempt of court, although "indictable", were rarely, if ever, tried by jury in Australia in nearly a century before the adoption of the Constitution, the notion that such an offence would, in some cases at least, fall outside the guarantee in s 80 would not have shocked the drafters of the Constitution. Nor would it have surprised lawyers in England at that time. Coincidentally, the last case in England of a jury trial of charges akin to contempt was recorded in 1902[143]. This fact invited the comment of Hutley AP in *Registrar of Court of Appeal v Willesee*[144] that the procedure by indictment in such cases "is for all practical purposes obsolete …" with no reported decision in which it had been "availed of in this country."

92 Thirdly, the dissenting opinions in this Court about the requirements of s 80 display no unanimity as to the applicable principle by which "on indictment" will be read, in effect, as "indictable" and how such "indictable" offences will be distinguished from those that may nonetheless proceed to summary trial. Whereas Dixon and Evatt JJ in *Lowenstein*[145] saw the purpose of s 80 as being to ensure jury trial in all cases involving "a serious offence against the laws of the Commonwealth" (a view shared by Murphy J in *Li Chia Hsing v Rankin*[146]) - so as to require such a trial where the accused is charged with an offence that carries a term of imprisonment or is liable to imprisonment - this was not the view of

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142 Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 6: "one need not be a cynic but merely an historian".

143 *R v Tibbits* [1902] 1 KB 77. The counts of the indictment charged conspiracy to obstruct and pervert the course of law and justice, amongst other counts.

144 [1984] 2 NSWLR 378 at 379 applied *Director of Public Prosecutions v Australian Broadcasting Corporation* (1987) 7 NSWLR 588 at 595.

145 (1938) 59 CLR 556 at 581-582.

146 (1978) 141 CLR 182 at 198. See also *Beckwith v The Queen* (1976) 135 CLR 569 at 585.

Deane J in *Kingswell*[147]. He took the requirement of the section to apply only where the offence carried a term of imprisonment of more than twelve months. The qualification, not found in the text of s 80, occasions criticism that this is judicial invention, not constitutional interpretation.

93 Fourthly, the authority of this Court requires that where s 80 of the Constitution does apply, the essential elements of jury trial must be observed[148]. Those requirements may not be waived by the accused given that they apply "for the benefit of the community as a whole as well as for the benefit of the particular accused."[149] In light of this holding about the meaning of s 80, an unnecessary element of inflexibility might be imported into the trial of offences in the nature of contempt. Even if it were possible to distinguish lesser contempts (suitable for summary disposal) from contempts in the nature of scandalising a court (requiring jury trial) there might be some cases where the person charged with the latter would prefer summary trial. Yet if s 80 of the Constitution applied there would be no option. A trial by jury would have to proceed.

94 Fifthly, it was argued that nothing in the law enacted by the Parliament nor the practice of the Commonwealth in the first century of the Constitution warranted a conclusion that the Parliament would abuse the entitlement afforded by s 80 or depart from the section's contemplation that some offences, usually serious, would be tried on indictment thus attracting the ancient privilege of jury trial[150]. Generally speaking, the Constitution should not be interpreted upon the assumption that the Parliament which it establishes will defy its fundamental presuppositions[151].

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147 (1985) 159 CLR 264 at 318-319; cf Willis, "To What Extent is s 235 of the Customs Act 1901-1975 (Cth) Invalid as Contravening s 80 of the Constitution?", (1978) 52 *Australian Law Journal* 502.

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

149 *Brown v The Queen* (1986) 160 CLR 171 at 201 per Deane J. See also at 197 per Brennan J.

150 This point was made at the Convention by another delegate who later became a Justice of this Court, Richard O'Connor. See *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne) 31 January 1898 at 352-353. He said: "You may trust the Parliament not to increase the list of offences to be dealt with by summary jurisdiction."

151 cf *Sue v Hill* (1999) 73 ALJR 1016 at 1074; 163 ALR 648 at 727.

Section 80 is a guarantee of trial by jury

95 I accept the force of these arguments both of authority and principle. However, in my view the proper construction of s 80 of the Constitution is that favoured by Deane J in *Kingswell.* The parties are entitled to have my opinion on what, in truth, the Constitution provides. I must pay due regard to the opinions of other Justices past and present about the question[152]. I have sought to demonstrate that I have done this. But being convinced of the error of previous authority on the meaning of the Constitution, I have a duty to express what I consider to be its proper construction. I will state my reasons. I can do so briefly because they follow substantially those upon which predecessors, holding the like opinion currently in the minority, have based their conclusions.

96 First, it is fundamentally erroneous to approach the construction of the Constitution as if the task of the Court were to give effect to the opinions, expectations, beliefs and hopes of the founders of the Commonwealth. However helpful it may sometimes be to study their deliberations, we are not hostage to them. Once adopted, the Constitution assumed a function as the fundamental law of a federal nation: one amongst the community of nations[153]. The text was then set free from the "intentions" of its draftsmen[154]. It must be construed by contemporary Australians. Necessarily, they read its language with the eyes of their generation expecting it to fulfil (so far as the words and structure permit) the rapidly changing needs of their times. Occasionally it will be held that the language or structure of the Constitution do not permit it to meet those perceived needs[155]. But for nearly a century the Constitution has met the requirements of government in Australia by reason, in part, of a willingness of this Court to avoid unnecessarily narrow or rigid interpretations. It was probably inevitable that the early Justices who had expressed such strong opinions about s 80 at the constitutional Conventions would adhere to those opinions when like questions came before them in the early days of this Court. But we are not confined to those opinions any more than to other views held by them which have since been abandoned[156]. This Court is bound to read s 80 as a permanent obligation,

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152 cf *Queensland v The Commonwealth* (1977) 139 CLR 585 at 593 per Barwick CJ.

153 *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 765-766; 152 ALR 540 at 599; cf Inglis Clark, *Studies in Australian Constitutional Law*, (1901) at 20-22 cited *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171-173.

154 cf *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 878; 163 ALR 270 at 323.

155 *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839; 163 ALR 270; cf *Gould v Brown* (1998) 193 CLR 346.

156 Such as the doctrine of the immunity of instrumentalities: *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585; *Commissioners of Taxation (NSW) v*

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expressed in Ch III of the Constitution and thus governing the important question of the composition of a court in the circumstances specified.

97 Secondly, when viewed in this light, it would be indeed "queer"[157] if s 80 were to mean no more than there "shall" be trial by jury where a law made by the Parliament so provides or where the officers of the Executive Government under such a law so elect. In the context of the express provision for the Parliament to prescribe other matters as stated in s 80, it would not lightly be assumed that the Parliament or the Executive Government would enjoy such an untrammelled discretion to determine, without interference from the Constitution, when a trial should be on indictment and when it should not. That truly would be the mockery of the Constitution which Mr Isaacs implied at the Conventions, and always thereafter believed, s 80 to entail. The fact that, in the face of these suggestions, the section was adopted as part of the Constitution negates an interpretation which would have such a consequence. The construction may be tested by taking the logic of the argument to its extreme. Could the Commonwealth by statute, or perhaps by prosecution policy, abolish entirely all trials on indictment and thereby deprive everyone in Australia of trial by jury in every case of an offence against a law of the Commonwealth? In the face of the language and purpose of s 80, I do not believe that such a result would be compatible with the existence of s 80 in the Constitution. Yet it is inherent in (and has even been stated to be the result of) the construction which has so far found favour[158].

98 Thirdly, it may be true that early interpretations of the Constitution were sometimes formalistic and inattentive to the protection of the rights of the individual as expressed in the document's language and structure. This was doubtless the result of historical forces which led to unthinking acceptance of some of the presuppositions of English notions of the sovereignty of Parliament fundamentally unsuited to the Parliament created by the Constitution of the Australian Commonwealth. However, the same error is scarcely true of more recent decisions of this Court. There, it has been recognised that the understanding of the meaning of the words of the Constitution is just as much in movement as is the history of the events to which the Constitution applies[159]. Take for example

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Baxter (1907) 4 CLR 1087; cf *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("*The Engineers' Case*") (1920) 28 CLR 129; *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396-397 per Windeyer J.

157 *Lowenstein* (1938) 59 CLR 556 at 581.

158 *Spratt v Hermes* (1965) 114 CLR 226 at 244 per Barwick CJ.

159 Detmold, "Australian Law: Federal Movement", (1991) 13 *Sydney Law Review* 31 at 35-36.

the assertion in the *Engineers' Case*[160] that one of the "cardinal" features of the Constitution was the "common sovereignty of all parts of the British Empire". Contrast that holding with the recent decision of the Court in *Sue v Hill*[161]. There are many other illustrations of the shift of the Court away from formalism towards a perception of the requirements of the Constitution in ways necessary for it to fulfil its function as the organic law of the nation[162]. Numerous examples could be cited which illustrate how, in recent years, the Court has discarded old approaches to express constitutional guarantees[163]. The Court has also accepted that implied constitutional freedoms (in the sense of immunity from restrictive federal laws) can be inferred from the language and structure of the Constitution[164].

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160 (1920) 28 CLR 129 at 146.

161 *Sue v Hill* (1999) 73 ALJR 1016; 163 ALR 648.

162 Horrigan, "Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning", in Sampford and Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions*, (1996) 31 at 32, 59, 69. See also Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience", (1986) 16 *Federal Law Review* 1 at 5.

163 See eg *Cole v Whitfield* (1988) 165 CLR 360; *Street v Queensland Bar Association* (1989) 168 CLR 461. See also Mason, "Express Guarantees of Rights in the Australian Constitution", University of the Northern Territory, Darwin (1994); Hanks, *Constitutional Law in Australia*, 2nd ed (1996) at 14-16.

164 See eg *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

99 In *Street v Queensland Bar Association*[165], Mason CJ explained the reasons for overturning the earlier holding of the Court in *Henry v Boehm*[166]. He referred to what he described as "an additional factor" in forming a view about the construction of s 117 of the Constitution which he preferred. He continued[167]: "[t]he question at issue relates to an important provision in the Constitution dealing with individual rights central to federation. The earlier decisions placed an incorrect interpretation upon it. The Court has a responsibility to set the matter right."

100 Although s 80 of the Constitution is not, in the same way as s 117, central to federation as such, it is certainly a part of that chapter of the Constitution which deals with the Judicature of the federation. It is relevant to the rights of the individual facing trial for any offence against "any law of the Commonwealth". It also concerns the right to trial by jury which has been conventionally regarded as something of real concern to the community as well as to the accused[168]. In these circumstances, as it seems to me, this Court should adopt the correct view of the section, even belatedly, rather than continue to embrace an erroneous opinion which rests on an assumption that the section was misconceived at birth and amounts to nothing more than "the high water mark of uncritical and seemingly senseless copying of inappropriate American precedent."[169] This Court should not attribute such a barren meaning to a permanent constitutional provision such as s 80[170].

101 Fourthly, undue attention has been paid in the cases (and in argument before this Court) to the law and practice of summary prosecutions for contempt in England and in the Australian colonies and States which developed without

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165 (1989) 168 CLR 461 at 489.

166 (1973) 128 CLR 482.

167 (1989) 168 CLR 461 at 489; cf Williams, *Human Rights under the Australian Constitution*, (1999) at 107, 113, 123-127.

168 See eg *Cheatle v The Queen* (1993) 177 CLR 541 at 550-559.

169 Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 24.

170 The trend of authority is noted in *Lane's Commentary on the Australian Constitution*, (1986) at 464; cf Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 443-445; Hanks, "Constitutional Guarantees", in Lee and Winterton (eds), *Australian Constitutional Perspectives*, (1992) 92 at 98-100; Blackshield and Williams, *Australian Constitutional Law and Theory*, 2nd ed (1998) at 1005 where it is said that the decisions in *Brown* and *Cheatle* make the "unresolved disagreement in *Kingswell* … seem more anomalous".

concern for the need to consider the application of a provision such as s 80. It matters not that trials for the offence of contempt, when charged under colonial or State law in Australia, were never had by jury[171]. That fact says nothing at all about the requirements of s 80 of the Constitution, addressed as it is to the context of crimes against federal law. Charges of contempt in the nature of scandalising a court are rare. They have not been brought successfully for more than sixty years in England and Wales[172]. The greater willingness to bring such charges in Canada (and Australia) has been ascribed by one observer who studied the matter to "greater sensitivity on the part of Canadian courts or to greater feelings of insecurity in the face of criticism"[173]. In that context, the need for the protection of s 80 where a person stands liable to serious punishment is more arguable. This is especially so given that the proceeding will commonly be heard by a judge or judges of the very court that the accused is said to have lowered in the general estimation of the public. And whether the protection in s 80 is considered necessary or not in that context, it exists. It is therefore pointless to refer to practice in jurisdictions where it did not, or does not, exist.

102 Fifthly, it is true that some persons accused of offences such as contempt might prefer summary trial. But in *Brown v The Queen* this was not deemed an answer to the requirements of s 80[174]. Nor is it here. A partial amelioration of the suggested inconvenience of the section is provided by confining the application of s 80 to a case where the law provides, or a judicial order would involve, punishment of a contemnor by imprisonment for more than twelve months. Any person exposed to such serious punishment should have the offence tried by jury. This is so not by force of federal legislation (which might be changed). It is so by force of s 80 of the Constitution itself.

103 Sixthly, to the criticism that the introduction of a criterion of liability to imprisonment or to imprisonment for a term of more than one year involves introduction into s 80 of the Constitution of conditions not expressed in the text, there is a simple answer. It is often the case that this Court must elaborate and explain the application of a disputed constitutional provision. In the United States,

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171 Such as confirmed in the case of the law of Western Australia in *James v Robinson* (1963) 109 CLR 593 at 612-614.

172 Walker, "Scandalising in the Eighties", (1985) 101 *Law Quarterly Review* 359 at 359.

173 Canada, Law Reform Commission, *Contempt of Court,* Working Paper 20 (1977) at 31. The offence has been prosecuted frequently in India, although the Supreme Court has expressed a policy of restraint: *EMS Namboodiripad v T N Nambiar* [1971] 1 SCR 697; *In Re Sham Lal* [1978] 2 SCR 581; *In Re S Mulgaokar* [1978] 3 SCR 162; cf *Shamdasani v King-Emperor* [1945] AC 264 at 270.

174 (1986) 160 CLR 171.

there is a developed jurisprudence on the instances of "petty" crimes to which Art III, s 2 of the Sixth Amendment does not apply[175]. Every legal system must draw "nice distinctions" and, as a consequence, accept "borderline cases"[176]. So long as these are defined by reference to an "intelligible principle" they escape justifiable criticism. The criterion proposed by Deane J in *Kingswell*[177] is no different, in principle, from the developed case law in the United States. It takes into proper account the history of summary trials in Australia and England at the time s 80 was adopted, and since that time, and the purpose that must be attributed to s 80, appearing as it does in the judicial chapter of the fundamental law of the Commonwealth.

104 Seventhly, so far as acting on the hypothesis that the Parliament will observe the spirit or intendment of s 80 of the Constitution and that no intervention of this Court to define its requirements is necessary, in matters of fundamental constitutional rights a greater vigilance will be adopted by this Court than elsewhere. Governments, including the Executive Government of the Commonwealth, will sometimes have strong reasons, not all of them financial, for supporting proposals to limit jury trials in certain circumstances. But that is what s 80 of the Constitution prevents. It is for this Court to give meaning to the section. It is fundamentally inconsistent with its imperative language and place in Ch III of the Constitution to leave it to the Parliament (or the Executive Government), unbridled, to give the provision its meaning and practical operation.

Conclusion and order

105 It follows that the contempt with which the prosecutor is charged is an offence against a law of the Commonwealth which s 80 of the Constitution requires to be had on indictment and thus by jury. As at present, contempt of federal courts is not governed by comprehensive legislation[178] to the extent that

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175 *Callan v Wilson* 127 US 540 at 549-550 (1888); cf Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Sydney Law Review* 1 at 2-3; *District of Columbia v Clawans* 300 US 617 at 623-625 (1937); *Baldwin v New York* 399 US 66 at 68-74 (1970).

176 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 517 per Lord Devlin.

177 (1985) 159 CLR 264 at 319.

178 Australia, Law Reform Commission, *Contempt* (Report No 35) (1987), Ch 10. See also United Kingdom, *Report of the Committee on Contempt of Court* (Cmnd 5794) (1974), Ch 7; Great Britain, Law Commission, *Criminal Law – Offences Relating to Interference with the Course of Justice* (Law Com No 96) (1979) pars 3.64-3.70; Canada, Law Reform Commission, *Contempt of Court* (Report No 17) (1982) at 24-27.

the Constitution would permit this. The punishments provided by law are thus uncontrolled by legislative prescription. Whatever might be the punishment apt to a contempt in the face or hearing of the Court or for breach of a judicial order[179], that which would be apt to a serious case of scandalising a court would certainly be liable to extend beyond imprisonment for twelve months. In these circumstances, in proceeding by way of summary trial against the prosecutor, the respondents acted in a manner contrary to s 80 of the Constitution. By upholding the jurisdiction of the Family Court, a Ch III court within the Judicature of the Commonwealth, to conduct the trial of the prosecutor without a jury, Burton J erred. To the extent that s 35 of the Family Law Act, any other provisions of that Act or the Family Law Rules purported to permit the summary trial of the prosecutor, such laws were invalid as in breach of s 80 of the Constitution.

106 This conclusion relieves me of the obligation to consider the many other issues that were raised by the prosecutor in objection to the proceedings brought against him. I will therefore refrain from doing so. He is entitled to succeed in his objection based on s 80 of the Constitution.

107 An order absolute in the first instance for a writ of prohibition should be made.

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179 Such that it could be ascertained from the decisions of the courts: *Ahnee v DPP* [1999] 2 WLR 1305 at 1310.

108 HAYNE J. I agree with Gleeson CJ and Gummow J that, for the reasons they give, this application should be dismissed with costs.

109 Although I accept that it is right to speak of an "offence" of contempt, the use of that term should not be permitted to obscure the significant differences between the powers that are invoked against an alleged contemnor and those that are set in train under the criminal law. As was said in *Hinch v Attorney-General (Vict)*[180]:

> "Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil jurisdiction and attract the rule that ordinarily applies in that jurisdiction, namely, that costs follow the event."

The power to punish for contempt is an inherent power of courts charged with "the function of superintending the administration of justice"[181]. It is a power that is invoked sparingly but in a very wide variety of circumstances. There are, in that sense, many forms of contempt; there is no single "offence" of the kind that the criminal law knows.

110 What must be proved before a court punishes for contempt will vary from case to case. In particular, what must be shown about the alleged contemnor's intention can vary greatly. Although it may be that all forms of contempt are rooted in the need to protect the due administration of justice, some forms of contempt (like wilful disobedience of an order) are concerned more with the administration of justice in a particular case than other forms of contempt (like scandalising the court) which may be seen as more concerned with the general administration of justice. Traditionally this was taken to suggest a distinction between civil and criminal contempt. But the difficulty of distinguishing between proceedings for contempt that are proceedings intended to have a remedial, rather than coercive, effect was noted by the Court in *Witham v Holloway*[182]. The Court concluded in *Witham* that all forms of contempt required proof beyond reasonable doubt, and four members of the Court concluded that the distinction between civil and criminal contempt was based upon differences that are "in significant respects, illusory"[183]. But this conclusion does not deny that the kinds of conduct constituting contempt are many and varied and does not deny that

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180 (1987) 164 CLR 15 at 89.

181 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 443 per Isaacs J.

182 (1995) 183 CLR 525.

183 *Witham v Holloway* (1995) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ.

the elements to be established to prove an alleged contempt differ according to the nature of the allegation.

111 Further, unlike other offences, proceedings for contempt can be, and often are, instituted by a court of its own motion. No separate prosecuting authority (with a discretion about whether to charge an offence or what offence to charge) intervenes in such a case. (The fact that rules of court often provide, as the Family Law Rules do in this case[184], that proceedings may be brought by a court officer, like the Marshal, should not obscure that such proceedings are brought at the direction of the court concerned.[185])

112 The interposition of a prosecuting authority (whether law officer or director of public prosecutions or the like) and the consequent interposition of the exercise of discretions by that prosecuting authority would deny the cardinal feature of the power to punish for contempt; that it is an exercise of judicial power *by the courts*, to protect the due administration of justice. And that would still be so even if, contrary to the position with other offences, the courts had power to review the exercise of such prosecutorial discretions in a case of contempt[186]. The function that is exercised when a court proceeds against an alleged contemnor is not one to be exercised or controlled by the executive.

113 I do not accept that s 35 of the *Family Law Act* 1975 (Cth) creates an "offence" of contempt. Section 35 of the *Family Law Act* (and s 24 of the *Judiciary Act* 1903 (Cth) upon which s 35 was obviously based) are, as Gleeson CJ and Gummow J say, declaratory of an attribute of the judicial power of the Commonwealth and identify particular powers of the courts with which they are concerned.

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184 Family Law Rules (Cth), O 35 r 3.

185 *Killen v Lane* [1983] 1 NSWLR 171.

186 cf *Maxwell v The Queen* (1996) 184 CLR 501 at 513-514 per Dawson and McHugh JJ, 534 per Gaudron and Gummow JJ; *DPP (SA) v B* (1998) 194 CLR 566 at 579-580 per Gaudron, Gummow and Hayne JJ.

CALLINAN J.

Facts and Previous Proceedings

114 This is an application for a writ of prohibition to prohibit the hearing by the second respondent of proceedings initiated by the first respondent for contempt by way of scandalisation of the Family Court.

115 The prosecutor's grounds as pressed are as follows:

"1. That the application for contempt constitutes an indictment;

2. Alternatively, that if the application is not at present, by reason of its form or otherwise, an indictment, it is nonetheless the jurisdictional foundation for the trial of an indictable offence, and therefore falls to be dealt with in a fashion which does not by mere prosecutorial choice of form thwart any constitutional or other right the prosecutor may have to trial by jury;

3. That the application for contempt is for an offence against the law of the Commonwealth;

4. That pursuant to s 80 of the Constitution of the Commonwealth of Australia, the hearing of the contempt must proceed by trial by jury;

5. Extra-curial statements and opinions of the Chief Justice of the Family Court . . . concerning [the prosecutor] or concerning persons including [the prosecutor] . . . have, in connection with the pending contempt proceedings against [the prosecutor], created an appearance, apprehension, or actuality of –

(a) institutional bias in the Family Court of Australia;

(b) a lack of judicial independence;

(c) irredeemable unfairness and prejudice;

6. The statements made and opinions expressed by the Chief Justice of the Family Court (and carrying his authority) in part 16 of his speech to the assembled judges of the Family Court Conference in Melbourne on 20 October 1998 constituted, in connexion with the pending contempt proceedings against [the prosecutor], such an interference with due

process as to destroy or remove the appearance, apprehension or actuality of such trial of those proceedings (whether by judge alone or by a judge and a jury) being fair;

…

8. [T]he use of summary procedures for contempt by way of scandalising the Court is obsolete."

116 It is unnecessary to repeat the material which the prosecutor disseminated concerning the Family Court and its Chief Justice in July and August 1998. It is sufficient to say that statements in leaflets distributed by the prosecutor included references to the Family Court and its judges in the following terms: "incompetent and immoral system of justice", "garbage can", "unfair and biased practices", "[t]he Family court is a tool of destruction backed by corrupt legislation and created by evil politicians", "[a] feminazi Court".

117 Proceedings for contempt were commenced on 6 August 1998 before Mushin J in relation to those and other statements. Mushin J subsequently adjourned the hearing so that the prosecutor might obtain legal representation and have time to prepare his case. The matter came before Burton J for hearing on 10 September 1998. The prosecutor made three submissions: first, that emotional stress from his recent involvement in Family Court proceedings had left him unable to instruct his advisers adequately, and, for that reason the proceedings should be adjourned; secondly, that the charges of contempt should be dismissed because the material before the Court did not include any allegation as to the state of mind of the prosecutor; and, thirdly, that s 80 of the Constitution required that his trial for contempt of the Family Court be by jury. Burton J rejected the second and third submissions and adjourned the proceedings to give the prosecutor time to prepare his defence. On 20 October 1998 the Chief Justice of the Family Court at a national conference of that Court made a speech which was widely published and which was critical of those, particularly groups of men, whose protests his Honour claimed undermined the work of the Court. Extracts of that speech are set out in the reasons of Gleeson CJ and Gummow J.

The Application to this Court

118 At the hearing in this Court the prosecutor made these basic submissions: that the offence of scandalisation of the Court was obsolete; that every member of the Family Court was disqualified on the ground of an apprehension of "institutional bias" from hearing the case against the prosecutor; and that the hearing had to be conducted before a judge and jury by reason of s 80 of the Constitution. I will deal with the last of these first.

Mode of Trial

119 Section 80 of the Constitution provides as follows:

> "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."

120 The prosecutor submitted to this Court that the "law of the Commonwealth" which he was alleged to have infringed was a law incidental to the enforcement of the powers of the Family Court. He did not identify any specific statutory provision the subject of any infringement.

121 The power of the Family Court to punish for contempt is founded upon s 35 of the *Family Law Act* 1975 (Cth) which in turn directs attention to s 24 of the *Judiciary Act* 1903 (Cth). The former provides as follows:

> "Subject to this and any other Act, the Family Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court."

122 Section 24 of the *Judiciary Act* provides:

> "The High Court shall have the same power to punish contempts of its power and authority as is possessed at the commencement of this Act by the Supreme Court of Judicature in England."

123 Part XIIIA of the *Family Law Act* makes provision for "Sanctions for Failure to Comply with Orders and Contempt of Court". Division 2 relates to contravention of orders of the Court. Division 3 contains s 112AP which confers upon the Family Court power to punish a person for a contempt that:

> "(1)…
>
> (a) does not constitute a contravention of an order under this Act; or
>
> (b) constitutes a contravention of an order under this Act and involves a flagrant challenge to the authority of the court.
>
> …"

124 Order 35 of the Family Law Rules, made pursuant to s 112AP(3) sets out the rules of practice and procedure for the bringing of charges of contempt and for the hearing of such charges.

125 It is accepted by the Commonwealth and the respondents that jurisdiction to try an offence summarily usually depends upon some identifiable statutory authorisation in that regard. But this has not been so in relation to contempt proceedings[187]. Although it may have been strictly historically incorrect to declare that the process of attachment without the intervention of a jury was a procedure founded upon "immemorial usage" in prosecuting for a libel on a judge in his judicial capacity[188], the summary method of dealing with such applications has nonetheless been long followed. In the second edition of *Halsbury's Laws of England* the following appears[189]:

> "Sub-Sect 3 – *Speeches or Writings tending to defeat the Ends of Justice*
>
> **8**. The issuing of attachments by the supreme courts of justice for contempts out of Court is founded upon the same immemorial usage as supports the whole fabric of the common law.
>
> Contempt by speech or writing may be by scandalising the Court itself . . . Any act done or writing published which is calculated to bring a Court or a judge into contempt, or to lower his authority, . . . is a contempt of Court.
>
> **9**. Scandalous attacks upon judges are punished by attachment or committal upon the principle that they are, as against the public, not the judge, an obstruction to public justice, and a libel on a judge, in order to constitute it a contempt of court, must be calculated to cause such an obstruction." (footnotes omitted)

126 There is therefore no doubt that the summary procedure for the trial of offences of contempt (including by way of scandalising the Court) is well established. *R v Nicholls*[190] is an early case in this Court in which the alleged offender was summarily tried (and acquitted) of a charge of contempt. In *Director of Public Prosecutions v Australian Broadcasting Corporation*[191] the Court of Appeal of New South Wales constituted by five judges, Street CJ, Hope, Glass,

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187 See *Blackstone's Commentaries on the Laws of England,* 15th ed (1809), vol 4 at 280.

188 *R v Almon* (1765) Wilm 243 at 254 per Wilmot J [97 ER 94 at 99].

189 2nd ed (1932), vol 7 at 6-7.

190 (1911) 12 CLR 280.

191 (1987) 7 NSWLR 588.

Samuels and Priestley JJA concluded that prosecution on indictment for contempt is not now the usual and appropriate procedure. Their Honours said[192]:

> "… For centuries charges in respect of some although not all forms of contempt were tried upon indictment. In 1765, following the undelivered draft judgment of Wilmot J in *R v Almon* (1765) Wilm; 97 ER 94[193], English 'courts claimed jurisdiction to punish all contempts by the summary procedure. For practical purposes, the summary procedure has superseded trial by jury': *Attorney-General for New South Wales v John Fairfax & Sons Ltd and Bacon* (1985) 6 NSWLR 695 per McHugh JA. As Hutley AP said in *Registrar, Court of Appeal v Willesee* [1984] 2 NSWLR 378 at 379, the procedure by indictment 'is for all practical purposes obsolete, counsel could not refer to any case in which it had been availed of in this country. It is for all practical purposes also obsolete in England: *Halsbury's Laws of England*, 3rd ed, vol 8 at 4. *R v Tibbits* [1902] 1 KB 77 appears to have been the last such instance'. The provisions of the *Supreme Court Rules* 1970, Pt 55, support this view."

127 Evatt J in *R v Fletcher; Ex parte Kisch* summarised the law in relation to scandalisation of the Court as he understood it to be in 1935[194]:

> "(1) The High Court has ample jurisdiction to punish summarily those responsible for publications calculated to obstruct or interfere with the administration of justice, whether such publications take the form of comment referring to proceedings pending in the Court or that of unjustified attacks upon the members of the Court in their public capacity (*Porter v The King; Ex parte Yee*[195], per Isaacs J).
>
> The origin of the present law and procedure is explained by Sir *John Fox* in his *History of Contempt of Court* (1927). The present English law in relation to newspapers is closely analyzed by Professor A L Goodhart in the *Harvard Law Review*, vol 48, p 885. The latter refers, at p 900, to Lord *Morris's* 'strange remark' in *McLeod v St Aubyn*[196], that committals for contempt by scandalizing have become obsolete in England.

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192 (1987) 7 NSWLR 588 at 595.

193 (1765) Wilm 243 [97 ER 94].

194 (1935) 52 CLR 248 at 257-258.

195 (1926) 37 CLR 432 at 443.

196 [1899] AC 549.

(2) In the case of attacks upon this Court or its members, the summary remedy of fine or imprisonment is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable (*Bell v Stewart*[197], per Isaacs and Rich JJ).

(3) All the recent decisions show that it is the duty of the Court to protect the public against every attempt to overawe or intimidate the Court by insult or defamation, or to deter actual and prospective litigants from complete reliance upon the Court's administration of justice (*In re Sarbadhicary*[198]; *R v Gray*[199]; *Attorney-General of the Irish Free State v O'Kelly*[200]; and *R v Editor of the New Statesman; Ex parte Director of Public Prosecutions*[201]; *R v Colsey*[202]).

(4) Fair criticism of the decisions of the Court is not only lawful, but regarded as being for the public good; but the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice (*R v Nicholls*[203]).

(5) Even although the criticism exceeds the bounds of fair comment so that other remedies of a civil or criminal nature are or may be available, the Court will not apply the summary remedy unless upon the principles stated above.

(6) In all cases of contempt, the Court has power to act not only summarily but *ex mero motu* (*Re the Echo and Sydney Morning Herald Newspapers*[204]). This power is essential in the case of the High Court before which the Governments of the Commonwealth and States are frequent litigants.

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197 (1920) 28 CLR 419 at 429.

198 1906 23 TLR 180 at 182.

199 [1900] 2 QB 36 at 40.

200 [1928] IR 308 at 315.

201 1928 44 TLR 301.

202 *The Times*, 9th May 1931 at 4.

203 (1911) 12 CLR 280 at 286.

204 (1883) 4 LR (NSW) 237.

In *Skipworth's Case*[205] the Attorney-General proceeded against the respondent at the request of the Court, and 'as the representative of the profession' (per Cockburn LC, *Kenealy's Trial of Tichborne*, introductory vol, p 240). Further, the general rule of British criminal jurisprudence is that 'a private person has just as much right to prosecute in the name of the Crown as the Crown itself' (Holdsworth, *History of English Law*, vol III, p 62; Stephen, *History of Criminal Law*, vol I, pp 493, 495).

(7) Summary proceedings for contempt are criminal in character, and the respondents are therefore entitled to invoke the principle that guilt should be proved beyond reasonable doubt."

128 The prosecutor's argument is that a practice which has evolved over the years cannot stand in the way of a constitutional guarantee of the kind which s 80 of the Constitution confers. Correctly, he submits that the fact that a particular procedure may have fallen into obsolescence, does not mean that it may not be revived, especially if, as a matter of constitutional imperative, it must be.

129 There are two decisions of this Court which stand in the way of the prosecutor's argument and which would need to be reopened and held no longer to state the law for him to succeed: *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[206] and *Kingswell v The Queen*[207].

130 In the earlier of these the prosecutor argued that a Federal Court (or its officers) could not, without offending a constitutionally entrenched doctrine of the separation of powers, cause a prosecution for a breach of s 217 of the *Bankruptcy Act* 1924 (Cth)[208] to be instituted and tried by that Court. Despite a strong

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205 (1873) LR 9 QB 230.

206 (1938) 59 CLR 556.

207 (1985) 159 CLR 264.

208 In 1938, s 217 relevantly provided:

"(1) If the court, in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against this Act punishable by imprisonment, it may-

(a) charge him with the offence and try him summarily; or

(b) commit him for trial before any court of competent jurisdiction.

(2) Where the court tries the bankrupt summarily it shall serve him with a copy of the charge and appoint a day for him to answer it. On the day so appointed, the

(Footnote continues on next page)

dissenting judgment by Dixon and Evatt JJ in which their Honours stressed the importance of the constitutional guarantee in s 80 of the Constitution and the undesirability of its erosion by legislative denomination of serious offences as non-indictable offences, the majority in *Lowenstein* rejected the prosecutor's argument. Starke J, one of the majority, said this[209]:

> "The argument that the separation of powers in the Constitution prohibits absolutely the performance by one department of the powers of any other department of the government is incorrect. The truth is that there is not and never was any clear line of demarcation between legislative, executive and judicial powers, nor can there be if efficient and practical government is to be maintained. 'Rather', says *Willoughby on the Constitution of the United States*, [2nd ed (1929), vol 3 p 1619], the correct statement of the principle of the separation of powers 'is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.' Thus the determination of controversies between the sovereign and its subjects, and between subjects, is part of the judicial power of the Commonwealth which from its nature does not fall within the powers of the other departments of government. But this does not involve, nor in my opinion is there any constitutional prohibition against, conferring upon the judicial department all powers connected with and incidental to the performance by it of its own functions."

131 In *Kingswell*, the applicant argued that to the extent that s 235 of the *Customs Act* 1901 (Cth)[210], as it then stood, provided for differential penalties relative to the

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> court shall require the bankrupt to plead to the charge, and if the bankrupt admits the charge, or if after trial the court finds that the bankrupt is guilty of the offence, the court may sentence him to imprisonment for any period not exceeding six months."

209 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 577.

210 Section 235 relevantly provided:

> "(2) Subject to sub-sections (3) and (7), where-
>
> (a) a person commits an offence against sub-section 231(1), section 233A or sub-section 233B(1); and
>
> (b) the offence is an offence that is punishable as provided by this section,

(Footnote continues on next page)

the penalty applicable to the offence is-

(c) where the Court is satisfied-

(i) that the narcotic goods in relation to which the offence was committed consist of a quantity of a prescribed narcotic substance that is not less than the commercial quantity applicable to that substance; or

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

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

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

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

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

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

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

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

(3) Where-

(a) the Court is satisfied that the narcotic goods in relation to which an offence referred to in sub-section (2) was committed consist of a quantity of a narcotic substance that is not less than the traffickable quantity applicable

(Footnote continues on next page)

quantity of the illegal drugs in question and the offender's intention as found by the sentencing judge (and not the jury), it infringed s 80 of the Constitution. Gibbs CJ, Wilson and Dawson JJ said[211]:

> "Sections 233B(1)(cb) and 235(2) do not contravene s 80 of the Constitution. Section 80 requires that if there is a trial on indictment of any offence against any law of the Commonwealth it shall be by jury. The sections now in question do not provide to the contrary. If there is a trial by jury the ordinary incidents of such a trial will apply; the judge will continue to exercise his traditional functions, and, for the purpose of imposing a sentence within the limits fixed by the law, will form his own view of the facts, provided that that view is not in conflict with the verdict of the jury. Section 80 says nothing as to the manner in which an offence is to be defined. Since an offence against the law of the Commonwealth is a creature of that law, it is the law alone which defines the elements of the offence. The fact that s 80 has been given an interpretation which deprives it of much substantial effect provides a reason for refusing to import into the section restrictions on the legislative power which it does not express. It has been held that s 80 does not mean that the trial of all serious offences shall be by jury; the section applies if there is a trial on indictment, but leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily. This result has been criticized, but the Court has consistently refused to reopen the question and the construction of the section should be regarded as settled: *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte*

> to that substance, but is not satisfied as provided in paragraph (c) of that sub-section in relation to those narcotic goods; and
>
> (b) the Court is also satisfied that the offence was not committed by the person charged for any purposes related to the sale of, or other commercial dealing in, those narcotic goods,
>
> notwithstanding paragraph (d) of that sub-section, the penalty punishable for the offence is the penalty specified in paragraph (e) of that sub-section.
>
> (4) An offence referred to in sub-section (1) or (2) may be prosecuted summarily or upon indictment or, where the law of the State or Territory in which the proceedings are brought makes provision for an offender who pleads guilty to a charge to be dealt with by the Court otherwise than on indictment, the Court may deal with an offender in accordance with that law."

Sub-section (7) provided the penalties that may be imposed when a court of summary jurisdiction determines proceedings summarily.

211 *Kingswell v The Queen* (1985) 159 CLR 264 at 276-277.

Lowenstein (1938) 59 CLR 556; *Sachter v Attorney-General (Cth)* (1954) 94 CLR 86 at p 88; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182. To understand s 80 as requiring the Parliament to include in the definition of any offence any factual ingredient which would have the effect of increasing the maximum punishment to which the offender would be liable would serve no useful constitutional purpose; indeed the Parliament might feel obliged to provide that some offences, which would otherwise be made indictable, should be triable summarily."

132 Brennan J, in dissent, was of the opinion that the sections in question were invalid. In persuasive terms his Honour deplored any intrusion upon the right to trial by jury guaranteed by s 80 of the Constitution[212]:

"But the Constitution must prevail. Trial by jury is guaranteed by s 80 of the Constitution when an offence against a law of the Commonwealth is tried on indictment. The offence with which the applicant was charged and the offence for which he was convicted was an offence constituted by elements drawn from s 233B(1)(cb) alone. He cannot be sentenced as for another offence – an offence constituted in part by s 233B elements and in part by elements drawn from s 235(2)(c) – for which he was not convicted on the jury's verdict. Had he been charged on indictment with the offence for which he was sentenced, the law which created that offence would have precluded its trial by jury. By providing that the issues derived from s 235(2)(c) are to be tried by a judge, that paragraph denies the guarantee given by s 80 of the Constitution. In my opinion, the Parliament's attempt to provide condign punishment for persons involved in the illegal importing of narcotic goods or in the possession of illegally imported narcotic goods has miscarried for failure to observe the imperative requirements of s 80. Parliament ignored Blackstone's warning in his *Commentaries* (1769), Book IV, p 344:

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

The failure to observe the imperative requirements of s 80 carries the deplorable consequence that invalidity strikes provisions enacted for the suppression of some of the most serious crimes in the criminal calendar."

133 The view of the majority in *Kingswell* accords with the intentions of the founding fathers. At the Convention Debates, the delegates considered the exact

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212 *Kingswell v The Queen* (1985) 159 CLR 264 at 295-296. See also Deane J at 298 et seq.

question. Section 80 was based on Art III, s 2 of the United States Constitution, which relevantly provides:

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

134 The framers made a conscious decision to limit the guarantee in s 80 to "trial on indictment". Section 80 was originally drafted to apply to "all indictable offences". However, in Melbourne in 1898, Edmund Barton proposed that the words "of all indictable offences" be altered to "on indictment of any offence"[213]. In his view, this change was necessary to ensure that trial by jury only be required when the Commonwealth chose to prosecute by indictment. Otherwise, trial by jury would be required whenever any offence was potentially indictable, even if the Commonwealth chose to prosecute summarily. Edmund Barton referred specifically to prosecutions of contempt[214]:

> "The better way, however, is as we suggest, that where there is a power of punishing a minor offence summarily, it may be so punished summarily. But where an indictment has been brought the trial must be by jury. The object was to preserve trial by jury where an indictment has been brought, but such cases of contempt should be punishable by the court in the ordinary way . . . 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."

135 Isaac Isaacs contended that the clause in Edmund Barton's form was an inadequate guarantee of trial by jury because when the Commonwealth creates an offence, it may say it is not to be prosecuted by indictment, and immediately it does it is not within the protection of this clause. He was of the view that Parliament could, if it chose, make murder a summary offence. His view did not prevail. The clause was adopted in the form proposed by Edmund Barton[215].

136 The intention of the framers so clearly expressed, the long history of summary proceedings for contempt and the recent considered judgment of this

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

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

215 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne) 4 March 1898 at 1895-1896.

Court in *Kingswell* bring me to the conclusion that s 80 of the Constitution does not require that the charge of contempt of the Family Court by scandalising it be tried by jury, notwithstanding that I share some of the concerns expressed by Dixon and Evatt JJ in *Lowenstein* and by Brennan J in *Kingswell* in the passage I have quoted.

Does Contempt by Way of Scandalisation of the Court Still Exist?

137 Because scandalising the Court is no more than a particular, if rarely encountered, species of contempt, there is nothing in the prosecutor's point that summary trial for the offence of scandalising the Court is obsolete. *Gallagher v Durack*[216] which was decided in 1983 affords a comparatively modern example of a prosecution conducted summarily for a contempt which was in fact contempt by scandalisation of the Court.

138 Whether the prosecutor can make out other defences and whether his conduct here is capable of falling within the generally accepted definition of the offence as provided by Lord Russell of Killowen in *R v Gray* will be matters for determination on his trial[217]:

> "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke LC characterised as 'scandalising a Court or a judge'[218]. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published."

Apprehended "Institutional Bias"

139 The second respondent accepts that a question might arise if the Chief Justice were himself to sit on the hearing of the charge against the prosecutor. That may well be so. It is important to remember that a judge trying a contempt case not

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216 (1983) 152 CLR 238.

217 [1900] 2 QB 36 at 40.

218 *In re Read and Huggonson* (1742) 2 Atk 469.

only pronounces on guilt or innocence but also upon an appropriate penalty. The remarks of his Honour might perhaps be thought to raise an apprehension that the maker of them (even if he were able to decide the first issue either with complete objectivity or an apprehension of it) might be perceived to hold such a strong (albeit conscientious) view about the consequences of the allegedly contemptuous conduct, that he might appear to have difficulty in preserving objectivity in dealing with the issue of penalty.

140 But it is unnecessary for this Court to decide whether the Chief Justice's remarks were justified or prudent, or had the relevant tendency to identify and criticise the prosecutor as the prosecutor urges.

141 The second respondent in argument advanced two reasons why the Chief Justice should be entitled to make the observations that he did. First, it was said, it is part of the Chief Justice's statutory role pursuant to s 21B(1) of the *Family Law Act*[219] to defend the Court and comment on its performance; and, secondly, (on instructions from the Attorney-General), the second respondent put that it has now become accepted that a Chief Justice of a Court should be entitled to speak out on behalf of and defend the Court over which he or she presides.

142 These matters can also be put aside because on any view it cannot be said that the remarks made by the Chief Justice in the circumstances in which he made them could possibly give rise to any apprehension of bias on the part of the different judge who is to try the charges. Dissents from, and disagreements with judgments of chief justices of all courts are not uncommon. Judges are bound to, and reasonable observers would appreciate that they will, try cases on the evidence before them and apply the law as they take it to be. They are even less likely to be improperly influenced by remarks made extra-curially by a chief justice than they would be by a decision (not binding on them) made by a chief justice in court with which they conscientiously disagreed. It is true that in *Kable v Director of Public Prosecutions (NSW)*[220] McHugh J and Gummow J did refer to the Supreme Court of a State in terms of an institution and contemplated the possibility of a compromise of "institutional impartiality"[221] but their Honours' remarks were made in relation to the unacceptable exercise of powers by every member of that

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219 That sub-section provides:

> "The Chief Judge is responsible for ensuring the orderly and expeditious discharge of the business of the Court and accordingly may, subject to this Act and to such consultation with the Judges as is appropriate and practicable, make arrangements as to the Judge or Judges who is or are to constitute the Court, or the Full Court, in particular matters or classes of matters."

220 (1996) 189 CLR 51.

221 (1996) 189 CLR 51 at 121, 133.

Court, that is to say any member of that Court viewed as an institution, and are of no relevance to the circumstances of this case. The claim of a reasonable apprehension of an "institutional bias" fails.

143 I would only add one matter, and that is to commend the salutary practice adopted here of having (as and when it can be) the trial of contempt conducted by a judge different from the one against whom any personal imputations have been made.

144 I would dismiss the application with costs.