IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B28 OF 2011**

On appeal from
Court of Appeal of the Supreme Court of Queensland

BETWEEN: **ADAM JOHN HARGRAVES**
Appellant

AND: **THE QUEEN**
Respondent

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B24 OF 2011**

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On appeal from
Court of Appeal of the Supreme Court of Queensland

BETWEEN: **DANIEL ARAN STOTEN**
Appellant

AND: **THE QUEEN**
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth), in support of the respondent in each proceeding.

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the appellants' list of legislative provisions.

PART V ARGUMENT ON ISSUES PRESENTED BY THE APPEAL

10 4. These submissions address the argument that the appellants did not receive a "trial by jury", as required by s 80 of the Constitution.

5. The focus of the appellants' argument is on whether the function of an appellate court under s 668E(1A) of the *Criminal Code* (Qld) (**proviso**)[1] is inconsistent with the requirement for a "trial by jury". However, their argument also raises a prior question – whether an error of law at trial can mean that a person indicted does not receive a "trial by jury".

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1 Similar provisions exist in all States: see *Weiss v The Queen* (2005) 224 CLR 300 at 310 (fn 40) (the Court).

A. SECTION 80 AND THE ENTRENCHED REQUIREMENTS OF A "TRIAL BY JURY"

6. The requirements of a "trial by jury" must be understood against the role of s 80 in Ch III of the Constitution.[2]

7. Section 80 is directed at trials – it prescribes a "mode of criminal trial procedure known as trial by jury" for Commonwealth offences tried on indictment.[3]

8. Section 80 performs a structural role,[4] by identifying the jury as an essential component of these trials.[5] It qualifies the States' otherwise exclusive power to determine the constitution of State courts,[6] in that the States must maintain at least some courts that are capable of exercising criminal jurisdiction in the way required by s 80.[7] Moreover, s 80 removes any argument against the involvement of laypersons in the exercise of federal judicial power.[8]

9. Section 80 also identifies the jurisdiction in which Commonwealth indictable offences must be tried – every trial on indictment of a Commonwealth offence "shall be held in the State where the offence was committed" (or in

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2 James Stellios, 'The Constitutional Jury – "A Bulwark of Liberty"?' (2005) 27 *Sydney Law Review* 113 at 133; see also *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [54] (Gaudron, Gummow and Hayne JJ).

3 *Brownlee* (2001) 207 CLR 278 at 284 [4] (Gleeson CJ and McHugh J); see also *Brown v The Queen* (1986) 161 CLR 171 at 214 (Dawson J); *R v JS* (2007) 175 A Crim R 108 at 140 [181] (Mason P).

4 *Brown* (1986) 160 CLR 171 at 214 (Dawson J); see also 208: Ch III is concerned with the organisation of the federal judicature.

In this respect, s 80 is like Art III, s 2 of the United States Constitution, which refers to the jury "in a structural or organizational sense": ibid at 210. Section 80 is modelled on Art III, s 2: *Cheatle v The Queen* (1993) 177 CLR 541 at 555 (the Court); see also *R v Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 CLR 556 at 581 (Dixon and Evatt JJ, dissenting in the result).

5 See generally Stellios, "The Constitutional Jury" (2005) 27 *Sydney Law Review* 113 at 135-137.

6 The Commonwealth cannot affect or alter the constitution or organisation of a State court: see eg *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 75 [61] (Gummow, Hayne and Crennan JJ): *Le Mesurier v Connor* (1929) 42 CLR 481 at 495-496 (Knox CJ, Rich and Dixon JJ). The presence of a jury goes to the constitution of a court: *Brown* (1986) 160 CLR 171 at 199 (Brennan J), 214 (Dawson J).

7 Stellios, "The Constitutional Jury" (2005) 27 *Sydney Law Review* 113 at 136. On whether the Commonwealth could confer jurisdiction to try Commonwealth offences on indictment on State courts that do not sit with a jury, see *Brown* (1986) 160 CLR 171 at 199 (Brennan J), 218-219 (Dawson J); cf *Cheng v The Queen* (2000) 203 CLR 248 at 263 [30] (Gleeson CJ, Gummow and Hayne JJ).

8 This is important with federal courts. Section 71 of the Constitution refers to federal judicial power being conferred on "courts", which (in the case of federal courts) are comprised of judges.

such place prescribed by the Parliament if the offence was not committed within any State).

10. The structural role of s 80 means that it says little about *how* trials by jury are to be conducted. As Mason P observed in *R v JS*:[9]

> [s 80] says nothing about how often that function [of trial by jury] may be performed, or the circumstances in which a new trial may be ordered. It is also silent as to the status of a verdict.

11. Accordingly, although s 80 of the Constitution entrenches the "essential characteristics" of a trial by jury,[10] that does not mean that s 80 of the Constitution entrenches **all** criminal trial procedure that occurs in jury trials.[11]

12. Important safeguards in criminal cases (such as the presumption of innocence) apply equally to summary prosecutions.[12] To attempt to import these requirements into s 80 of the Constitution would create curious anomalies. Section 80 could only "constitutionalise" these requirements for trials on indictment. However, s 80 does not restrict the Commonwealth Parliament's ability to determine whether an offence is triable on indictment[13] and, if so, in what circumstances. Since 1926, the *Crimes Act 1914* (Cth) has provided for certain Commonwealth indictable offences to be tried summarily in specified situations.[14] This was specifically in the contemplation of the

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9 (2007) 175 A Crim R 108 at 140 [181]. See also Clifford L Pannam, "Trial by Jury and section 80 of the Australian Constitution" (1968) 6 *Sydney Law Review* 1 at 21: "All [s 80] guarantees is a right to a trial by jury. It has nothing to say about any other aspect of a trial on indictment."

10 See eg *Ng v The Queen* (2003) 217 CLR 521 at 526 [9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

11 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 (O'Connor J): the Commonwealth can "modif[y] any principle of British criminal law, no matter how fundamental, so long as the modification is not forbidden expressly or impliedly by the Constitution".

12 See eg *AK v Western Australia* (2008) 232 CLR 438 at 478 [104] (Heydon J). Thus the fact that a misdirection as to credit arguably might affect the presumption of innocence does not establish a breach of s 80: cf Hargraves submissions, para 46.

The Commonwealth can modify these safeguards, as part of its power to modify the laws of evidence and procedure: see para 14 below.

13 See eg *Kingswell v The Queen* (1985) 159 CLR 264; *Cheng* (2000) 203 CLR 248.

14 Provision was first made by the former s 12A of the *Crimes Act*, added by the *Crimes Act 1926* (Cth), s 10. Section 12A was confined to offences against that Act, and required either the consent of the accused (s 12A(1)) or a request by the prosecutor in the case of offences that related to property of not more than £50 (s 12A(2)). In 1987, s 11 of the *Crimes Legislation*

framers,[15] and the High Court has recognised that the capacity to try indictable offences summarily can contribute on occasion to the more effective administration of justice.[16]

13. It is the separation of judicial power effected by Ch III as a whole which means that:

13.1. criminal guilt for Commonwealth offences can only be determined by courts (specifically, the courts referred to in s 71 of the Constitution);[17] and

13.2. a Commonwealth law (which includes a State law picked up by s 68 of the Judiciary Act)[18] cannot require a court to exercise federal judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.[19]

14. The Commonwealth Parliament has undoubted power to alter the rules of evidence in federal criminal cases,[20] and to alter where the balance of public interest lies.[21] The same is true of criminal practice generally. It is most

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Amendment Act 1987 (Cth) added s 4J to the *Crimes Act*, which extended this facility to all Commonwealth indictable offences that have a penalty not exceeding 10 years imprisonment, with the consent of the prosecutor and the defendant.

15 See Official Records of the Debates of the Australasian Federal Convention, Vol II, Melbourne, 4 March 1898 at 1895 (Mr Douglas).

16 *Cheng* (2000) 203 CLR 248 at 270 [57] (Gleeson CJ, Gummow and Hayne JJ).

17 See eg *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ, with Mason CJ agreeing on this point).

18 Cf *R v LK* (2010) 241 CLR 177 at 193 [25] (French CJ): in asking whether a State law can validly be picked up by s 68 of the Judiciary Act, the issue is whether an equivalent Commonwealth law would be contrary to s 80 of the Constitution.

19 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ, with Mason CJ agreeing on this point).

20 *Nicholas v The Queen* (1998) 193 CLR 173 at 189 [23] (Brennan CJ), 203 [55] (Toohey J), 273 [235] (Hayne J); see also 232 [143], 234-235 [152] (Gummow J). For example, the Commonwealth may enact "reverse onus" provisions: see eg ibid at 190 [24] (Brennan CJ), 203 [55] (Toohey J), 234-236 [152]-[156] (Gummow J); see also 225 [123] (McHugh J); see also *Milicevic v Campbell* (1975) 132 CLR 307 at 316-317 (Gibbs J), 318-319 (Mason J), 321 (Jacobs J).

Moreover, s 80 says nothing about the validity of a provision abrogating the privilege against self-incrimination: *Huddart, Parker* (1909) 8 CLR 330 at 358 (Griffith CJ), 375 (O'Connor J), 385-386 (Isaacs J) see also *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298-299 (Gibbs CJ, with Mason, Wilson and Dawson JJ agreeing on this point); see also 314 (Brennan J).

21 *Nicholas* (1998) 193 CLR 173 at 197 [37] (Brennan CJ), 203 [55] (Toohey J), 239 [164], [167] (Gummow J), 275-276 [241]-[242] (Hayne J); see also 211 [82] (Gaudron J).

unlikely that s 80 would entrench exactly the sort of inflexibility that these doctrines avoid – the ordinary rules of evidence and procedure are instruments of investigation, not ends in themselves.[22]

15. Pursuant to s 77(iii) of the Constitution and s 68 of the Judiciary Act, Commonwealth criminal offences, including indictable offences, are largely tried in State courts.[23] This reflects a permissible legislative choice that the trial of Commonwealth criminal offences in each State should be placed on the same footing as that of State offences.[24] It would undermine this choice if s 80 entrenched large parts of criminal procedure, because this would create a divergence between the permitted methods of trying Commonwealth and State offences.

16. For these reasons, s 80 only entrenches the "essential characteristics" of a trial by jury **that distinguish a jury trial from other sorts of trials.** Undoubtedly, there are other characteristics of trials on indictment that have constitutional status – for example, that the court must be, and be seen to be, impartial[25] – but these are not entrenched by s 80.

17. It may be accepted that a distinguishing characteristic of "trial by jury" is that the jury is the "constitutional arbiter of fact".[26] O'Connor J described a "trial by jury" in an early s 80 case as "the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in civil litigation or in a criminal process".[27]

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22 John H Wigmore, "New Trials for Erroneous Rulings on Evidence; A Practical Problem for American Justice" (1903) 3 *Columbia Law Review* 433 at 438.

23 See eg *R v Gee* (2003) 212 CLR 230 at 241 [7] (Gleeson CJ), 255 [63] (McHugh and Gummow JJ); Pannam, "Trial by Jury and section 80 of the Australian Constitution" (1968) 6 *Sydney Law Review* 1 at 15.

24 *Gee* (2003) 212 CLR 230 at 240-241 [6]-[7] (Gleeson CJ), [63]-[64] (McHugh and Gummow JJ); *R v Williams (No 2)* (1934) 50 CLR 551 at 560 (Dixon J).

25 Cf *Northern Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

26 *Hocking v Bell* (1945) 71 CLR 430 at 440 (Latham CJ, dissenting in the result), cited in *Weiss v The Queen* (2005) 224 CLR 300 at 315 [38] (the Court).

27 *Huddart, Parker* (1909) 8 CLR 330 at 375, cited with approval in cases including *Cheatle* (1993) 177 CLR 541 at 549 (the Court) and *R v LK* (2010) 241 CLR 177 at 198 [38] (French CJ). The statement provides "a useful starting point" for a consideration of the legal and historical context

18. That said, it would be wrong to suggest that there exists or has ever existed some hermetic division between the trial judge's functions relating to the law, and the jury's functions relating to the facts.[28] The trial judge could always direct that the jury acquit,[29] not to consider a particular defence,[30] or even in some situations to reach a verdict of guilty.[31] More generally, there could be no objection to a trial judge "weighing the evidence before [the jury] and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact".[32]

19. What is significant is that it is no part of the distinguishing characteristics of a "trial by jury" that the "guidance of [the] Judge" be free from legal error. Most errors of law (certainly those of which the appellants complain) do not concern matters that are distinctive to a jury trial, but could arise equally in summary proceedings as in a trial on indictment.

20. Accordingly, s 80 of the Constitution does not entrench a right to trial free from legal error. While it would be necessary to look at the nature of the error (if error is found), to determine whether the error has the effect of depriving the accused of an essential feature of trial by jury, only in the most exceptional circumstances would a legal error have that effect.

21. Whether, and if so in what circumstances, legal or other error ought result in the setting aside of a conviction for a Commonwealth offence is accommodated within the scheme of Ch III not by some implicit limitation in

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in which the words "trial ... by jury" appeared in the Constitution: *Brownlee* (2001) 207 CLR 278 at 287 [16] (Gleeson CJ and McHugh J).

28 The Hon Sir Patrick Devlin, *Trial by Jury: The Hamlyn Lectures (8th series)*, (1956) at 5; see also 61-62, 119-120.

29 *R v LK* (2010) 241 CLR 177 at 200 [40] (French CJ, with Gummow, Hayne, Crennan, Kiefel and Bell JJ agreeing on this point: at 216 [88]).

30 *Braysich v The Queen* [2011] HCA 14 at [32] (French CJ, Crennan and Kiefel JJ); see also [101] (Bell J (dissenting), with Heydon J agreeing).

31 See *Yager v The Queen* (1977) 139 CLR 28 at 36 (Barwick CJ), 46 (Mason J), with Stephen J agreeing with both justices: at 40, discussed in *R v LK* (2010) 241 CLR 177 at 196 [30] (French CJ). *Yager* was applied in *R v Childs* [2007] SASC 195 at [19]-[27] (the Court).

32 *Cesan v The Queen* (2008) 236 CLR 358 at 390 [102] (Gummow J), quoting Sir Matthew Hale, *The History of the Common Law* (5th ed, 1794), Vol 2 at 147. On receipt of an ambiguous verdict, the trial judge could also draw the jury's attention more fully to certain evidence and invite them to reconsider their verdict: *R v Crisp* (1912) 7 Cr App R 173 at 175.

the requirement for "trial by jury" in s 80 where the conviction is entered in a trial on indictment but by the capacity of the Commonwealth Parliament to provide for appeal or review of those convictions through the conferral of jurisdiction under s 76(ii) or s 77(i) or (iii) of the Constitution subject to the entrenched appellate jurisdiction of the High Court under s 73 of the Constitution.

B. "TRIAL BY JURY" AND THE ROLE OF AN APPELLATE COURT

22. As pointed out in *R v Weaver*:[33]

> ... the decision of the Court of Criminal Appeal quashing a conviction and entering judgment and verdict of acquittal **is a determination of a Court of law, and not of a jury** ...

23. An appellate court does not "substitute" its decision for a verdict in quashing a conviction.

24. Much less does an appellate court "substitute" its decision for a verdict in determining, in the application of the proviso, that a conviction (and thus the verdict) should stand.[34] Nor in so doing does the appellate court find the accused guilty of a different offence from that which he or she was convicted of at trial.[35]

25. It is true that since *Weiss v The Queen*[36] an appellate court, in applying the proviso, will often determine for itself, on the basis of the record of trial, whether the accused was proved beyond reasonable doubt to be guilty of the offence. In making that determination, the appellate court is performing a task of the same nature as when it determines whether a jury's verdict was

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33 (1931) 45 CLR 321 at 333 (Gavan Duffy CJ, Starke and McTiernan JJ; see also 356 (Evatt J).

34 Wigmore, "New Trials for Erroneous Rulings on Evidence" (1903) 3 *Columbia Law Review* 433 at 438.

35 It may be that s 80 would prevent an appellate court from dismissing an appeal on the grounds that the evidence established that the accused was guilty of a different offence from which he or she was charged: *Spies v The Queen* (2000) 201 CLR 603 at 620-621 [47] (Gaudron, McHugh, Gummow and Hayne JJ). Cf Qld Criminal Code, s 668F(2), which is based on s 5(2) of the 1907 English Act.

36 (2005) 224 CLR 300 at 316 [41], 317 [44] (the Court).

unreasonable or cannot be supported having regard to the evidence.[37] If determining whether a verdict is unreasonable or cannot be supported is consistent with the requirements of s 80 of the Constitution (and the appellants do not suggest that it is not), then the application of the proviso must also be consistent with those requirements.[38]

26. Moreover, an appellate court will not apply the proviso if the trial was "fundamentally flawed", or if there is "such a departure from the essential requirements of the law that it goes to the root of the proceedings".[39] Although this language of "fundamental flaw" cannot be treated as if it were an exception grafted onto the language of the proviso,[40] nevertheless:

> ... [t]he graver the departure from the requirements of a fair trial, the harder it is for the appellate court to conclude that guilt is established beyond reasonable doubt. It is harder because the relevant premise for the debate about the proviso's application is that the processes designed to allow a fair assessment of the issues have not been followed at trial.[41]

27. The notion of "fundamental flaw" is broader than, but includes, the essential features of a jury trial. A court cannot apply the proviso if there has been a radical departure from the requirements of the trial. Any departure from the essential features of a trial by jury within s 80 would necessarily involve a radical departure from the requirements of a trial going to the root of the proceedings.

C. HISTORICAL POSITION

28. Great caution is required before accepting a proposition that the Constitution preserves any "common law" position at 1901.[42] That is particularly so in

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37 *Weiss* (2005) 224 CLR 300 at 316 [41] (the Court).

38 See Wigmore, "New Trials for Erroneous Rulings on Evidence" (1903) 3 *Columbia Law Review* 433 at 438-439.

39 See *Weiss* (2005) 224 CLR 300 at 317 [46] (the Court), citing *Wilde v The Queen* (1988) 164 CLR 365 at 373 (Mason, Brennan and Deane JJ).

40 *AK v Western Australia* (2008) 232 CLR 438 at 455-456 [54] (Gummow and Hayne JJ).

41 *Evans v The Queen* (2007) 235 CLR 521 at 534 [42] (Gummow and Hayne JJ).

42 See *Nicholas* (1998) 193 CLR 173 at 232 [143] (Gummow J).

respect of criminal appeals and criminal procedure.[43] Appeals are the creation of statute, not the common law.[44] And the common law criminal procedure did not exist even then without significant statutory overlay.

29. The Constitution does not confine the legislative power of the Commonwealth (here under s 76(ii), s 77(iii) and s 51(xxxix) of the Constitution through picking up State laws under s 68 of the Judiciary Act) to the legislative provisions about criminal appeals that existed in 1901. To the contrary, the High Court has long recognised that the ambulatory operation of s 68 of the Judiciary Act enables it to pick up novel appellate jurisdiction created under State law.[45]

*(a) **Limited procedures to challenge criminal convictions at 1901***

30. Although the methods available to challenge a conviction imposed following a trial on indictment that existed at 1901 do not control the meaning of s 80 of the Constitution,[46] they are relevant, and demonstrate the error in the appellants' arguments. Those methods cannot be treated as indicative of some coherent conception of the fundamental nature of a trial by jury. They were, and were recognised at the time to be, a procedural pastiche crying out for legislative reform.

31. In England at 1901, the methods available to challenge a conviction or sentence imposed following a criminal trial were: (a) a writ of error, (b) a motion in arrest of judgment, (c) an order made on a motion for a new trial, and (d) (since 1848) through the referral of a question of law to the Court for

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43 See *Storey v Lane* (1981) 147 CLR 549 at 558 (Gibbs CJ, with Mason, Wilson and Brennan JJ agreeing).

44 *Conway v The Queen* (2002) 209 CLR 203 at 208 [6] (Gaudron A-CJ, McHugh, Hayne and Callinan JJ); *Lacey v Attorney-General (Qld)* (2011) 275 ALR 646 at 649 [8] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

45 *R v LK* (2010) 241 CLR 177 at 189 [16] (French CJ, with Gummow, Hayne, Crennan, Kiefel and Bell JJ agreeing on this point).

46 By analogy, the essential characteristics of a jury are determined by reference to the purposes and objectives of a jury: *Brownlee* (2001) 207 CLR 278 at 298 [54] (Gaudron, Gummow and Hayne JJ); see also 288 [21] (Gleeson CJ and McHugh J), adopting a "functional approach" to meaning of a "jury".

Crown Cases Reserved.[47] All of these procedures were "far from satisfactory" and "compare unfavourably with the rights that the common-form criminal appeal statute now gives to convicted persons".[48]

32. A **writ of error** was only available for errors on the face of the record, which meant it could not be used to challenge the legal rulings or directions of the trial judge.[49] Similarly, the remedy for **arrest of judgment** could only succeed for errors that appeared on the face of the record.[50]

33. A motion for a **new trial** could only be made for a conviction by the King's Court (or for a case that was removed into that Court before verdict), and an application had to be made within four days of the judgment with the defendant present in court.[51] Moreover, there were some illogicalities in the rules for when a new trial would be ordered.[52] Not every misdirection was grounds for a new trial.[53] A new trial could not be ordered in the case of a felony, at least when the irregularity was not grounds for treating the verdict as a nullity.[54] In that situation, the conviction would stand – the remedy to prevent a failure of justice was an application to the authorities for the sentence to be commuted.[55]

34. The **Crown Cases Reserved** procedure enabled that court to determine questions of law that arose at any trial (including a criminal trial). However, the Court could not consider questions of fact, and the decision to refer

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47 *Conway* (2002) 209 CLR 203 at 208-209 [7] (Gaudron A-CJ, McHugh, Hayne and Callinan JJ). See generally Sir James Stephen, *A History of the Criminal Law of England* (1883) Vol 1, Ch X; *Report of the Royal Commission appointed to consider the Law relating to Indictable Offences* (1879) at 37-38; *Archbold's Pleading, Evidence, & Practice in Criminal Cases* (22nd ed 1900), Ch VIII.

48 *Conway* (2002) 209 CLR 203 at 209 [7] (Gaudron A-CJ, McHugh, Hayne and Callinan JJ).

49 *Conway* (2002) 209 CLR 203 at 209 [8], [9]; Stephen, *A History of the Criminal Law of England* (1883) Vol 1, 308-309.

50 *Conway* (2002) 209 CLR 203 at 211 [13].

51 *Conway* (2002) 209 CLR 203 at 210 [11].

52 *Conway* (2002) 209 CLR 203 at 211 [12].

53 See R B Cooke, "Venire De Novo" (1955) 71 *Law Quarterly Review* 100 at 108-109.

54 See *R v Murphy* (1869) 16 ER 693 at 702. See also *R v Bertrand* (1867) 16 ER 391 at 398-399.

55 See *R v Murphy* (1869) 16 ER 693 at 702.

questions was absolutely in the discretion of the trial judge.[56] There were other limitations on this procedure – first, the Court could only determine the questions reserved (even if other points in favour of the accused appeared on the face of the case);[57] second, the Court could not determine questions of mere practice (such as whether the case was properly left to the jury on the unconfirmed testimony of an accomplice);[58] third, the Court was confined to the facts that were in the case stated.[59] Moreover, it was doubtful whether the Court had any power to order a new trial.[60]

35. The English model of trial by jury was introduced to the Australian colonies in 1839.[61] For the most part, convictions were challenged in ways that followed those used in England.[62] In particular, the colonial provisions for reserving questions of law (except New South Wales and Queensland) expressly stated that this process was in the discretion of the trial judge,[63] and thus contained the same limit as the comparable English provisions.[64]

36. Accordingly, at 1901, the processes in England and the Australian colonies for challenging decisions in criminal cases "[fell] short of what is now

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56 *Conway* (2002) 209 CLR 203 at 210 [10], citing Stephen, *A History of the Criminal Law of England* (1883) Vol 1, at 312.

57 *Archbold's Pleading, Evidence, & Practice in Criminal Cases* (22nd ed 1900) at 250. Moreover, only points in favour of the accused could be referred – the trial judge could not obtain guidance on finely-balanced questions where the judge had ruled in favour of the accused: *Report of the Royal Commission appointed to consider the Law relating to Indictable Offences* (1879) at 38.

58 *Archbold's Pleading, Evidence, & Practice in Criminal Cases* (22nd ed 1900) at 250.

59 *Archbold's Pleading, Evidence, & Practice in Criminal Cases* (22nd ed 1900) at 251. There was provision for the Court to return the case for amendment; however, this was only done when the case was imperfectly stated and not on the mere application of counsel: ibid.

60 *Conway* (2002) 209 CLR 203 at 210 [11]; see also Cooke, "Venire De Novo" (1955) 71 *Law Quarterly Review* 100 at 102-103.

61 D O'Connor, "Criminal Appeals in Australia Before 1912" (1983) 7 *Criminal Law Journal* 262 at 262. See also the Hon HV Evatt, "The Jury System in Australia" (1936) 10 *Australian Law Journal* 49 at 52-53.

62 For New South Wales Courts, see O'Connor, "Criminal Appeals in Australia Before 1912" (1983) 7 *Criminal Law Journal* 262 at 262.

63 See *Crimes Act 1890* (Vic), s 481; *Criminal Law Consolidation Act 1876* (SA), s 397; *An Act to amend the Criminal Law Procedure 1886* (WA), s 1; *Criminal Law Procedure Act 1881* (Tas), s 7.

By contrast, the *Criminal Law Amendment Act 1883* (NSW), s 422 conferred a right on counsel for the accused to ask for a question to be reserved. The *Criminal Code 1899* (Qld), s 668 conferred a right on counsel for the accused to apply **before verdict** for questions to be reserved.

64 See footnote 56 above.

understood as an appeal from conviction or sentence".[65] These limits on the rights of challenge constrained the ability of an accused to overturn a wrongful conviction on a matter of law.[66] Moreover, at 1901 there was very limited provision for an accused to challenge the decision of a jury on questions of fact.[67]

37. In Australia, there was also the possibility of challenging a conviction by appealing, by leave, to the Privy Council (including, from 1844, an appeal directly from the trial court[68]). However, in criminal appeals and applications for leave to appeal against criminal convictions, the Judicial Committee refused to allow the appeal or grant the application unless it was satisfied that the legal error, whatever it was, had brought about a miscarriage of justice.[69] The approach of the Privy Council was thus analogous to the proviso.

(b) Content of criminal appeal rights was matter of lively controversy at 1901

38. The latter part of the 19th century brought widespread recognition of the need for legislative reform of appeal rights in criminal cases. In 1879, a Royal Commission in England reported the law relating to indictable offences, and (among other things) recommended changes to the appeal rights in criminal cases.[70] In 1892, the Council of Judges of the Supreme Court of England and Wales recommended to the Lord Chancellor that a Court of Criminal Appeal be established with jurisdiction to entertain appeals against sentence and to

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65 *Gee* (2003) 212 CLR 230 at 252 [55] (McHugh and Gummow JJ). For example, there were no State Courts of Criminal Appeal in 1901: id.

66 Cf *R v JS* (2007) 175 A Crim R 108 at 140 [183] (Mason P).

67 Stephen, *A History of the Criminal Law of England* (1883) Vol 1, at 312; Sir William Holdsworth, *A History of English Law* (4th ed 1927) Vol 1 at 217.

68 See the *Judicial Committee Act 1844* (7 & 8 Vict, c 69), referred to in *R v Snow* (1915) 20 CLR 315 at 347-348 (Isaacs J).

69 *Conway* (2002) 209 CLR 203 at 217 [31] (Gaudron A-CJ), McHugh, Hayne and Callinan JJ); see *Ibrahim v The King* [1914] AC 599 at 615.

70 *Report of the Royal Commission appointed to consider the Law relating to Indictable Offences* (1879) at 38-40. The proposed appeal rights are set out at 194-196.

assist the Home Secretary, at his request, in reconsidering sentences or convictions.[71]

39. Australian colonies had also modified the rules relating to criminal appeals during the 19th century. For example:

39.1. a provision enacted in Victoria in 1852 conferred express power on the Supreme Court of Victoria to order a new trial after determining a question of law reserved for it;[72] and

39.2. in New South Wales, the *Criminal Law (Amendment) Act 1883* (NSW) (46 Vict No 17) conferred power on the NSW Supreme Court to determine questions reserved from a trial, but provided in s 423 that "no conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice".[73]

40. Criminal appeal rights were also the subject of legislative amendment in the late 19th century and early 20th century in Canada[74] and the United States.[75]

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71 *Lacey* (2011) 275 ALR 646 at 649 [8] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases* (1894) at 7.

72 *Weiss* (2005) 224 CLR 300 at 309 [21] (the Court), referring to *An Act for Improving the Administration of Criminal Justice* (Vic) (16 Vict No 7), s 28. By contrast, there was some doubt whether the English Court for Crown Cases Reserved had power to order a new trial: *Conway* (2002) 209 CLR 203 at 210 [11] (Gaudron A-CJ, McHugh, Hayne and Callinan JJ).

73 See *Weiss* (2005) 224 CLR 300 at 310-311 [25] (the Court). However, despite s 423, an appeal would be allowed if evidence had been improperly admitted, unless it was impossible to suppose that this evidence had any effect on the verdict: *Makin v Attorney-General (NSW)* [1894] AC 57, analysed in *Weiss* at 311-312 [28]-[29].

74 Section 743(3) of the *Criminal Code 1892* (Can) (later renumbered s 1014) provided that either the accused or the Crown could apply during the trial to reserve a question of law for the consideration of the Court of Appeal. If the question was reserved, a case would be stated for the Court of Appeal under s 743(6). However, if the application were refused, the applicant could move the Court of Appeal for leave to appeal and (if leave were granted) that Court would consider the question as if it had been reserved. This provision permitted an appeal against an acquittal: *R v Fraser* (1913) 30 Ont LR 598, cited in *R v Snow* (1915) 20 CLR 315 at 362.

75 In March 1907, Congress enacted the Criminal Appeals Act (34 Stat 1246) providing for writs of errors in certain instances in criminal cases (see *R v Snow* (1915) 20 CLR 315 at 369 (Powers J)). Attorneys-General had recommended appeal rights for the government from 1892: see *United States v Sisson* 399 US 267 (1970) at 293. See more generally on government appeal rights in criminal cases, *Carroll v United States* 354 US 394 (1957) at 400-403.

41. For the Constitution as at 1901 to have had the effect of impeding legislative reform of the grounds on which appeals could be brought to intermediate appellate courts, and from those courts to the High Court, would have run inexplicably counter to this legislative trend.[76] Indeed, the appellants' argument is not just that s 80 impedes legislative reform (by preventing the application of the proviso), but that s 80 also confers a far greater right of challenge than existed at 1901 (by creating a constitutional right to have a verdict set aside in any case where there is a legal error in a jury trial). The appellants therefore characterise s 80 as an instrument of radical reform of criminal appeal rights. The true position, as explained above, is that s 80 performs a structural role and has nothing to say on these matters.

42. It is true that, in those cases where proceedings were brought under the procedure for Crown Cases Reserved, the appellate court was constrained to order a new trial whenever any legal error appeared, by reason of the "Exchequer rule".[77] However, at 1901, the Exchequer rule did not represent long-standing practice. In civil cases it had emerged in 1835 and had been abolished by legislation in 1873.[78] Its first application in a criminal case appears to have been somewhat later. By the time it had become clearly established in 1887,[79] significant changes to the rights of appeal in criminal cases had already been proposed in 1879,[80] and legislation introducing new appeal rights was introduced in England in 1907.[81] And even where it applied, given the limitations on rights of challenge set out in Part C(a)

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76 At the very least, the Commonwealth's legislative powers would extend to resolving cross-currents and uncertainties that existed in the common law and statute relating to criminal procedure at the time of federation: See *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479 at 501 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (concerning "patents of invention" in s 51(xviii)); *Singh* (2004) 222 CLR 322 at 391 [176]-[177] (Gummow, Hayne and Heydon JJ) (concerning "alien" in s 51(xix)).

77 See *Weiss* (2005) 224 CLR 300 at 306-308 [13]-[17] (the Court).

78 *Weiss* (2005) 224 CLR 300 at 307 [14] (the Court).

79 The application of the Exchequer rule to criminal cases was clearly established in *R v Gibson* (1887) 18 QBD 537 at 541 (Lord Coleridge CJ). However, the rule may explain the earlier decision in *R v Fuidge* (1864) 169 ER 1443 at 1445 (Cockburn CJ). On the historical development of the Exchequer rule, see *Weiss* (2005) 224 CLR 300 at 306-307 [13]-[16] (the Court). Properly understood, it was probably not a "rule" in any event: *Weiss* at 306-307 [13], 308 [17].

80 See para 38 above.

81 The *Criminal Appeal Act 1907* (UK).

above, the Exchequer rule did **not** have the effect that an accused could always have a conviction overturned if there had been an error at the trial.[82]

43. Equally, the fact that some statutory precursors to the proviso had been given a relatively narrow interpretation does not reveal any fundamental difficulty with applying the proviso according to its terms.[83] Some early English decisions applying the proviso upheld a conviction even where an error at trial concerned an incorrect direction as to the facts, or a legal error relevant to credit.[84]

44. As stated in *Conway v The Queen*,[85] "it is hardly conducive to the proper administration of criminal justice to set aside a conviction where there has been no miscarriage of justice."

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D. UNITED STATES AUTHORITY

45. Section 80 is based on the structural provision in Art III, s 2 of the United States Constitution,[86] not the 6th Amendment. The 6th Amendment is an individual rights provision,[87] and its content cannot readily be disentangled from the surrounding rights provisions that have no counterpart in the Australian Constitution, including the guarantee of due process and the prohibition against double jeopardy in the 5th Amendment.[88]

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82 *Bray v Ford* [1896] AC 44 (cited in Hargraves submissions, paras 39-40) did **not** require a new trial in every case where there had been a misdirection to the jury. For example, a misdirection to the jury as to the amount of damages did not require a new trial if the appellate court was satisfied that the misdirection would not extend beyond a particular amount, and the plaintiff offered to redress any injustice by reducing the amount of the verdict: *Lionel Barber & Co v Deutsche Bank (Berlin) London Agency* [1919] AC 304 at 315-316; see also 314-315.

83 Contra Hargraves submissions, para 51.

84 See eg *R v Cohen and Bateman* (1909) 2 Crim App R 197 at 208, 210 (error of fact in summing up); *R v Smallman* (1914) 10 Cr App R 1 at 3-4 (judge had improperly stopped cross-examination of a witness by the accused's counsel); *R v Beecham* [1921] 3 KB 464 at 470, 472 (judge had improperly permitted cross-examination as to previous convictions for dangerous driving).

85 (2002) 209 CLR 203 at 208 [6] (Gaudron A-CJ, McHugh, Hayne and Callinan JJ).

86 *Cheatle* (1993) 177 CLR 541 at 555 (the Court); see also *Lowenstein* (1938) 59 CLR 556 at 581 (Dixon and Evatt JJ, dissenting in the result).

87 The 6th Amendment refers to the "right" to a trial by jury; see *Brown* (1986) 160 CLR 171 at 195 (Brennan J), 204 (Deane J), 210 (Dawson J).

88 Take, for example, the beyond reasonable doubt requirement. In *Sullivan v Louisiana* 508 US 275 (1993), the Supreme Court held that the criminal standard of proof derives from the 5th amendment right to due process more than the 6th amendment right to a trial by jury, although the

46. Those huge contextual differences mean that Mr Hargraves can derive no real assistance from the proposition in the dissenting judgment of Scalia J in *Neder v United States*[89] that a trial by jury requires that a jury determine that all elements were proved. It should not, in any event, be ignored that the majority saw that case as coming within the "harmless error" rule[90] under which a breach of the Constitution will not necessarily lead to the quashing of the conviction, if the appellate court is satisfied beyond reasonable doubt that the error did not contribute to the verdict. Harmless errors have been held to include breaches of many constitutional requirements including the 6th Amendment.[91] It is true that the harmless error doctrine did not exist at 1901, and therefore does not rise to the level of an accepted interpretation that the framers must have intended be given to s 80 of the Constitution.[92] That does not make it wholly irrelevant.[93] Its relevance lies in the fact that in the United States, where the Constitution confers an individual right to a jury, an express right to due process and an express protection against double jeopardy, those express constitutional rights do not guarantee a criminal

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rights are related: at 277-278; but cf *United States v Gonzalez* 548 US 140 (2006) at 149, where the Supreme Court referred to "the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction", citing *Sullivan*.

89 527 US 1 (1999) at 27; Hargraves submissions, para 59.

90 The harmless error rule is contained in statute (first enacted in 1919, now in 28 USCA s 2111). This statutory rule can extend to errors consisting of non-compliance with constitutional requirements: *Chapman v California* 386 US 18 (1967).

91 The harmless error rule only applies to "trial errors" and not "structural errors": *Arizona v Fulminante* 499 US 279 (1991). Trial errors are those "which may ... be quantitatively assessed in the context of the other evidence" (*Fulminante* at 307-308), while structural errors are those which "affec[t] the framework within which the trial proceeds, rather than simply an error in the trial process itself" (at 310).

To date, the only constitutional defects that are "structural errors" (that **cannot** be excused under the harmless error rule) are: bias of the trial judge; racial discrimination in the selection of the grand jury; denial of the right to pro se representation; denial of the right to counsel and counsel of one's choosing, denial of the right to a public trial; and defective reasonable doubt instructions: see Roger A Fairfax, "Harmless Constitutional Error and the Institutional Significance of the Jury" (2008) 76 *Fordham Law Review* 2027 at 2029 (fn 3).

Many of these "structural errors" reflect the express rights contained in the United States Constitution that are not contained in the Australian constitution: for example, denial of a right to counsel (see *Gideon v Wainwright* 372 US 335 (1963); *Fulminante* 499 US 279 (1991) at 310).

92 To adopt the description of Gibbs CJ (dissenting in the result) of the rule against "waiver" in *Brown* (1986) 160 CLR 171 at 181. See Hargraves submissions, para 58.

93 See Adrienne Stone, "Comparativism in Constitutional Interpretation" [2009] *New Zealand Law Review* 45 at 60. For two recent examples of this sort of use of foreign precedents, see *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 177-178 [13]-[16] (Gleeson CJ), 203-204 [100] (Gummow, Kirby and Crennan JJ); *Austin v The Commonwealth* (2003) 215 CLR 185 at 252-254 [132]-[135] (Gaudron, Gummow and Hayne JJ).

defendant a trial free from error.[94] That tends against treating s 80 of the Constitution (which is a structural provision, and not an individual right) as having a more extreme operation.

47. The fact that the Exchequer rule applied in the United States at 1901 is also of limited relevance. That rule was subject to severe criticism in the early 20th century (by John Henry Wigmore, Roscoe Pound and William Taft, among others),[95] and a federal "harmless error" statute was enacted in 1919 after thorough consideration of various proposals by successive Congresses from the 60th to the 65th (from 1907 to 1919).[96]

48. Finally, cases on the "re-examination clause" in the 7th Amendment are of no relevance, as the 7th Amendment relates only to civil trials and there is no comparable provision in the Australian Constitution.[97]

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94 See *Delaware v Van Arsdall* 475 US 673 (1986) at 681: "[t]he Constitution entitles a criminal defendant to a fair trial, not a perfect one".

95 See eg Wigmore, "New Trials for Erroneous Rulings on Evidence; A Practical Problem for American Justice" (1903) 3 *Columbia Law Review* 433 at 439: the results of the Exchequer rule are "lamentable".

See generally Roger A Fairfax Jr, "A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule" (2009) 93 *Marquette Law Review* 433 at 437-441.

96 See eg *Kotteakos v United States* 328 US 750 at 758-759.

97 See eg *R v LK* (2010) 241 CLR 177 at 198 [34] (French CJ); *R v JS* (2007) 175 A Crim R 108 at 141 [188] (Mason P); see also *Cheatle* (1993) 177 CLR 541 at 556 (the Court). Cf Hargraves submissions, paras 52-56.