IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B26 and 27 of 2011

BETWEEN: DALE CHRISTOPHER HANDLEN

Appellant

and

THE QUEEN

Respondent

and

DENNIS PAUL PADDISON

Appellant

and

THE QUEEN

Respondent

ANNOTATED APPELLANTS' REPLY

PART I

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

PART II

Function of s 80 of the Constitution

2. The Commonwealth Attorney-General contends that s 80 should be given a structural role and that virtually all legal errors in the course of a jury trial will not affect whether there has been trial by jury.[1] He contends that s 80 'only entrenches the

[1] Submissions of the Attorney-General of the Commonwealth in *Hargraves v The Queen*, para 20 ('Cth Attorney-General's *Hargraves* submissions').

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"essential characteristics" of a trial by jury that distinguish a jury trial from other sorts of trials'.[2]

3. These submissions should be rejected.

4. Firstly, the authorities do not suggest that s 80 has the limited purpose for which the Attorney-General contends. In *Brownlee v The Queen* ('*Brownlee*'), Gleeson CJ and McHugh J accepted that the purpose of trial by jury under s 80 was 'to prevent oppression by the Government'.[3] Their Honours quoted approvingly from the judgment of the Supreme Court of the United States in *Williams v Florida* ('*Williams*').[4] The passage from which their Honours quoted relevantly states:[5]

> *"The purpose of the jury trial, as we noted in Duncan, is to prevent oppression by the Government.*
>
> *Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.*
>
> *Duncan v. Louisiana, supra, at 156. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."*

5. In *Ng v The Queen* ('*Ng*'), Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ stated that the essential features of a trial by jury were to be 'discerned with regard to the purpose which s 80 was intended to serve and to the constant evolution, before and since Federation, of the characteristics and incidents of jury trial'.[6] Their Honours cited the passages in *Brownlee* in which Gleeson CJ and McHugh J had quoted from *Williams*.

6. The purpose of trial by jury under s 80 identified in *Brownlee* and *Ng*—to prevent oppression by the government—accords with the Court's decision in *Brown v The Queen*.[7] The majority in that case held that the constitutional requirement of trial by jury represented more than a privilege for the benefit of the accused and could not be waived; the minority thought otherwise. Yet all members of the Court accepted that s 80 contained a constitutional guarantee that protected the accused.[8] Justice Deane, for example, described the method of trial by jury in s 80 as 'an important constitutional guarantee against the arbitrary determination of guilt or innocence'.[9]

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2 Cth Attorney-General's *Hargraves* submissions, para 16; Submissions of the Attorney-General of the Commonwealth in *Handlen v The Queen*and *Paddison v The Queen*, para 5.1 ('Cth Attorney-General's *Handlen* submissions').

3 (2001) 207 CLR 278 at 288-289 [21].

4 (2001) 207 CLR 278 at 288-289 [21].

5 (1970) 399 US 78 at 100.

6 (2003) 217 CLR 521 at 526 [9].

7 (1986) 160 CLR 171. It also accords with statements in *Kingswell v The Queen* (1985) 159 CLR at 300-301 (Deane J) and *Fittock v The Queen* (2003) 217 CLR 508 at 516 [23] (McHugh J).

8 (1986) 160 CLR 171 at 197 (Brennan J) (referring to trial by jury as 'the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice'), 214 (Dawson J). See also *Cheng v The Queen* (2000) 203 CLR 248 at [268] (Callinan J).

9 (1986) 160 CLR 171 at 201-202.

His Honour referred to the decision of the Supreme Court of the United States in *Duncan v Lousiana*,[10] upon which that Court had relied in *Williams*.[11]

7. Chief Justice Gibbs, in dissent, expressly linked the purpose of s 80 to preventing oppression:[12]

> *"It must be inferred that the purpose of [section 80] was to protect the accused — in other words, to provide the accused with a "safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge": Duncan v. Louisiana (1968) 391 US 145, at p 156 [1968] USSC 152; (20 L.Ed.2d 491, at p 500)...Section 80 was modelled on Art.III, s 2(3) of the United States Constitution, which provides:*
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> > *"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."*
>
> *In Singer v United States, Warren CJ said of that provision that it "was clearly intended to protect the accused from oppression by the Government ..." This view was repeated in Duncan v Louisiana, at p 155. This also was the purpose of s.80."*

8. None of these authorities suggests that the purpose of s 80 is as limited as the Commonwealth Attorney-General suggests. They offer no support for the idea that s 80 only entrenches those features of 'trial by jury' that are not shared with any other criminal trials.

9. Secondly, the consequences of accepting the Commonwealth Attorney-General's submissions would be incongruous. It is well established that trial by jury is a 'method of trial in which laymen selected by lot ascertain under the guidance of Judge the truth in questions of fact arising either in civil litigation or in a criminal process'.[13] That the jury is supposed to follow the directions of a trial judge is clear.[14] Yet on the approach of the Commonwealth Attorney-General, these aspects of trial by jury become largely irrelevant. Because errors would affect the essential features of trial by jury 'only in the most exceptional circumstances',[15] there would presumably be a trial by jury under s 80 notwithstanding that the trial judge erred in directing the jury about the onus of proof in criminal proceedings, failed to put multiple elements of an offence to the jury or failed to provide any guidance to the jury but simply read out the offence provision. As summary proceedings never involve directions to a jury and as the purpose of trial by jury under s 80 is to prevent oppression of the accused, it would be remarkable to find that none of these errors affect the essential features of trial by jury. It would be even more remarkable to reach that conclusion in light of the willingness of courts in the United Kingdom, the

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10 (1968) 391 US 145 at 156.

11 (1970) 399 US 78 at 100.

12 (1986) 160 CLR 171 at 179 (emphasis added).

13 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 (O'Connor J); *Cheatle v The Queen* (1003) 177 CLR 541 at 549; *R v LK* (2010) 241 CLR 177 at 198 [38] (French CJ).

14 *Fittock v The Queen* (2003) 217 CLR 508 at 515 [21] (McHugh J).

15 Cth Attorney-General's *Hargraves* submissions', para 20.

Australian colonies and the United States in the late nineteenth century and early twentieth century to set aside verdicts on the basis of often minor errors.[16]

10. Thirdly, the submissions are based partly on the claim that s 80 should not be seen to entrench 'large parts of criminal procedure' because it would create a divergence between the permitted methods of trying Commonwealth and State offences. But this claim discounts the fact that there is already considerable divergence between the methods of trying State and Commonwealth offences. Because s 80 entrenches unanimity, for example, the Commonwealth cannot take advantage of existing facilities for majority verdicts under the laws of New South Wales, South Australia, Victoria and Tasmania.[17] Nor can it take advantage of the waiver of a jury trial under State laws[18] or of any possible reduction of juries to fewer than 10 persons (as has occurred in the United States).[19]

11. In any event, the appellant does not submit that 'large parts of criminal procedure' are entrenched by s 80. In the proceedings below, the judge directed the members of the jury, in accordance with the Crown case, to return a verdict on the charge of importation by reference to the concept of a 'joint criminal enterprise', a species of liability then unknown to the *Criminal Code* (JAB Vol 2 – 841). They did so (JAB Vol 2 – 881-885). To hold that there was no proper verdict on the charge in these circumstances would not entail that 'large parts of criminal procedure' are entrenched by s 80. It would simply mean that the jury should have been squarely asked to determine criminal liability on a basis that existed at the time as opposed to one that did not.

Evolution of jury trial

12. The respondent[20] contends that not every aspect of jury trials in the nineteenth century is an 'essential element' of trial by jury and that the 'essential features' of a jury trial do not include legally impeccable directions as to the elements of the offence.

13. It is true that not every aspect of jury trial as understood in the nineteenth century is an essential element of trial by jury within s 80 of the Constitution. The appellant has never suggested otherwise. *Brownlee* makes it clear, however, that one cannot determine the essential features of trial by jury without considering the purpose of s 80. The respondent and the interveners, with the exception of the Commonwealth Attorney-General, have not attempted to do this.

14. As explained earlier, the purpose of trial by jury within s 80 is to prevent oppression by the government. That emerges from *Brownlee* and *Ng*, and it is consistent with *Brown* and the American authorities. It would undermine the purpose of trial by jury

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16 See paras 16 to 20 below.

17 *Jury Act 1977* (NSW), s 55F; *Juries Act 1927* (SA),s 57; *Juries Act 2000* (Tas), s 43; *Juries Act 2000* (Vic), s 46.

18 *Brown* (1986) 160 CLR 171.

19 *Williams v Florida* (1970) 399 US 78.

20 Respondent's submissions, para 39.

under s 80 to hold that there has been a proper verdict on the charge although the judge never asked members of the jury to decide on accessorial liability but instead asked them to decide whether there was a *"joint criminal enterprise"*—a concept then unknown to the *Criminal Code* (Cth).

Some historical matters

15. The respondent and the interveners make several claims about the historical evolution of trial by jury and criminal appeals. It is enough to make the following points.

16. First, the *Criminal Appeal Act 1907* (UK) was enacted 'against a background where the understanding of when a new trial would be ordered was that the "Exchequer rule" prevailed'.[21]

17. Secondly, courts in Australia before and after Federation took a strict view of misdirections. The decision of the Full Court of the Supreme Court of South Australia in *R v Snow*,[22] which was based on the common law, illustrates this.

18. Thirdly, while attempts had been made to overcome the 'Exchequer rule' in the Australian colonies before federation, the relevant provisions had been interpreted very narrowly.[23] In *Makin v Attorney-General for New South Wales*, for instance, the Privy Council considered s 423 of the *Criminal Law (Amendment) Act 1883* (NSW). Their Lordships stated:[24]

> *Their Lordships do not think that it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.*

19. Their Lordships contemplated that the proviso might apply 'where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence'.[25] As this Court in *Weiss* observed, one longstanding justification for interpreting provisions in this way was the concept that the accused was entitled to a trial in which the relevant law was correctly explained to the jury and the laws of evidence were strictly followed.[26]

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21 *Weiss v The Queen* (2005) 224 CLR 300 ('*Weiss*') at 306 [13].

22 [1918] SALR 173 at 204, 207 (Murray CJ, with whose reasons Buchanan J agreed). Special leave to this Court was refused: (1918) 25 CLR 377.

23 In any event, some of the provisions were confined to the rules of evidence, with which the 'Exchequer rule' was centrally concerned: see *Criminal Code* (Qld), s 671.

24 [1894] AC 57 at 70.

25 [1894] AC 57 at 71.

26 (2005) 224 CLR 300 at 311 [27] (referring to *Mraz v The Queen* (1955) 93 CLR 493 at 514 (Fullager J)).

20. Fourthly, the Commonwealth Attorney-General's reliance on debate in the United States is problematic.[27] Even more so than in the United Kingdom and in the Australian colonies, the position in the United States at federation was that the 'Exchequer rule' was prevalent.[28] Furthermore, professional and academic criticism of the 'Exchequer rule' in the United States *after* federation, and the fact that successive Congresses between 1907 and 1919 debated reforms does not shed light on the interpretation of s 80. The Constitution came into force more than a decade before any 'harmless error' statute was passed by Congress.

United States authorities and alleged extremity of results

21. Contrary to the submission of the Commonwealth Attorney-General,[29] the application of 'harmless error' to constitutional infringements in the United States is no more relevant to the interpretation of s 80 than was the development of 'waiver' of jury trials in that country.[30]

22. It would not, moreover, give s 80 an 'extreme operation'[31] to regard it as more demanding, in some ways, than the right of trial by jury in the United States. That is already the case. Section 80 of the Constitution prevents an accused from waiving the requirement of jury trial; that is not the case in the United States.[32] Section 80 of the Constitution would probably prevent a jury from being properly composed if it consisted of fewer than 10 members;[33] a criminal jury in the United States can consist of as few as six persons.[34] While s 80 of the Constitution requires a jury verdict to be unanimous, moreover, the right of trial by jury in the Sixth Amendment, which is applied to the American States by the Fourteenth Amendment, does not forbid majority verdicts.[35]

No privileging of form over substance

23. The Attorney-General for New South Wales submits that acceptance of the appellant's submissions would make the administration of justice 'hostage to "outworn technicality"'.[36] That is not so. Rather, it would encourage trial judges to ask themselves a simple question before they commence their summing up: does the basis for liability advanced by the prosecution exist? That is not a demanding requirement. Indeed, in a system in which trials are supposed to be determined

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27 Cth Attorney-General's *Hargraves* submissions, para 47.

28 JH Wigmore, 'New Trials for Erroneous Rulings upon Evidence; A Practical Problem for American Justice' (1903) 3 *Columbia Law Review* 433 at 436. See also 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 435-436.

29 Cth Attorney-General's *Hargraves* submissions, para 45.

30 *Brown* (1986) 160 CLR 171.

31 Cth Attorney-General's *Hargraves* submissions, para 46.

32 *Brown* (1986) 160 CLR 171.

33 *Brownlee* (2001) 207 CLR 278 at [72] (Gaudron, Gummow and Hayne JJ).

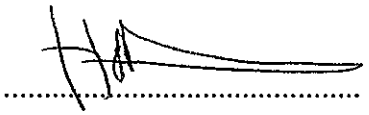
34 *Williams* (1970) 399 US 78.

35 See, for example, *Burch v Louisiana* (1979) 441 US 130 at 136-137.

36 Submissions of the Attorney-General for NSW, para 28 (referring to *Conway v The Queen* (2002) 209 CLR 203 at [29]).

according to law, and in which juries are intended to have a protective role, there is no excuse for avoiding it.

Dated 29 August 2011



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