IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S279 OF 2015

BETWEEN: **HAMDI ALQUDSI**
Applicant

AND: **THE QUEEN**
Respondent

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

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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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) (**Judiciary Act**).

PART III CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. In addition to those set out by the Applicant, the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (**Foreign Incursions Act**), ss 6, 7(1)(e) and 9A as at 19 December 2005. These provisions have since been repealed and replaced with Pt 5.5 of the *Criminal Code* (Cth).

PART IV ARGUMENT

Issues to be determined

4. The issue presented is whether ss 132(1) to (6) of the *Criminal Procedure Act 1986* (NSW) (**CP Act**) are incapable of being applied to the Applicant's trial by s 68 of the Judiciary Act, because their application would be inconsistent with s 80 of the Constitution; and, relatedly, whether this Court's 3-2 decision in *Brown v The Queen* (1986) 160 CLR 171 (***Brown***) can properly be distinguished or otherwise be reopened and overturned.

Summary of argument

5. In summary, the Commonwealth submits as follows:

   5.1. As a matter of construction, and subject to the s 80 question, s 68 of the Judiciary Act picks up ss 132(1) to (6) of the CP Act so that they apply to the prosecution of the Applicant (see section 3 below).

   5.2. In interpreting s 80, in addition to the purposive and structural considerations pointed to in the Applicant's submissions, regard should be had to the fact that well prior to 1900 there was ample evidence in the Australian colonies (as well as in the United States and the United Kingdom) of statutory mechanisms by which criminal justice could be administered by judge alone. These mechanisms fell into 2 broad categories: the *prescriptive* mechanism (whereby the legislature stipulated in absolute terms that certain defined crimes would be tried by judge alone) and the *elective* mechanism (whereby the legislature created a set of conditions under which various choices or decisions by one or more of the prosecution, accused and court, made in the context of the particular case, would determine whether there would be judge alone trial) (see section 4 below).

   5.3. Regard should also be had to important developments after 1900, which confirm that s 80 should be interpreted such that it affords Parliament the

flexibility to determine the conditions under which the trial of a federal criminal offence shall proceed before judge alone or judge and jury (which may include, for example, picking up the conditions in the State or Territory court in which the trial is to take place); and in doing so, s 80 permits the Parliament the flexibility to specify conditions which employ prescriptive or elective mechanisms; mechanisms which take into account developments bearing on the suitability of trial by jury for the due administration of justice within Chapter III either for particular offences or for particular cases (see section 5 below).

5.4. So interpreted, s 80 is not tautological. That criticism underestimates that accommodation of values described as parliamentary designation, the accused's participation and the community's involvement in trial on indictment underlying the terms of s 80. Section 80 allows Parliament to choose *when* community participation is to be brought into the administration of justice for particular offences, but also imposes the limitation that this can occur only through an institution which displays the essential features of 'trial by jury' under s 80 (see section 6 below).

5.5. Subsections 132(1)-(6) of the CP Act do not conflict with s 80 because they are a modern example of an elective mechanism, which is functionally and substantively no different to those employed prior to 1900, and fully respectful of the individual and community values that underpin the guarantee under s 80 while also ensuring the due administration of justice within Chapter III (see section 7 below).

5.6. *Brown* can properly be distinguished, or if not, it is in error and should be re-opened and overruled (see section 8 below).

The statutory scheme in the present case

6. *The Offence.* The Applicant has been charged with offences against s 7(1)(e) of the Foreign Incursions Act, and is to be tried before the Supreme Court of New South Wales. The maximum penalty for the offence is 10 years imprisonment.

7. *The Scheme.* Subsection 9A(1) of the Foreign Incursions Act provides that a prosecution for an offence against s 7(1)(e) 'shall be on indictment'. Section 9A dis-applies what would otherwise be the rule under s 4J of the *Crimes Act 1914* (Cth) (**Crimes Act**) that the offence may be heard and determined summarily with the accused's consent. Section 68 of the Judiciary Act vests federal jurisdiction in the Supreme Court with respect to the 'trial and conviction on indictment' of persons charged with offences against the laws of the Commonwealth,[1] and applies State laws to the prosecution of those offences, subject to s 80 of the Constitution. The CP Act outlines the procedure for the prosecution of NSW criminal offences. It adopts an historically binary division between indictable (Chapter 3) and summary (Chapter 4) procedure but adds to it two elective mechanisms. First, the CP Act allows indictable offences to be

[1] The Supreme Court has jurisdiction in respect of all indictable offences: s 46(1) of the CP Act, and s 68(2) of the Judiciary Act confers the equivalent federal jurisdiction for federal offences.

dealt with summarily if permitted by statute (see the CP Act s 6(2) and Chapter 5)).

8. *The relevant elective mechanism.* Secondly, the indictable procedure has a further elective mechanism. Chapter 3 of the CP Act outlines the procedure 'in respect of proceedings for indictable offences (other than indictable offences being dealt with summarily)' (s 45). The Court has jurisdiction in such proceedings as soon as the indictment is presented to the Court and the accused person is arraigned (s 130(2)). Those indictable procedures include a procedure for judge alone trials. Section 132 introduces a mechanism whereby such a trial can proceed upon the meeting of certain conditions. A judge sitting alone pursuant to a trial by judge order under s 132 'may make any finding that could have been made by a jury on the question of the guilt of the accused' and '[a]ny such finding has, for all purposes, the same effect as a verdict of a jury' (s 133). If no such order is sought or made, the trial will proceed with the re-arraignment of the accused at the empanelment of a jury: s 130(3)(b).

9. *Summary.* By the combined force of s 9A of the Foreign Incursions Act, s 68 of the Judiciary Act and s 132 of the CP Act, and subject to s 80, the Applicant is to be tried on a procedure described as 'indictable' but under which, depending on satisfaction of legislatively stipulated conditions, there may be trial by judge alone.

Section 80 should be understood against a pre-1900 background of legislative mechanisms providing for judge alone criminal trials

10. *Summary.* The Commonwealth's submissions move from a premise that s 80 provides an accommodation between parliamentary designation, the accused's participation and the community's involvement in a trial on indictment. The correctness of that premise is borne out by explaining s 80's constitutional and common law history.

11. *Blackstone's History.* For Sir William Blackstone, trial by jury was the 'grand bulwark of ... liberties'.[2] He knew an 'indictment' to be a legal process, amongst others, for taking an accusation of criminal guilt to a jury: a 'written accusation of one or more persons of a crime or misdemeanour, preferred to, and presented upon oath by, a grand jury'.[3] If the grand jury was satisfied of the truth of a criminal accusation, the indictment was 'said to be found'[4] and then delivered to the court for the accused to be tried on the indictment by the petty jury. All common law crimes (except perhaps contempt) were indictable offences. Treason and felonies were always tried by jury on indictment, but a misdemeanor could be tried by a jury on information without the involvement of a grand jury.[5]

12. Summary conviction for criminal offences was not unknown to Blackstone.[6] It was a creature of statute,[7] which, as Professor Maitland later explained, seldom

2 William Blackstone, *Commentaries on the Laws of England* (1769) Book IV, Ch 27.
3 Book IV, Ch 23.
4 Book IV, Ch 23.
5 F W Maitland, *The Constitutional History of England* (1908) 230.
6 Book IV, Ch 20.
7 '[F]or the common law is a stranger to it, unless in the case of contempts' (Book IV, Ch 20).

prescribed rules of criminal procedure, other than that there need not be a trial by jury.[8] By the 18th century summary conviction had become 'considerable'.[9]

13. Blackstone's grand bulwark was identified at a time when the accused's institutional protections were still maturing. Summary jurisdiction might have been exercised by 'commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed *and removable at the discretion of the crown*'.[10] Justices of the Peace and police magistrates need not have been legally trained.[11] Criminal process rights were also still to be fully developed for accused persons who had no assured right to legal counsel until 1836[12] and were unable to give sworn testimony until 1898.[13]

14. *The American Experience.* The position in England was reflected in the American colonies. Most colonial charters included provisions requiring jury trials before life, liberty or property could be lost. Yet, as in England, 'all the colonies utilized summary jurisdiction over minor offenses, despite professions of allegiance to trial by jury'.[14] The enactment of legislation by the English Parliament expanding summary jurisdiction in the American colonies[15] was a catalyst for the American Revolution, and provided the context for the drafting of the Constitutions of various States and the US Constitution. The inclusion of Art III, s 2 and the Sixth Amendment in the US Constitution were driven by fear of despotic rule, secret courts and arbitrary judges susceptible of influence and corruption.[16] In that revolutionary climate, Blackstone's opinions on the constitutional and political role of juries became influential. As the US Supreme Court said in Schick v United States, 195 US 65, 69 (1903), 'Blackstone's Commentaries [were] accepted as the most satisfactory exposition of the common law of England'.[17]

15. However there was ample evidence of waiver of jury trial, even for serious offences, in the American colonies at the time of the adoption of the Constitution[18] and in some States during the 19th century, providing a firm historical foundation for what the Supreme Court would later hold in Patton v US, 281 US 276 (1930) and Singer v US, 380 US 24 (1964). In those cases, the US Supreme Court held that, consistently with Art III, § 2, cl 3 and the Sixth Amendment, an accused may waive their right to trial by jury and a legislature

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8 Maitland at 209.

9 Ibid 231. Maitland said that it grew 'rapidly during the eighteenth and nineteenth centuries' (at 473). See also Sir James Stephen, *A History of the Criminal Law of England* (1883, Burt Franklin (reprint)), Vol 1, 124-5; Pendleton Howard, 'The Rise of Summary Jurisdiction in English Criminal Law Administration' (1931) 19 *California Law Review* 486.

10 Book IV, Ch 20 (emphasis added).

11 Indeed, most were not until the mid-19th century: see David Bentley, *English Criminal Justice in the 19th Century* (1998) 19-20, 26-8.

12 *Prisoners' Counsel Act 1836.*

13 *Criminal Evidence Act 1898*, s 1.

14 Leonard W Levy, *The Palladium of Justice: Origins of Trial by Jury* (1999) 72.

15 See the discussion of the Stamp Act of 1765 and the Townshend Acts of 1767 in Levy, *The Palladium of Justice: Origins of Trial by Jury* (1999) 85-8.

16 Levy, *The Palladium of Justice: Origins of Trial by Jury* (1999) 91-105; Akhil Reed Amar, *The Bill of Rights* (1998) 108-110; Valerie P Hans and Neil Vidmar, *Judging the Jury* (1986) 31-6.

17 Hence the significance placed on the choice of the word 'crimes' in Art III, s 2 of the US Constitution, used by Blackstone to exclude petty offences: See *Schick v United States*, 195 US65, 69-70 (1903).

18 Erwin N Griswold, 'Waiver of Jury Trial in Criminal Cases' (1934) 20 *Virginia Law Review* 655.

can condition an accused's waiver on the consent of the prosecuting attorney and the trial judge.

16. *The Australian Experience*. '[T]rial by jury did not come to the Australian colonies as part of the common law upon European settlement. It was introduced into each of the colonies by legislation, and the legislation varied'.[19] The relevant legislation[20] and Letters Patent[21] provided for the creation of colonial courts in NSW and Van Diemen's Land, including Supreme Courts. However, common law jury trials were not expressly identified as a curial form for the exercise of criminal jurisdiction. Instead, a military jury was established for the Supreme Court and continued in operation until abolished by the *Jury Trials Act 1839*. Despite the absence of an express reference to lay juries in the constitutive Imperial instruments, the view was taken by Forbes CJ in *R v Magistrates of Sydney* [1824] NSWKR 3[22] that s 19 of 4 Geo IV, c 96 (Imp) (*Act for the Administration of Justice in New South Wales and Van Diemen's Land 1823*) authorised the establishment by the Governor of Courts of General or Quarter Sessions to be constituted by a judge and jury and, accordingly, a lay jury system with a grand jury was established and operated from 1824 to 1828 until it was brought to an end by 9 Geo IV, c 83 (Imp) (*The Australian Courts Act 1828*).[23]

17. An institution of jury trial was then progressively introduced by the *Jury Trials Act 1832, Jury Trials Act 1833*[24] and *Jury Trials Act 1839*. Under the 1839 Act, prosecutions of all crimes, misdemeanours and other offences were to be by a jury of 'twelve inhabitants of the ... Colony' in the Supreme Court and the Courts of Quarter Sessions and were to be commenced by information.[25] Except for the period from 1824 to 1828, indictments, in the common law sense of a presentment by a grand jury to a petty jury, were not a common feature of criminal procedure in the Australian colonies.[26] Summary jurisdictions persisted, and at the end of the 19th century the colonial position was much the same as in England.

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19 *Brownlee v The Queen* (2001) 207 CLR 278 (**Brownlee**) 286 [12] (Gleeson CJ and McHugh J). See also *R v Valentine* [1871] SCR 113, 122-3 (Stephen CJ), 133-5 (Faucett J). Gleeson CJ and McHugh J in *Brownlee* referred to Evatt, 'The Jury System in Australia' (1936) 10 (Supp) *Australian Law Journal* 49.

20 Mainly, 27 Geo III, c 2 (Imp) (*Act Constituting a Court of Criminal Judicature in New South Wales 1787*); 4 Geo IV, c 96 (Imp) (*Act for the Administration of Justice in New South Wales and Van Diemen's Land 1823*); 9 Geo IV, c 83 (Imp) (*The Australian Courts Act 1828*).

21 First Charter of Justice (Letters Patent, 2 April 1787); Second Charter of Justice (Letters Patent, 4 February 1814); Third Charter of Justice (Letters Patent, 13 October 1823).

22 Cf: the contrary view taken on the same question by Pedder CJ in *R v Magistrates of Hobart Town* [1825] TASSupC 8.

23 See G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (2002) 56-61.

24 The 1833 Act permitted an election between a common law jury and a military jury. By 1839 population increase permitted the mandating of a common law jury of civilians.

25 Except in relation to crimes, misdemeanors and other offences not punishable with death which had been committed by transported felons or other offenders whose sentences had not expired or been remitted, in which case jurisdiction continued to be summary. The information referred to in the 1839 Act s 2 was 'in the name of Her Majesty's Attorney General or other officer duly appointed for such purpose by the Governor of said Colony ...'.

26 See G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (2002) 59-61.

18. *Prescriptive Procedures in England.* Writing in the 1880s, Maitland was able to say that punishable offences fell into two classes: indictable and non-indictable offences. He recognised that many petty offences were punishable by statute upon summary conviction, which means 'trial without jury before two justices (or one police magistrate).'[27] By contrast, '[a] person ... accused by indictment, inquest, or information, is tried by a petty jury'.[28] A binary division between indictable offences and summary offences had thus been established. Indictable offences were those *capable* of being heard by a jury, whether they were taken on indictment (in the strict common law sense) through the grand jury, or directly by way of coroner's inquest or information.

19. *Elective Procedures in England.* From 1847 onwards, Parliament began to experiment with a hybrid model of trial procedure. These models contained elective mechanisms, which sought to improve the accused's participation in the disposition of his or her case. The relevant provisions permitted the court or the justices before whom a person was charged, with the consent of the accused, to summarily deal with certain larceny offences, the range of which expanded over time (including, after 1879, some larceny offences with a maximum term of imprisonment of 7 years if not dealt with summarily).[29] This hybrid model blurred that binary distinction between indictable and summary offences.

20. *Elective Procedures in the Colonies.* By the 1880s the historical assimilation between an indictable offence, a trial on indictment, a presentment by a grand jury and determination by a petty jury, had broken down in the Australian colonies. That is so for *two* reasons:

    20.1. First, as already noted, the process of indictment here did not denote the common law concept involving a grand jury.[30]

    20.2. Secondly, colonial legislatures also began to experiment with elective mechanisms for jury trials. The *Criminal Law Amendment Act of 1883* (NSW) followed the hybrid model introduced into England. Section 150 of the *Criminal Law Amendment Act of 1883* (NSW) expanded[31] an 'elective' mechanism for what would otherwise have been a trial on indictment before a jury.[32] That provision permitted the justices before whom a

27 Maitland at 473.

28 Ibid 475.

29 See eg *Juvenile Offenders Act of 1847* (10 & 11 Vic c. 82) s 1; *Criminal Justice Act of 1855* (11 & 12 Vic c. 43) s 1 and *Summary Jurisdiction Act 1879* (UK) (42 & 43 Vic c. 49) s 12.

30 Committal proceedings for indictable offences in essentially their modern form originated in England in 1848 in *The Indictable Offences Act 1848* ('Sir John Jervis' Act') (11 & 12 Vict c. 42). The provisions of Sir John Jervis' Act were adopted in New South Wales in 1850 in the *Imperial Acts Adoption and Application Act 1850 (NSW)* (14 Vic. No 43). It is clear that grand juries have not been used in New South Wales at least since 1850 but, despite this, the term 'information' continued until s 3 of the *Criminal Law Amendment Act 1883* (NSW) (46 Vic No 17) made way for the use of the term 'indictment' (*Grassby v The Queen* (1989) 168 CLR 1, 13 (Dawson J). The history of committal proceedings in New South Wales up to 1989 was outlined by Dawson J at 11–15).

31 See the *Juvenile Offenders Act 1850* (NSW) (14 Vic No 2) s 1, *Larceny Summary Jurisdiction Act 1852* (NSW) (16 Vic No 6) s 1.

32 At this time, s 17 of the *Jurors and Juries Consolidation Act 1847* (NSW) (11 Vic No 20), the successor to s 1 of the *Jury Trial Act 1839* (NSW) (3 Vic No 11), provided that 'all crimes and misdemeanors prosecuted in the Supreme Court the Circuit Courts or Courts of General and Quarter Session shall be tried by a jury consisting of twelve men chosen and returned according to the provisions of this Act.'

person was charged, with the accused's consent, to dispose of certain larceny offences summarily. In 1891, this elective summary jurisdiction was expanded to include attempted suicide and other theft offences (s 18 of the *Criminal Law and Evidence Amendment Act of 1891* (NSW) (55 Vic No 5)). The jurisdiction conferred by the section was not to be exercised if the accused desired 'the case to be determined by a jury'. Even after hearing the prosecution's case, the accused was entitled 'to have the case disposed of in the ordinary course of law' (s 20).[33]

21. *The Convention Debates.* These prescriptive and elective procedures informed s 80's evolution throughout the Convention Debates. Andrew Inglis Clark's draft Constitution referred to 'The trial of all crimes cognisable by any Court ... shall be by jury...'.[34] This reflected Art III, s 2 of the United States Constitution but also reflected the language used in the *Jury Trials Act of 1839 (NSW)* which established juries as part of the judicial structure in the following terms: '... all crimes misdemeanors and offences cognizable in the said Supreme Court and prosecuted by information in the name of Her Majesty's Attorney General or other officer duly appointed for such purpose by the Governor of said Colony and all issues of fact joined on every such information shall be tried by a jury of twelve inhabitants of said Colony ...'.

22. The first official draft of the Constitution was expressed in narrower terms, applying only to 'all indictable offences cognisable by any Court'.[35] The clause, in that form, reflected that there would continue to be scope for Parliament to prescribe non-indictable offences, where no right to trial by jury would be extended.

23. A further narrowing occurred when Barton moved that the words 'of all indictable offences' be replaced with 'on indictment of any offence'.[36] His stated purpose was 'simple': 'As the clause stood it provided that the trial of all indictable offences against any law of the Commonwealth "shall be by jury". This meant that, however small might be the offence created by any Commonwealth enactment, supposing an offence that should be punishable summarily, it would, nevertheless, have to be tried by jury'.[37]

24. Having noted that contempt was also an indictable offence that, under the existing draft, would be caught by s 80, Barton said that the 'better way' is

> 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

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33 Other Colonies also had similar elective mechanisms: see e.g. *Larceny Summary Conviction Ordinance 1856* (WA) s 2; *Minor Offences Procedure Act 1869* (SA) s 3; *Criminal Law Consolidation Act 1876* (SA) s 58; *Crimes Act 1890* (Vic) s 68; *Criminal Code Act 1899* (Qld) s 444.

34 See John M Williams, *The Australian Constitution: A Documentary History* (2005), 107.

35 Ibid 152.

36 Convention Debates, vol V, *Melbourne,* 1898, 1894.

37 Ibid.

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.[38]

25. The final comment before the amendment was agreed to without division was by Douglas who said that '[t]here are many offences dealt with summarily which are indictable, and we must be careful not to do away with summary jurisdiction. That would not be at all desirable'.[39]

26. That debate revealed much about the colonial experience with jury trials in Australia that s 80 was to continue to accommodate:

26.1. First, the Framers focused on a procedure which treated the nature and form of criminal accusation, rather than the nature of the offence or its categorisation, as decisive.

26.2. Secondly, the Framers focused on a procedure which left it for Parliament, as was the case in England and the colonies, to determine the line that separates whether the criminal accusation would, in its factual components, be dealt with by the jury on indictment or by the judge alone.

26.3. Thirdly, there was sufficient flexibility in the language of s 80 to accommodate both prescriptive mechanisms and elective mechanisms such as experimented with in the 1883 NSW Act, and which other colonies had known in various guises, by which trial would proceed by the judge alone.

26.4. Fourthly, what underpinned such choices was that s 80 was not adopted in a climate of fear of arbitrary judges or despotic executives. Representative and responsible government had been well established in the colonies, and decisions about community participation in the administration of criminal justice would be, as was the case in England and the colonies in the 1890s, left to legislative determination. It is true that Wise had earlier spoken about the jury as 'a necessary safeguard to the individual liberty of the subject'.[40] However, Higgins responded that, while such a claim may have been made 'a hundred years ago', it was 'mere claptrap to say that [it] was ... at the present time'.[41] Isaacs also rejected the view that s 80 was a 'safeguard': Parliament could, when creating an offence, determine that it not be prosecuted on indictment, in which case s 80 would not apply.[42] According to Isaacs, Parliament could be trusted to make those judgments.[43] In light of the subsequent amendment (without division), which in effect crystallised Isaac's view of s 80's character and purpose, it could not be said that Wise's view held sway.

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38 Ibid 1894-5.
39 Ibid 1895.
40 Convention Debates, vol IV, *Melbourne*, 1898, 350.
41 At 351.
42 At 352.
43 At 353.

Section 80 should be further understood against a series of post 1900 developments

27. There were *six* critical developments in the 20th century which further clarify the above accommodation of values within s 80.

28. First, from the earliest days of the Commonwealth, Parliament assumed its competence to legislate for both prescriptive and elective mechanisms. Parliament authorised State courts to administer federal criminal jurisdiction and, to that end, s 68 of the Judiciary Act, and the provisions of the *Punishment of Offences Act 1901* (Cth) before it, were enacted to operate, in an ambulatory way,[44] to assimilate federal and State criminal jurisdictions. For much of the 20th century, State criminal procedures continued to divide generally between trials on indictment and procedures for summary conviction, but also included elective mechanisms such as those provided for in colonial legislation.

29. Secondly, this Court has progressively reinforced that Ch III is designed to secure the independence and impartiality of the federal judicature,[45] particularly through the separation of judicial power limitations applicable to the Commonwealth Parliament in *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 and *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. Of more recent origin, and subsequent to the decision in *Brown*, this Court in cases like *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 and *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 has held that Ch III limits how State Parliaments might constitute their courts, particularly State Supreme Courts. The *Kable* and *Kirk* principles ensure the independence and impartiality of State courts, however constituted, and their amenability to review or appeal, ultimately by this Court under s 73(ii). These principles give effect to the expectations and assumptions held by the Framers about the institutional integrity of State courts.[46]

30. With these protections, the exceptional nature of s 80 is confirmed. The exercise of federal criminal jurisdiction is regularly undertaken by judges who are assumed to be capable of exercising that function independently and impartially, and whose independent and impartial role is protected by constitutional provisions and implications. The exception is that the community shall participate in the administration of criminal justice in a trial on indictment through the alternative judicial structure of a jury trial envisaged by s 80.

31. Thirdly, the 1883 elective mechanism was adapted and extended by the Commonwealth Parliament in (the then) ss 12 and 12A of the *Crimes Act 1914*

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44 The ambulatory operation of s 68 in relation to the operation of s 80 was considered in *R v LK* (2010) 241 CLR 177, 189-191 [16]-[20] (French CJ; Gummow, Hayne, Crennan and Bell JJ agreeing at 216 [88]). See also *R v Gee* (2003) 212 CLR 230, 240-1 [6]-[7] (Gleeson CJ), 254-5 [63]-[64] (McHugh and Gummow JJ), 269 [113]-[114] (Kirby J), 295 [203] (Callinan J); *Putland v The Queen* (2004) 218 CLR 174, 178-9 [4] (Gleeson CJ), 188-9 [39]-[41] (Gummow and Heydon JJ).

45 In relation to s 72, see the comments of Isaacs and Rich JJ in *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 469-70.

46 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 804, quoted with approval by French CJ in *South Australian v Totani* (2010) 242 CLR 1, 38-9 [51].

(Cth).[47] The scheme under the *Crimes Act* for the prosecution of offences divided offences into (i) those expressly declared in the Act to be indictable and (ii) those not declared to be indictable. For an offence declared to be indictable by a section in the Act, s 12A operated to permit the offence to be heard and determined by a Court of Summary Jurisdiction[48] with the consent of the accused (s 12A(1)), or if the court thought fit upon the request of the prosecutor in relation to certain property offences (s 12A(2)). A court of summary jurisdiction was limited to imposing a term of imprisonment of no more than 1 year (s 12A(3)). For an offence not declared to be indictable, s 12(1) provided that the offence shall be punishable either on indictment or on summary conviction. Subsection 12(3) further provided that a court of summary jurisdiction could not impose a longer period of imprisonment than 1 year. Subsection 12(2) provided that where a proceeding for an offence was brought before a court of summary jurisdiction, the court could either determine the proceeding or commit the defendant for trial.[49] Thus, there were both prescriptive and elective mechanisms in this scheme.

32. Critically, the provisions of ss 12 and 12A were upheld in *R v Archdall and Roskruge; Ex parte Brown* (1928) 41 CLR 128 (***Archdall***).[50] It was argued there that offences regarded as indictable at 1900 could not be declared by Parliament to be other than indictable. The joint judgment of Knox CJ, Isaacs, Gavan Duffy and Powers JJ rejected the contention in the following terms (at 136): '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'. Justice Higgins also rejected the s 80 challenge (at 139-140): 'if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment'. His Honour cited, in support, the Court's earlier decision in *R v Bernasconi* (1915) 19 CLR 629 in which Isaacs J had said (at 637), '[i]f a given offence is not made triable on indictment at all, then sec 80 does not apply. If the offence is so tried, then there must be a jury'. Justice Starke in *Archdall* (at 147) described the argument as 'untenable'.

33. *Archdall* expressed two principles with considerable historical pedigree: (i) s 80 leaves it to Parliament to determine the conditions under which a trial of a federal criminal offence shall proceed with or without a jury; and (ii) Parliament

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47 Section 12 was included in the Act in its original form when enacted in 1914. Section 12A was inserted by Act No 9 of 1926.

48 As defined by the then s 26(d) of the *Acts Interpretation Act 1901* (Cth).

49 Defined in the then s 27(d) of the *Acts Interpretation Act 1901* (Cth) to mean 'committed to prison with the view of being tried before a judge and jury, or admitted to bail upon a recognisance to appear and be so tried'.

50 The offence in question in *Archdall* was s 30K of the Crimes Act which was not declared to be indictable and, thus, was punishable either on indictment or on summary conviction under s 12(1). The maximum penalty was imprisonment for 1 year. The Court's order in *Archdall* rejected a challenge to the validity of (the then) ss 12 and 12A. As recorded in the report of the case, the grounds upon which the rule nisi was obtained included that the sections were '*ultra vires* of the Parliament and contrary to the Constitution of the Commonwealth' (at 132). Although the Court's reasoning did not expressly consider the validity of s 12A, the Court's discharge of the rule nisi (at 135) must be seen as a rejection of the challenge to its validity. Additionally, comments in subsequent cases have emphasised that neither the character of the offence, nor the severity of the punishment, affect the Parliament's power to define the curial process as by judge alone or by judge sitting with a jury.

has a degree of flexibility in the manner in which it can specify such conditions such that it can employ either prescriptive or elective mechanisms, or both.

34. Relying on *Archdall*, this Court in subsequent cases has upheld similar procedures for the administration of justice.[51] A majority of the Court in *Kingswell v The Queen* (1985) 159 CLR 264 (***Kingswell***) considered the *Archdall* construction of s 80 to be settled.[52] Relevantly for this case, s 4J of the Crimes Act has been held to be valid: that provision permits indictable offences punishable by a term of imprisonment not exceeding 10 years to be tried summarily if the prosecutor and the defendant consent, albeit with lower maximum penalties than available on indictment.[53] In *Cheng v The Queen* (2000) 203 CLR 248 (***Cheng***), a majority of the Court declined to reconsider the authority of the *Archdall* approach.[54] Indeed, McHugh J said (at 289) that 'on the current interpretation of s 80, it is open to Parliament to declare that even treason or murder can be prosecuted summarily before a judge or magistrate appointed in accordance with s 72 of the Constitution or in a State Court invested with federal jurisdiction'.[55]

35. Fourthly, there has been a significant increase in the number and type of federal crimes.[56] This is most evident since the commencement of the Commonwealth *Criminal Code* in 1997 with expanding federal offence categories including offences related to terrorism, war crimes, child sex tourism, child pornography, slavery, human trafficking, serious drug offences, money laundering and computer offences.[57] Relatedly, there is now increasing overlap in circumstances where there are both Commonwealth and State criminal statutes dealing with the same or similar conduct.[58] The significance of this is that there will be many cases where an accused would undoubtedly have

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51 See *R v The Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 (***Lowenstein***) (an elective mechanism in the *Bankruptcy Act 1924* (Cth) where the election was by the court) at 570-1 (Latham CJ), 573 (Rich J), 591 (McTiernan J). See also cases upholding Parliament's prescription of summary offences: *Zarb v Kennedy* (1968) 121 CLR 283, 294 (Barwick CJ), 297 (McTiernan J), 297 (Taylor and Kitto JJ), 298 (Menzies J), 305 (Windeyer J), 312 (Owen J); *Li Chia Hsing v Rankin* (1978) 141 CLR 182 (***Li Chia Hsing***) 190 (Barwick CJ), 193 (Gibbs J), 195 (Stephen and Jacobs JJ), 196 (Mason J), 203 (Aickin J).

52 (1985) 159 CLR 264, 277 (Gibbs CJ, Wilson and Dawson JJ, Mason J agreeing at 282): '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'. Justice Brennan (at 294) also accepted the authority of *Li Chia Hsing* that 's 80 guarantees trial by jury only in cases where an offence against a law of the Commonwealth is prosecuted on indictment'.

53 *Mattner v Director of Public Prosecutions* (2011) 252 FLR 239; [2011] SASC 89, at [37]. Elective provisions of this character permitting a choice between trial on indictment and summary conviction can also be found in *Criminal Procedure Act 1986* (NSW) ss 260, 267, 268; *Criminal Code 1899* (Qld) s 552A, 552B, 552BA, 552H; *Criminal Procedure Act 2009* (Vic) ss 28, 29; *Criminal Procedure Act 2004* (WA) s 3, 40(4); *Magistrates Court Act* 1930 (ACT) s 108A; *Summary Procedure Act 1921* (SA) ss 5, 103(3), 103(3aa), 108(1); *Justices Act 1959* (Tas) ss 71, 72; *Justices Act* (NT) ss 120, 121.

54 See at 268-270 [49]-[58] (Gleeson CJ, Gummow and Hayne JJ), 289 [121] (McHugh J).

55 This was also the view expressed by Isaacs during the Convention Debates (Convention Debates, Vol V, Melbourne, 1898, 1895) and quoted in Quick and Garran: *The Annotated Constitution of the Australian Commonwealth* (1901) 808: see *Cheng* (2000) 203 CLR 248, 268-9 [53] (Gleeson CJ, Gummow and Hayne JJ).

56 See, eg, ALRC (2005) 'Sentencing of Federal Offenders', Issues Paper No. 29, 38-41 [2.5]-[2.16].

57 See generally the Schedule to the *Criminal Code Act 1995* (Cth) (s 3 provides that the Schedule may be cited as the Criminal Code).

58 See, for example, the overlapping offences that gave rise to a question of s 109 inconsistency in *Dickson v The Queen* (2010) 241 CLR 491; cf. *Momcilovic v The Queen* (2011) 245 CLR 1; and *Crimes Act 1914* (Cth), ss 3AA and 4C which recognise the same.

the option (absolute or qualified) to have the State offence determined by judge alone but, on the narrow view of s 80, no such option exists for the federal offence. Such an accused must, on the narrow view, forgo rights under State law or embark on the inconvenient, uncertain and potentially prejudicial course of seeking separate trials for offences arising out of the same conduct.

36. Fifthly, under a number of State statutes, many procedures and rights of an accused that were attached to the traditional trial of an offence on 'indictment' other than by trial by jury itself are now extended to all criminal prosecutions.[59]

37. Finally, Commonwealth and State Parliaments have continued to experiment with trial by jury in order to adapt the administration of justice to modern conditions. A provision permitting a decision or election for judge alone trials is one such development, and s 7 of the *Juries Act 1927* (SA) (**Juries Act**) considered in *Brown* was the first of such provisions. Subsection 7(1) provides that the accused can elect to be tried by judge alone. Provided that the presiding judge is satisfied that the accused, before making the election, sought and received legal advice in relation to the election, then the inquest shall proceed without a jury. There is no discretion permitted to the court and the prosecutor's agreement is not required. It is, thus, a procedure for judge alone trial which is entirely driven by the accused's unilateral election. The validity of such a provision does not arise for determination in this case. Other examples of such provisions, in different terms, include s 132 of the CP Act.[60]

38. Having full regard to these developments pre and post 1900, the Commonwealth's argument is that not only is *Archdall* correct, but its underlying principles reflect an accommodation of values within s 80 which permit the picking up of elective mechanisms like s 132 of the CP Act.

Section 80 does not descend into mere tautology

39. Section 80 is more than a mere procedural provision,[61] and a full application of the principles underlying the decision in *Archdall* does not reduce it to a mere tautology.[62]

40. To criticise the above interpretation of s 80 for tautology underestimates the accommodation of values between parliamentary designation, the accused's participation and the community's involvement in trial on indictment which underlie the terms of s 80. Section 80 identifies the institution of the jury trial as an available, alternative instrument for use in the administration of justice for federal offences.[63] Section 80 allows Parliament to choose *when* community

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59 See, eg, *Criminal Procedure Act 1986* (NSW) s 38; *Criminal Code Act 1899* (Qld) s 615B; *Criminal Procedure Act 2004* (WA) s 65; *Criminal Code (Tas)* s 308.

60 See also *Supreme Court Act 1933* (ACT) s 68B; *Criminal Code Act 1899* (Qld) s 614; *Criminal Procedure Act 2004* (WA).

61 See the comments in *Brown* (1986) 160 CLR 171, 197 (Brennan J); 215 (Dawson J) rejecting criticism that, on an *Archdall* interpretation of s 80, it has been reduced to a mere procedural provision.

62 See *Kingswell* (1985) 159 CLR 264, 306 (Deane J).

63 Section 80 removes any doubt that may have existed as a consequence of Australia's colonial history, as to whether the community could be involved in the determination of criminal guilt in federal courts. The type of disagreement between Forbes CJ in *R v Magistrates of Sydney* [1824] NSWKR 3 and Pedder CJ in *R v Magistrates of Hobart Town* [1825] TASSupC 8 as to whether lay juries could be established in Courts of Quarter Sessions was avoided by the inclusion of s 80.

participation is brought into the administration of justice for particular offences, but also imposes the limitation that this can occur only through an institution which displays the essential features of 'trial by jury' within s 80.

41. Section 80 remains, therefore, a guarantee which operates as a *limitation* on Parliament. If Parliament decides to bring the community into the fact finding process in the administration of justice, it can do so but only through the jury trial mechanism with all its essential features under s 80.

42. These essential elements have become clearer in the cases since *Brown*.[64] It must be a jury of the person's peers randomly selected. The Commonwealth cannot prescribe a military jury (which was the earliest form of jury in NSW) or a panel of experts (as suggested by Higgins during the Convention Debates when opposing the inclusion of s 80).[65] Furthermore, s 80 requires that the jury must be drawn from the relevant State of the offence where that can be identified.

Subsections 132(1)-(6) of the CP Act do not conflict with s 80

43. In a model such as the CP Act, one sees a variation on a traditional elective mechanism. The NSW Parliament has retained the traditional binary distinction between indictable and summary procedures but with two additions: Chapter 5 allows for summary conviction for certain indictable offences, and Chapter 3, Part 3, Division 2 provides that within what is otherwise an indictable procedure there is the option that, if certain conditions are met, the fact finding will be done by the judge alone.

44. The s 132 procedure is a functional and substantive successor to the traditional elective mechanism upheld in *Archdall*. The accused has the benefit of the presentment of the 'indictment' and can make legal challenges to it, or seek advance rulings on the admissibility of evidence. But before the empanelment of any jury,[66] the accused may seek to have the facts determined by the judge alone. The prosecution must agree, or the Court must be satisfied that the interests of justice so require, before a trial by judge order can be made.

45. In *Cheng*, Gleeson CJ, Gummow and Hayne JJ suggested that 'the capacity to prosecute some serious offences summarily [that is, utilising the traditional *Archdall* form of elective mechanism], at least with the agreement of the accused, can contribute, on occasion, to the more effective administration of justice'.[67] The effective administration of justice may depend upon circumstances particular to the case in question. As McHugh J said in *Cheng* (at 298-299), '[m]any accused persons would not regard the mandatory requirement of a jury trial as conferring any benefit on them. ...To some accused, trial by jury is not a boon'. Traditional elective mechanisms are ill-suited to responding to the demands of justice in the particular circumstances

64 See, eg, *Cheatle v The Queen* (1993) 177 CLR 541; *Brownlee* (2001) 207 CLR 278; *Ng* (2003) 217 CLR 521; *Fittock* (2003) 217 CLR 508.

65 Convention Debates, vol III, *Adelaide*, 1897, 990-1; vol IV, *Melbourne,* 1898, 350-2.

66 Section 132A(1) prescribes when the application must be made.

67 Their Honours referred specifically to the area of commercial fraud, described (at 270) as 'an area which would be of particular importance if the regulation of the conduct of those concerned with the management of corporations were to become a matter of Commonwealth law'. Of course, the management of corporations is now subject to regulation under the *Corporations Act 2001* (Cth).

of a case once a prosecution has commenced on indictment. Section 132 is designed to address those demands through mechanisms which account for, variously, the positions taken by the accused, the prosecution and the court when more is known about the particular charge (and particular accused).

46. Through the working out of this elective mechanism, an answer is reached as to whether the administration of justice, which is the core goal of Ch III, requires community participation not just for this offence viewed generically, but for the trial of the offence against *this particular accused*.

47. The s 132 procedure may fairly be thought to have certain advantages in the administration of justice over the traditional elective mechanisms upheld in *Archdall* and subsequent cases. Because it remains a process on indictment for the purposes of Chapter 4 of the CP Act, the full statutory procedures and rules governing indictments contained in that Act continue to apply (including the benefits of the committal process). It provides greater protection for the accused's access to a jury trial than the provision upheld in *Archdall*, which excluded the accused entirely from some decisions to proceed summarily.[68] In some circumstances, s 132 allows greater scope for, and thus protection of, trial by jury than some of the traditional elective provisions upheld by this Court. And in cases where a judge alone order is made, that will also be protective of the institution of trial by jury in the broader sense because of the strictures of the conditions in s 132(1)-(6).

48. The Commonwealth's construction accommodates the text of s 80 in one of two ways:

    48.1. First, there is no 'trial on indictment' so as to enliven s 80 unless and until all the conditions specified by Parliament which may lead to a judge alone trial have been exhausted; or

    48.2. Alternatively, even if the command of s 80 is prima facie enlivened, it is capable of legislative exception (or reasonable regulation) where the conditions specified adequately respect the individual and community values which underpin the guarantee.

a) Section 80 never enlivened

49. The first interpretation is that there is no 'trial on indictment' within the terms of s 80 until the whole of the process specified by Parliament to determine whether there shall be a trial by jury has been worked through. That includes the work of s 132.

50. The expression 'trial on indictment' as it appears in s 80 has received little attention in the cases. However, 4 propositions have been stated: (i) the words are not limited to the common law conception of an indictment as a bill presented by a grand jury to a petty jury;[69] (ii) the expression is not limited to

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68 Section 12A operated to permit the offence to be heard and determined by a Court of Summary Jurisdiction if the court thought fit upon the request of the prosecutor in relation to certain property offences (s 12A(2)).

69 *Lowenstein* (1938) 59 CLR 556, 582 (Dixon and Evatt JJ). Cf the view of Judge Chomley in *R v Judd* in the Victorian Court of Petty Sessions (1904) 10 ALR(CN) 73): 'trial on indictment' meant a 'trial on indictment by a Grand Jury' and that s 80 'left all other classes of cases unprovided for'.

any particular *form* of legal process described as an 'indictment': as Dixon and Evatt JJ said in *Lowenstein* (at 582) '[t]he accusation of different times and in different States has been variously called an information, an indictment and a presentment';[70] (iii) on the other hand trial 'on indictment' does not include all forms of criminal accusation before a court, otherwise there would be no scope for the operation of summary jurisdiction; and (iv) the *Archdall* line of cases has made it clear that the expression is not controlled by the character of the offence (whether described as indictable or summary) or the severity of the punishment imposed.

51. What then is characteristic about a 'trial on indictment' for the purposes of s 80? It is, as Dixon and Evatt JJ suggested (although ultimately erroneously further qualified[71]), 'the means of putting a prisoner upon his trial before a petit jury'.[72] In other words, it is descriptive of, and signifies for the purposes of s 80, the legal process for determining whether the community should be involved in the administration of justice.[73]

52. Further, a 'trial on indictment' for the purposes of s 80 is a step in a criminal proceeding with discernible boundaries. In the context of s 80, it refers to the process of determining the facts joined in issue on the indictment.[74] For s 80 purposes that process commences no earlier than when the accused is arraigned before a jury panel or once the accused is placed in charge of a sworn jury.[75] While the initial presentation of the document described as the indictment and the initial arraignment of the accused attract the jurisdiction of the court (s 130(2)), they do not determine whether (or when) a 'trial on indictment' has commenced for s 80 purposes. Here, while the matter had previously been listed for a trial, the Applicant has not been arraigned before any jury-elect.

53. The alternative view would see the 'trial on indictment' within s 80 as commencing once a document described as an 'indictment' under the CP Act is presented to the Court. Yet, that proposition (i) cannot stand in the face of this Court's acceptance that the constitutional expression is not limited to a particular *form* of legal process described as an 'indictment', and (ii) would

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70 See also *Kingswell* (1985) 159 CLR 264, 304 (Deane J).

71 Concerned that the *Archdall* approach to s 80 would give it 'no substantial effect' (at 584) or reduce it to a mere procedural provision, Dixon and Evatt JJ suggested (at 580) that s 80 was primarily concerned with the protection of the right of the accused to a jury trial. The consequence of such a view, it was said, was that there would be a 'trial on indictment' where the offender was liable to a term of imprisonment or some graver form of punishment (at 583). However, their Honours' view of the purpose of s 80 has never been accepted as exhaustive, and its application by their Honours to the meaning of the words 'trial on indictment' was, and remains, a dissenting view. Only Murphy J (see *Li Chia Hsing* (1978) 141 CLR 182, 201-2), Deane J (see *Kingswell* (1985) 159 CLR 264, 308-11), and Kirby J (see *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 422, 426-7) have adopted modified versions of the approach by Dixon and Evatt JJ.

72 *Lowenstein* (1938) 59 CLR 556, 582.

73 Cf the criticism of Deane J at 305 in *Kingswell*.

74 See *Cheng* (2000) 203 CLR 248, 268 [51] (Gleeson CJ, Gummow and Hayne JJ). As their Honours continued in *Cheung v The Queen* (2001) 209 CLR 1, 24 [53], 'the constitutional command in s 80 is directed to jury trial of issues joined between prosecution and accused'.

75 In this regard, Quick and Garran observe at 808 that 'It has been held in the United States that the word "trial" means the trying of the cause by the jury, and not the arraignment and pleading preparatory to such trial (*United States v Curtis*, 4 Mason 232).' See also *R v Nicolaidis* (1994) 33 NSWLR 364, 367 (Gleeson CJ).

deny the well accepted examples of guilty pleas,[76] pleas of autrefois acquit or autrefois convict and directed verdicts.[77]

54. The consequence of this argument is that, where the Court orders under s 132, in exercise of judicial power under s 77(iii), that there is a trial by judge alone, there is no 'trial on indictment' which enlivens s 80.

b) Alternatively, section 80 is enlivened but can be subject to reasonable regulation

55. The second interpretation for reconciling s 132 with s 80 is to accept that the command in s 80 is enlivened once an 'indictment' is presented to the Court, but that is not to exclude a parliamentary sanctioned regulation or waiver provided it is within limits which respect the accommodation of values contained within s 80 and s 80's role within Ch III. Once prescribed by Parliament, a jury trial operates for the benefit of the accused and the wider community as an 'instrument in the administration of justice.'[78] But that is not to preclude Parliament from specifying the conditions under which the administration of justice, as applied to the particular circumstances of the case, is better advanced by the trial reverting to the primary judicial structure established by Ch III of the Constitution constituted by a judge alone.

Brown should be distinguished or overruled

56. *Summary.* The Commonwealth submits that *Brown* can be distinguished from the present case because of the solely accused-focused elective mechanism considered there, and the impact it had on shaping the parties' arguments and the Court's reasoning. However, if *Brown* cannot be distinguished, it is in error and should be re-opened and overturned.

57. In *Brown*, on a cause removed, the Court considered whether s 7(1) of the Juries Act was picked up by s 68(1) of the Judiciary Act and applied to the appellant's trial, commenced by information, of an offence under s 233B(1)(ca) of the *Customs Act 1901* (Cth). A majority of the Court in *Brown* (Brennan, Deane and Dawson JJ; Gibbs CJ and Wilson J dissenting) held that s 80 precluded the appellant from electing pursuant to s 7(1) of the Juries Act to be tried by judge alone. Consequently, it was held, s 68(1) of the Judiciary Act could not apply s 7(1) to the trial on indictment of the accused. There are a number of features about the decision which require close consideration.

58. First, the only question before the Court was whether s 80 precluded the appellant from electing under s 7 of the Juries Act to be tried by judge alone. The question and answer in *Brown* were thus narrow. It was limited to s 7 which gave the accused the right to waive trial by jury with no other conditions employed. The Court did not answer a question on a broader provision such as s 132 of the CP Act.

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76 See *Cheng* (2000) 203 CLR 248, 268 [51] (Gleeson CJ, Gummow and Hayne JJ).

77 See *R v LK* (2010) 241 CLR 177, 199-200 (French CJ; Gummow, Hayne, Crennan, Kiefel and Bell JJ agreeing on the operation of s 80 at 216).

78 *Brownlee* (2001) 207 CLR 278, 303 (Gaudron, Gummow and Hayne JJ)

59. Secondly, the arguments in *Brown* were tailored by the parties (at 172-176) in a binary manner to address the specific statute in question, and that approach shaped the way in which the question was resolved in the judgments.[79] This binary approach to the question led the majority judges (at least Brennan and Dawson JJ) to the view that s 80 entrenches a jury as an indispensable feature of the system of government and, as such, could not be waived unilaterally by the accused as under s 7. By contrast, the dissenting judges considered that s 80's purpose was solely that of the protection of the accused, such that a jury trial could be waived by the accused with no other conditions required. In the present case both the Applicant and the Commonwealth argue for a more nuanced view of s 80 that accommodates *both* the accused's interests and those of the community.

60. Thirdly, although *Archdall* was referred to by the majority,[80] there was no attempt to reconcile it with their conclusion in the case, or consider its underlying principles.[81] Fourthly, and relatedly, the type of elective procedure included in the 1883 NSW Act was not considered by the majority. And of course a more modern variant such as s 132 in the CP Act was not available for consideration in *Brown*. Fifthly, there are different strands of reasoning within the majority judgments: (i) the mandatory language of s 80; (ii) the absence of historical practice; (iii) the trial by jury as an entrenched institution of government; and (iv) that s 80 provides a check on arbitrary judges. None of these strands, alone or in combination, sufficiently justifies precluding the operation of a provision like s 132 of the CP Act.

61. *Mandatory language*. The majority Justices in *Brown* referred to the apparent mandatory language of s 80.[82] If the Commonwealth's submission is accepted that there is no 'trial on indictment' when a judge alone order is made under s 132, then even the literal language provides no obstacle to the application of that provision. However, even if s 80 is enlivened, to rely exclusively on a literal reading of s 80 to deny any form of Parliamentary sanctioned election for judge alone trials would disconnect s 80 from its underlying purposes and its larger role within Ch III as a whole. Indeed, each of the majority Justices considered that more was needed than mere reliance on a literal reading of the constitutional text. This Court has departed from a literal reading of mandatory constitutional language when the broader constitutional context or underlying purpose has required it.[83]

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79 See, in particular, the way in which Wilson J (at 184-5) and Dawson J (at 208) referred to the arguments.

80 See *Brown*: 196 (Brennan J); 202-3 (Deane J), 215 (Dawson J). Of course, in *Kingswell* 159 CLR 264, Deane J had earlier rejected the *Archdall* line of cases (at 311-9).

81 Cf: Gibbs CJ in *Brown* at 181-2. Deane J (at 202) also took the view that there was binding authority supporting his Honour's conclusion. However, none of these previous cases considered a provision like s 7 of the Juries Act permitting unilateral jury waiver by the accused.

82 *Brown* (1986) 160 CLR 171, 196 (Brennan J), 201 (Deane J); 208, 217 (Dawson J).

83 Interstate trade and commerce is not 'absolutely free' under s 92 (*Cole v Whitfield* (1988) 165 CLR 360) and the Senate is not 'composed of senators for each state' as required by s 7 (*Western Australia v The Commonwealth* (1975) 134 CLR 201; *Queensland v The Commonwealth* (1977) 139 CLR 585); nor has the Inter-State Commission operated continuously since federation (cf s 101: 'There shall be an Inter-State Commission').

62. *Historical Practice.* The majority Justices pointed to the lack of historical practice of jury waiver at common law.[84] This conclusion is open to doubt.[85] However, more importantly, it ignores the traditional statutory elective mechanisms which had emerged prior to 1900 in England and the Australian colonies, and subsequently approved by this Court in *Archdall*, for accommodating the values of parliamentary designation, the accused's participation and the community's involvement in the administration of justice. The 'waiver' provision considered in *Brown* can be seen as the product of further experimentation with elective mechanisms. Yet, the majority judgments do not engage in any consideration of the traditional elective provisions or how their decisions could be reconciled with *Archdall*.

63. As recognised in *Brown*,[86] jury waiver was, by 1900, accepted in some US States, even where the relevant constitutional provision was expressed in mandatory terms.[87] While at a federal level in 1900, there was no established interpretation of Art III, § 2, cl 3[88] and this did not come until *Patton* in 1930, the US experience was sufficient to further confirm that which had become evident in the UK and Australian colonies as to a range of legislative prescriptive and elective mechanisms.

64. *Institution of Government.* Each of the majority Justices correctly recognised an institutional dimension of s 80.[89] However, that institutional dimension commences rather than concludes an enquiry into how s 80 treats elective mechanisms of the kind in s 132. The majority gave no weight to the accused-protective values also within s 132 nor to the importance of Parliament's ability to tailor conditions which will ensure that the administration of justice is enhanced rather than hindered by trial by jury in the particular circumstances of the case; and indeed to ensure that the institution of trial by jury itself is not damaged by being made to apply to cases for which is it not suited.

65. *A Check on Arbitrary Judges.* Deane J (at 201-202) went further than Brennan and Dawson JJ by suggesting that the jury necessarily operates to protect against 'the arbitrary determination of guilt or innocence'. A panel of lay jurors would help to ensure that 'neither the powerful nor the weak should expect or fear special or discriminatory treatment' and that 'the administration of criminal justice is, and has the appearance of being, unbiased and detached'.[90] The Commonwealth submits that this is not a purpose of s 80. First, constitutional

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84 *Brown* (1986) 160 CLR 171, 195-6 (Brennan J); 203 (Deane J), 211 (Dawson J).

85 It has been noted that '[t]he English books ... do contain traces of a procedure which in substance is exceedingly similar to the waiver of trial by jury': Erwin Griswold, 'Waiver of Jury Trial in Criminal Cases' (1934) 20 *Virginia Law Review* 655, 659.

86 *Brown* (1986) 160 CLR 171, 181 (Gibbs CJ), 188 (Wilson J), 211 (Dawson J), each citing the United States Supreme Court decision of Hallinger v. Davis, 146 US 314, 318 (1892) in which the Court referred to the numerous decisions of State courts upholding the validity of jury waiver by the accused; see further the decisions of State Courts referred to in Schick v. US, 195 US 65 (1903), Patton v. US, 281 US 276 (1930) and Singer v. US, 380 US 24 (1964). See also at 195 (Brennan J), referring to State v. Griggs, 34 W Va 78 [11 SE 740] (1890); and at 204 (Deane J).

87 Erwin Griswold, 'Waiver of Jury Trial in Criminal Cases' (1934) 20 *Virginia Law Review* 655.

88 See, e.g., *Brown* (1986) 160 CLR 171, 211 (Dawson J).

89 See e.g. *Brown* (1986) 160 CLR 171, 197, 199 (Brennan J), 202 (Deane J), 208, 214, 216 (Dawson J).

90 His Honour referred to similar statements made in his judgment in *Kingswell* (1985) 159 CLR 264 (at 301-2) characterising s 80 as a check on arbitrary judges.

provisions and implications protective of independence and impartiality, including those applicable to State Parliaments which were recognised by the Court after *Brown*, make these contentions difficult to accept. Secondly, Deane J's characterisation of s 80's purpose is also inconsistent with the historical context in which Ch III was drafted which, as has been explained, was very different to that which informed the drafting of constitutions in the United States. Thirdly, on the accepted *Archdall* approach to s 80, there is nothing in Ch III to suggest that the quality of justice offered by a jury is superior in any way to the quality of justice offered by judges sitting alone when Parliament decides whether an offence should be tried on indictment or by summary conviction. There is no reason why the quality of justice should be any less on a trial by judge alone following election and decision. The Commonwealth contends that Wilson J in *Brown* was correct to say, as a general proposition, that '[t]here is no reason why the verdict of a jury should attract and hold the confidence of the community any more than the decision of a judge when the method of trial by judge alone has been freely chosen by the accused person and the choice expressed in the manner prescribed by law' (at 193).[91]

66. In addition to the above matters, the other grounds for reopening[92] include: (i) That *Brown* is the first and only case in which the Court has squarely addressed the question of jury waiver; (ii) It is a narrow majority decision of only 5 judges; only Kirby J has since considered the point and has found in favour of jury waiver;[93] (iii) Parliament has not acted on *Brown* in a manner which militates against reconsideration. The decision in *Brown* has not altered the statutory basis upon which federal criminal jurisdiction is administered. If *Brown* is overturned, the ambulatory character of s 68 of the Judiciary Act will pick up the relevant State provisions in accordance with the reformulated constitutional principle; and (iv) As a consequence of the decision in *Brown*, the administration of federal criminal justice is placed on a radically different footing to the administration of justice in relation to State offences. With the increasing overlap in federal and State criminal offences, this is likely to produce ever increasing inefficiency (and indeed prejudice) in the administration of justice.[94] This inefficiency (and prejudice) should only be countenanced if there is a clear constitutional command producing that outcome, which there is not.

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91 See also Duncan v. Louisiana, 391 US 145, 157-8 (1968).

92 Set out in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

93 *Brownlee* (2001) 207 CLR 278, 319-20 [120].

94 See, by analogy, *Abebe v Commonwealth of Australia* (1999) 197 CLR 510, 531-3 [39]-[45] (Gleeson CJ and McHugh J).

PART V ESTIMATED HOURS

It is estimated that 1 hour and 15 minutes will be required for the presentation of the oral argument of the Commonwealth.

Dated: 25 January 2016

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S279 OF 2015

BETWEEN: HAMDI ALQUDSI
Applicant

AND: THE QUEEN
Respondent

10 ANNEXURE A TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), as at 19 December 2005

6 Incursions into foreign States with intention of engaging in hostile activities

(1) A person shall not:

(a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or

(b) engage in a hostile activity in a foreign State.

Penalty: Imprisonment for 20 years.

(2) A person shall not be taken to have committed an offence against this section unless:

(a) at the time of the doing of the act that is alleged to constitute the offence, the person:

(i) was an Australian citizen; or

(ii) not being an Australian citizen, was ordinarily resident in Australia; or

(b) the person was present in Australia at any time before the doing of that act and, at any time when the person was so present, his or her presence was for a purpose connected with that act, or for purposes that included such a purpose.

(3) For the purposes of subsection (1), engaging in a hostile activity in a foreign State consists of doing an act with the intention of achieving any one or more of the following objectives (whether or not such an objective is achieved):

(a) the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;

(aa) engaging in armed hostilities in the foreign State;

(b) causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;

(c) causing the death of, or bodily injury to, a person who:

(i) is the head of state of the foreign State; or

(ii) holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or

(d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State.

(4) Nothing in this section applies to an act done by a person in the course of, and as part of, the person's service in any capacity in or with:

(a) the armed forces of the government of a foreign State; or

(b) any other armed force in respect of which a declaration by the Minister under subsection 9(2) is in force.

(5) Paragraph (4)(a) does not apply if:

(a) a person enters a foreign State with intent to engage in a hostile activity in that foreign State while in or with an organisation; and

(b) the organisation is a prescribed organisation at the time of entry.

(6) Paragraph (4)(a) does not apply if:

(a) a person engages in a hostile activity in a foreign State while in or with an organisation; and

(b) the organisation is a prescribed organisation at the time when the person engages in that hostile activity.

(7) For the purposes of subsections (5) and (6), ***prescribed organisation*** means:

(a) an organisation that is prescribed by the regulations for the purposes of this paragraph; or

(b) an organisation referred to in paragraph (b) of the definition of terrorist organisation in subsection 102.1(1) of the Criminal Code.

(8) Before the Governor-General makes a regulation prescribing an organisation for the purposes of paragraph (7)(a), the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering:

(a) a serious violation of human rights; or

(b) armed hostilities against the Commonwealth or a foreign State allied or associated with the Commonwealth; or

(c) a terrorist act (as defined in section 100.1 of the Criminal Code); or

(d) an act prejudicial to the security, defence or international relations of the Commonwealth.

7 Preparations for incursions into foreign States for purpose of engaging in hostile activities

(1) A person shall not, whether within or outside Australia:

(a) do any act preparatory to the commission of an offence against section 6, whether by that person or by another person;

(b) accumulate, stockpile or otherwise keep arms, explosives, munitions, poisons or weapons with the intention of committing an offence against section 6, whether by that person or by another person;

(c) train or drill or participate in training or drilling, or be present at a meeting or assembly of persons with intent to train or drill or to participate in training or drilling, any other person in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of preparing that other person to commit an offence against section 6;

(d) allow himself or herself to be trained or drilled, or be present at a meeting or assembly of persons with intent to allow himself or herself to be trained or drilled, in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of committing an offence against section 6;

(e) give money or goods to, or perform services for, any other person or any body or association of persons with the intention of supporting or promoting the commission of an offence against section 6;

(f) receive or solicit money or goods, or the performance of services, with the intention of supporting or promoting the commission of an offence against section 6;

(g) being the owner, lessee, occupier, agent or superintendent of any building, room, premises or place, intentionally permit a meeting or assembly of persons to be held in the building, room, premises or place with the intention of committing, or supporting or promoting the commission of, an offence against paragraph (a), (b), (c), (d), (e) or (f); or

(h) being the owner, charterer, lessee, operator, agent or master of a vessel or the owner, charterer, lessee, operator or pilot in charge of an aircraft, intentionally permit the vessel or aircraft to be used with the intention of committing, or supporting or promoting the commission of, an offence against paragraph (a), (b), (c), (d), (e) or (f).

(1A) A reference in subsection (1) to the commission of an offence against section 6 is a reference to the doing of an act that would constitute, or would but for subsection 6(2) constitute, an offence against section 6.

(1B) A person shall not be taken to have committed an offence against this section merely because of doing an act by way of, or for the purposes of, the provision of aid of a humanitarian nature.

(2) A person shall not be taken to have committed an offence against this section in respect of the doing of an act outside Australia unless:

(a) at the time of the doing of that act, the person:

(i) was an Australian citizen; or

(ii) not being an Australian citizen, was ordinarily resident in Australia; or

(b) the person was present in Australia at any time before the doing of that act and, at any time when the person was so present, his or her presence was for a purpose connected with that act, or for purposes that included such a purpose.

Penalty: Imprisonment for 10 years.

9A Mode of trial

(1) Subject to subsection (2), a prosecution for an offence against this Act shall be on indictment.

(2) Where the law of a State or Territory makes provision for a person who pleads guilty to a charge in proceedings for the person's commitment for trial on indictment to be committed to a higher court and dealt with otherwise than on indictment, a person charged in that State or Territory with an offence against this Act may be dealt with in accordance with that law.

(3) A reference in this section to an offence against this Act includes a reference to an offence against:

(a) section 6 of the *Crimes Act 1914*; or

(b) an ancillary offence (within the meaning of the *Criminal Code*);

that relates to an offence against this Act.