IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S279 OF 2015**

BETWEEN: **HAMDI ALQUDSI**
Applicant

AND: **THE QUEEN**
Respondent

SUBMISSIONS IN REPLY 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 ARGUMENT IN REPLY

2. These submissions are filed pursuant to the orders made by French CJ on 15 December 2015.

Section 68 applies s 132 subject to the s 80 issue

3. There is no dispute among the parties as to the scope of s 68 of the *Judiciary Act 1903* (Cth), subject to s 80, to apply s 132 of the *Criminal Procedure Act 1986* (NSW) ('**CP Act**') to the Applicant's trial. As was the case in *Brown v The Queen* (1986) 160 CLR 171 ('***Brown***'), the application of s 132 to the Applicant's trial by s 68 of the Judiciary Act depends on its compatibility with the requirements of s 80 of the Constitution, not whether the ambulatory operation[1] of s 68 is capable, as a matter of construction, of picking up s 132.

4. Additionally, although s 9A of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) ('**Foreign Incursions Act**') provides that 'the prosecution for an offence against this Act shall be on indictment', it is clear from the legislative history of s 9A that its introduction in 1989 was to restore the position of having the offences under that Act prosecuted only on indictment and not summarily. Prior to the addition in 1987 of s 4J(1) to the *Crimes Act 1914* (Cth), offences under the Act could only be prosecuted on indictment.[2] With the addition of s 4J to the Crimes Act, all but one of the offences under the Act could be heard and determined by a court of summary jurisdiction (with a reduced maximum penalty). Section 9A restored the former position.[3]

Responses to the Respondent's submissions

Mandatory language of s 80 and whether the trial is 'on indictment'

5. The Respondent's primary submission is that the text of s 80 is mandatory and cannot be departed from (RS [15]-[19]). The Respondent further contends that, under the provisions of the CP Act, the trial of the accused remains on indictment even after a judge alone order is made under s 132 (RS [28]-[36]; [73]-[75]).[4] In his submissions, the Attorney-General for the Commonwealth

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1 See *R v Gee* (2003) 212 CLR 230, 240-1 [6] (Gleeson CJ), 244-5 [24] (McHugh and Gummow JJ); *R v LK* (2010) 241 CLR 177, 187-8 [13] (French CJ, with Gummow, Hayne, Crennan, Kiefel and Bell JJ agreeing at 216 [18]).

2 The lowest maximum term of imprisonment under the Act was in excess of six months and, thus, according to the classification of offences at that time under s 42 of the *Acts Interpretation Act 1901* (Cth), the offences were indictable. There was no possibility of summary disposition under s 43 of that the *Acts Interpretation Act 1901* (Cth), and ss 12 and 12A of the *Crimes Act 1914* (Cth) did not apply to offences under the Foreign Incursions Act.

3 See Explanatory Memorandum to *Law and Justice Amendment Act 1989* (Cth) at [21].

4 Although the Respondent appears to concede that that such an order might be made prior to the commencement of the trial (RS [75]). The application for a trial by judge order must be made not less than 28 days before the date fixed for trial: s 132A(1).

(**Commonwealth**) contended, in the alternative, that (i) s 80 can be construed such that the trial of the Applicant would not be 'on indictment' for the purposes of s 80 if an order were made under s 132 (CS [49]-[54]); or (ii) even if s 80 has been enlivened, it can be subject to reasonable regulation (CS [55]).

6. In response to (i), the Respondent has merely addressed the question of whether a trial remains on indictment *for the purposes of the CP Act*. However, as the Commonwealth contends in its submissions (CS [49]-[54]), that statutory process is not determinative of the constitutional expression 'trial on indictment'. The Respondent has not engaged with the Commonwealth's submissions on the constitutional meaning of that expression, including the timing question *when* the trial on indictment commences for s 80 purposes.

7. In response to (ii), the Respondent contends that if 'the mandatory language of s 80 were to be read down in some way, one might expect clear parameters around any construction to be advanced' (RS [53]) and that s 80 'does not need to be read down to accommodate qualifications so as to secure the integrity of operation of Ch III' (RS [55]). However, this assumes an ordered relationship between judge alone trials and trials by jury, and that the interests of justice always require s 80 jury trials to be used in preference to trials by judge alone where there is an indictment. The Commonwealth contends that each judicial structure is equally effective to achieve just outcomes in a case and the choice of mode of trial is one for Parliament (see CS [30], [40]-[42], [65]). A jury waiver provision is only relevant once Parliament has chosen for the community to be involved in the administration of justice through a jury. At least where the jury waiver provision appropriately reflects the various interests protected by jury trial (ie, the interests of the accused and the broader community interest: see CS [45], [64]), then there is no indeterminacy in placing parameters around the qualification. The mode of trial reverts to the primary and equally effective judicial structure established by Ch III for the administration of justice, civil or criminal.

Section 132 as a successor to the traditional elective mechanisms for the purposes of s 80

8. The Respondent accepts that s 80 is broad enough to accommodate traditional elective mechanisms where indictable offences are tried summarily (CS [20]-[25]), but not the more recent elective mechanisms of judge alone trials on indictment (provisions like s 132) that deal with the particular circumstances of the case once a prosecution has commenced on indictment.

9. In explaining why the former can be accommodated by s 80, but not the latter, the Respondent appears to support the differential operation of s 80 by reference to: (i) the relationship between, on the one hand, the nature and seriousness of the offence and, on the other, the form of criminal accusation (RS [42]-[43]); (ii) the role of juries in protecting the liberty of the accused, both historically in England and in the colonies (RS [44]-[45]); (iii) the role of juries to protect against arbitrary executives and judges (RS [46]); (iv) the demands of the rule of law (RS [47]); and (v) the institutional role played by juries (RS [48]).

10. None of these matters provides a persuasive basis to justify the differential treatment under s 80 of elective mechanisms like that in s 132, because,

respectively: (i) any bright line, unvarying constitutional link between the seriousness of the offence and the mode of trial was severed by the Court's decision in *R v Archdall and Roskruge; Ex parte Brown* (1928) 41 CLR 128 (***Archdall***); (ii) although s 80 serves the interests of the accused once it is triggered, it is not the only interest reflected in s 80 and cannot be said to justify preventing jury waiver with the consent of the accused; (iii) protection against arbitrary prosecutors and judges is neither supported by Australia's constitutional history in the late 19th century, the thrust of the Convention Debates, this Court's decision in *Archdall* nor subsequent constitutional developments (CS [65]); (iv) the rule of law is advanced equally by the two judicial structures: an independent and impartial judge sitting alone and a judge and jury sitting together (see CS [30], [40]-[42], [65]); and (v) the institutional role commences rather than concludes the enquiry (CS [64])[5].

11. The Respondent further suggests that elective mechanisms of the s 132 kind should not be permitted because the '[i]mposition of decision-making functions on courts as to how a trial on indictment is to proceed is contrary to the decision made by the framers, reflected in the terms of s 80, that, after a decision to proceed on indictment, the courts were to be insulated from decisions as to by whom the exercise of judicial power in trials on indictment was to be exercised' (RS [51]; see also at RS [24], [52], [56]). The Commonwealth makes two submissions here in response.

    11.1. First, there is nothing in the Convention Debates to suggest that the framers understood and limited s 80 in this way. There was no express consideration of elective mechanisms of the s 132 kind. Given the recent pedigree of elective provisions like s 132, that is not surprising. And the Convention history is not as rigid as suggested by the Respondent. Rather than placing fixed constraints on what could or could not be determined by a judge alone, the framers moved from rigidity to flexibility over the course of the Convention Debates to allow s 80 to accommodate the mechanisms for judge alone trials that were known to the Australian experience at federation. Section 80 should not be read as freezing those developments at 1900.

    11.2. Secondly, the notion of s 80 'insulating' the judiciary from the operative decision whether there shall be a jury is problematic. It is clear that courts with appropriate jurisdiction can, consistently with s 80, decide whether to try an offence summarily or commit the accused for trial on indictment. For example, in *R v The Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 (***Lowenstein***), the court upheld s 217 of the *Bankruptcy Act 1924* (Cth) empowering the Court of Bankruptcy, on an application for discharge of bankruptcy, to (i) charge the bankrupt with an offence and try the offence summarily or (ii) commit the person for trial. Similarly, in *Pearce v Cocchiaro* (1977) 137 CLR 600 (***Pearce***), the Court upheld s 273(2) of the *Bankruptcy Act 1966* (Cth) which provided that

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5 The Respondent refers (at RS [43]) to the establishment of the jury in civil litigation. However, jury waiver at the election of the parties in civil cases was well established in England by federation: see s 1 of the *Common Law Procedure Act 1854*.

where proceedings for offences under that Act[6] were brought in a court of summary jurisdiction, the court could (i) determine the proceedings or (ii) commit the defendant for trial. In these cases, a judge could decide whether the determination of criminal guilt would be made by that judge sitting alone, or by another judge sitting with a jury. There is no material difference between these provisions and s 132. The former case involves the exercise of incidental non-judicial power,[7] whereas the decision under s 132 is made when the court is exercising judicial power.[8] That is a difference of no relevance. The procedure of the *Lowenstein* or *Pearce* kind is in the nature of a committal proceeding, and the court has said in *Murphy v The Queen* (1985) 158 CLR 596, 616 that committal proceedings are 'sui generis': '[t]hey have the closest, if not an essential, connexion with an actual exercise of judicial power'.[9] It is merely the invocation of the court's jurisdiction to exercise judicial power which differentiates the two: a step of no significance for the Respondent's argument. If 'insulation' is not required before a court of summary jurisdiction then, equally, it is not required after an indictment has been prosecuted at the s 132 stage of the proceeding. The Court is exercising power in a single matter which determines whether a jury is ultimately called on, and that is so whether the matter involves one Court or two, and solely judicial power or a mix of judicial and incidental power.

12. In summary, the Respondent has not made good its assertion that the variation in elective mechanisms effected by s 132 is 'substantial' and 'fundamental' and that it is 'a radical and ahistorical change at the federal level' (RS [72]).

Section 80 as a limit on power

13. The Respondent contends (RS [27], [52]), and the Commonwealth accepts (cf CS [41]-[42]) that s 80 operates as a limitation on legislative, executive and judicial power. However, the *content* of that limitation depends on a conception of the purpose and function of s 80. As the Commonwealth has submitted (cf CS [30], [40]-[42], [65]), s 80 identifies the jury as an available judicial instrument for the administration of criminal justice for federal offences. If Parliament chooses to involve the community in the administration of justice, it is limited to the form of jury trial contemplated by s 80. But, there is no value judgment entrenched by s 80, or any other provision in Ch III, as to the desirability of one form of judicial structure over the other for the achievement of justice, or an entrenched concern that one form of judicial structure gives rise to greater risks or dangers to the liberty of the accused than the other.

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6 The relevant offence had a maximum penalty of three years imprisonment in some circumstances, and, thus, was indictable under s 42 of the *Acts Interpretation Act 1901* (Cth), but punishable either on indictment or by summary conviction under s 273(1) of the *Bankruptcy Act 1966* (Cth). See the similar provision in s 235(6) of the *Customs Act 1901* (Cth), which commenced on 10 November 1977 and was in force at the time that *Brown* was decided.

7 As to the incidental character of s 217, see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 294 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); as to s 273, see *Pearce v Cocchiaro* (1977) 137 CLR 600, 609 (Gibbs J). See also *Murphy v The Queen* (1985) 158 CLR 596, 618 (The Court).

8 *Murphy v The Queen* (1985) 158 CLR 596, 615-8 (The Court).

9 This is even more so in the case of a *Lowenstein* or *Pearce* provision because the decision will, whatever the outcome, result in an exercise of judicial power.

Distinguishing Brown

14. The Respondent contends that *Brown* cannot be distinguished because the majority's answer to the question in that case flowed from their reliance on the mandatory language of s 80, and that the same outcome would follow for s 132 (RS [12]-[14]). However, as contended in the Commonwealth's submissions (CS [56]-[65]), that alone does not prevent *Brown* from being distinguished. The Commonwealth's contentions in that respect are not addressed in the Respondent's submissions.

Response to the submissions of the Attorney-General for Victoria

15. The Commonwealth submits that the Court should reject Victoria's 'additional consideration' supporting the application of s 132 to the Applicant's trial (at Vic [13]-[37]). Victoria identifies (at Vic [16]-[17]) a 'State court principle'[10] that it contends must inform the construction of s 80.

16. In circumstances like the present, where a State court exercising federal jurisdiction is capable of being constituted by a judge sitting alone or with a jury, it is for the Commonwealth Parliament to identify the circumstances in which the federal offence will be tried by jury. Brennan J was correct in *Brown* to say (at 199-200) that '[w]hen a State court may be constituted or organized in more than one way to exercise its ordinary jurisdiction, the Parliament is not constrained when investing the court with federal jurisdiction to follow the State law which prescribes the circumstances in which the court is to be constituted or organized in one way or another'.[11] A fortiori, where a State court exercising federal jurisdiction is capable of being constituted by a judge sitting alone or with a jury, there is no scope for conflict between s 80 and the asserted State court principle.

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10 As stated by Knox CJ, Rich and Dixon JJ in *Le Mesurier v Connor* (1929) 42 CLR 482, 495-6 and Mason CJ and Deane J in *Harris v Caladine* (1991) 172 CLR 84, 92.

11 Brennan J referred (at 200) in support to *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 (upholding the validity of s 39(2)(d) of the Judiciary Act which prescribed the constitution of State courts of summary jurisdiction when exercising federal jurisdiction), and to its application in *Troy v Wrigglesworth* (1919) 26 CLR 305.