IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S279 of 2015

BETWEEN:

HAMDI ALQUDSI
Applicant

and

THE QUEEN
Respondent

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the statement by the Attorney-General of the Commonwealth of the applicable legislative provisions.

Part V: Submissions

5. South Australia confines its submissions to the interpretation of s 80 of the Constitution.

6. In summary, South Australia submits:

   i. It is for the Commonwealth Parliament to determine which, if any, Commonwealth offences are to be tried on indictment.[1]

   ii. It is within the power of the Commonwealth Parliament to determine that whether an offence is to be tried on indictment is contingent on the satisfaction of certain stipulated conditions.[2] The Commonwealth Parliament could, therefore, enact a provision providing that in circumstances where an accused elects for trial by judge alone, that trial is not to be one on indictment. An election by the accused in those circumstances would not be a "waiver" of the requirements of s 80.[3] Rather, by operation of Commonwealth legislation determining that which will and will not be tried by trial on indictment, the accused's election would take the trial in question outside the scope of s 80.

   iii. The question whether the Parliament has made such a law, in any given case, is a question of statutory construction. In this case, the question is whether s 132 of the *Criminal*

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1 *Kingswell v The Queen* (1985) 159 CLR 264 at 276-7 (Gibbs CJ, Wilson and Dawson JJ), 282 (Mason J); *Cheng v The Queen* (2000) 203 CLR 248 at [121]-[122], [125], [129], [143], [151] (McHugh J); [283] (Callinan J); *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [24] (Gleeson CJ and Gummow J), [136] (Callinan J); *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 190 (Barwick CJ), 193 (Gibbs J); *Zarb v Kennedy* (1968) 121 CLR 283 at 294 (Barwick CJ), 297 (McTiernan J), 298-9 (Menzies J); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 571 (Latham CJ); *R v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 at 136 (Knox CJ, Isaacs, Gavan Duffy and Powers JJ), 139-140 (Higgins J). So much was also expressly contemplated by the framers of the Constitution; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at p1895.

2 See, e.g., ss 4J and 4JA of the *Crimes Act 1914* (Cth).

3 Such waiver not being open to an accused; *Brown v The Queen* (1985) 160 CLR 171 at 196, 201 (Brennan J); 202, 207 (Deane J), 214, 216-7 (Dawson J).

Procedure Act 1986 (NSW) (**CPA**), through s 68 of the *Judiciary Act 1903* (Cth), provides that the trial of the offence under s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (**C(FIR) Act**) can be otherwise than "on indictment".

iv. That is a question of construction of s 132 of the CPA, read in the context of ss 7(1)(e) and 9A of the C(FIR) Act.

v. South Australia makes no submission on the answer to this question of statutory construction.

vi. If the answer to the question of construction is that s 132 of the CPA provides that the relevant offence may be heard and determined otherwise than by "trial on indictment", once a trial by judge order is made pursuant to s 132, s 80 of the Constitution is not engaged.

vii. If the answer to the question of construction is that s 132 of the CPA does not provide that the offence may be heard and determined otherwise than by trial on indictment, then the effect of the decision in *Brown v The Queen*[4] (***Brown***) arises.

viii. South Australia makes no submission as to the effect of the decision in *Brown*.

A. THE ISSUE

7. The Applicant is charged with seven offences against s 7(1)(e) of C(FIR) Act.[5] It is alleged that the Applicant performed services in New South Wales for seven different persons with the intention of supporting or promoting the commission of an offence against s 6 of C(FIR) Act, being the entry of persons into a foreign State with the intent to engage in a hostile activity, namely armed hostilities in that State.[6]

8. Each of the offences with which the Applicant is charged is an offence against the C(FIR) Act. Section 9A(1) of the C(FIR) Act provides that a prosecution for an offence against that Act "shall be on indictment".[7] Further, each of the offences with which the Applicant is charged carries a maximum penalty of imprisonment for 10 years.[8] The offences being punishable by imprisonment for a period exceeding 12 months are also stipulated by the Commonwealth Parliament to be "indictable offences, unless the contrary intention appears".[9]

9. Section 80 of the Constitution provides relevantly that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury" and shall take place in the State in which

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4 (1985) 160 CLR 171.
5 Now repealed.
6 Cause Removed Book (**CRB**) at 2-4.
7 The Applicant not having pleaded guilty, the exception in s 9A(2) is inapplicable.
8 C(FIR) Act, s 7.
9 *Crimes Act 1914* (Cth) s 4G.

the offence was committed.

10. The Applicant's offending is alleged to have taken place in New South Wales, and the Applicant's trial is to be heard in the Supreme Court of New South Wales.

11. As the Applicant is charged with Commonwealth offences, jurisdiction to try those offences is conferred on the courts of New South Wales by s 68(2) of the *Judiciary Act 1903* (Cth). Further, the procedure of that State applicable in the prosecution of State offences applies so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth.[10] In this, s 68 "reflects a legislative decision to rely upon State courts to administer criminal justice in relation to federal offences and to have uniformity within each State as to procedures for dealing with State and federal offences".[11]

12. Two observations fall to be made at this juncture. First, s 68(1) will on its term only apply the laws of a State "so far as they are applicable" to persons who are charged with offences against the laws of the Commonwealth and in respect of whom jurisdiction has been conferred on the courts of that State by s 68. Such a law will only be "applicable" in the relevant sense if it is compatible with the provisions of the Constitution.[12] Second, the jurisdiction conferred on a State court pursuant to s 68(2) is expressly made "subject ... to section 80 of the Constitution", such that any jurisdiction so exercised will not be exercisable in a manner inconsistent with the Constitution.[13]

13. The laws of New South Wales which provide the procedure for summary conviction and the procedure for trial and conviction on indictment reside chiefly, and, for present purposes, relevantly, in the CPA. The Applicant, having been presented for trial in the Supreme Court of New South Wales, applies, pursuant to s 132 of the CPA, for an order that his trial be by judge alone (a "trial by judge order"[14]).[15]

14. Bearing in mind that it is by operation of s 68(2) of the *Judiciary Act 1903* (Cth) that the Supreme Court of New South Wales can exercise the federal jurisdiction needed to hear the Applicant's trial, and that it is only by operation of s 68(1) of the *Judiciary Act 1903* (Cth) that the procedural laws of the CPA are applied in the Applicant's trial, the question stated for the consideration of this Court arises:

    Are sub-ss 132(1) to (6) of the *Criminal Procedure Act 1986* (NSW) incapable of being applied

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10 *Judiciary Act 1903* (Cth), s 68(1).

11 *R v LK* (2010) 241 CLR 177 at [13] (French CJ). See also *R v Gee* (2003) 212 CLR 230 at [6]-[7] (Gleeson CJ), [63]-[64] (McHugh and Gummow JJ); *R v Williams (No 2)* (1934) 50 CLR 551 at 560 (Dixon J).

12 *Brown v The Queen* (1985) 160 CLR 171 at 200 (Brennan J), 206 (Deane J) 217-8 (Dawson J).

13 *Brown v The Queen* (1985) 160 CLR 171 at 206 (Deane J). See also *R v LK* (2010) 241 CLR 177 at [13]-[20], [24]-[25] (French CJ).

14 *Criminal Procedure Act 1986* (NSW) s 132(1).

15 CRB 12-13.

to the Applicant's trial by s 68 of the *Judiciary Act 1903* (Cth) because their application would be inconsistent with s 80 of the Constitution?

B. "TRIAL ON INDICTMENT" AND PARLIAMENT'S POWER TO CHOOSE

15. The requirements of s 80 – that the relevant trial "shall be by jury", and that "every such trial shall be held in the State where the offence was committed" – only apply in the case of "[t]he trial on indictment of any offence against any law of the Commonwealth".

16. In this, s 80 of the Constitution implicitly contemplates the creation by the Commonwealth Parliament of offences which may be triable on indictment. Its terms do not, however, implicitly require that, at any given time, there be offences which meet that description. Indeed, as at federation, there were no Commonwealth statutes, and thus no offences created by such statute – triable on indictment or otherwise.[16]

17. It is for the Commonwealth Parliament to determine which, if any, Commonwealth offences are to be tried on indictment.[17] Further, the question of whether or not a given offence is to be tried on indictment may not be answered simply by identifying whether or not the offence in question has been classified by the Commonwealth Parliament as "indictable". Whilst s 69 of the *Judiciary Act 1903* (Cth) has the effect that, generally, indictable offences against the laws of the Commonwealth will be tried on indictment, this *prima facie* position can be rebutted by provisions evincing a contrary intention (or, indeed, by legislative amendment or repeal of s 69). Such contrary statutory intention is expressed, by way of example, in the terms of ss 4J and 4JA of the *Crimes Act 1914* (Cth).[18]

18. It being within the power of the Commonwealth Parliament to determine that which is to be tried on indictment and that which is not, it is within the power of that legislature to render the determination of the mode of trial of a particular offence – on indictment or otherwise – conditional on some other stipulated criterion. Sections 4J and 4JA of the *Crimes Act 1914* (Cth) are examples of such conditional stipulations as to the applicable mode of trial. By way of further

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[16] The *Customs Act 1901* (Cth), which was proclaimed to commence operation on 4 October 1901, was the first Commonwealth statute to create offences against a law of the Commonwealth that were to be tried on indictment.

[17] *Kingswell v The Queen* (1985) 159 CLR 264 at 276-7 (Gibbs CJ, Wilson and Dawson JJ), Mason J agreeing at 282; *Cheng v The Queen* (2000) 203 CLR 248 at [121]-[122], [125], [129], [143], [151] (McHugh J); [283] (Callinan J); *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [24] (Gleeson CJ and Gummow J), [136] (Callinan J); *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 190 (Barwick CJ), 193 (Gibbs J); *Zarb v Kennedy* (1968) 121 CLR 283 at 294 (Barwick CJ), 297 (McTiernan J), 298-9 (Menzies J); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 571 (Latham CJ); *R v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 at 136 (Knox CJ, Isaacs, Gavan Duffy and Powers JJ), 139-140 (Higgins J). So much was also expressly contemplated by the framers of the Constitution; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at p1895.

[18] The Commonwealth legislature has in fact provided for certain indictable Commonwealth offences to be tried summarily in certain circumstances since as early as 1926, when s 10 of Act No 9 of 1926 inserted (former) s 12A into the *Crimes Act 1914* (Cth).

examples, it would equally be within the power of the Commonwealth Parliament to enact laws which provide that, for a given Commonwealth offence, the offence is to be tried on indictment unless:

i. the offence carries a maximum penalty of less than five years;

ii. the accused elects to be tried summarily; or

iii. the accused elects to be tried by judge alone.

19. Once the relevant condition or conditions imposed by Parliament were satisfied, the hypothesised Commonwealth provision would operate to determine that the offence in question is one to be tried otherwise than by trial on indictment. The offence no longer being triable on indictment, the trial would no longer be one falling within the ambit of s 80 of the Constitution and thus not attract its requirement to be by jury.

20. As is apparent from the second and third examples postulated above, it is within the power of the Commonwealth Parliament effectively to "delegate" its power to determine whether a particular offence is to be tried on indictment to, for example, an accused. Indeed, at present, ss 4J and 4JA of the *Crimes Act 1914* (Cth) effect a similar "delegation" to the prosecution and accused jointly, where certain other conditions are also met.[19]

21. Each of these conclusions regarding the scope of the Commonwealth's power to determine legislatively those offences which are to be tried on indictment and those which are not, flows from the majority decision of this Court in *Kingswell v The Queen*[20] (***Kingswell***).[21]

22. These conclusions support the proposition that it would be within the power of the Commonwealth Parliament to legislate so as to provide an accused with a means of effectively disengaging – although not "waiving" – the operation of s 80 of the Constitution.[22] Such a conclusion is not at odds with this Court's decision in *Brown*.

23. The disengagement of s 80 in such circumstances would not amount to a "waiver" of s 80 on the part of the accused[23] because the relevant election by the accused (be it, for example, to be tried

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19 By way of further example see also s 30(6)-(7) of the *Australian Crime Commission Act 2002* (Cth).

20 (1985) 159 CLR 264.

21 See also *Cheng v The Queen* (2000) 203 CLR 248 at [121]-[122], [125], [129], [143], [151] (McHugh J); [283] (Callinan J); *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [24] (Gleeson CJ and Gummow J), [136] (Callinan J); *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 190 (Barwick CJ), 193 (Gibbs J); *Zarb v Kennedy* (1968) 121 CLR 283 at 294 (Barwick CJ), 297 (McTiernan J), 298-9 (Menzies J); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 571 (Latham CJ); *R v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 at 136 (Knox CJ, Isaacs, Gavan Duffy and Powers JJ), 139-140 (Higgins J). No party in this case has sought to reopen the decision in *Kingswell* or *R v Archdall; Ex parte Carrigan* 1928) 41 CLR 128.

22 See *Cheng v The Queen* (2000) 203 CLR 248 at [150] (McHugh J).

23 Such waiver not being open to an accused; *Brown v The Queen* (1985) 160 CLR 171 at 196, 201 (Brennan J); 202, 207 (Deane J), 214, 216-7 (Dawson J).

otherwise than by trial on indictment,[24] or even to be tried by judge alone[25]), as permitted by the hypothesised Commonwealth provision, would exclude the accused's trial from the ambit of s 80. That is, by dint of the hypothesised Commonwealth legislation, the mandate in s 80 is not waived, rather s 80 is simply not engaged.

24. Where the Commonwealth Parliament determines, as is its prerogative, that a particular offence is not to be tried on indictment in a certain circumstance – e.g., where an accused elects for trial by judge alone – then the legislative choices of Parliament remain the ultimate source of any disengagement of s 80, rather than any purported exercise by an accused of an ability to waive some purported individual constitutional right.

10 25. This is consistent with the majority judgments in *Kingswell* and *Brown*.[26] Provided the disengagement of s 80 is effected by a legislative choice of the Commonwealth Parliament, even where that choice is in some sense "delegated" to an accused person and determined by whether that accused wishes to be tried by judge alone, no waiver occurs and the disengagement is unobjectionable.

26. In *Brown*, s 7(1) of the *Juries Act 1927* (SA) fell to be considered. Section 7(1), if picked up by s 68(1) of the *Judiciary Act 1903* (Cth), purported to permit a person charged on indictment with offences against the laws of the Commonwealth to elect for trial by judge alone despite the injunction in s 80 that, *if* the offence be tried on indictment, it shall be by jury. *Brown* is authority for the proposition that the consequence conditioned on the Commonwealth Parliament's
20 determination that a particular offence be tried on indictment – i.e., trial by jury – cannot be waived by an accused. It does not address itself to the submission that South Australia makes here. In *Brown*, the offence was one to be tried on indictment.[27] Section 7(1) of the *Juries Act 1927* (SA) operated in relation to a trial on indictment and not to determine whether the trial was to be on indictment. The distinction is not a matter of form. The exercise by the Commonwealth Parliament of its power to determine whether a matter is to be tried on indictment or otherwise is a matter of substance.

27. The question then becomes, in any given case, a matter of statutory construction. Here, the question is: Has the Commonwealth Parliament, through s 68 of the *Judiciary Act 1903* (Cth), when read with the C(FIR) Act, evinced an intention that an election for trial by judge alone
30 pursuant to s 132 of the CPA by an accused charged with offences against the C(FIR) Act, also determines that the trial will not be on indictment?

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24 As per the example given at [18(ii)] above.
25 As per the example given at [18(iii)] above.
26 That being so, there is no imperative to reopen the decision in *Brown*.
27 *Brown v The Queen* (1985) 160 CLR 171 at 200 (Brennan J), 202 (Deane J), 209 (Dawson J).

28. So much not being express, the question in this case is whether such a statutory intention is nevertheless implied by the terms of s 132. If it is, the answer to the question stated for this Court must be "no", for the Applicant's trial falls beyond the scope of s 80. If, however, s 132 of the CPA does not, by implication, provide that the trial need not be on indictment, then s 80 may be engaged and the effect of the decision in *Brown* would arise.

29. South Australia makes no submission as to the effect of *Brown*.

Part VI: Estimate of time for oral argument

30. South Australia estimates that 10 minutes will be required for the presentation of oral argument.

Dated: 29 January 2016

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