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 TASMANIA, INTERVENING

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General of Tasmania intervenes pursuant to s 78A of the *Judiciary Act 1903 (Cth)* in support of the Applicant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not Applicable

PART IV: APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The applicable Constitutional and legislative provisions are identified in Part VII of the Applicant's Submissions.

Date of Document: 25 January 2016
Filed on behalf of the Attorney-General for Tasmania

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PART V: SUBMISSIONS

Issue

5. The following question has been posed for determination by this Court:

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

6. Tasmania intervenes in support of the Applicant and submits that the answer to the question should be "no".

Preliminary matters

7. Tasmania does not have statutory provisions relating to trial by judge alone. However, it has an interest in law reforms to enable trial by judge alone, the circumstances in which that might be possible and more generally in the rights of its citizens to a fair trial. It seeks to ensure that those rights can conveniently be administered by its courts according to the justice of the case, including trials on indictment of offences against a law of the Commonwealth.

8. In *Brown v The Queen* (1986) 160 CLR 171 (*"Brown"*) a majority[1] of this Court held that s 80 of the Constitution did not permit an accused person indicted for an offence against a law of the Commonwealth to elect to be tried by a judge alone.

9. It is submitted, for the reasons which follow, to the extent that it is necessary for determination of this matter that *Brown* should be reopened and overruled.

10. The Attorney-General for Tasmania respectfully adopts in whole the Applicant's submissions under the headings "Text, history and general principles" on pages 7-9 and "Waiver by an accused" on pages 14-16. The Attorney-General also adopts the Applicant's submissions under the headings "Context and purpose" on pages 9 - 13, "Constitutional guarantees and the word 'shall'" on pages 13 - 14 and "The majority decision in *Brown*" on pages 16-18 and makes the following additional submissions in regards to those matters.

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1 Brennan, Deane & Dawson JJ

A means to a fair trial

11. At common law the general concept of "trial by jury" is to be understood by reference to its essential features. The concept is conveniently dealt with by French CJ in *R v LK* (2010) 241 CLR 177 at [36]. The features include the requirement of unanimity, that the members of the jury, having been randomly and impartially selected, are to be representative of the community and are impartial to the issues in contest.[2]

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12. Trial by jury ought to be understood as a fundamental right of citizenship[3] the purpose of which is directed towards protecting the accused against the tyranny or oppression of the state.[4]

13. Vitally, trial by jury forms part of the broader right to a fair and impartial trial[5]. In *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 116 [37] it was recognised that *every* accused has a right to a fair and impartial trial according to law. In *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 541 Isaacs J stated that every person has:

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> "the elementary right ... to a fair and impartial trial. That such a right exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretensions to civilization"
>
> and at 549
>
> "The final and paramount consideration in all cases is...'to do
30 justice'...All other considerations are means to that end."

14. It is contended that trial by jury is a means to that end or, as was said in *Patton v United States* (1930) 281 US 276 at 297, it is "one of [the courts'] instrumentalities" [6] primarily for the protection of the accused.

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2 *Ng v R* (2003) 217 CLR 521 at [37] per Kirby J

3 *Newell v The King* (1936) 55 CLR per Latham CJ at 711-712, Dixon and Evatt JJ agreeing at 712-713

4 *Brown* at 179 per Gibbs CJ; 188 - 191 per Wilson J, 197 per Brennan J; *Kingswell v The Queen* (1985) 159 CLR 264 at 298-303; *Cheng v The Queen* (2000) 203 CLR 248 at [80], [83]; *Brownlee v The Queen* (2001) 207 CLR 278 at [21]; *Fittock v The Queen* (2003) 217 CLR 508 at [23]

5 *R v Macfarlane; Ex parte O'Flanagan (1923) 32 CLR 518*, 541-2; *X7 v Australian Crimes Commission* (2013) 248 CLR 92 at 116- 117

6 In *Patton v US* (1930) 281 US 276 at 297 the Court rejected the proposition that the jury was constitutionally established as an integral and inseparable part of the court, instead of one of its instrumentalities.

15. The notion that s 80 is a fundamental law of the Commonwealth[7] must mean that s 80 is something more than a procedural provision.

16. Treating the right to trial by jury as a principal, but not exclusive means, to support the right to a fair trial is a more satisfactory explanation of the purpose and context of s 80.

17. First, s 80 recognises that there is more than one mode of fair trial in offences against a law of the Commonwealth.

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18. Secondly, the common law right to a fair trial has always underpinned the administration of criminal justice. The framers of the Constitution must at least have acted on that assumption.[8]

19. Thirdly, the interpretation of s 80 in this way does no violence to any public benefit or interest that might accrue from the institution.[9] To the contrary it supports the public interest. The right to trial by jury, displaced by consent of the parties, or an order of the court in appropriate cases, is a guarantee of the integrity of the judicial system
20 and does not work to its detriment. Section 80 delivers no public benefit in trials which are unfair because they fail, or are perceived to fail to deliver the necessary detachment and impartiality. Public confidence in trial by jury is engendered by the system operating fairly.

20. Fourthly, the interpretation is consistent with a right which should logically reside in the accused. If the right is to a bulwark of liberty,[10] it must be reposed in the accused. There is no other liberty at stake. Similarly, if the purpose of section 80 is to prevent oppression by government,[11] the prevention should immunise the accused.

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21. Fifthly, the interpretation is more consistent with the interpretation of the Constitution as an enduring document, which deals with concepts and purposes, which are adaptable and adapted to contemporary community standards.[12]

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7 *R v Snow* (1915) 20 CLR 315 at 323 per Griffith CJ

8 *Official Record of the Debates of the Australian Federal Convention*, 3rd Session, Vol 1 at 351 to 353, esp Mr Higgins at 352, "what we want to get is justice."

9 Identified by Deane J in *Kingswell* and *Brown* and built on by Gaudron J in *Cheng* at [80] & [81]

10 See the authority referred to in Hon V Bell, *Section 80 – The Great Constitutional Tautology"* (2013) Monash University Law Review, Vol 40 No 1 p 7 at p 9

11 *Brown* at 179 per Gibbs CJ; *Brownlee* at 288 [21] per Gleeson CJ and McHugh J citing *Williams v Florida* (1970) 399 US 78 at 100

12 *Re Wakim; ex parte McNally* (Cross Vesting Case) (1999) 198 CLR 511 at 552; *Australian National Airways v Commonwealth* (1945) 71 CLR 29 at 81; *Brown* at 183 per Gibbs CJ, 190 per Wilson J and 216-217 per Dawson J

22. Sixthly, the interpretation provides a proper balance between the Commonwealth's legislative power to create indictable or summary offences and where relevant its executive power to proceed on indictment instead of summarily on the one hand and an accused person's right to be dealt with justly on the other.[13]

23. Seventhly if, as we contend, the purpose of the section is seen as providing an institution within the judicial power of the Commonwealth to provide for a fair trial, then that purpose would be frustrated if the trial of an indictable offence against a law of the Commonwealth was not fair, or perceived as fair. The purpose of s 80 remains intact only if it results in a fair trial.

Brown

24. In *Brown* a majority of this Court held that s 80 of the Constitution did not permit an accused person indicted for an offence against a law of the Commonwealth to elect to be tried by a judge alone. The majority judges, however, differed in their reasons for that conclusion.[14]

25. Brennan J reasoned that at common law no waiver of the right to a trial by jury was permitted and that the jury was an essential constituent of any court exercising jurisdiction to try a person on indictment.[15]

26. Deane J said that s 80 is a guarantee against the arbitrary determination of guilt.[16] He found that the jury system produced benefits to the accused and the community.[17] Thus s 80 did not guarantee a private right capable of being waived.[18]

27. Dawson J found that the only mode of trial on indictment contemplated by the common law was by jury.[19]

28. The dissenting judgments of Gibbs CJ and Wilson J evince the following propositions.

    a. Although the text of s 80 is drafted in mandatory terms,[20] it does not deny to an accused person a right to waive its operation.[21]

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13 The Applicant's submissions at p17.34, para 82.

14 Hon V Bell, *Section 80 – The Great Constitutional Tautology Monash University Law Review*, Vol 40 No 1 p 7 at p 20

15 *Brown* at 196-7

16 *Brown* at 201

17 *Brown* at 202

18 For the principles relating to waiver of a statutory right, see the dissenting judgments of Gibbs CJ and Wilson J in *Brown* and also *Commonwealth v Verwayen* (1990) 170 CLR 394 at 404, per Mason CJ, 424 per Brennan J, 468 per Toohey J

19 *Brown* at 211

b. The Constitution underpins a body politic, providing an instrument that is intended to endure. The question is how s 80 is to be interpreted in those circumstances.[22]
c. The purpose of s 80 is to protect the accused from oppression by government.[23]
d. The purpose of the section is directed solely to securing to an accused person a trial by jury.[24]
e. A right given to a jury in a criminal trial is in no different category than rights to give evidence, admit facts, remain silent, or plead guilty. The Crown has no part in any of these.[25]

29. It is submitted that in *Brown* the underlying assumption was that the prescription of a jury under s 80 is (in varying degrees) an indispensible instrument of justice, in cases where the offence against a law of the Commonwealth is an indictable offence. Consistently with the submission that the purpose of s 80 is to secure a fair trial, we contend that that assumption does not hold in every such case. A jury trial is not indispensible to a fair result.

30. The judgments that rely on the common law in *Brown* do not refer to:

a. the evolution of the institution of trial by jury at common law;
b. the effect of statutory changes to the institution by the time of Federation;
c. the fact that the institution was continuing to evolve at Federation.

31. Later authority[26] referring more to the functional characteristics of trial by jury recognises these matters. To say that there is a conditional right to waive a trial by jury is to recognise, as Gibbs CJ and Wilson J did in *Brown*, that the constitutional provision endures. But, "essential features"[27] of a jury aside, the institution is not immutable.

32. We also contend that, for the reasons given in the judgment of Wilson J, that the United States' cases were incorrectly interpreted by the majority to make Art. III s 2(1) of the United States' Constitution as

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20 *Brown* at 178 per Gibbs J; Wilson J at 187
21 *Brown* at 189 per Wilson J
22 *Brown* at 183 per Gibbs CJ; at 190 per Wilson J
23 *Brown* at 179 per Gibbs CJ
24 *Brown* at 190 per Wilson J
25 *Brown* at 192-3 per Wilson J
26 *Brownlee v R* (2001) 207 CLR 278 at 287 - 8 [17] to [20]; 299 at [58] – [64]; 338 to 341 [175] to [183]
27 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375; *Cheatle v The Queen* at 549 (1993) 177 CLR 541

relevantly affected by the Sixth Amendment. In our respectful submission, the reasoning in *Patton* contains no such implication.

Conclusion

33. It is submitted that the fundamental common law right on which s 80 rests is an accused person's right to a fair trail. The application of that purpose is the most satisfactory answer to the proper construction of s 80.

34. Viewed in that way, the community's expectations of the administration of criminal justice are adequately served. Fundamentally, the guarantee of a fair trial to an accused person is given proper meaning and effect by construing s 80 so as to allow for waiver of the right to a trial by jury in appropriate circumstances in accordance with rules governing the administration of criminal justice in the courts.

35. The Attorney-General of Tasmania submits that the answer to the question stated for the Court should be "No".

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

36. Tasmania estimates that it will require not more than 20 minutes for presentation of oral argument.

Dated 25 January 2016

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