IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S279 of 2015

B E T W E E N:

HAMDI ALQUDSI

Applicant

AND:

THE QUEEN

Respondent

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SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING) - ANNOTATED

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Filed on behalf of: Attorney-General for the State of Victoria

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HIGH COURT OF AUSTRALIA
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PART I: CERTIFICATION

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

PARTS II & III: INTERVENTION

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

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. The Applicant has referred to the relevant legislative provisions in Part VII of his submissions. Victoria also refers to s 77(iii) of the Constitution.

PART V: ARGUMENT

A. Introduction

4. Victoria submits that the answer to the question stated[1] for the consideration of the Full Court is "no": Sections 132(1) to (6)[2] of the *Criminal Procedure Act 1986* (NSW) (the **CP Act**) are not incapable of being applied to the Applicant's trial by s 68 of the *Judiciary Act 1903* (Cth).

5. In summary, it makes the following submissions:

   (1) There is no inconsistency with s 80 where an accused is tried by judge alone, in circumstances where the accused agrees to that course and either the prosecution also agrees or the court considers such a course to be in the interests of justice, as provided for in s 132 of the CP Act.

   (2) In short, that is because the recognition of such an exception to the guarantee in s 80 is consistent with its purpose; conversely, not to allow the exception would be inconsistent with its purpose.

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1 Cause Removed Book, 10.

2 For ease of reference, when these submissions refer to "s 132", they should be taken to refer to subsections (2) to (6) of s 132.

(3) An additional matter that supports that approach to s 80 is constitutional coherence between, on the one hand, s 80 and, on the other hand, States' freedom to constitute and organise their courts as they see fit.

(4) Specifically, the Court should not lightly attribute to s 80 the consequence that State legislatures are denied the ability to make laws such as s 132 of the CP Act applicable whether their courts are exercising State or federal jurisdiction.

(5) *Brown v The Queen*[3] (***Brown***) does not govern this case, because 132 of the CP Act, unlike s 7 of the *Juries Act 1927* (SA) considered in *Brown*, does not condition trial by judge alone merely on a choice by the accused person. However, if necessary, *Brown* ought be reconsidered and overruled.

6. In respect of points (1)-(2) and (5) Victoria does not substantially add to the Applicant's submissions, which Victoria respectfully adopts.

7. These submissions, in the main, are directed to points (3) and (4).

B. No inconsistency with s 80

8. As the Applicant submits,[4] it being orthodox to regard constitutional guarantees cast in absolute terms as being subject to limited exceptions, it ought be accepted that the interests of justice may require s 80 to admit of exceptions consistent with its purpose.

9. The division of opinion in *Brown* centred on the contention that s 80 gives rise to a constructional choice between a mode of trial that is hardwired, on the one hand, and a right that is conferred for the benefit of the accused and which the accused can unilaterally waive, on the other. A shortcoming of the latter construction is that it failed to accommodate the broader public interest in trial by jury.

10. However, the provisions in suit give rise to a more nuanced constructional question: is there room in s 80 for a provision that allows for trial by judge alone

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3 (1986) 160 CLR 171.

4 We hope to do no injustice to the Applicant's submissions.

in the interests of justice, as reflected in the agreed position of prosecutor and accused, or where the court, with the agreement of the accused, determines that it is in the interests of justice for there to be a trial by judge alone?

11. Victoria contends, substantially for the reasons given by the Applicant, that s 80 is broad enough to admit of exceptions where it is in the interests of justice for the trial to be had without a jury.

12. That interpretation is supported by a number of considerations, including:

(1) the capricious operation which s 80 would have if it permitted the Parliament to avoid trial by jury by providing for a trial other than on indictment, but prevented an accused being spared an unfair jury trial;

(2) the absurdity and injustice of applying s 80 where its "reason utterly fails",[5] for example, where the accused person has applied for a trial by judge alone and where the court has found that such a trial is in the interests of justice.

13. Victoria submits that there is an additional consideration that may be added to that list; namely, the need for coherence between, on the one hand, s 80 and, on the other hand, States' freedom to constitute and organise their courts as they see fit.[6]

14. The steps in Victoria's argument are as follows:

(1) The courts of a State are the judicial organs of that State and State law, "primarily at least, determines the constitution of the Court itself, and the organization through which its powers and jurisdictions are exercised".[7]

(2) One consequence of that principle is that, when the Commonwealth invests a State court with federal jurisdiction under s 77(iii), it cannot change the constitution, structure or organisation of the State court.

(3) An investiture of federal jurisdiction in a State court under s 77(iii) of the Constitution brings with it, in relevant trials, the requirements of s 80 of

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5 *Patton v United States* (1930) 281 US 276 at 306.

6 *Harris v Caladine* (1991) 172 CLR 84 at 92 (Mason CJ and Deane J).

7 *Le Mesurier v Connor* (1929) 42 CLR 481 at 495-6 (Knox CJ, Rich and Dixon JJ).

the Constitution, giving rise to a tension between, on the one hand, s 80 and, on the other hand, States' freedom to constitute and organise their courts as they see fit (the **State court principle**).

(4) Constitutional coherence requires that s 80 be construed in light of the State court principle and s 80 ought not lightly be construed as having the consequence that State legislatures are denied the ability to make laws such as s 132 of the CP Act applicable whether their courts are exercising State or federal jurisdiction.

The State court principle

15. Justice Isaacs said in *R v Murray; Ex parte Commonwealth*:[8]

> The Constitution, by Ch III, draws the clearest distinction between federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilise the judicial services of State Courts recognizes in the most pronounced and unequivocal way that they remain "State Courts".

16. The courts of a State are the judicial organs of that State and State law, "primarily at least, determines the constitution of the Court itself, and the organization through which its powers and jurisdictions are exercised".[9]

17. State courts are created and maintained by the States for the purpose of administering the laws in each State, a purpose that is vital to the existence of the States as free communities.[10] As Mason CJ and Deane J said in *Harris v Caladine*:[11]

> [T]he Parliament cannot alter the organization or structure of a State court as it exists under State law. Parliament cannot alter that organization or structure, for to do so would interfere with the State's freedom to constitute and organize its courts as it sees fit.

18. Thus, a particular application of the State court principle is the rule that Parliament, when investing a State court with jurisdiction under s 77(iii), must

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8 (1916) 22 CLR 437 at 452.

9 *Le Mesurier v Connor* (1929) 42 CLR 481 at 495-6 (Knox CJ, Rich and Dixon JJ). See also *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49.

10 *Russell v Russell* (1976) 134 CLR 495 at 516 (Gibbs J).

11 *Harris v Caladine* (1991) 172 CLR 84 at 92 (Mason CJ and Deane J).

"take a State court as it finds it". The application of the principle is illustrated by the following examples:[12]

(1) In *Le Mesurier v Connor*,[13] it was held that provisions of the *Bankruptcy Act 1924* (Cth) purporting to make registrars, acting as Commonwealth officers, part of the organisation of State courts and which authorized them to exercise powers and functions as officers of the court, were invalid.

(2) In *Russell v Russell*,[14] it was held that a law requiring State courts to hear certain proceedings in closed court was an impermissible attempt to alter the structure and organisation of State courts.

(3) In *Commonwealth v Hospital Contribution Fund*,[15] the High Court found that a Supreme Court could be constituted, or its jurisdiction or powers exercised, by Masters, whether or not it was exercising federal jurisdiction: it was for State law to determine the organisation through which the powers and jurisdiction of the State courts are exercised.[16]

Section 132 concerns the constitution, structure or organisation of State courts

19. Section 132 of the CP Act is an instance of State law seeking to determine, in a particular context, the constitution of a State's courts, or the organisation through which their powers and jurisdictions are to be exercised. More precisely, it is an instance of a State law providing that, in specified circumstances, the court in criminal proceedings should be constituted by judge alone rather than by a judge and a jury.

20. Section 132 is also the outcome of the New South Wales Parliament's deliberations as to how best to protect the public or community interest in jury

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12 See also the discussion of the authorities in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598-601 (McHugh J).

13 (1929) 42 CLR 481.

14 (1976) 134 CLR 495 at 506-507 (Barwick CJ), 520-521 (Gibbs J), 530-532 (Stephen J).

15 (1982) 150 CLR 49.

16 (1982) 150 CLR 49 at 58 (Gibbs CJ, with whom Stephen and Aickin JJ agreed at 59 and 66 respectively). See also *Kotsis v Kotsis* (1970) 122 CLR 69 at 104-113 (Gibbs J).

trials. As Wilson J observed in *Brown*,[17] "in light of the statute, it is not for the court to insist" that the public interest requires something else.

21. Other States (South Australia, Western Australia and Queensland) and the Australian Capital Territory have enacted provisions allowing an accused to apply for, or elect, a trial by judge alone. It is no longer the case, as it was at the time of *Brown*, of one State breaking new ground.[18]

(1) In Western Australia and Queensland, the court may only make an order for trial by judge alone on the application of the accused "if it considers it is in the interests of justice to do".[19] In both of these States, the prosecutor may also apply for an order for trial by judge alone, which may be granted if the accused consents and the court considers it is in the interests of justice to do so.[20]

(2) In South Australia and the Australian Capital Territory, the election of the accused person is effective without the consent of the prosecutor or the sanction of the court.[21]

22. In *Brown*,[22] Brennan J, with whom Deane J agreed,[23] appeared to accept that "the constitutional requirement of a jury relates to the constitution or organisation of the court itself".[24] Indeed, Brennan J described s 80 as entrenching the jury as "an essential constituent of any court exercising the jurisdiction to try persons charged on indictment with a federal offence".[25] However, Brennan J concluded that the Parliament was empowered by s 77(iii):

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17 (1986) 160 CLR 171 at 192.

18 See *Brown v The Queen* (1986) 160 CLR 171 at 188 (Wilson J).

19 *Criminal Procedure Act 2004* (WA), s 118(4); *Criminal Code Act 1899* (Qld), s 615(1).

20 *Criminal Procedure Act 2004* (WA), s 118(4); *Criminal Code Act 1899* (Qld), s 615(1)-(2).

21 *Juries Act 1927* (SA), s 7; *Supreme Court Act 1933* (ACT), s 68B.

22 (1986) 160 CLR 171.

23 *Brown v Queen* (1986) 160 CLR 171 at 206.

24 *Brown v Queen* (1986) 160 CLR 171 at 199.

25 *Brown v Queen* (1986) 160 CLR 171 at 197. See also *Jenkins v Director of Public Prosecutions* [2013] NSWCA 406 at [92]-[119] (Simpson J, with whom Hoeben JA agreed at [1]).

> .... to require a State Supreme Court which ordinarily sits with a jury in criminal trials to be constituted and organized in accordance with s 80 of the Constitution so that its sits with a jury whenever it exercises analogous invested jurisdiction.[26]

23. His Honour's reasoning appears to have been as follows:[27]

(1) An available mode of trial in the South Australian courts was trial by jury; indeed, that was the way the courts were "ordinarily" constituted when exercising "analogous ordinary jurisdiction".

(2) It did not matter that there was another mode of trial (by judge alone), available in the prosecution of State offences, because that option was merely a matter of procedure;

(3) Therefore, the Commonwealth law did not purport to require the State court to alter its constitution or organisation by requiring that the trial proceed before a jury.

24. Similarly, perhaps, Dawson J reasoned:[28]

> To disregard s 7 in the application of the *Juries Act* is not to interfere with the constitution or organization of the State court; it is merely to deny an accused a right which he would otherwise have.

25. At least four things may be said about this reasoning:

(1) First, it appears to have been influenced by the particular legislation at issue in *Brown*, under which the accused enjoyed the option of a trial by judge alone. That is not the case under s 132 of the CP Act, under which the role of the prosecutor and/or the court ensures that the mode of trial is not simply a matter of forensic choice for the accused. Section 132 reflects a position, in an adversarial setting, where the parties concur or the court determines, that a jury is not the correct mode of trial in the interests of justice.

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26 *Brown v Queen* (1986) 160 CLR 171 at 200.

27 *Brown v Queen* (1986) 160 CLR 171 at 198-200.

28 *Brown v Queen* (1986) 160 CLR 171 at 218.

(2) Secondly (and related to the first point), given the status of trial by jury as a fundamental guarantee, a law determining the circumstances in which that guarantee will not apply cannot be dismissed as merely procedural.

(3) Thirdly, to introduce concepts such as "ordinary" and "analogous" is to obscure the very matter at issue, namely, the State's right to decide how its court will be constituted in particular categories of cases, which, in its view, are not analogous to other categories.

(4) Finally, as a matter of plain meaning, it is very difficult to make sense of the proposition that a requirement on a State court to be constituted and organised in a particular way[29] does not affect the constitution or organisation of that court.

26. In Victoria's submission, to render s 132 inoperative in federal jurisdiction plainly affects the constitution or organisation of relevant New South Wales courts and conflicts with the State court principle by not giving effect to a State law providing that, in specified circumstances, criminal proceedings should be tried by a judge rather than a jury.

27. In that context, for the Commonwealth to require that the trial proceed in the "ordinary jurisdiction" would be to obviate the legislative choice of the State Parliament that the court should be constituted in a particular way for particular trials.

28. The construction of s 80 in the present context gives rise to a stark choice: a construction that makes no allowance for the ability of States to determine the constitution and composition of their courts and one that gives at least some limited leeway where a State law confirms a right to a jury but admits of exceptions if an insistence on a jury trial would run counter to the interests of justice.

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29 See *Brown v Queen* (1986) 160 CLR 171 at 200.

29. The latter construction avoids the consequence identified by Deane J in *Brown*,[30] that the assessment and balancing of the advantages and disadvantages, either of trial by jury in general or of allowing an accused to elect to be tried by a judge alone in particular, are completely irrelevant to the operation of s 80.

30. In *Brown*, the majority only considered the significance of the State court principle once it had determined the question of the construction of s 80. That is particularly evident in the judgments of Deane and Dawson JJ, who reasoned that s 7 of the *Juries Act 1927* (SA) had to be construed in accordance with – or would only be picked up by s 68(1) of the *Judiciary Act 1903* (Cth) if it was consistent with – s 80 of the Constitution. By reason of s 80, s 7 could have no application to persons charged with offences against the Commonwealth and tried on indictment. Therefore, there was no obstacle "to the vesting of jurisdiction in the State courts on terms which reinforce [its] inapplicability to the trial upon indictment of Commonwealth offences".[31]

31. In Victoria's submission, the State court principle ought to have been considered earlier: s 80 should be construed in light of the State court principle.[32] Two consequences follow. First, it is respectfully submitted that the failure to do so undermines the reasoning of the majority in *Brown*. Secondly, having regard to the State court principle, a State law that allowed for trial by judge alone where the accused and prosecutor agree or where, with the agreement of the accused, the court determines that trial by judge alone is in the interests of justice, should be held to be consistent with s 80.

Constitutional coherence

32. The effect of an exercise of power under s 77(iii) may be to require a State court to be constituted and organised in accordance with s 80 of the Constitution. That effect will be more or less significant depending on the construction of s 80. The

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30 *Brown v Queen* (1986) 160 CLR 171 at 207.

31 *Brown v Queen* (1986) 160 CLR 171 at 206 (Deane J) and 218 (Dawson J).

32 See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 188 [53] (Gummow, Kirby and Crennan JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 102 [288]; *Williams v The Commonwealth* (2012) 248 CLR 156 at 238 [157] (Gummow and Bell JJ).

significance for States of a particular construction of s 80 may provide insight into whether that is the proper construction of s 80. As Hayne and Kiefel JJ said in *Pape v Commissioner of Taxation*:[33]

> It is necessary to construe each provision of the *Constitution* as part of the whole. There is no little danger in taking one of its provisions (eg, s 81), construing it in isolation, and then taking that construction as a premise for further conclusions about the ambit of other powers.

33. In *Brown*, Deane J said that, "[t]o construe the fundamental law of s 80 as involving no more than the mere conferral of a privilege would be to distort the whole by confining attention to a single aspect".[34] While Deane J's concern was not to ignore the benefits of s 80 to the whole community, it is respectfully submitted that the whole, in the sense of the whole of the Constitution and the division of responsibilities under it, is also distorted where attention is confined to s 80 without regard to the State court principle.

34. The significance of the effect on States must be understood in light of the relatively recent growth of Commonwealth offences. As Hayne J said in *Momcilovic v The Queen*,[35] "[t]he federal Parliament, in exercise of the external affairs power, has enacted criminal laws dealing directly with subject matters ... that for many years were dealt with only by State and Territory criminal laws". This, in turn, has implications for a State's resources, given that criminal trial by jury "is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice".[36] Further, as Mason J said in *Commonwealth v Hospital Contribution Fund*:[37]

> An exercise of the legislative power conferred by s 77(iii) imposes an obligation on the State court to exercise the jurisdiction thereby invested. It would indeed be a great inconvenience to the States and their courts if the structure and composition of a State court for the exercise of federal jurisdiction is to differ from that selected

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33 (2009) 238 CLR 1 at 102 [288].

34 *Brown v The Queen* (1986) 160 CLR 171 at 202.

35 (2011) 245 CLR 1 at 125 [287].

36 *Kingswell v The Queen* (1985) 159 CLR 264 at 302 (Deane J, citing Harlan J in *Duncan v Louisiana* (1968) 391 US 145 at 188). See also New South Wales, *Parliamentary Debates*, Assembly, 24 October 1990, 9160 (Mr Dowd, Attorney-General).

37 (1981) 150 CLR 49 at 62 (emphasis added).

> by the State for the exercise of its similar non-federal jurisdiction. ... What is more, it will have a coercive and restraining influence on the States' competence to organize their courts as they choose. If the States are compelled to employ their judges in the exercise of federal jurisdiction, even in unimportant matters, they may be impelled to use the same organization for the exercise of similar non-federal jurisdiction, to avoid having two organizations or to avoid drawing an unacceptable distinction between federal and non-federal business.

35. Victoria submits that this Court should not lightly attribute to s 80 the consequence that State legislatures are denied the ability to make laws such as s 132 of the CP Act applicable whether their courts are exercising State or federal jurisdiction.

Conclusion

36. If s 80 of the Constitution "entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence"[38] then, taking one of the scenarios posited by s 132 of the CP Act, there must be a jury trial despite:

(1) the accused preferring a trial by judge alone;

(2) the court's view that it is in the interests of justice that the accused person be tried by judge alone; and

(3) the policy of the New South Wales legislature that, in the above circumstances, it is in the interests of the community that the proceeding be tried by a court constituted by judge alone.

37. These submissions have focused on the last matter, namely, the policy of the New South Wales legislature, which would ordinarily be regarded as an exercise of a State's freedom to constitute and organise its courts as it sees fit. The effect on that freedom ought to properly inform the construction of s 80 and the question whether s 80 is inconsistent with s 132 of the CP Act.

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38 *Brown v Queen* (1986) 160 CLR 171 at 197 (Brennan J).

C. *Brown* does not govern this case

38. Section 132 of the CP Act, unlike s 7 of the *Juries Act 1927* (SA) considered in *Brown*, does not condition trial by judge alone merely on a choice by the accused person. That choice must be accompanied by either the consent of the prosecution or a determination by the court that it is in the interests of justice to make a "trial by judge order".

39. The fact that an accused person's choice was sufficient to dispense with a jury trial was significant in the judgment of Deane J in *Brown*. As set out in paragraph 33 above, Deane J was concerned that the "whole" would be distorted by construing s 80 as involving a mere conferral of a privilege.[39]

40. Justice Dawson also referred to this aspect of *Brown*, describing the appellant's argument as being that "s 80 affords no more than a personal guarantee of trial by jury".[40] In his Honour's discussion of *Patton v United States*, he said that the additional requirements imposed on waiver by the Supreme Court (the consent of government counsel and the sanction of the court) seemed to him "to deny the personal nature of the guarantee of trial by jury and to admit public circumstance which, upon ordinary principles, would preclude the right of the individual to waive the benefit".[41]

41. Moreover, as set out at paragraph 25 above, the fact that, in *Brown*, an accused person's choice was sufficient to dispense with a jury trial was also (it seems) influential in the majority's approach to the State court principle.

42. In the alternative, if the Court were to hold that *Brown* does govern the present matter, Victoria supports the submission of the Applicant that it (or the considered dicta in it) should be reconsidered and overruled (or not followed).

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39 *Brown v The Queen* (1986) 160 CLR 171 at 202.

40 *Brown v The Queen* (1986) 160 CLR 171 at 208.

41 *Brown v The Queen* (1986) 160 CLR 171 at 212.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

43. Victoria estimates that it will require approximately 10 minutes for the presentation of oral submissions.

Dated: 25 January 2016

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