IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S-279 of 2015

BETWEEN: **HAMDI ALQUDSI**

Applicant

AND:

THE QUEEN
Respondent

RESPONDENT'S ANNOTATED SUBMISSIONS

Part I: Publication

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

Part II: Issue

2. The question for determination in the Case Stated by the Chief Justice is:

> 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? (CRB 10)

3. The respondent contends that the answer to that question should be "*yes*" because s 80 of the Constitution does not permit trial by judge alone for a federal offence on indictment.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. Notices have been issued pursuant to s 78B of the *Judiciary Act*.

Part IV: Facts

5. The facts in paragraphs [1]-[3] of the Case Stated (CRB 10) and the applicant's chronology are sufficient for the purposes of determining the issue raised, save that the chronology does not record the fact that, on 8 May 2015, the applicant was arraigned in the Supreme Court of NSW and adhered to his pleas of "*not guilty*".

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Part V: Legislative Provisions

6. The respondent accepts the applicant's statement of applicable legislative provisions in relation to the matters raised by the applicant.

7. The Commonwealth's alternative construction of s 80 of the Constitution requires consideration of other provisions of the *Criminal Procedure Act*, namely: ss 5-8, 45-46, 65, 111, 121, 127-132, 154 and 170. Extract copies of those provisions are attached to the respondent's list of authorities.

Part VI: Argument

Summary

10 8. The respondent contends that s 132 of the *Criminal Procedure Act* is inconsistent with s 80 of the Constitution, as construed by a majority of this Court in *Brown v The Queen* (1986) 160 CLR 171 (***Brown***). Consistently with its terms, the command in s 80 that all trials on indictment against any law of the Commonwealth be by jury applies without exception, however those exceptions might be described.[1]

9. Although the mechanisms in s 132 of the *Criminal Procedure Act* by which an accused might secure a trial by judge alone do not include unilateral waiver, which was at issue in *Brown*, the reasoning of the majority applies to those mechanisms with equal force. That s 80 constitutes an imperative of the breadth delineated in *Brown* reflects the text of the provision, read in the context of Ch III of the
20 Constitution and against the background of the historical significance of the institution of the jury and its use in the colonies at the time of Federation.

10. Accordingly, in so far as a court may order a trial by judge alone pursuant to s 132(1) to (6) of the *Criminal Procedure Act*, either by agreement between accused and prosecution (s 132(2)) or on the application of the accused if the court considers it is in the interests of justice (s 132(4)), the section is incapable of being applied to the trial of the applicant pursuant to s 68(2) of the *Judiciary Act*.

11. Alternatively, if this Court considers that ss 132(1) to (3), (5) and (6) are capable of applying to the applicant's trial, the respondent contends that the Court should nonetheless conclude that s 132(4) is incapable of being applied by s 68(2) of the
30 *Judiciary Act* because that subsection does not include any provision for prosecution consent.

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[1] The applicant's written submissions (**AWS**) describes the imposition of "*confined qualifications*" as being permissible pursuant to Ch III. The Commonwealth Attorney-General refers to "*parliamentary sanctioned regulation or waiver*" (Cth [55]).

Brown applies in the present case

12. The issue in *Brown* was whether s 80 of the Constitution precluded the appellant from electing, pursuant to s 7(1) of the *Juries Act 1927* (SA), to be tried by judge alone for the offence with which he was charged. The affirmative answer that Brennan J, Deane J and Dawson J separately gave to that question flowed from their Honours' conclusion that "*shall*" in s 80 means what it says in relation to the requirement for a jury.

13. The legislation at issue in the present case is not formulated in the same terms as the legislation at issue in *Brown*,[2] but the outcome of its application is the same. If applied by s 68(2) of the *Judiciary* Act, an order under s 132(2) or s 132(4) of the *Criminal Procedure Act* with respect to the trial on indictment of the applicant for offences against a law of the Commonwealth will proceed without a jury, contrary to the express words of s 80 of the Constitution.

14. The result for which the applicant and interveners (apart from the Attorney-General for South Australia) contend requires this Court to construe "*shall*", where it first appears in s 80 of the Constitution, otherwise than in accordance with its ordinary meaning. That construction is contrary to that adopted by the majority in *Brown*, with the benefit of full argument directed to that very question.[3] For the reasons outlined below, this Court should not depart from the conclusion reached by the majority in *Brown*, and the earlier decisions of this Court which supported that outcome.

Section 80: Text

15. Section 80 "*imposes various imperatives upon trials on indictment of offences against Commonwealth law*",[4] each formulated in the mandatory language of "*shall*".

16. The first imperative relates to trial by jury. In *Brown*, a majority of this Court concluded that the first part of the section constituted a mandatory requirement.

17. The second imperative relates to the venue where that trial is to be held. In *Cheng v The Queen* (2000) 203 CLR 248 (***Cheng***), Gleeson CJ, Gummow and Hayne JJ expressed the view that non-compliance with the second part of the section would result in the particular trial miscarrying.[5]

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[2] Section 7(1) of the *Juries Act 1927* (SA) permitted an accused to elect to be tried by judge alone, subject to the presiding judge being satisfied that the accused had sought and received legal advice.
[3] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 385 [179] (Gummow and Hayne JJ); *Hughes & Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 70 (Dixon J).
[4] *Cheng v The Queen* (2000) 203 CLR 248 (***Cheng***) at 262-3 [29] (Gleeson CJ, Gummow & Hayne JJ).
[5] *Cheng* at 263 [30] (Gleeson CJ, Gummow and Hayne JJ).

18. The unqualified nature of the imperative language in s 80 can be contrasted with the qualification upon the trial to which the commands apply. Although s 80 was modelled on Art III s 2(3) of the Constitution of the United States of America, "*it departed in one important respect from the United States counterpart*".[6] By contrast with Art III s 2(3), the imperative for a jury in s 80 applies not to "*the Trial of all Crimes, except in Cases of Impeachment*", but to "*the trial on indictment of any offence against any law of the Commonwealth*".

19. At least one reason for the qualification was to avoid the United States experience, in which the courts encountered difficulty in giving a literal meaning to the words of both Art III and the Sixth Amendment.[7] But it also implements a division between and, by extension, imposes limits upon, the functions of the legislature and judiciary.

20. As to the legislature, s 80 leaves to it the function of designating the offences which are to be heard on indictment:

    (a) Parliament may provide that a given offence against a law of the Commonwealth is not triable on indictment at all. Instead, the offence may be a summary offence only, which offences are tried and sentenced by magistrates. Section 80 does not operate with respect to proceedings for offences of that nature.

    (b) Parliament may enact that offences are indictable only, to be dealt with as to trial by a judge and jury in accordance with the terms of s 80, and as to sentence by a judge.

    (c) Alternatively, Parliament may enact that indictable offences can be dealt with summarily or on indictment.[8]

21. For indictable offences that may be dealt with summarily, the provisions permit an election for summary disposal for a range of offences. Former ss 12 and 12A of the *Crimes Act 1914* (Cth) (now s 4J and 4JA), the validity of which were upheld in *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 (***Archdall***), are provisions of that kind.

22. Depending on the seriousness of the offence and other features of the case, the election may be by the prosecution, or both the prosecution and the defendant,[9] seeking summary disposal, subject to a magistrate's approval and with lower maximum penalties applying.

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[6] *Cheng* at 292 [131] (McHugh J).
[7] *Brown* at 214 (Dawson J).
[8] As expressly contemplated by the change in the wording of s 80 from "*all indictable offences*" to "*on indictment of any offence*" so as to mirror and apply colonial law and practice.
[9] In NSW, the description of the alleged offender changes from "*defendant*" in the Local Court to "*accused*" in the District or Supreme Courts.

23. Where the election is made and accepted to deal with the matter summarily, it will be heard and determined by a magistrate. If the matter is to be dealt with on indictment, after committal (unless there is an *ex officio* indictment) it will be heard by judge, sitting with a jury.

24. Section 80 accords no role to the judiciary in so far as the constitution of the court for the purposes of a federal trial on indictment is concerned. The anterior question as to how an alleged offence may be dealt with, be that only summarily, by election between summarily or on indictment, or strictly on indictment, is left to Parliament. It has been noted that the "*Australian experience has not been of any oppressive misuse of the statutory power to define offences*".[10]

25. For indictable offences able to be dealt with summarily and for which summary disposal is in contemplation, the prosecutor causes the processes prescribed by Parliament in ss 4J and 4JA of the *Crimes Act 1914* (Cth) to be applied. If the charge is to proceed on indictment, the State court with jurisdiction will conduct the trial. If contested, the court will be constituted by a judge sitting with jury.[11]

26. This view of the structure of s 80 "*has not been without its forceful critics*", but has nonetheless "*withstood challenge for many years*".[12]

27. In so far as s 80 prevents a judge alone from hearing a trial on indictment against a law of the Commonwealth, it imposes a limitation on judicial power.[13] Additionally, the section imposes a limitation on legislative power which is "*enlivened when a law of the Commonwealth provides that the trial of an offence against a law of the Commonwealth shall be on indictment*".[14] When that condition is satisfied, neither the Parliament nor the courts may permit a trial covered by s 80 to be heard by a judge or judges without a jury.[15]

Section 132(1) to (6) of the *Criminal Procedure Act*

28. Section 132(1) to (6) of the *Criminal Procedure Act* includes provisions which are inconsistent with the limitations that s 80, read according to its terms, places on legislative and judicial power.

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[10] *Cheng* at 344 [283] (Callinan J).
[11] *Kingswell v The Queen* (1985) 159 CLR 264 (***Kingswell***) at 294 (Brennan J).
[12] *Brown* at 215 (Dawson J); see also at 196 (Brennan J); and 202-203 (Deane J), referring to *R v Bernasconi* (1915) 19 CLR 629 at 637 (Isaacs J); *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 (***Archdall***) at 139 (Higgins J); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 (***Lowenstein***) at 570 (Latham CJ), 583 (Dixon and Evatt JJ); *Zarb v Kennedy* (1968) 121 CLR 283 at 298 (Menzies J).
[13] *Cheng* at 277 [79] (see Gaudron J); *R v LK* (2010) 241 CLR 177 at 193 [24] (French CJ, with whom Gummow, Hayne, Crennan, Kiefel and Bell JJ agreed at 216 [88]).
[14] *R v LK* (2010) 241 CLR 177 at 193 [24] (French CJ, with whom Gummow, Hayne, Crennan, Kiefel and Bell JJ agreed at 216 [88]). The respondent notes that it is *ad idem* with the Commonwealth Attorney-General in so far as s 80 operates as a limitation on Parliament (Cth [41]).
[15] *R v Bernasconi* (1915) 19 CLR 629 at 637 (Isaacs J).

29. Section 132 forms part of Chapter 3 of the *Criminal Procedure Act*, which applies "*to or in respect of proceedings for indictable offences (other than indictable offences being dealt with summarily)*": s 45(1). Pursuant to s 5(1) of the Act, an offence must be dealt with on indictment unless it is an offence that is permitted or required to be dealt with summarily.

30. Section 8 of the *Criminal Procedure Act* provides that "*[a]ll offences shall be punishable by information (to be called an indictment) in the Supreme Court or the District Court, on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions*": s 8(1). The section does not, however, apply to offences that are required to be dealt with summarily: s 8(3). Nor does it affect any law or practice that provides for an indictable offence to be dealt with summarily: s 8(4).

31. An offence that is permitted or required to be dealt with summarily is to be dealt with in the Local Court: s 7(1). Separate provision is made, in Chapter 4 of the *Criminal Procedure Act*, for the procedure with respect to summary offences, including indictable offences which are being dealt with summarily: s 170(1).

32. Part 3 of Chapter 3 of the *Criminal Procedure Act* is entitled "*Trial Procedures*". At the point that Part 3 applies, there has usually been a committal proceeding,[16] following which a magistrate has decided to commit the accused person for trial and the papers have been sent to the appropriate officer of the court with jurisdiction to try the matter: see Part 2, in particular ss 65, 111 and 128.

33. Section 121 of the *Criminal Procedure Act* defines "*criminal proceedings*" to include "*proceedings relating to the trial of a person before the Supreme Court or the District Court*", being the two Courts in NSW before which all offences punishable on indictment are to be heard.[17] An indictment is to be presented in the manner prescribed (s 127), within the period stipulated in s 129.

34. The Supreme Court or the District Court "*has jurisdiction with respect to the conduct of proceedings on indictment as soon as the indictment is presented and the accused person is arraigned*" (emphasis added): s 130(2). An accused person who is arraigned on an indictment and pleads "*not guilty*" is "*taken to have put himself or herself on the country for trial, and the court is to order a jury for trial accordingly*": s 154. The applicant in the present case was arraigned and pleaded "*not guilty*" to the seven counts in the indictment on 8 May 2015.

35. Section 131 of the *Criminal Procedure Act* stipulates that "*criminal proceedings* [as defined] *are to be tried by a jury, except as otherwise provided by this Part*". Section 132 of the Act contains two presently relevant exceptions to that requirement:

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[16] *Ex officio* indictments may be found: see eg s 9 of the *Director of Public Prosecutions Act 1983* (Cth).

[17] For the respective jurisdiction of the Supreme Court and the District Court, see s 46.

(a) s 132(2) requires the court to make an order for a judge-alone trial where the accused and the prosecution agree to that course (subject to being satisfied that the accused has received legal advice as to the effect of the order); and

(b) s 132(4) vests a discretion in the court to make an order where the accused applies and the court considers it is "*in the interests of justice*" to make the order sought (again, subject to the accused having received legal advice).

36. In the scheme of Chapter 3 of the *Criminal Procedure Act*, by the time s 132 arises for consideration the trial is proceeding on indictment. Both s 132(2) and s 132(4) enlist the court that has jurisdiction to hear the trial (by virtue of the "*not guilty*" pleas, if not more generally) in a determination as to how that trial is to proceed – the latter by reference to a broad discretion the application of which will vary from case to case. However, an order of the court pursuant to either subsection does not alter the nature of the trial as one ultimately proceeding on indictment (even if s 154 did not exist to formalize jurisdiction at the time a s 132 order is made). A section 132 order only operates to alter the constitution of the court that will be hearing the trial on indictment, contrary to the terms of s 80.

37. In this respect, in so far as s 132 is an "*elective mechanism*" (Cth [38]) it is of a very different character, and cuts in at a different stage of the criminal process, as compared with provisions to which reference has been made above (at [20]), which permit offences declared as indictable to be heard and determined summarily by a Local Court magistrate exercising summary jurisdiction.

38. Where the trial on indictment is with respect to an offence against a Commonwealth law, the respondent contends that an order under ss 132(2) or (4), and the involvement of the court in that process, is inconsistent with the terms of s 80 of the Constitution.

Matters of history and context

39. The formulation of s 80 reflects, in the words of Deane J in *Kingswell*, "*a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases*".[18]

40. At Federation, there was a recognised division between summary proceedings, being a creature of statute and reserved for less serious offences, and trial on indictment, which was the ordinary method for the trial of all other offences.[19] The submissions for the Commonwealth Attorney-General call attention to this division, and the existence of "*elective mechanisms*" pursuant to which offences designated as indictable might be dealt with summarily (Cth [19]-[20]).

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[18] *Kingswell* at 298 (Deane J).
[19] *Brown* at 215, citing *Kingswell* and *Lowenstein* at 583.

41. Elective mechanisms of the nature to which the Commonwealth Attorney-General refers implemented a process as to how an offence was to be tried. Proceeding on indictment with respect to an offence involved a judge sitting with a jury, whereas a court exercising summary jurisdiction would deal with an offence (including an indictable offence) that was to be dealt with summarily.

42. Elective mechanisms enabled, and continue to enable, the prosecutor to consider whether the seriousness of an indictable offence warranted the matter being dealt with on indictment, or whether it could and should instead be dealt with by a court exercising summary jurisdiction. The Convention Debates in relation to s 80, which are summarised by McHugh J in *Cheng*,[20] demonstrate an awareness of the interrelationship between the nature and seriousness of the offence and the form of criminal accusation; they are not mutually exclusive alternatives (cf Cth [26.1]).

43. By the time of Federation, the common law institution of trial by jury had been adopted in all the Australian colonies as the method of trial of more serious criminal offences.[21] The adoption of the system of trial by jury for indictable offences in s 80 acknowledged the long-standing significance of the institution as a representative body responsible for discharging fact-finding functions in civil litigation and in criminal committal and trial processes.[22]

44. In *Kingswell*, Deane J traced the underlying notion of judgment by one's equals under the law to at least 1215. The Charter of that year provided, among other things, that no man should be arrested, imprisoned, banished or deprived of life otherwise than by the lawful judgment of his equals or by the law of the land.[23]

45. In *Cheng*, Gaudron J described the use of trial by jury for indictable offences as "*so deeply embedded in our judicial process that its importance in protecting the liberty of the individual from oppression and injustice needs no elaboration*". Additionally, however, her Honour emphasised the importance of the institution of the jury "*to the rule of law and, ultimately, the judicial process and the judiciary itself*".[24]

46. Justice Deane expressed a similar opinion in *Kingswell*, describing the rationale and essential function of the "*guarantee*" in s 80 as:[25]

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[20] (2000) 203 CLR 248 at [132]ff.
[21] See *Cheatle v The Queen* (1993) 177 CLR 541 at 549.
[22] *Cheatle* at 549.
[23] *Kingswell* at 299.
[24] *Cheng* at 277 [80]; see also *Kingswell* at 299-300 (Deane J). On the topic of the protection of the judiciary from controversy, see also the exchanges between the bench and the then Solicitor-General for the Commonwealth in the course of the hearing in *Brownlee v The Queen* S-82/1998 [2000] HCATrans 681 (16 November 2000) at lines 3026 to 3169.
[25] (1985) 159 CLR 264 at 300.

...the protection of the citizen against those who customarily exercise the authority of government; legislators who might seek by their laws to abolish or undermine 'the institution of 'trial by jury' with all that was connoted by that phrase in the constitutional law and in the common law of England' (per Griffith CJ [in R v Snow]); administrators who might seek to subvert the due process of law or be, or be thought to be, corrupt or over-zealous in its enforcement; judges who might be, or be thought to be, over-remote from ordinary life, over-censorious or over-responsive to authority.

47. The inclusion of s 80 in Ch III of the Constitution is consistent with the significance of the institution of the jury to the rule of law and the judicial process in the trials to which it applies. Section 80 not only is a guardian of liberty, but is also "*the community's guarantee of sound administration of justice*" and "*entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence*".[26]

48. In so doing, s 80 "*constitutes an element of the structure of government and distribution of judicial power which were adopted by, and for the benefit of, the people of the federation as a whole*".[27] In their respective judgments in *Brown*, Deane J and Dawson J conceived of s 80 in those terms, that being one of the bases upon which their Honours rejected the contention that s 80 involved "*no more than the mere conferral of a privilege*" upon an individual accused.[28] Their Honours distinguished s 80 from Art III s 2(3) of the United States Constitution in this respect.

49. Read consistently with the terms of the Sixth Amendment, Art III s 2(3) has been construed as conferring a right on an accused person which is amenable to waiver (subject to the agreement of the prosecution and the court).[29] By contrast, the scope of s 80 is not limited to individual privilege, with such privilege as it does confer contained within the wider prescription of trial by jury in all federal prosecutions on indictment.[30]

Section 80 should not be construed as the applicant contends

50. Construed in the manner outlined above, s 80 speaks in terms of function rather than freedom. For Dawson J, that had the following consequences for the section:[31]

    (a) There was no justification for departing from the plain meaning of the words of s 80 merely because theory rather than practice saw weakness in the choice which it offered the Commonwealth in the mode of prosecution to be adopted.

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[26] *Brown* at 197 (Brennan J).
[27] *Brown* at 202 (Deane J).
[28] *Brown* at 202 (Deane J), at 214 (Dawson J).
[29] See *Patton v United States* 281 US 276 (1930) at 293, 297.5; *Adams v United States; Ex rel McLean* 317 US 269 (1942); *Singer v United States* 380 US 24 (1965).
[30] *Brown* at 215 (Dawson J).
[31] *Brown* at 216-217 (Dawson J).

(b) At Federation, no less than at the time of *Brown*, there were public as well as private advantages in the procedure in s 80, which would more than justify the use of language in s 80 denying any opportunity for waiver.

(c) There was no warrant for departing from the plain terms of s 80 merely because waiver of trial by jury was seen by some as a convenient device in modern times (on bases which might include reasons such as those advanced at Cth [35]-[36]).

51. The Court in *Brown* was concerned with legislation that permitted unilateral waiver, but the reasoning of the majority is equally applicable to waiver by agreement or by order of the court on the basis of the "*interests of justice*", or some other greater or lesser legislative test or discretion. Imposition 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.

52. The structural force of s 80 is weakened if the limitation that the section imposes on how judicial power is to be exercised, in trials on indictment for offences against the law of the Commonwealth, is construed as amenable to judicial alteration. Adoption of a construction having that result exposes the court system to potential criticism in relation to decisions regarding the conduct of trials for federal offences. This is contrary to the intention reflected in the terms of s 80 that the courts be insulated from such exposure through the application of a universally applicable procedure for trials on indictment.[32] That potential exists notwithstanding the protection of the impartiality and independence of judges exercising federal criminal jurisdiction accorded by constitutional provisions and implications which have developed since 1900 (Cth [29]-[30]; AWS [51]).

53. If it were the case that the mandatory language of s 80 were to be read down in some way, one might expect clear parameters around any such construction to be advanced, consistently with the role of the section in securing a significant divisional function between the legislature, executive and the judiciary in serious criminal cases. In relation to s 92 of the Constitution, for example (see AWS [56]), the terms of the section necessitated an answer as to what trade, commerce and intercourse among the States was to be "*absolutely free*" from. The answer, reached by reference to the context of the Constitution as a whole (including s 51(i)), was that the section protects against the imposition of discriminatory burdens of a protectionist kind, thereby setting an identifiable qualification on the otherwise broad scope of the section.[33]

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[32] *Cheng* at 277-8 [80]-[81] (Gaudron J) (citations omitted).
[33] See *Cole v Whitfield* (1988) 165 CLR 360.

54. Similarly, the equality of treatment that is conferred by s 117 of the Constitution has been confined by reference to the need simultaneously to preserve the autonomy of the States and their institutions of government.[34]

55. By contrast with s 92 or s 117, s 80 does not need to be read down to accommodate qualifications so as to secure the integrity of operation of Ch III, or the Constitution more broadly. Perhaps as a consequence, the qualifications sought to be imposed on the mandatory terms of s 80 operate by reference to criteria which are more broadly and subjectively framed, such as "*the interests of justice*" as appears in s 132 in this case.

10 56. Section 80 does not readily accommodate the involvement of the judiciary, let alone involvement that fundamentally alters the process for the determination of criminal guilt that s 80 contemplates, on the application of a criterion of that scope. Consideration of a test such as the "*interests of justice*" may entail a range of factors which will vary from case to case, as the applicant points out: AWS [22]. The views as to the weight to be attributed to those factors is also likely to vary as between individual judges, and perhaps jurisdictions.

57. The application of any given test for trial by judge alone will not necessarily produce consistent outcomes in so far as the manner in which trials on indictment of offences against Commonwealth laws may proceed (noting that the criteria for permitting
20 trials by judge alone vary across those jurisdictions which have legislation permitting such a trial to take place: see AWS [21]).[35] Such variation is itself troubling in terms both of consistency and the rule of law.

58. Although a discretion such as is conferred by s 132(4) must be exercised consistently with the Constitution (AWS [69]), this begs the question as to what s 80 of the Constitution requires. The applicant relies in this respect, *inter alia*, on the interests of the accused, which are served by a court being able to do what it considers to be in the interests of justice on application of the accused for a judge alone trial (AWS [39]-[40]; Cth [55]).[36] However, there are well-established mechanisms by which courts can and do control the processes of a trial so as to achieve that result
30 when sitting with a jury, discussed below at [65] to [68].

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[34] See *Street v Queensland Bar Association* (1989) 168 CLR 461 at 491 (Mason J); 512-514 (Brennan J); 528-529 (Deane J); 548 (Deane J); AWS [57].

[35] Victoria, Tasmania and the NT do not presently have legislation by which a court can make an order for trial by judge alone in respect of a trial on indictment.

[36] See also the submissions for the Attorneys-General for Tasmania and Queensland.

59. The "*interests of justice*" test for the grant of a trial by judge alone only applies in NSW, Western Australia[37] and Queensland.[38] However in both South Australia[39] and the ACT[40] an accused can opt for trial by judge alone without any consideration of the interests of justice or any other test. Apart from rule of law concerns about this fundamental difference for federal offenders in the various jurisdictions, this indicates that there is considerable scope for the wider community interests reflected by the majority reasons in *Brown* to disappear in favour of the unilateral rights of the accused reflected by the minority reasons in *Brown*.

60. Where an "*interests of justice*" test does apply, the problem that arises (in addition to the concerns identified by the majority reasons in *Brown* of the judge and not the jury being the tribunal of fact), is the involvement of the judiciary in the decision, and in some cases controversy, that there will be a trial by judge alone of an offence serious enough to proceed on indictment, depriving the community of its participation.

61. Where there is no such "*interests of justice*" test or the like and it is essentially the unilateral right of the accused to dispense with a jury, the problem is that there is no scope for regard to be given by the trial court or prosecution to wider community interests and advantages in the participation of community representatives.

62. It is not beyond reasonable contemplation that other more pragmatic considerations will come to dominate the decision not to have a jury, both overtly as a legislative test, and covertly as a practical reality, at the possible cost to the standard and quality, and community confidence in, and support for, the administration of justice.

63. Counting against either way of determining whether or not to have a trial by judge alone (by judicial determination, or by unilateral election by an accused), or indeed any other method or test, no insurmountable problems have been identified in continuing to try federal offences on indictment by jury. That does not mean that trial by jury is perfect, but rather that it is better than the alternative of judge alone trials for all the reasons identified by the majority reasons in *Brown*.

64. It may also be that some of the supposed benefits of trial by judge alone are illusory, or are outweighed by countervailing disadvantages, both short term and long term, including such intangible things as community support and trust in the administration of justice.

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[37] *Criminal Procedure Act 2004* (WA), s 118
[38] *Criminal Code* (Qld), ss 614 & 615
[39] *Juries Act 1927* (SA), s 7
[40] *Supreme Court Act 1933* (ACT), s 68B

65. It has long been accepted that the law "*proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence*".[41] This does not mean that it is safe to assume that the decision-making function of juries is not at risk of being affected by adverse influences, including prejudice.[42] However, what is "*vital*" to the criminal justice system "*is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations*".[43] That capacity can be, and is, supported by a variety of mechanisms designed to reinforce the fairness and integrity of trial by jury.

66. The first of the examples posited by the applicant, of widespread pre-trial publicity and/or significant local prejudice (AWS [42]-[43]), is a circumstance that arises with reasonable frequency, in relation to a range of offences. This Court has held that matters of that nature can be managed by a trial judge with appropriate directions.[44]

67. Risks of jury-tampering or jury intimidation, being the second of the applicant's examples (AWS [44]), are managed through the legislation and procedures relating to the jury, including in NSW by identification of jurors by number alone, the availability of jury sequestration, and the enactment of criminal sanctions for soliciting information from or harassing a juror and for disclosing the identity or address of a juror.[45] Additionally, there are criminal sanctions for a juror who makes inquiries except in the proper exercise of his or her functions as a juror.[46] In the rare and extreme case in which such risks cannot be managed so as to ensure a fair trial, a court can give consideration to a temporary, or even permanent, stay of the proceedings.

68. It does not follow from the nature of a stay of criminal proceedings, as a remedy that is not readily granted (AWS [46]), that additional support in the form of a provision such as s 132(4) is required. To the contrary, the rarity of the grant of a stay recognises "*the rarity of a situation in which the unfair consequences of an apprehended defect in a trial cannot be relieved against by the trial judge during the course of a trial*".[47] It is only in those rare circumstances that an accused person would be denied a fair trial according to law,[48] such that the trial cannot proceed, either at that time, or at all.

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[41] *Glennon v The Queen* (1992) 173 CLR 592 at 603 (Mason CJ and Toohey J).
[42] *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13] (Gleeson CJ and Gummow J); *Glennon* at 603, both cited with approval in *Dupas v The Queen* (2010) 241 CLR 237 (***Dupas***) at 248 [29] (the Court).
[43] *Dupas* at 248 [29].
[44] See, e.g., *Dupas* at 247 [22].
[45] See, for example, the *Jury Act 1977* (NSW), ss 29, 54(1), 68 and 68A.
[46] See s 68C(1) of the *Jury Act*.
[47] *Dupas* at 250 [35] (the Court).
[48] See, e.g., *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56 (Deane J), 75 (Gaudron J).

69. The Commonwealth Attorney-General asserts that traditional elective mechanisms are ill-suited to responding to the demands of justice in the particular circumstances of a case once a prosecution has commenced on indictment, which supports the utility of a provision such as s 132 (Cth [45]). However, those mechanisms did not traditionally apply in those circumstances, and were not intended to do so.

70. Section 132 may be contrasted in this respect with the operation of ss 12 and 12A of the *Crimes Act 1914*, which were considered in *Archdall*. Section 12 made provision for offences specified in the Act to be tried on indictment or summarily, "*other than indictable offences*": s 12(1). Where offences under the Act had been declared to be indictable, s 12A made provision for those offences to "*be heard and determined by a Court of Summary Jurisdiction*": s 12A(1). As originally enacted, the provision imposed a monetary limit on the value of property involved and the sentence that may be imposed, before a matter could proceed summarily. The current form of the provisions, in ss 4J and 4JA, contain similar limitations.

71. Provisions such as s 12 and 12A (now ss 4J and 4JA) did not entitle a court to interfere with the manner in which the trial was to proceed once that was set, based on the seriousness of the offence and related considerations. Nor did they entitle a judge to hear an indictable offence, in respect of which no election was available, without a jury. By comparison, s 132 is only enlivened after the point at which the traditional elective mechanisms could be invoked (if at all). The course of the matter has been set; where an offence is against a law of the Commonwealth is proceeding on indictment, so also has the composition of the court that is to hear it, by reason of s 80 (cf Cth [26.3]).

72. By reason of such differences, while it might be open to describe a provision such as s 132 of the *Criminal Procedure Act* as "*a variation*" on a traditional elective mechanism (Cth [43]), the variation is substantial, fundamental and beyond what is expressly contemplated by s 80. Section 132 cannot properly be described as the "*functional and substantive successor*" to elective provisions such as were upheld in *Archdall* (cf Cth [5.5], [44]). Rather, it is a radical and ahistorical change at the federal level.

<u>The Commonwealth Attorney-General's alternative construction of s 80</u>

73. The alternative construction of s 80 that the Commonwealth Attorney-General advances is that the section does not operate until the completion of the process specified by Parliament to determine whether there shall be a trial by jury, including the work of a provision such as s 132 of the *Criminal Procedure Act* (Cth [49]-[54]). For the reasons outlined above (at [28] to [36]), that is not an available construction of s 132, which only operates with respect to proceedings on indictment after arraignment and a "*not guilty*" plea.

74. Even if the court hearing the trial makes an order under s 132(2) or (4), the trial unavoidably retains the character of a trial "*on indictment*" of an offence against the law of the Commonwealth. In *Brown*, Dawson J observed that "*indictment*" has "*an extended meaning in this country which encompasses a 'trial ... initiated by some step taken by the Crown or some instrument or agent of government' "*.[49]

75. Using the applicant's circumstances as an example, s 9A of the *Crimes (Foreign Incursions and Recruitment) Act 1978* requires the prosecution of an offence against the Act to be on indictment. If the processes in s 132 are worked through before commencement of his trial, and an order made under s 132(4), the trial would remain one that proceeds on indictment. The inconsistency with s 80 is not avoided by orders made under s 132(2) or (4).

The Court should not depart from the construction of s 80 adopted in *Brown*

76. Consideration of departing from a previous decision of the Court is informed by "*a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken*".[50] For the reasons outlined in these submissions, the criticisms now made of the decision in *Brown* do not present a sufficient case for any such departure.[51]

77. All trials on indictment against a law of the Commonwealth have proceeded since *Brown* with a jury.[52] The existence of a possible different construction of s 80 which permits a judge alone trial is not a sufficient basis on which to depart from the reasoning in *Brown*.[53] Nor does the existence of State legislation permitting that mechanism justify such a change.[54] Accordingly, even if leave to reopen were granted (and the respondent contends that leave is required),[55] the Court should not depart from its earlier decision in *Brown*.

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[49] *Brown* at 215, citing *Kingswell* and *Lowenstein* at 583.
[50] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [70] (French CJ), citing the *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J). See also at *Cheng* at 291 [125], 299 [152] (McHugh J).
[51] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554 (the Court).
[52] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
[53] *D'Orta Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 14 [24] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[54] *Ibid.*
[55] *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311; *Brownlee v The Queen* (2000) 207 CLR 278 at [48]; *British American Tobacco v Western Australia* (2003) 217 CLR 30 at 62 [74].

78. There is no conflict between the obvious meaning of the words of s 80, the essential nature and function of that section, and the content of relevant statements of the Court about its meaning and effect: *Brown* at 205 (Deane J). If there are arguments for modifying the generality of the constitutional requirement, the proper audience for them is not this Court.[56]

Section 132 of the *Criminal Procedure Act* does not apply to the trial of the applicant

79. Consistently with the reasoning of Brennan J in *Brown*, the inconsistency between s 132 of the *Criminal Procedure Act* and s 80 of the Constitution means that the former will not be picked up by s 68(2) of the *Judiciary Act 1903* (Cth) in relation to the trial on indictment for an offence against a law of the Commonwealth.[57] That this will lead to a differential application of the provision in State courts, as between federal and State offences on indictment, does not create a constitutional difficulty for the reasons that Brennan J explained, and with which Deane J agreed.[58]

80. In the present case, the applicant must be tried on indictment before a jury.

Alternative argument: s132(4) of the *Criminal Procedure Act* does not apply

81. If, contrary to the above primary position, a trial by judge-alone for an indictable offence against a law of the Commonwealth is not inconsistent with s 80 of the Constitution, that can only be the case if the prosecution agrees to that course.

82. No party in the present case takes issue with the conclusion of the majority in *Brown* that s 80 does not confer a personal right on the accused that may be waived at his or her election.[59] The applicant takes a position that is somewhere between the United States cases and *Brown*, in so far as he contends that s 80 is "*in part*" of benefit to him and thus he should be able to waive it (subject to satisfaction on the part of the court as to the interests of justice and the applicant having taken legal advice) (AWS [62]ff). Despite his attempts to distinguish the position, the respondent contends that, on the authorities stated in AWS [64], the notion of an accused person waiving trial by jury is inapposite where the section also serves a public purpose.

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[56] *Brown* at 207 (Deane J); *Cheng* at 291 [125] (McHugh J); *Singh v The Commonwealth* (2004) 222 CLR 322 at 330 [6] (Gleeson CJ), at 424 [295] (Callinan J).

[57] *Brown* at 199-200; Deane J at 206.

[58] See also *Brown* at 216 (Dawson J). The respondent contends that their Honours' reasons in *Brown* answer the submissions of the Attorney-General for Victoria in relation to the "*State court principle*".

[59] The Queensland Attorney-General and the Tasmanian Attorney-General emphasise the personal nature of the right, but neither goes so far as to say it can be waived at the election of an accused person alone.

83. Even in the United States, where Art III s 2(3) permits an accused to waive the right to a jury trial, the Supreme Court has required the agreement of the prosecution and the trial court.[60] That requirement reflects the nature of the trial by jury for federal offences on indictment, as set out above, as an institution that enures "*for the benefit of the community as a whole*".[61]

84. The respondent therefore contends, very much in the alternative, that prosecution consent is required as a precondition to any consideration by the court of the question of a trial by judge alone. As s 132(4) of the *Criminal Procedure Act* contains no such provision, it cannot be picked up by s 68(2) of the *Judiciary Act*.

10 **Part VII: Oral argument**

85. Approximately 1 hour will be required for the presentation of the oral argument of the first respondent.

Dated: 2 February 2016

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[60] *Patton v United States* 281 US 276 (1930) at 312.7.
[61] *Brown* per Deane J at 201.7; see also Brennan J at 197.3 and Dawson J at 213.5.