IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S279 of 2015

BETWEEN:

HAMDI ALQUDSI
Applicant

and

THE QUEEN
Respondent

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APPLICANT'S SUBMISSIONS (ANNOTATED)

PART I: CERTIFICATION

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

PART II: ISSUES

2. The applicant is charged on indictment in the Supreme Court of New South Wales with seven offences against s.7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). By motion filed on 25 November 2015[1] he seeks a trial by judge alone, pursuant to s.132 of the *Criminal Procedure Act 1986* (NSW) (**CPA**). Under that section (and assuming no co-accused), an accused in the Supreme or District Courts may apply for
20 a judge-alone trial, and the court must so order if the prosecutor agrees (s.132(2)), and may so order if the prosecutor does not agree if the court "considers it is in the interests of justice to do so" (s.132(4)).

3. Section 80 of the *Constitution* provides that trials on indictment for Commonwealth offences "shall be by jury". This Court's construction of s.80 in *Brown v The Queen* (1986) 160 CLR 171 (***Brown***), adopted by a majority of 3:2, would (at least on one view of it) preclude the order sought by the applicant's motion being granted.

4. On 15 December 2015, following an application by the Attorney-General of the Commonwealth, French CJ ordered that that part of the cause pending in the Supreme Court of New South Wales which involved the determination of a notice of motion filed by
30 the applicant be removed into this Court.[2] His Honour stated a case pursuant to s.18 of the *Judiciary Act 1903* (Cth), with one question posed for this Court's determination (CRB 10):

> 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?

5. The Court should answer that question "no". In the applicant's submission the whole of s.132 *can be* picked up and applied by s.68. In the alternative, all of s.132(1) to (6) other

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1 The motion is at Cause Removed Book (**CRB**) 12.

2 The order is at CRB 7; note *Attorney-General of the Commonwealth v The Queen* [2015] HCATrans 343.

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than subsection (2) can be so picked up and applied. That is so, in summary, for the following reasons:

a. Section 80 forms part of Ch III's coherent constitutional scheme for the exercise of the judicial power of the Commonwealth. Properly understood, that scheme does not prevent a court from making orders in criminal proceedings which are sought by the accused and which the court considers to be in the interests of justice. Nor does it prevent a court from adopting trial by judge alone where the Crown and the accused agree on that course.

b. No purpose of s.80 or Ch III dictates a contrary conclusion. To the contrary, the purposes which this Court has ascribed to both are advanced by permitting some qualifications on the Constitution's prescription of trial by jury.

c. The facially mandatory language of s.80 – "shall" – does not dictate a contrary conclusion. This Court's decisions with respect to other constitutional guarantees recognise that such guarantees expressed in mandatory form can be subject to some restrictions at least so long as those restrictions are consistent with the constitutional systems and the purposes of the particular guarantee. Further, an otherwise mandatory provision, should be capable of being waived so long as the provision exists in part for the benefit of an individual and the waiver is otherwise consistent with the provision.

d. Strictly speaking, the ratio in *Brown* does not govern the question raised here. In any event, to the extent necessary this Court should grant leave to re-open the majority decision in *Brown* and should overrule it.

PART III: SECTION 78B

6. A notice under s.78B of the *Judiciary Act 1903* (Cth) has been served (see CRB 17).

PART IV: DECISION BELOW

7. There is no decision below in relation to the question at hand.

PART V: FACTS

8. As noted above, the applicant is charged on indictment with seven offences against s.7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, and on 25 November 2015 he filed a notice of motion seeking an order for trial by judge alone.

9. The motion had not been heard prior to removal. To have done so would likely have been of no utility in light of *Brown*. Similarly, whether or not the Respondent would agree to the order being made in this case, or, if not, whether the Court is persuaded it would be in the interests of justice to so order, have not yet been determined.

10. The matter had been set down for trial before Adamson J and a jury commencing on 1 February 2016, but it has now been adjourned by her Honour to a call-over on 17 February 2016, in light of the orders made by this Court on 15 December 2015: CRB 10.

PART VI: ARGUMENT

11. The issues are addressed in the following order:

    a. the NSW provisions;

    b. judge-alone trials;

    c. text, history and general principles;

    d. context and purpose;

    e. constitutional guarantees and the word "shall";

    f. waiver by an accused;

    g. the majority decision in *Brown*.

10 **The NSW provisions**

12. Trial by judge alone was introduced in NSW courts by the *Criminal Procedure Legislation (Amendment) Act 1990* (NSW). That Act introduced the then s.32 of the CPA, which required trial by judge alone if the accused elected, the judge was satisfied that the person had sought and received advice and the prosecutor consented.[3] In 1995, the requirement for consent from the prosecutor was changed to consent from the Director of Public Prosecutions.[4] In 1999, s.32 was renumbered to be s.16[5] and, in 2001, s.16 was then renumbered to become s.132.[6] Section 132 remained in relevantly the same form until the current form of s.132 was introduced by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW).[7] The current text of ss.132, 132A and 133 of the CPA is set
20 out in Part VII of these submissions.

13. The relevant powers in issue are those in s.132(2) and (4). Section 132(2) confers a power, coupled with a duty, to order trial by judge alone: the duty is triggered where both the

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3 In 1986 the NSW Law Reform Commission had recommended that there be a facility for criminal accused to apply for trial by judge alone, which application could be granted upon showing legitimate grounds or that the only issue was one of law: NSW Law Reform Commission, *The Jury in a Criminal Trial* (Report 48 1986): recommendations 56 and 87. In 1989, the Attorney-General issued Discussion Paper entitled *Reforms to the Criminal Justice System*, which raised the issue of judge-alone trials.

4 See *Criminal Legislation Amendment Act 1995* (NSW) Sch.1, cl.1.4[1]. During the Second Reading Speech, the Minister for Police, Paul Whelan described the motive for this amendment: "[i]t amends section 32 of the Act, which permits an accused person to dispense with a jury and be tried by judge alone. This provision is presently being frustrated by the requirement that consent be obtained from the Crown Prosecutor with carriage of the matter. Administrative difficulties in contacting a particular Crown Prosecutor will be rectified by this amendment by enabling the Director of Public Prosecutions or his delegate to consent to trial by judge alone".: see NSW Parliament, Legislative Assembly, *Hansard* (8 June 1995) 1010 (Whelan MLA).

5 See *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) Sch.2 [12].

6 See *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW) Sch.1 [59].

7 These amendments were introduced following a report of the Standing Committee on Law and Justice of the Legislative Council of the Parliament of New South Wales. Recommendation 1 formed the basis of s.132(4).

accused and the Crown seek such an order. Section 132(4) confers a discretionary power to order trial by judge alone: the power is triggered where the accused seeks the order and the court "considers it is in the interests of justice" to so order. Without limiting that discretion, s.132(5) specifically provides that the court may refuse to make an order "if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness".

14. In each case, the power cannot be exercised unless the court is satisfied that the accused has sought and received advice in relation to the effect of such an order from an Australian legal practitioner: s.132(6). With respect to joint trials, an application must not be made unless all other accused persons apply to be tried by a judge alone, and each application is made in respect of all offences with which the accused persons in the trial are charged that are being proceeded with in the trial: s.132A(2).

15. Section 133 deals with the nature and effect of such judge-alone trials.

16. There is a third power to order a judge-alone trial, although this is not raised by the question stated for this Court. Under s.132(7), the court may order a judge-alone trial, despite any other provision of ss.132 or 132A, if the court is of the opinion that there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and the risk of those acts occurring may not reasonably be mitigated by other means. That Division of the *Crimes Act* is headed "Interference with judicial officers, witnesses, jurors etc".

17. The question in these proceedings is not whether s.132 is valid. The question is whether the *Judiciary Act* picks up and applies ss.132(1) to (6) to a trial for an offence against Commonwealth law where the Crown has proceeded by indictment. If the operation of s.132 on the trial would be inconsistent with the Constitution – in particular, the s.80 requirement for trials by jury on indictments for Commonwealth offences – it would not be picked up by the *Judiciary Act*. That would be a statutory consequence flowing from the constitutional inconsistency. The relevant principles were explained in *Brown* at 198-199 (Brennan J), 205-206 (Deane J), 217-219 (Dawson J).

18. Before turning to address that question, it is useful to note the context in which it arises.

Judge-alone trials

19. NSW was not the first Australian jurisdiction to permit judge-alone trials for trials on indictment. When *Brown* was decided thirty years ago, South Australia was the lone pioneer in this country of legislation allowing such trials. The provision at issue there – s.7(1) of the *Juries Act 1927* (SA) – was introduced in 1984.[8] It provided as follows (see *Brown* at 176-7):

> Subject to this section, where, in a criminal inquest before the Supreme Court or a District Criminal Court-

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8 By the *Juries Act Amendment Act 1984* (SA) s.5.

(a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and

(b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner,

the inquest shall proceed without a jury.

20. As can be seen, in contrast to s.132 of the CPA, the South Australian provision gave the accused a unilateral right to opt for a judge-alone trial, with no additional requirement for consent of the prosecution or approval of the court (subject to the presiding judge being satisfied that relevant legal advice had been obtained).

21. Since *Brown*, the number of jurisdictions permitting trial by judge alone has increased from South Australia to include not only NSW but also the ACT (1993),[9] Western Australia (1994)[10] and Queensland (2008).[11] The criteria for permitting such trials vary.

22. Where an "interests of justice" criterion applies, such as in NSW and Western Australia, relevant factors have been found to include:

a. the risk to the trial arising from adverse prejudicial pre-trial publicity (*Arthurs v WA* [2007] WASC 182 at [85]-[89] (Martin CJ); *R v GSR (No 3)* [2011] NSWDC 17; *R v Simmons (No 4)* [2015] NSWSC 259 at [114]-[117] (***Simmons***)) – although many cases have recognised the basal assumption of the law that jurors will properly attend to directions given to them (see, eg, the cases cited in *Simmons* at [84]-[86]; see also *Dupas v The Queen* (2010) 241 CLR 237 at [25]-[29]) and the ability of courts to craft orders which limit potential prejudice from adverse publicity (eg *R v McNeil* [2015] NSWSC 357 at [85] (Johnson J) (***McNeil***));

b. the value of reasons for judgment in ensuring fairness and facilitating an appeal, including in cases where the complexity of the factual issues renders the exposure of the fact-finder's reasoning valuable to the exercise of appeal rights: *Arthurs* at [74]-[76], [89]-[92] (Martin CJ); *R v Belghar* (2012) 217 A Crim R 1 at [112] (McClellan CJ at CL) (***Belghar***);

c. whether the case involves complex expert evidence that could be difficult for a jury to understand (*R v Simmons (No 4)* [2015] NSWSC 259 at [71] (Hamill J)) or where there is a potential conflict between experts which it would be challenging for the jury to resolve fairly and properly (*R v Farrow* [2014] NSWSC 1781 at [38]-[41] (Rothman J) (***Farrow***));

d. the likely length of the trial if conducted by judge alone as distinct from with a jury – for reasons of potential juror frustration and disengagement, rather than overall administrative efficiency: *Belghar* at [110]-[111];

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9 *Supreme Court Act 1933* (ACT) s.68B.

10 Trial by judge alone was introduced by the *Criminal Law Amendment Act 1994* (WA). The provisions are now contained in the *Criminal Procedure Act 2004* (WA) Pt.4, Div.7.

11 *Criminal Code 1899* (Qld) Ch.62, Div.9A.

e. the inherent value of trial by jury – including the degree of finality it brings to a verdict and the value in involving the community in the determination of criminal guilt: *Farrow* at [30];

f. whether there are likely to be issues of credibility – which may be a factor militating in favour of jury trial: *McNeil* at [101]-[104]; cf *Simmons* at [73]-[82];

g. more generally, in *Coates v WA* [2009] WASCA 142 the Western Australian Court of Appeal held that it will be in the interests of justice to order a trial by judge alone "if that is necessary to ensure the accused receives a fair trial according to law": at [1] (Martin CJ), [104] (Buss JA).

23. Australian jurisdictions are not the only common law jurisdictions which facilitate trial by judge alone in serious criminal cases. In New Zealand, the *Criminal Procedure Act 2011* (NZ) permits trial by judge alone. The applicable procedure depends on which "category" of offence the accused is charged with. For category 1 and 2 offences (punishable by either no imprisonment or imprisonment for less than two years), trial is by judge alone. For category 3 offences, being those punishable by imprisonment for more than two years, the defendant can elect in or out of trial by jury: s.50. Even if the defendant elects for trial by jury, the court can order a trial by judge alone. The court can do so under s.102 if (relevantly) the court is satisfied that the defendant's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively: s.102(4).[12] The court cannot make an order under s. 102 if the offence is punishable by imprisonment for life or for 14 years or more: s.102(1). The court can also, despite the defendant's election, order trial by judge alone on application by the prosecutor and if the court is satisfied that there are reasonable grounds to believe that juror intimidation is occurring or may occur and its effects can be avoided only by ordering trial by judge alone: s.103.

24. Trial by jury is protected by s.24(e) of the *New Zealand Bill of Rights Act 1990* (NZ), which provides that "[e]veryone who is charged with an offence— ... (e) shall have the right, except in the case of an offence under military law tried before a military tribunal, benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more". The right in s.24(e) is, as with other rights set out in the Act, subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The applicant is not aware of any case determining whether that right can be waived.

25. In the United Kingdom, the *Criminal Justice Act 2003* (UK) permits trial by judge alone in two categories of case. The first category is serious or complex fraud cases: s.43. The prosecution may apply for trial by judge alone. The court then has a discretion which is enlivened if the court is satisfied that "the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require" trial without a jury: s.43(5). The court is to "have

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12 "The Court must not make under subsection (2) unless ... the court is satisfied— (a) that all reasonable procedural orders (if any), and all other reasonable arrangements (if any), to facilitate the shortening of the trial have been made, but the duration of the trial still seems likely to exceed 20 sitting days; and (b) that, in the circumstances of the case, the defendant's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively".

regard to any steps which might reasonably be taken to reduce the complexity or length of the trial": s.43(6). The second category is where there is a risk of future jury tampering or the judge is satisfied that jury tampering has already taken place and the judge has chosen to discharge the jury: ss.44, 46.

26. In Canada, trial on indictment is by judge and jury "except where otherwise expressly provided by law": *Criminal Code 1985* s.471. Express provision to the contrary is made by *Criminal Code* s.536(2)-(3), which permit an accused to elect to be tried in various ways, including otherwise than by jury.[13] However, the Attorney-General can require the accused to be tried by jury unless the offence is punishable by imprisonment for five years or less: s.569. Trial by jury is protected by s.11(f) of the *Canadian Charter of Rights and Freedoms*, which provides that "[a]ny person charged with an offence has the right ... except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment". The Supreme Court of Canada has held that the accused can unilaterally waive that right: see *R v Turpin* [1989] 1 SCR 1296. Prominent in the Court's reasoning was the fact that what was protected was the right to the benefit of trial by jury.

27. In the United States, trial by jury is protected by Art.III, §2, cl.3 of the Constitution, which provides that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury". The 6th Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and the district wherein the crime shall have been committed". The basic position in the United States remains that articulated in *Patton v United States*, 281 US 276 at 312-3 (1930), namely, that the accused can, with informed consent and with the concurrence of government counsel and the court, waive the trial by jury protections given in both Art.III and the 6th Amendment; see also *Adams v United States, ex rel McCann*, 317 US 269 at 275 (1942) and *Singer v United States*, 380 US 24 (1965). This position is given statutory effect in the US federal court system by Rule 23(a) of the Federal Rules of Criminal Jury which provides that "[i]f the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves".

Text, history and general principles

28. It must be acknowledged that the language of s.80 – "shall be by jury" – is suggestive of a mandatory requirement for trials on indictment of Commonwealth offences. That said, the text was drawn substantially from the United States Constitution, and, as noted, that requirement has been construed to permit waiver of the right to a jury trial by an accused.

29. There is little, if anything, in the drafting history of the Australian provision that casts clear light on the question before the Court (as to this history, note eg *Brown* at 188-9 (Wilson J); *The Queen v LK* (2010) 241 CLR 177 at [32]-[35] (French CJ); the Hon V Bell, "Section 80 – The Great Constitutional Tautology", The Lucinda Lecture, Monash University, 24 October 2013, at 1-12).

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13 See also s.473, which permits trial by judge alone for certain offences where the accused and the Attorney-General agree.

30. In any event, a simple reading of the text cannot, alone, serve to resolve the issue before the Court.

    a. As a matter of constitutional principle, s.80 is to be construed in light of the Constitution as a whole: see analogously *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [53] (Gummow, Kirby and Crennan JJ) (***Roach***); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [288] (Hayne and Kiefel JJ); *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 597-598, 606 (Gummow J). Put another way, the Constitution should be construed coherently: see *Williams v The Commonwealth* (2012) 248 CLR 156 at [157] (Gummow and Bell JJ). In particular, s.80 should be construed in its immediate constitutional context, namely, Ch.III.

    b. As with other constitutional guarantees and limitations, account must also be taken of the purpose/s of the s.80 guarantee itself: see, eg, *Ha v State of New South Wales* (1997) 189 CLR 465 at 494-5 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Cole v Whitfield* (1988) 165 CLR 360 at 394-5.

    c. Moreover, this Court has accepted – in line with courts around the world – that constitutional guarantees may not be absolute in their requirements, even if expressed in absolute terms.

31. These points are developed further below.

32. Further, it must, of course, be recalled that it is a constitution being construed, an instrument of government meant to endure and to be capable of responding to changing circumstances and conditions over time: eg *Australian National Airways Pty Ltd v Commonwealth (No 1)* (1945) 71 CLR 29 at 81 per Dixon J; *Cheng v The Queen* (2000) 203 CLR 248 at [82]-[83] (Gaudron J); *Brownlee v The Queen* (2001) 207 CLR 278 at [7] (Gleeson CJ and McHugh J).

33. Just as for the law relating to corporations,[14] or the juristic classification of marriage,[15] the notion of trial by jury has not been static in Anglo-Australian law: note *Brownlee* at [12] (Gleeson CJ and McHugh J) and [33]-[34], [59] (Gaudron, Gummow and Hayne JJ). In *Brownlee*, at [34], Gaudron, Gummow and Hayne JJ quoted with approval the following observations from Professor AW Scott, in his paper "Trial by Jury and the Reform of Civil Procedure" (1918) 31 Harvard Law Review 669 at 669-670 (citations omitted):

> Perhaps the most striking phenomenon in the history of our procedural law is the gradual evolution of the institution of trial by jury. The jury as we know it today is very different from the Frankish and Norman inquisition, out of which our modern jury has been slowly evolved through the centuries of its 'great and strange career'. It is different from the assizes of Henry II, that great reformer of procedural law. It is different from the trial by jury known to Lord Coke and to the early American colonists who carried to a New World the principles of English jurisprudence. 'To suppose', says Edmund Burke, 'that juries are something innate in the Constitution of Great

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14 *Work Choices Case* (2006) 229 CLR 1 at [121]-[123]; *CEPU v Queensland Rail* (2015) 318 ALR 1 at [17]-[22].

15 *Commonwealth v ACT* (2013) 250 CLR 441 at [14]-[38].

> Britain, that they have jumped, like Minerva, out of the head of Jove in complete armor is a weak fancy, supported neither by precedent nor by reason'. In England there has been a wonderfully steady and constant development of trial by jury from the Conquest to the present day. In this country surely it was not, by the adoption of our constitutions, suddenly congealed in the form in which it happened to exist at the moment of their adoption.

34. The modern development of judge-alone trials in Australia can be seen not so much as a fundamental departure from this evolving institution as a qualification relating to its operation. That is so, at least, where the legislative criterion requires an individual judicial determination of where the interests of justice lie in the particular case, as provided for in s.132(4) of the CPA, as opposed to some wholesale (or perhaps unilateral) removal of the requirement for a jury trial. That is also so where the jury requirement may be departed from where both the accused and the prosecutor agree, as provided for by s.132(2). That view is supported by analysis of the context and purpose of s.80.

Context and purpose

35. Chapter III constitutes and regulates a coherent scheme for the exercise of the judicial power of the Commonwealth. A principal object of Ch.III and the scheme it creates is the protection and advancement of the interests of Commonwealth justice. Accordingly, it has been said that in the exercise of judicial power, the "final and paramount consideration in all cases is ... 'to do justice'": *R v Macfarlane; Ex parte Flanagan and O'Kelly* (1923) 32 CLR 518 at 549 (Isaacs J) (***O'Flanagan***); *Hogan v Hinch* (2011) 243 CLR 506 at [87] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). Chapter III gives practical effect to the rule of law[16] and there is a close correlation between the rule of law and the interests of justice. The notion of "doing justice" to which Isaacs J referred in *O'Flanagan* encompasses various fundamental incidents of Commonwealth judicial power, including "the elementary right of every accused person to a fair and impartial trial": *O'Flanagan* at 541-2.[17]

36. More specifically, it has been said that the "separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges": *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

37. These general objects of Ch.III are consistent with the (overlapping) objects which members of this Court have ascribed to s.80 itself, namely:

    (a) the advancement of the liberty of an accused, in particular from governmental oppression: *Brown* at 179 (Gibbs CJ), 188-191 (Wilson J), 197 (Brennan J); *Kingswell v The Queen* (1985) 159 CLR 264 at 298-303; *Brownlee* at [21] (Gleeson CJ and McHugh J); *Fittock v The Queen* (2003) 217 CLR 508 at [23] (McHugh J);

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16 *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [30] (Gleeson CJ and Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307 at [61] (Gummow and Crennan JJ).

17 See also *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [37] (French CJ and Crennan J); *Chapman v Gentle* (1987) 28 A Crim R 29 at 32-33 (Yeldham J).

(b) giving the community a guarantee of the proper administration of criminal justice, including the reality and appearance of impartial justice and the rule of law: *Brown* at 197 (Brennan J), 201-202 (Deane J), 208-209, 216 (Dawson J); *Kingswell v The Queen* (1985) 159 CLR 264 at 301 (Deane J); *Cheng v The Queen* (2000) 203 CLR 248 at [77]-[83] (Gaudron J).[18]

38. The essential features of the s.80 requirement "are to be discerned with regard to the purpose which s 80 was intended to serve and to the constant evolution, before and since federation, of the characteristics and incidents of jury trial": *Ng v The Queen* (2003) 217 CLR 521 at [9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

39. In this context, it is not readily to be supposed that s.80 bears a meaning which prevents a Court, upon application by the accused, from doing that which it considers to be in the interests of justice. To hold that s.80 ties a court's hands such that it cannot do that which is necessary or appropriate for the interests of justice would divorce the guarantee from the broader objects of Ch.III.

40. None of the objects of s.80 itself require a contrary conclusion. The liberty interest of an accused is advanced if the accused is able to seek the mode of trial which he or she considers most advantageous. The community's interest in the proper and impartial administration of justice is advanced if the court is empowered to ensure a mode of trial which best effectuates the administration of justice in the particular circumstances of the case. Conversely, the community's interest in the administration of justice is impaired if the courts are prevented from giving effect to the interests of justice.

41. To require an accused to have a jury trial may, in some particular circumstances, operate to the detriment of receiving a fair trial, and to the detriment of the reality and appearance of impartial justice and the rule of law. A jury itself may, in some instances, be capable of being an instrument of oppression. As McHugh J recognized in *Cheng* at [150], "[t]o some accused, trial by jury is not a boon"; see further *Brownlee v The Queen* (2001) 207 CLR 278 at [118] (Kirby J) and *R v Turpin* [1989] 1 SCR 1296 at 1312-1313.

42. These points can be illustrated through examples (which may be especially pertinent where an accused has been charged with offences relating to terrorism or foreign incursions). Suppose a particular accused had been the subject of widespread, adverse pre-trial publicity; or that the nature of the charge, or the identity of the accused, was such that there was a substantial risk of significant local prejudice. A court could readily and appropriately form the view that the interests of justice, including the accused's interest in a fair trial and the community's interest in the reality and appearance of impartial justice, were best served by the trial being by judge alone. It would not advance the purposes of s.80 or of Ch.III if s.80 were to prevent that course.

43. In *Cheatle v The Queen* (1993) 177 CLR 541 at 553 the Court stated that "the common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt". Yet

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[18] For the reasons which follow, these proceedings can be decided without deciding whether this second purpose is an object of s.80 and (if so) whether it is an object of equal importance to the liberty interest of the accused. Differing answers to these questions effectively resulted in the 3:2 split in *Brown*.

in some circumstances of strong local prejudice there may be reason to think that a jury will not necessarily accord an accused that benefit.

44. Alternatively, suppose that there was strong evidence of a substantial risk of jury-tampering or jury intimidation. Again, a court might readily and appropriately form the view that the parties' interest in a fair trial[19] and the community's interest in the reality and appearance of impartial justice were best served by trial by judge alone.

45. In each of those examples, the "interests of justice" criterion in s.132(4) of the CPA would amply accommodate the protection of the accused's liberty interest and the protection of the community's interest in the proper, efficient and fair administration of justice. Conversely, to fail to allow some accommodation for the particular circumstances of the case would tend to defeat the very objects served by s.80 in particular and Ch III in general.

46. It may be argued that such prejudice could be averted by the grant of a stay. Yet that remedy is not readily granted,[20] and it will not necessarily avoid all the consequences of prejudice or the like. More generally, it is a rather blunt remedy, preventing or delaying the exercise of judicial power, and potentially undermining confidence in the administration of justice by allowing a serious charge to go un-tried. As Mason CJ and Toohey J said in *The Queen v Glennon* (1992) 173 CLR 592 at 598, the "community" has a "right to expect that a person charged with a criminal offence be brought to trial". To allow a judge-alone trial where that is required by the interests of justice is supportive of the objects of Ch III and s.80 in allowing a trial to proceed.

47. Recognising the valid operation of s.132(4) of the CPA with respect to federal offences is not to abandon an aspect of the s.80 requirement "for reasons of contemporary convenience or practical utility": cf *Cheatle v The Queen* (1993) 177 CLR 541 at 561-2. Rather, it is enable more complete fulfilment of the relevant constitutional objects.

48. In *Cheng*, at [80]-[81], Gaudron J stated:

> ... Respect for the rule of law and, ultimately, the judicial process and the judiciary is enhanced if the determination of criminal guilt is left in the hands of ordinary citizens who are part of the community, rather than in the hands of judges who are perceived to be and, sometimes, are 'remote from the affairs and concerns of ordinary people' [quote from *Kingswell* at 301 (Deane J)].
>
> The participation of the people of this country in the exercise of judicial power, through their service on juries, provides a basis for community acceptance of verdicts in criminal trials and, more broadly, an understanding of the judicial processes.

49. The general force of this point is not diminished by recognizing that in some limited, particular cases, respect for the rule of law, and the general interest in the administration of justice, may be undermine by requiring a jury trial.

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19 Which includes the interests of the Crown: *McKinney v The Queen* (1991) 171 CLR 468 at 488; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [190] (Kiefel J).

20 See *Dupas v The Queen* (2010) 241 CLR 237 at [17] (per curiam).

50. In *Brownlee*, at [71], Gaudron, Gummow and Hayne JJ referred to "the substantial character of the institution [of trial by jury] as an efficient instrument in the administration of justice". As such an instrument, its entrenchment in s.80 should not be regarded as requiring a jury trial even where to do so is contrary to the interests of justice. That phrase appears to have originated in Prof Scott's 1918 paper (pp.669 and 691), via the judgment of Brandeis J in *Ex parte Peterson*, 253 US 300 at 309-310 (1920) (as referred to in *Brownlee* at [53]). The statement by Prof Scott at the conclusion of his article (p.691) is noteworthy:

> If the ancient institution of trial by jury is to survive, as our ancestors intended that it should, it must be capable of adaptation to the needs of the present and of the future. This means that it must be something more than a bulwark against tyranny and corruption: it must be an efficient instrument in the administration of justice.

51. There is no reason why the judiciary should not be assumed to be an appropriate guardian of any "community" interest of the kind referred to by members of the majority in *Brown*. The judiciary exercising the judicial power of the Commonwealth are part of an integrated judicial system, the integrity of which is guaranteed by the Constitution and the superintendence of this Court. The judicial branch is well familiar with the task of protecting and advancing the administration of criminal justice and, in particular, the reality and appearance of impartial justice.

52. Similarly – to turn to the s.132(2) criterion – s.80 should not be construed to prevent the Court from ordering trial by judge alone where both the Crown and the accused seek that course. The Crown, as prosecutor, can be expected to act in a manner calculated to advance any systemic, public interests which Ch.III and s.80 serve. The Crown is of course subject to a duty of fairness, which is "calculated to enhance the administration of justice": *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [63] (French CJ, Hayne, Crennan, Bell and Keane JJ). Also, the Crown is, through the systems of representative and responsible government, ultimately answerable to the community whose interests are protected by s.80. The purposes of Ch.III and s.80 are respected where trial can occur by judge alone in circumstances where the accused, in discharge of the accused's private interests, and the Crown, as representative of the public interest, agree that trial by judge alone is the appropriate method of trial.

53. Again, this point can be illustrated by an example. Suppose the Crown were of the view that, because of the likely length of a trial and its complexity, the administration of justice was best served by a judge alone trial, and the Crown and the accused jointly seek that course. At the level of validity, the Crown must be assumed to have properly formed that view. In this case, the accused's liberty interest is advanced by the need for his or her consent. And the community's interests are advanced by giving the Crown, as public representative, a veto right.

54. It can be noted that the contrary proposition – that the Crown and the accused cannot consent to trial by jury – does not sit well with this Court's existing s.80 doctrine. That doctrine holds that s.80 applies *only* where (a) the Commonwealth Parliament has defined an offence to be capable of being an indictable offence; and (b) where an offence can be tried either summarily or on indictment, the Crown has in its discretion chosen to proceed on indictment: see *Kingswell v The Queen* (1985) 159 CLR 264 at 276-7 (Gibbs CJ, Wilson and Dawson JJ) (***Kingswell***) and *The Queen v LK* (2010) 241 CLR 177 at [24]

(French CJ) (and the authorities cited therein). It is difficult to discern why the Constitution would permit the Crown unilaterally to opt out of trial by jury at the outset by charging summarily, but not to permit the Crown to opt out of trial by jury at a later stage where the accused consents to such a course.

Constitutional guarantees and the word "shall"

55. When account is taken of the nature of s.80 as a constitutional guarantee, the fact that it employs the word "shall" does not necessarily preclude it from being subject to confined qualifications. That s.80 is a constitutional guarantee which can usefully be compared to other guarantees was accepted by Gaudron J in *Cheng* at [77]-[83]. Three examples from this Court's constitutional doctrine support the proposition that constitutional guarantees given by the term "shall" can be subject to qualifications.

56. First, s.92 relevantly provides that "trade, commerce, and intercourse among the States ... shall be absolutely free". The guarantee is expressed in apparently mandatory terms, "shall". Moreover, the guarantee is expressed in powerful language: *absolutely free*. Even so, this Court has accepted that s.92 does not prevent the imposition of all restrictions on interstate trade. Only discriminatory burdens of a protectionist kind are proscribed: see, eg, *Cole v Whitfield* (1988) 165 CLR 360 at 394-6 (***Cole***). One reason for such qualifications on the otherwise forceful words of s.92 is that s.92 must be read in the context of the Constitution as a whole, which includes the positive conferral of power on the Commonwealth to regulate trade and commerce amongst the States in s.51(i): see *Cole* at 398-399. A further reason for those qualifications is that, if the guarantee were absolute, the polities would be prevented from enacting necessary or appropriate laws: see *Cole* at 406-407; note also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472. This Court has identified the restrictions on interstate trade which are compatible with s.92 by reference to the objects of the protection: see *Cole* at 392-3.

57. Secondly, s.117 provides that "[a] subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State". Again, despite the mandatory language, the Court has recognised that some disability or discrimination is permissible: see *Street v Queensland Bar Association* (1989) 168 CLR 461 at 491-2 (Mason CJ), 512-4 (Brennan J), 548 (Dawson J), 583-4 (McHugh J) (***Street***); *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 at 493 (McHugh J). One reason given for that outcome is to ensure that s.117 does not extend beyond its objects: *Street* at 491 (Mason CJ), 548 (Dawson J). A further reason is structural and systemic (and thus contextual): the Constitution necessarily contemplates some State autonomy and an absolute restriction on States conferring differential privileges on State residents would infringe that autonomy: *Street* at 492 (Mason CJ), 583-4 (McHugh J).

58. Thirdly, this Court has also recognised that some qualifications on the constitutional requirements created by (in particular) ss.7 and 24 are compatible with the guarantee. The guarantee in those provisions, which encompasses the franchise, is given by the term "shall": the relevant House of Parliament "*shall* be composed [of persons] directly chosen by the people" of the relevant polity. Whilst this could have been construed to require compulsory voting – noting that the parliamentarians must in terms be chosen by "the people", not a subset of the people – this Court has not construed ss.7 and 24 in that way: see *Judd v McKeon* (1926) 38 CLR 380 at 383 (Knox CJ, Gavan Duffy and Starke JJ), 385

(Isaacs J), 390 (Rich J); see also *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [219] (Hayne J), [422]-[423] (Kiefel J) (***Rowe***). To the contrary, this Court has understood ss.7 and 24 to provide for universal adult suffrage, while recognising that that suffrage can be subject to limitations which are reasonably appropriate and adapted to serve an end compatible with the constitutionally-prescribed systems: see *Roach* at [85] (Gummow, Kirby and Crennan JJ); see also *Roach* at [24] (Gleeson CJ); *Rowe* at [161]-[162] (Gummow and Bell JJ). Again, significantly, the task of identifying the permissible limits on the universal franchise are informed by the guarantee's purposes: see, eg, *Rowe* at [1]-[2], [25], [47] (French CJ).

10 59. This Court has similarly recognized that the freedom of communication on political and government matters, which is founded substantially on ss.7 and 24, is not absolute: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561 (per curiam) (***Lange***). It is limited to that which is necessary to achieve the freedom's purposes: *Lange* at 561. The understanding of that qualification has continued to develop, most recently in *McCloy v New South Wales* (2015) 325 ALR 15.

60. The general explanation for these examples may be that the Constitution does not pursue any particular purpose at all costs, similarly to ordinary statutes: as to which, see *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [40]-[41]. Thus where the Constitution confers a particular guarantee, there is inevitably a role for the courts in
20 assessing how that guarantee is to be accommodated to other constitutional powers, principles and values. Put another way, "no right is absolute": *SL v. Commission scolaire des Chênes* [2012] 1 SCR 235 at [31] (Deschamps J, for McLachlin CJ, Binnie, Deschamps, Abella, Charron, Rothstein and Cromwell JJ); see also *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 126-127 (Latham CJ), 149-150 (Rich J), 154 (Starke J).

61. It is, however, unnecessary to adopt any general theory as to when otherwise mandatory constitutional guarantees can be overcome. The propositions advanced by the applicant are narrower: when used in the *Constitution*, "shall" does not always identify a rigid "must in all cases"; in deciding whether "shall" has that level of rigidity, it is appropriate to construe
30 the constitutional guarantee in the context of the whole of the Constitution; and in deciding what (if any) kinds of restrictions on the guarantee are permissible, it is necessary to consider the purposes of the guarantee.

Waiver by an accused

62. There is a further, overlapping reason why use of the term "shall" in s.80 does not require a jury trial in all federal trials on indictment. An otherwise mandatory constitutional guarantee, which exists in part for the benefit of an individual, should be recognised to be capable of being "waived" by that individual *where* the conditions for the efficacy of the waiver are otherwise compatible with the objects of the guarantee.

63. This proposition differs somewhat from that relied on by Gibbs CJ in *Brown* at 178-9.
40 That proposition – that any person can waive a statutory provision introduced entirely for his or her own benefit – is a subset of the broader proposition now advanced by the applicant in this case. Where a requirement exists entirely for the benefit of an individual, all other things being equal, it would not be contrary to the objects of the guarantee to permit the individual to opt out.

64. It can be accepted that there are many cases holding that "an individual cannot waive a matter in which the public have an interest": *Graham v Ingleby* (1848) 154 ER 277 at 279 (Alderson B) (***Ingleby***); see also, eg, *Ingleby* at 278-9 (Pollock C B), 279 (Parke B); *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 486 (Gaudron J); *Equitable Life Assurance of United States v Bogie* (1905) 3 CLR 878 at 891-3 (Griffith CJ), 896-900 (Barton J); *Davies v Davies* (1919) 26 CLR 348 at 355-357 and 362 (Isaacs J); *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 456-8 (Windeyer J) (***Burns Philip***). In each of these cases, the issue has been whether an individual *by unilateral act* can waive a statutory provision, and it has correctly been said that, all other things being equal, if the provision exists for the benefit of others as well as the individual then the individual's unilateral act ought not be capable of waiving the provision.

65. The present case raises a different issue. Neither of the relevant provisions in s.132 permit the accused unilaterally to waive trial by jury: the agreement of either the judicial or executive department of government is necessary.

66. The general principle was correctly stated by Windeyer J in *Burns Philp* at 456: "[w]hen a statute creates and confers rights and imposes corresponding duties, persons for whose benefit this was done may ... waive or renounce their rights, unless to do so would be contrary to the statute". Viewed in this way, the principle does not yield a rigid "yes" or "no" answer determined by whether the provision is exclusively for the benefit of an individual. In each case, the question is whether permitting an individual to waive the benefit of the provision would be contrary to the provision. The possibility of waiver is not foreclosed by the existence of a public purpose. For example, it could not be denied that waiver was permissible if a statute, though serving a public purpose, expressly provided for waiver.

67. Understood in this way, the principle is consistent with this Court's case law on nullity and illegality. In those areas the Court has recognised that, in each case, the consequences of departure from the facial meaning of the statutory scheme are not to be determined by the application of unyielding, top-down rules. Rather, the effect of the departure from the statutory scheme is to be determined by reference to the scheme's scope and object: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] (McHugh, Gummow, Kirby and Hayne JJ); *Gnych v Polish Club Limited* (2015) 320 ALR 489 at [35] (French CJ, Kiefel, Keane and Nettle JJ), see also at [59]-[75] (Gageler J).

68. Accordingly, to characterise s.80 as serving a public purpose does not, of itself, entail that an accused cannot "waive" the benefit of s.80. The relevant question here is whether s.80, construed in context and in light of its purposes, precludes trial by judge alone if the accused seeks that course and either the court considers it is in the interests of justice or the Crown consents. For the reasons above, it does not. Indeed, it would arguably be a strange result if s.80 required a jury trial in circumstances where neither the private liberty interest nor the public interest in the administration of justice was served by the requirement.

69. Further, the text of s.132(4) is sufficiently malleable to ensure its consistency with s.80. Section 132(4) confers a discretionary power. That discretion must be exercised consistently with the Constitution: see, eg, *Wotton v State of Queensland* (2012) 246 CLR 1 at [9]-[10] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 611-615 (Brennan J). If the power can be exercised lawfully, it is to be assumed that the courts will do so: see, eg, *Bank of NSW v*

Commonwealth (1948) 76 CLR 1 at 338 (Dixon J); *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [81] (Hayne J); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [219] (Crennan and Kiefel JJ). Moreover, error in the exercise of the discretion is amenable to correction on appeal.[21] The discretion is enlivened by the courts' perception that its making is in the interests of justice. The "interests of justice" referred to include the requirements of the Constitution and the values advanced by trial by jury, including the accused's liberty interest and the community's interest in the proper administration of justice. To the extent possible, those words will accommodate themselves to the guarantee in s.80.

10 **The majority decision in *Brown***

70. The issues posed by the present case were not squarely decided in *Brown*. The issue in *Brown* was whether s.7 of the *Juries Act 1927* (SA) was picked up by the *Judiciary Act*. That provision *required* trial by jury upon the *unilateral* election of the accused.

71. *Brown* came before this Court as a removal of part of a cause then pending in the Full Court of the Supreme Court of South Australia. This Court's jurisdiction was limited to deciding the part of the cause so removed, being "so much of the cause 'as involves the question of whether s.80 of the Constitution precluded [Brown] from electing pursuant to sub-section 7(1) ... as applied by s.68 of the *Judiciary Act 1903*, to be tried by a Judge alone for the offence with which he was charged'": see Gibbs CJ at 177. The Court's
20 formal ruling was given as an answer to a question, as follows (see at 219):

> Answer the question removed under s. 40(1) of the *Judiciary Act* as follows:
>
> Section 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.

72. In agreeing in that answer, the three majority judges expressed views which, if applied to the present proceedings, would resolve it against the applicant. Brennan J said "[i]n my opinion, there is no reason why s. 80 of our Constitution should not be construed as making trial by jury mandatory": at 196. Deane J said (at 205, citation omitted):

> The command of s. 80 applies, according to its terms, in respect of the trial on
30 indictment of any offence against any law of the Commonwealth. 'Neither Parliament nor Courts may permit' that such a trial be 'by a Judge or Judges without a jury'.

73. Dawson J observed that there could "be no real doubt that the words of s.80, given their literal meaning, required the appellant to be tried by jury" (at 208) and discerned no reason to depart from that literal meaning.

74. Strictly, the ratio decidendi of *Brown* should be regarded as no broader than the answer to the question, dealing with the issue raised for determination in the cause removed. So much reflects the principle that constitutional issues are best resolved by reference to

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21 Under *Criminal Appeal Act 1912* (NSW) s.5F. The Government considered whether to introduce restrictions on interlocutory appeals from decisions under s.132, but ultimately decided not to do so: see NSW Parliament, Legislative Assembly, *Hansard* (24 November 2010) 28073 (Hatzistergos MLC).

concrete disputes raised for determination. The issue raised by the operation of s.132 of the CPA – and the light thereby thrown on the operation of s.80 – is distinct (if overlapping) from that raised by the South Australian provision. Thus if the ratio of *Brown* extends no further than the validity of s.7(1) and its cognates, there is no need to re-open *Brown*.

75. It must be accepted, however, that the broader views of the majority in *Brown* are at least considered dicta from a majority of the Court, not lightly to be departed from.

76. In the applicant's submission, if necessary, leave should (also if necessary)[22] be given for *Brown* to be over-ruled and *Brown* should be overruled. If it is unnecessary for *Brown* to be overruled, the broader views in it should not be followed.

77. First, to the extent that the majority in *Brown* held that the constitutional text "shall" rendered the guarantee rigidly mandatory (see Brennan J at 196, Deane J at 201, Dawson J at 208-9 and 216-217) the majority view should now be regarded as "wrong in a significant respect": cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 440 (***John v FCT***).[23] That is so for the reasons outlined above. This Court's approach to constitutional guarantees, and to recognition of the extent to which such guarantees may be qualified by reference to other legitimate ends, has changed very significantly since 1986. The majority's views now stand in some tension with the Court's approach to other guarantees.

78. Further, Brennan and Dawson JJ's reasons, with their emphasis on what was known to the common law, may now be regarded as manifesting insufficient recognition of the non-static nature of the concept of trial by jury: cf *Brown* at 195-7, 211-212.

79. Secondly, the majority decision in *Brown* and was not part of "a stream of authority" on the issue of waiver of s.80: cf *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630 (Aickin J). It did not rest on "a principle carefully worked out in a significant succession of cases": cf *John v FCT* at 438.

80. Thirdly, s.80 is "an important provision of the Constitution which deals with individual rights" (or at least an interest directly affecting individuals and presumptively for their benefit, at least in part), and thus *Brown* is more amenable to reconsideration by this Court in a manner apt better to protect those rights or interests: cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 613 (Gummow J); see also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 518-9 (Brennan J), 588 (McHugh J).

81. Fourthly, the reasoning of the majority judges is not identical and, in any event, it represented the views of only three Justices of the Court, with two disagreeing.

82. Fifthly, the decision in *Brown* gives rise to "potential absurdities and inconveniences": cf *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [85] (French CJ). As to the absurdities, it has the effect that the Crown can switch the constitutional protection on and off by choosing to charge on indictment or summarily, while the accused (for whose benefit the protection exists at least in part) is stuck with the Crown's choice. As to

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22 Even if *Brown* is binding, the question of whether leave to re-open is required has been described as an "open one": see *Plaintiff M47 v Director-General of Security* (2012) 251 CLR 1 at [533] (Bell J).

23 Although, even if *Brown* is binding, it can be doubted that there is a need for this Court to find that *Brown* was "wrong": see *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [71] (French CJ).

inconveniences, there are any number of reasons why trial by judge alone may be convenient in the circumstances of a particular case, as addressed above.

83. Sixthly, this is not a case in which governments have independently acted on the decision in *Brown*: cf *John v FCT* at 438-439. To the contrary, as noted above, since *Brown* was decided the number of jurisdictions permitting trial by judge alone has increased from South Australia to include NSW, the ACT, Western Australia and Queensland. Save for the effect of *Brown*, those provisions have always been capable of being picked up and applied in trials of Commonwealth offences by the *Judiciary Act*.

PART VII: APPLICABLE PROVISIONS

10 84. The following relevant provisions are still in force.

85. Section 80 of the Constitution provides:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

86. Sections 68(1) and (2) of the *Judiciary Act 1903* (Cth) provide:

> **68 Jurisdiction of State and Territory courts in criminal cases**
>
> (1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
>
> 20 (a) their summary conviction; and
>
> (b) their examination and commitment for trial on indictment; and
>
> (c) their trial and conviction on indictment; and
>
> (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;
>
> and for holding accused persons to bail shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.
>
> 30 (2) The several Courts of a State or Territory exercising jurisdiction with respect to:
>
> (a) the summary conviction; or
>
> (b) the examination and commitment for trial on indictment; or
>
> (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

87. Sections 132-133 of the *Criminal Procedure Act 1986* (NSW) provide:

132 Orders for trial by Judge alone

(1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a ***trial by judge order***).

(2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.

(3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.

(4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.

(5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

(6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.

(7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:

(a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and

(b) the risk of those acts occurring may not reasonably be mitigated by other means.

132A Applications for trial by judge alone in criminal proceedings

(1) An application for an order under section 132 that an accused person be tried by a Judge alone must be made not less than 28 days before the date fixed for the trial in the Supreme Court or District Court, except with the leave of the court.

(2) An application must not be made in a joint trial unless:

(a) all other accused person apply to be tried by a Judge alone, and

(b) each application is made in respect of all offences with which the accused persons in the trial are charged that are being proceeded with in the trial.

(3) An accused person or a prosecutor who applies for an order under section 132 may, at any time before the date fixed for the accused person's trial, subsequently apply for a trial by a jury.

(4) Rules of court may be made with respect to applications under section 132 or this section.

133 Verdict of single Judge

(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

PART VIII: ORDERS SOUGHT

88. The applicant seeks the following orders:

a. The question stated for the Court should be answered "no";

b. That part of the cause removed into this Court should be remitted to the Supreme Court of New South Wales.

89. These being criminal proceedings, there should be no order as to costs.

PART IX: ORAL ARGUMENT

90. The applicant will require approximately 1½ hours to present his argument.

Dated: 21 January 2016

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