IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S279 of 2015

BETWEEN:

HIGH COURT OF AUSTRALIA
FILED
- 5 FEB 2016
THE REGISTRY SYDNEY

HAMDI ALQUDSI
Applicant

and

THE QUEEN
Respondent

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APPLICANT'S REPLY SUBMISSIONS (ANNOTATED)

1. These submissions are made in reply to those of the Crown filed on 2 February 2016 (**CS**). They supplement those filed by the Applicant on 21 January 2016 (**AS**).

2. One general point may be made at the outset. A number of the Crown's submissions imply that ss 132(2) and (4) of the *Criminal Procedure Act 1986* (NSW) (**CPA**) materially undermine the system of trial by jury: see, eg, CS [59], [62]. That is not so. The default position under the CPA is that trials on indictment are by jury: s.131. That default position can only be departed from where the limited circumstances prescribed in s.132(2) or (4) are met. The values advanced by jury trial are a factor to which a judge can properly have
20 regard when making an order under s.132(4): see AS [22(e)]. The assessment of the interests of justice would include the larger constitutional and common law context: note analogously *Hogan v Hinch* (2011) 243 CLR 506 at [31]-[32] (French CJ). In any case, either the Court or the Crown must agree to the proposed course. It is not to be expected that provisions such as s.132 herald the end of trial by jury, whether at all or in the majority of cases. Indeed, evidence from Western Australia is that, where trial by judge alone is permitted, subject to a default of trial by judge alone, trial by jury is retained in the vast majority (more than 98%) of cases.[1] In this context, sub-ss 132(2) and (4) preserve a system which can properly be described as one of "trial by jury".

Text

30 3. The principal point advanced by the Crown is that "shall" dictates an absolute "must": see CS [15]-[27]. This point should be rejected for the reasons advanced at AS [55]-[69]: in the Constitution, "shall" does not inevitably mean an absolute "must".

4. The Crown is not assisted by drawing a contrast with the US Constitution: cf CS [18]. Like s.80, Art.III, §2, cl.3 of the US Constitution uses the term "shall". Yet, the Supreme Court of the United States has recognised that that "shall" does not mean "must in all cases": see AS [27]. Further, the dicta in *Cheng v The Queen* (2000) 203 CLR 248 on which the Crown relies at CS [17] was not directed to the issue in the present case.

5. The Crown contends that "shall", when used in s.80, is distinct from "shall" when used in ss.92 and 117: CS [53]-[55]. The basis for that contention appears to be that it was

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1 The Western Australian Law Reform Commission found in a study of criminal trials in superior courts in 2008 that only 11 of 579 were heard by judge alone: Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Discussion Paper: Project No 99* (September 2009) 11-12.

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necessary to read down those ss.92 and 117 to ensure the integrity of the Constitution. This response appears to accept the conclusion drawn by the applicant, namely, that "shall" in the Constitution does not always mean an absolute "must". It also accepts that such requirements must be read in context, and purposively, just as the applicant argues here with respect to s.80. The Crown offers no response to the applicant's argument by analogy from ss.7 and 24 and the implied freedom of political communication: see AS [58]-[59]. As it is, the Crown identifies too narrow a basis for this Court's decisions on constitutional guarantees and limitations referred to by the applicant at AS [56]-[59]. The basis for those decisions includes the basal principle that the object of a constitutional limitation informs and limits the scope of the restraint: see AS [30(b)].

6. Further, the Crown also errs to the extent it suggests that it is inappropriate to read constraints on the facially mandatory language to ensure the integrity of Ch.III. Chapter III creates a coherent scheme for the advancement of the interests of Commonwealth justice and for the reasons given at AS [39]-[52], the construction of s.80 advanced by the applicant ensures the integrity of that scheme. By way of example, the Crown appears to contend that the integrity of Ch.III and its objects are best advanced by the grant of a permanent stay of proceedings even where the stay could be avoided by an order for trial by judge alone (see AS [68]). That contention should be rejected: it is preferable for justice to proceed than for it to be stayed.

7. The Crown also errs to the extent that it contends that the approach the applicant takes to s.80 is categorically distinct from the approach this Court has taken to other constitutional guarantees because "the interests of justice" is a "subjective" criterion: CS [55]. The "interests of justice" is a longstanding criterion well-known to courts. It operates, for example, to qualify the open justice principle, which itself manifests a constitutional imperative as to the essential characteristics of courts: see eg *Hogan v Hinch* at [20], [21], [26] and [27] (French CJ); note also plurality at [90]-[91]. Its scope is not at large. Consistently with general principle, the "interests of justice" are not to be assessed by reference to private opinion, nor arbitrarily or capriciously: note analogously *Hogan v Hinch*, re a "public interest" criterion, at [31], [32], [41] (French CJ), and [80] (plurality). Further, consistently with general principle, "the interests of justice" bear any objective content necessary to ensure their consistency with the Constitution. The "interests of justice" are certainly no more difficult a criterion than the proportionality-type constraints which apply to ss.7, 24, 92 and 117: cf CS [55].

Structure

8. One theme of the Crown's submissions is that s.80 establishes a scheme in which there is a division between, and limits on, the functions of the legislature and judiciary: CS [19]-[20]. That proposition can be accepted when stated at that level of generality. It is the next step in the Crown's argument which should be rejected, namely, that the scheme is one in which the power of Parliament to authorise a departure from trial by jury is confined to specifying the circumstances in which trial is to be on indictment. There is no reason in logic or principle for that outcome: it has the effect that the Parliament could condition whether a trial is "on indictment" on the matters identified in s.132(2) and (4) but, once the trial has that label, prevents the Parliament from authorising a departure from trial by jury upon satisfaction of the same conditions.

9. The Crown attempts to justify the further step argument by appealing to an asserted intention of the framers that "courts were to be insulated from decisions as to by whom the exercise of judicial power in trials on indictment was to be exercised": CS [51]-[52]. So far as the intention referred to is an intention of the framers, it can be noted that the Crown's contention finds no support in the Convention Debates, and is not supported by the citation given by the Crown at fn 32 (namely, *Cheng* at [52]). If the intention referred to is an intention discerned wholly from the text of the Constitution, the argument reads more into s.80 than its text can reasonably bear and assumes the answer to the question at issue in these proceedings.

10. If any intention of the kind can be discerned in Ch.III, it is that the framers were willing to commit the determination of politically controversial matters, including decisions in matters arising under the Constitution and matters between States, to the judicial power of the Commonwealth: see ss.75, 76. One of the very reasons for the separation of judicial power effected by Ch.III is to create and maintain an independent decision-maker capable of resolving controversial matters, whether between subject and subject, polity and polity, or polity and subject: note *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-8, 275-7; *Wilson v Minister for Immigration* (1996) 189 CLR 1 at 11-13. That judges deciding criminal trials alone might be exposed to criticism is not a reason to reject the applicant's construction of s.80 (cf AS [52], [60]). The exercise of the judicial power of the Commonwealth often leads to public discussion and critique; that critique enhances rather than undermines the integrity of the judicial system.

11. The Crown contends that its view of the structure of s.80 has withstood challenge for many years: CS [26]. The only case determining the issue is *Brown v The Queen* (1986) 160 CLR 171, a 3:2 decision. Ch.III doctrine has developed since then. The applicant's argument does not undermine the structure of s.80; rather, he contends for a construction which renders s.80 more coherent with the structure of Ch.III.

Purpose

12. Nowhere in its submissions, does the Crown identify how its construction of s.80 advances the liberty interest protected by s.80. The importance of that purpose was emphasised in the passages excerpted by the Crown at CS [45]-[46]. For example, it quotes Gaudron J in *Cheng* at [80] stating that the importance of jury trials for indictable offences "in protecting the liberty of the individual from oppression and injustice needs no elaboration". Yet the Crown makes no attempt to reconcile this purpose with the fact that in some particular instances a jury trial may itself not be in the interests of justice. The position adopted by the Crown (at best) advances only one of the objects of s.80, whereas the position adopted by the applicant advances all of the purposes of s.80.

History

13. The Crown observes that, by federation, trial by jury had been adopted in all the Australian colonies as the method of trial for serious criminal offences: CS [43] (citing *Cheatle v The Queen* (1993) 177 CLR 541 at 549). The framers did not, however, entrench beyond legislative variation that pre-federation practice in the Constitution. They did not require "serious" offences to be tried by jury. Nor did they require "all" offences to be tried by

jury, as Inglis Clark's first draft of the Constitution had provided for.[2] Rather, as this Court has established, the framers accepted that variation may be appropriate; and they achieved that objective at least by empowering the Commonwealth Parliament to prescribe the circumstances in which an offence was or was not on indictment.

14. Here, as in other areas, it is an error to assume that the Constitution permits only that which was conventional at the time of federation: see, eg, *CEPU v Queensland Rail* (2015) 318 ALR 1 at [20]-[22]; *Commonwealth v ACT* (2013) 250 CLR 441 at [15]-[19]; *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561.

Consistency in the exercise of Commonwealth judicial power

10 15. The Crown contends that the applicant's construction should not be accepted as it may result in variations in the procedure adopted in the exercise of Commonwealth judicial power: CS [56]-[57], [59]. There are several answers to this.

16. First, to the extent that this variation arises only from the variable laws of the States and Territories: this is simply a consequence of the autochthonous expedient, combined with s.68 (and similarly ss.79 and 80) of the *Judiciary Act 1903* (Cth), and is a consequence which has not troubled this Court. There "is no general requirement in the Constitution that a federal law such as s.80 of the Judiciary Act have a uniform operation throughout the Commonwealth": see *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [20] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

20 17. Secondly, to the extent that this variation arises from the choice of defendants to elect for trial by judge alone, together with the concurrent exercise of power by either the Court or the Crown, that outcome is unexceptional: many decisions of accused, judges and the Crown affect the practical operation of federal justice.

18. Thirdly, established doctrine on s.80 already admits of a system in which otherwise identical conduct may be subject to varying trial procedures. That is the necessary consequence of this Court's recognition that the Commonwealth Parliament can determine the conditions upon which an offence will be indictable. The effect of that is that otherwise identical conduct may be subject to different trial procedures. The reasons for the variance may, for example, be the election of the Crown.

30 19. Fourthly, to the extent that the Crown relies on an unparticularised concept of the "rule of law" (see AS [57]), it is difficult to see how the rule of law, and certainly not any aspect of the "rule of law" which this Court has discerned in the Constitution, is undermined by a power, conditional on the consent of a defendant, to depart from trial by jury if the court considers that course is in the interests of justice or the Crown consents. It is also difficult to see how the rule of law is advanced by preventing a court from ordering trial by judge alone if the alternative is a permanent stay.

Exercise of the discretion

20. A number of the Crown's submissions appear to proceed from a concern that, when exercising a discretionary power to permit trial by judge alone, judges may not act
40 consistently with the requirements of the Constitution: see CS [56], [62]. This submission

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2 See J.Williams, *The Australian Constitution: A Documentary History* (2005) 89.

is contrary to fundamental constitutional principle: it is to be assumed that government, and particularly the Ch.III judiciary, will exercise power lawfully and consistently with the Constitution: see AS [69].

21. It is also to be assumed that, in the exercise of the discretion given by s. 132(4), courts will, to the extent necessary, have regard to the value of trial by jury and the availability of measures short of a s.132(4) order (such as suppression orders) capable of protecting the administration of justice. This goes beyond being a mere assumption of constitutional reasoning; it is borne out by the existing practice of judges: see AS [22(a), (e)]. The question is not whether there are alternative mechanisms which, in some cases, can reduce the risks to justice by such matters as jury tampering and adverse publicity (cf AS [66]-[68]). The question is whether, in some cases, the risks those matters pose to the administration of Commonwealth justice are most appropriately addressed by ordering trial by judge alone. That question should be answered "yes".

Advantages of trial by jury

22. The Crown contends that "some of the supposed benefits of trial by judge alone" may be "illusory": CS [64]. It is not apparent how that contention is said to bear on the precise issue of constitutional construction at hand. In any event, it is not borne out by the trend of legislative choice in Australia. Further, the relative advantages of different modes of trial are matters which, if constitutionally significant, may be expected to be considered by judges when ordering trial by judge alone.

Other issues

23. The Crown directs submissions to the issues which might arise if ss.132(2) and (4) permitted departure from trial by jury based solely on the accused's election, and refers to the possibility of unparticularised "more pragmatic considerations" coming "to dominate the decision not to have a jury": CS [59], [61], [62]. Those issues do not arise here. The argument seems to be of the "thin edge of the wedge" kind. The case law on justifiable infringement of other constitutional guarantees illustrates that the courts are quite capable of enforcing limits. If the Crown's contention is that judges might exercise the discretion in s.132(4) inconsistently with the constitutional guarantee in s.80, the answer is that this Court is not to assume that the discretion will be abused: see above paragraph 20.

24. With respect to the Crown's alternative position (CS [81]-[84]), it provides no argument as to why the community interest aspect of s.80 is not sufficiently given effect by a requirement for determination by the court of where the interests of justice lie, having, no doubt, heard submissions from the prosecutor on the point.

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