

SECTION 80 — THE GREAT CONSTITUTIONAL TAUTOLOGY*

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*Section 80 of the Constitution provides for trial by jury on indictment of any offence against the law of the Commonwealth. The orthodox interpretation of s 80 holds that it is a matter for the Parliament to determine whether an offence is tried on indictment. It is an interpretation that has been criticised as failing to give s 80 effect as a guarantee of individual rights. This article reviews the history of the provision, including the convention debates and High Court jurisprudence, and suggests that the conception of s 80 proposed by Gaudron J in *Cheng v The Queen* (2000) 203 CLR 248 is a satisfying alternative to the rights-protective conception. This alternative conception identifies s 80 as a constitutional limitation on judicial power, preventing the trial of federal offences on indictment by judge alone.*

I INTRODUCTION

Section 80 is in ch III of the *Constitution* which deals with the judicature. It provides for the mode and venue of the trial on indictment of any offence against any law of the Commonwealth: such trials shall be by jury and shall be held in the state where the offence was committed, and in the event the offence was not committed within a state, at such place or places as the Parliament prescribes. The provision has been interpreted according to its terms as requiring that only the trial on indictment of a Commonwealth offence be by jury.¹ Whether an offence is triable on indictment is left to the Parliament ('the orthodox interpretation'). The orthodox interpretation of s 80 has provoked some of the sharpest divisions among Justices of the High Court.²

The *Constitution* contains few constraints on governmental power in favour of the freedom of the individual. There are two provisions which have been

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1 See, eg, *R v Bernasconi* (1915) 19 CLR 629, 631, 637 (Issacs J); *R v Archdall; Ex parte Carrigan* (1928) 41 CLR 128, 139–40 (Higgins J); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 570–1 (Latham CJ); *Sachter v A-G (Cth)* (1954) 94 CLR 86, 88–9; *Zarb v Kennedy* (1968) 121 CLR 283, 294 (Barwick CJ), 297 (McTiernan J), 298 (Menzies J), 312 (Owen J); *Clyne v DPP (Cth)* (1984) 154 CLR 640, 648 (Mason and Brennan JJ); *Kingswell v The Queen* (1985) 159 CLR 264, 276–7 (Gibbs CJ, Wilson and Dawson JJ); *Cheng v The Queen* (2000) 203 CLR 248, 268–70 [49]–[58] (Gleeson CJ, Gummow and Hayne JJ), 299 [152] (McHugh J), 344–5 [283] (Callinan J).

2 See, eg, *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 580–5 (Dixon and Evatt JJ); *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 196–202 (Murphy J); *Kingswell v The Queen* (1985) 159 CLR 264, 298–320 (Deane J); *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 408–27 [63]–[104] (Kirby J); *Cheng v The Queen* (2000) 203 CLR 248, 306–8 [173]–[177] (Kirby J).

routinely characterised as guarantees of individual rights: trial by jury under s 80 and freedom of religion under s 116.³ Commentators have been roundly critical of the High Court for the narrow scope given to each. The criticism has been particularly pointed in the case of s 80.⁴

Professor Sawyer considered that the orthodox interpretation has rendered s 80's guarantee 'in practice worthless'.⁵ Professor Coper dismisses the orthodox interpretation as 'apparent nonsense' producing what he pithily describes as the '[g]reat [c]onstitutional [t]autology': a guarantee of trial by jury where the Parliament provides that the offence is to be tried by jury.⁶

II ORIGINS OF THE ORTHODOX INTERPRETATION

The 'nonsense' of which Professor Coper and other critics complain stems from the decision in *R v Archdall; Ex parte Carrigan*.⁷ Two union officials were convicted before the Brisbane Magistrates Court of hindering the provision of services by the Commonwealth by means of a boycott, an offence under s 30K of the *Crimes Act 1914* (Cth). They challenged their convictions on a number of grounds. One ground contended that s 30K was invalid by reason of s 80. They argued that the phrase 'trial on indictment' referred to those offences that would have been regarded as indictable at Federation and that it had not been open to the Parliament to enact the offence as triable summarily.⁸ Knox CJ, Isaacs, Gavan Duffy and Powers JJ dismissed the argument saying that it was without foundation and that its rejection needed no exposition.⁹ Starke J also said that it was 'untenable'.¹⁰ Higgins J explained s 80 as saying no more than that if there is an indictment there must be a jury but that the provision did not compel

3 Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 19.

4 See Clifford L Pannam, 'Trial by Jury and Section 80 of the Australian Constitution' (1968) 6 *Sydney Law Review* 1; Amelia Simpson and Mary Wood, "'A Puny Thing Indeed" — *Cheng v The Queen* and the Constitutional Right to Trial by Jury' (2001) 29 *Federal Law Review* 95; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (University of New South Wales Press, 2002) 27–8; Brian Galligan and Fred Morton, 'Australian Rights Protection' (Paper presented at the Australasian Political Studies Association Conference, University of Adelaide, 29 September – 1 October 2004) 2; Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 32; Anthony Gray, 'Mockery and the Right to Trial by Jury' (2006) 6 *Queensland University of Technology Law and Justice Journal* 66; George Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials* (Lawbook, 2nd ed, 2007) 630–1 [8.75]; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 571–4; Tony Blackshield and George Williams, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed abridged, 2010) 1155; Gabriel A Moens and John Trone, *Lumb, Moens and Trone: The Constitution of the Commonwealth of Australia* (LexisNexis Butterworths, 8th ed, 2012) 346 [617]; Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 3rd ed, 2012) 590–1 [10.105]–[10.108].

5 Sawyer, above n 3, 19.

6 Michael Coper, *Encounters with the Australian Constitution* (CCH Australia, 1987) 324.

7 (1928) 41 CLR 128 ('*Archdall*').

8 *Ibid* 133.

9 *Ibid* 136.

10 *Ibid* 147.

proceeding by indictment.¹¹ It may be noted that both Isaacs and Higgins JJ were active participants in the debate at the Melbourne convention when the provision in its final form was adopted. Despite the absence of reasoning, *Archdall* has survived repeated challenges.

III A CRITICISM OF THE ORTHODOX INTERPRETATION

Dixon and Evatt JJ in a trenchant joint dissent in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* rejected the orthodox interpretation, insisting that s 80 should be construed so as to ‘produce some real operative effect’.¹² Sir Anthony Mason, reviewing the jurisprudence of the High Court over its first 100 years, described their Honours’ dissenting reasons as of such persuasive power as to make one wonder why their interpretation had not prevailed.¹³ Famously, Dixon and Evatt JJ considered that *Archdall* ascribed a ‘queer intention’ to the *Constitution*: it supposed that the concern of the framers ‘was not to ensure that no one should be held guilty of a serious offence against the laws of the Commonwealth except by the verdict of a jury, but [merely] to prevent a procedural solecism’.¹⁴ A cynic, they said, might suggest that s 80 was drafted in mockery; its language carefully chosen so that the guarantee it appeared to give should be illusory.¹⁵

Dr Pannam, more in sorrow than in anger, suggests that one need not be a cynic, but merely an historian, to observe that the phrase ‘the trial on indictment’ was inserted in s 80 for the very purpose of producing the result that their Honours regarded as a ‘mockery’.¹⁶ This is a reference to the drafting history and the convention debates, to which I will return.

IV THE GRAND BULWARK OF LIBERTY

The Justices who have rejected the orthodox interpretation have shared with Dixon and Evatt JJ a view that s 80 is intended to confer a right or privilege on the accused protective of individual freedom.¹⁷ Murphy J read the provision in light of the ‘deep attachment of the people for whom the *Constitution* was made to trial by jury for criminal offences’.¹⁸ His Honour saw the institution of trial by jury as a ‘defence against governmental or other oppression’.¹⁹ In a similar vein, Deane J considered s 80 to reflect the deep-seated conviction of free men and

11 Ibid 139–40.

12 (1938) 59 CLR 556, 582 (*Lowenstein*).

13 Anthony Mason, ‘The High Court of Australia: A Personal Impression of Its First 100 Years’ (2003) 27 *Melbourne University Law Review* 864, 875.

14 *Lowenstein* (1938) 59 CLR 556, 581–2.

15 Ibid 582.

16 Pannam, above n 4, 6.

17 *Lowenstein* (1938) 59 CLR 556, 580.

18 *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 198.

19 Ibid 198.

women about the way in which justice should be administered in criminal cases. His Honour also saw the institution as a protection against tyranny.²⁰ Kirby J, too, favoured this analysis.²¹

These ideas owe much to Blackstone. Blackstone characterised the jury as the grand bulwark of liberties of every Englishman as secured by the Magna Carta.²² It preserved, he said, an admirable balance under the English constitution: without it Justices of oyer and terminer appointed by the Crown might imprison or despatch any man obnoxious to the government, as happened in France and Turkey.²³ By contrast, English law required that the truth of an accusation preferred on indictment be established by the unanimous vote of 12 of the accused's equals, indifferently chosen and superior to suspicion.²⁴

V THE UNITED STATES EXPERIENCE

Blackstone's *Commentaries* exerted considerable influence on the thinking of the founding fathers of the *United States Constitution*.²⁵ The Declaration of Independence records, among the King's repeated injuries and usurpations, his assent to acts of pretended legislation 'depriving us in many cases, of the benefits of Trial by Jury'.²⁶ In his classic work on the sources of the *United States Constitution*, Stevens quotes Blackstone's retort to Montesquieu:

A celebrated French writer, who concludes that Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.²⁷

It comes as no surprise that the *United States Constitution* should provide for trial by jury in the case of 'all Crimes' save for impeachment.²⁸ The provision is seen as a guarantee of the liberty of the individual against tyranny. The Supreme Court of the United States put it this way in *Duncan v Louisiana*:

20 *Kingswell v The Queen* (1985) 159 CLR 264, 298–9 ('*Kingswell*').

21 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 422 [95].

22 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) vol 4, 342–3.

23 *Ibid* 343.

24 *Ibid*.

25 A V Dicey, 'Blackstone's Commentaries' (1932) 4 *Cambridge Law Journal* 286, 300–1; Michael Hoefflich, 'American Blackstones' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 171; Dennis R Nolan, 'Sir William Blackstone and the New American Republic: A Study of Intellectual Impact' (1976) 51 *New York University Law Review* 731.

26 *United States Declaration of Independence*, Fact 18.

27 C Ellis Stevens, *Sources of the Constitution of the United States Considered in Relation to Colonial and English History* (Macmillan, 1894) 238, quoting Blackstone, above n 22, 379.

28 *United States Constitution* art III § 2(3) provides: 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed'.

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.²⁹

VI THE AUSTRALIAN EXPERIENCE

By contrast, an understanding of the attitude of mind of the framers of our *Constitution* is apt to make one wonder how s 80 found its way into the document.³⁰ Andrew Inglis Clark was a great admirer of American democracy.³¹ His draft constitution, which was circulated to the delegates before the 1891 convention, included a provision drawn in terms from the jury clause of the *United States Constitution*.³²

One difficulty occasioned by the United States ‘jury clause’ was that, read literally, it required trial by jury for the most minor of crimes. By 1888 it was settled that the constitutional guarantee did not apply to petty offences, which under the common law might be prosecuted summarily.³³ Nonetheless, the determination of whether an offence was a petty offence had been attended by difficulty.³⁴

The Judiciary Committee chaired by Clark drafted the judicature provisions of the *Constitution* that were adopted at the 1891 convention. The ‘jury clause’ was amended by the Committee. The requirement that the trial of ‘all crimes cognisable by any Court established under the authority of this Act shall be by jury’ was deleted and a requirement that the trial of ‘all indictable offences cognisable by any Court established under the authority of this Act shall be by jury’ was inserted.³⁵ A fair inference is that the amendment was designed to avoid the difficulties experienced in the United States respecting the trial of summary offences.

The delegates at the convention had an informed understanding of the United States model of federalism. Influential to that understanding was James Bryce’s

29 *Duncan v Louisiana*, 391 US 145, 155–6 (White J) (1968).

30 Owen Dixon, ‘Two Constitutions Compared’ in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Lawbook, 2nd ed, 1997) 100.

31 See generally John Reynolds, ‘A I Clark’s American Sympathies and his Influence on Australian Federation’ (1958) 32 *Australian Law Journal* 62.

32 Clause 65 of Clark’s draft provided ‘[t]he trial of all crimes cognisable by any Court established under the authority of this Act shall be by Jury, and every such trial shall be held in the Province where the crime has been committed, and when not committed within any Province the trial shall be held at such place or places as the Federal Parliament may by law direct’: John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 107.

33 *Callan v Wilson*, 127 US 540, 557 (Harlan J) (1888).

34 See generally Felix Frankfurter and Thomas G Corcoran, ‘Petty Federal Offences and the Constitutional Guaranty of Trial by Jury’ (1926) 39 *Harvard Law Review* 917.

35 Williams, above n 32, 452.

The American Commonwealth.³⁶ Bryce dedicated that work to his friend, Albert Dicey. Haig Patapan, writing about the protection of rights in Australia, discusses Bryce's influence, observing that Bryce's interest in United States federalism did not extend to the *Bill of Rights*.³⁷ For Bryce, and for the Diceyan lawyers who attended our constitutional conventions, there was something outmoded about the idea that the individual needed to be protected from the tyranny of the legislature:

The English, however, have completely forgotten these old suspicions, which, when they did exist, attached to the Crown and not to the Legislature. ... Parliament was for so long a time the protector of Englishmen against an arbitrary Executive that they did not form the habit of taking precautions against the abuse of the powers of the Legislature; and their struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority.³⁸

The 'jury clause' was included in the judicature chapter of the draft presented to the Adelaide session of the convention in April 1897. Edmund Barton presented the chapter. His account of the 'jury clause' focused on the guarantee of venue.³⁹ He explained that the provision would prevent a person being taken from the state where the offence was committed into another state and there tried by jury some '1 000 or 1 500 miles distant', therefore ensuring trial by one's peers in one's own state.⁴⁰

At the Melbourne session of the convention in January 1898, South Australia moved to amend the 'jury clause' to omit the requirement that the trial be by jury.⁴¹ Patrick Glynn explained that the object of the amendment was to ensure that the Federal Parliament would be as omnipotent within its sphere of authority as the Parliaments of the states.⁴² Bernhard Wise spoke against the amendment, arguing that the clause, as it stood, provided 'a necessary safeguard to the individual liberty of the subject in every state'.⁴³ Wise's concern was also directed to the guarantee of venue. He, like Barton, voiced the concern that without the clause the executive might remove an accused from one state to another and there subject him to trial by a resident magistrate.⁴⁴ The response of Higgins is eloquent of the point made by Patapan: had Wise been speaking 100 years earlier the remark might have been applauded, but it was 'mere clap-trap to say that trial by jury

36 See James Bryce, *The American Commonwealth* (Macmillan, 1889).

37 Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211, 216–19.

38 *Ibid* 218, quoting James Bryce, *Studies in History and Jurisprudence* (Oxford University Press, 1901) vol 1, 420.

39 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 12 April 1897, 446 (Edmund Barton).

40 *Ibid*.

41 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 350 (Edmund Barton and Patrick Glynn).

42 *Ibid* 350 (Patrick Glynn).

43 *Ibid* 350 (Bernhard Wise).

44 *Ibid* 350 (Bernhard Wise).

was a safeguard of liberty at the present time'.⁴⁵ Higgins considered that no matter how much trial by jury might be valued, it was not a matter for the *Constitution*.

On 4 March 1898 when the jury clause was read again Barton moved an amendment to delete the words 'of all indictable offences' and to substitute the words 'on indictment of any offence'.⁴⁶ The object of the amendment was, he said, simple. As the clause stood, it provided that the trial of all indictable offences against any law of the Commonwealth should be by jury. Barton pointed out '[t]his meant that, however small might be the offence created by any Commonwealth enactment, supposing an offence that should be punishable summarily, it would, nevertheless, have to be tried by Jury'.⁴⁷

He illustrated his concern using the example of prosecutions for contempt, an indictable offence that was commonly tried summarily. The object, he said, was to preserve trial by jury where an indictment was brought but to allow for contempt to be punishable in the ordinary way.⁴⁸ So, too, should minor offences be amenable to a summary procedure. He continued by saying '[t]here will be numerous Commonwealth enactments which would prescribe, and properly prescribe, punishment, and summary punishment; and if we do not alter the clause in this way they will have to be tried by jury'.⁴⁹

Isaacs repeated a point that he had earlier made, which was that the clause would not have any real effect because it would be within the powers of the Parliament to declare what is an indictable offence and what is not.⁵⁰

VII A CONTROVERSY OVER THE CONVENTION DEBATES

Freed by *Cole v Whitfield* to take into account the convention debates,⁵¹ McHugh J in *Cheng v The Queen* held that when s 80 is read in the light of its history, the only possible conclusion is that it was enacted in the form it was for the purpose of enabling the Parliament to determine whether an offence was to be indictable or punishable summarily.⁵² The joint reasons in *Cheng*, while less emphatic than McHugh J on the point, saw nothing in the history to support a departure from the orthodox interpretation.⁵³

In a paper published shortly after *Cheng* was delivered, Simpson and Wood were critical of the majority judgments for seizing upon Barton's amendment to confirm

45 Ibid 351 (Henry Higgins).

46 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1894 (Edmund Barton).

47 Ibid.

48 Ibid 1894–5 (Edmund Barton).

49 Ibid 1895 (Edmund Barton).

50 Ibid 1895 (Isaac Isaacs).

51 (1988) 165 CLR 360, 372.

52 (2000) 203 CLR 248, 295 [142] ('*Cheng*').

53 Ibid 269–70 [54]–[57] (Gleeson CJ, Gummow and Hayne JJ).

a ‘sterile, procedural’ meaning for s 80.⁵⁴ They propose an alternative reading of the debate on Barton’s amendment, suggesting that the intention was to confer on the Parliament the power to withhold jury trials ‘within the discrete sphere of ... minor offences’.⁵⁵ Taking this view, ‘trial on indictment’ is an expression having definite content.⁵⁶

Quick and Garran’s Commentary, that pristine source of reflection on the *Constitution*, does not lend support to the Simpson and Wood argument. After setting out the drafting history, the authors state:

The constitutional requirement of trial by jury only applies when the trial is ‘on indictment;’ and there is no provision, corresponding to the Fifth Amendment of the *United States Constitution*, that all capital or infamous crimes must be tried on indictment. As was pointed out by Mr Isaacs (Conv Deb, Melb, p 1894), ‘it is within the powers of the Parliament to say what shall be an indictable offence and what shall not. The Parliament could, if it chose, say that murder was not an indictable offence, and therefore the right to try a person accused of murder would not necessarily be by jury.’⁵⁷

Reference to the convention debates may assist in understanding the contemporary meaning of the language used in the instrument and the subject to which the language is directed. It is not undertaken with a view to divining the subjective understanding of the delegates as to the object of a clause or proposed amendment.⁵⁸ The drafting history culminating in the adoption of Barton’s amendment may present difficulties in the way of acceptance of the construction for which Simpson and Wood contend. It is sufficient to note the observation of the plurality in *Cheng* that in light of this history there is every reason for not embarking on consideration of a substantial re-interpretation of s 80 unless and until a case arises that makes that course necessary.⁵⁹

IX JURY TRIALS FOR SERIOUS COMMONWEALTH OFFENCES — THE EXPERIENCE TO DATE

Professor La Nauze, in his account of the making of the *Constitution*, did not cavil with the orthodox interpretation. He suggested that the lawyers at the convention had been content to let through a provision ‘so vulnerable’ because they had perfect confidence that trial by jury for those categories of cases in

54 Simpson and Wood, above n 4, 109.

55 Ibid 109, citing *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1894 (Edmund Barton).

56 Simpson and Wood, above n 4, 109; see also James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 523 [11.19].

57 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 808.

58 *Brownlee v The Queen* (2001) 207 CLR 278, 284–5 [7] (Gleeson CJ and McHugh J) (*‘Brownlee’*); *Cole v Whitfield* (1988) 165 CLR 360, 385.

59 *Cheng* (2000) 203 CLR 248, 268 [52] (Gleeson CJ, Gummow and Hayne JJ).

which it had been sanctioned by centuries of tradition would not be at risk.⁶⁰ They believed that neither the Commonwealth nor the states would seek to evade the use of juries in cases in which trial by jury was ‘conceived by the electors’ as ‘necessary to justice’.⁶¹ It remains to ask, why include the provision? Professor La Nauze’s pragmatic answer was to say that, as the jury clause had been included from the first draft of the *Constitution* in 1891, to ‘throw it out’ might have led to misunderstanding.⁶²

The concern that s 80 has been shorn of its capacity to protect trial by jury for offences of a serious character is apt to overlook a point made by Dawson J in *Brown v The Queen*, which is that there has ‘been nothing in the Australian experience so far’ that puts the accepted view of the provision to any ‘severe test’.⁶³

The assumed confidence of the delegates that the Parliament would not make provision for the summary trial of offences properly viewed as indictable has been justified.⁶⁴ The offence challenged in *Archdall* was punishable by a maximum penalty of imprisonment for one year. At Federation, many statutes in England and in the Australian colonies created summary offences. The maximum penalty for an offence triable summarily was commonly imprisonment for a period not exceeding 12 months.⁶⁵ Given that to date the Parliament has chosen to provide for the trial on indictment of offences of a serious character, it is unsurprising that the successive challenges to the authority of *Archdall* have been mounted in cases in which the offence might fairly be viewed as summary: *Sachter v Attorney-General (Cth)*;⁶⁶ *Zarb v Kennedy*;⁶⁷ *Clyne v Director of Public Prosecutions (Cth)*;⁶⁸ and *Li Chia Hsing v Rankin*.⁶⁹ It is true that the offence under the *National Service Act 1951* (Cth) in *Zarb* was punishable by a maximum sentence of two years’ imprisonment. However, as Deane J has noted, it was an unusual offence that may well have been, within limits, properly regarded as appropriate for summary disposition.⁷⁰

The absence of detailed consideration of s 80 in the majority reasons in *Lowenstein* is to be understood in context: Mr Barwick’s challenge to the validity of the bankruptcy offence in that case was based on the conferral on the Court of the

60 J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 228.

61 *Ibid.*

62 *Ibid.*

63 (1986) 160 CLR 171, 215 (*Brown*).

64 Section 4G of the *Crimes Act 1914* (Cth) provides that ‘[o]ffences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears’.

65 *Kingswell* (1985) 159 CLR 264, 312 (Deane J).

66 (1954) 94 CLR 86.

67 (1968) 121 CLR 283.

68 (1984) 154 CLR 640.

69 (1978) 141 CLR 182.

70 *Kingswell* (1985) 159 CLR 264, 315 (Deane J).

power both to charge and to try the offence.⁷¹ No argument on s 80 was advanced on the hearing of the special case in the High Court.⁷²

The dissenting reasons in *Lowenstein* to one side, the first detailed consideration of the authority of *Archdall* was in *Li Chia Hsing v Rankin*.⁷³ Gibbs J observed that the challenge was ‘impossible to maintain in the existing state of the authorities’.⁷⁴ Pointedly, his Honour said that the proceeding did not provide an occasion to further consider the scope of s 80, since on no possible view could the offence with which Mr Hsing was charged be characterised as an offence tried on indictment.⁷⁵ Mr Hsing had been charged at Thursday Island by an officer attached to the Fisheries Unit with an offence under the Commonwealth fisheries statute that was subject to a maximum penalty of six months imprisonment.⁷⁶

X ‘TRIAL ON INDICTMENT’

Any challenge to the orthodox interpretation has to come to grips with the phrase ‘trial on indictment’. Those who support the interpretation have pointed to the difficulty the dissentients have had in agreeing on its meaning.⁷⁷

Before turning to the differing formulations, I should make brief reference to the meaning of ‘indictment’ at common law. The term referred to the accusation of the grand jury found as a true bill.⁷⁸ Both felonies and misdemeanours were ‘Pleas of the Crown’ prosecuted on indictment in the name of the Crown. The accused was arraigned on the indictment and required to plead to it. An accused who entered a plea of ‘not guilty’ was taken to have ‘put himself or herself on the country for trial’ and a jury was empanelled to try the case.⁷⁹ This was distinct

71 *Bankruptcy Act 1924* (Cth) ss 217(1)(a), (2). See also Justice McHugh, ‘Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?’ (2001) 21 *Australian Bar Review* 235, 241, where it is suggested that in light of the modern view of ch III, it is difficult to see how the decision in *Lowenstein* can stand.

72 *Lowenstein* (1938) 59 CLR 556, 571 (Latham CJ).

73 (1978) 141 CLR 182.

74 *Ibid* 193.

75 *Ibid*.

76 See *Fisheries Act 1952* (Cth) s 13AB.

77 See, eg, *Cheng* (2000) 203 CLR 248, 295–6 [144]–[145] (McHugh J).

78 The grand jury or jury of presentment comprised 23 persons summonsed by the sheriff to consider whether there were grounds for suspicion that the person presented had committed an offence. By majority the grand jury returned the presentment endorsed as a ‘true bill’, upon which the accused was put on his trial, or ‘ignore’ upon which no further proceedings were taken: Sir William Searle Holdsworth, *A History of English Law* (Methuen, Sweet and Maxwell, 7th revised ed, 1956) vol 1, 321–3.

79 See, eg, *Criminal Procedure Act 1986* (NSW) s 154. The verdict of the jury was the verdict of a *pays* or ‘country’, a *persona ficta* signifying a community or neighbourhood. Litigants consented to the verdict of the jury and hence they ‘put themselves upon the jury, or country, for trial’. This history is reflected in statutory provisions, of which s 154 of the *Criminal Procedure Act 1986* (NSW) is an example. It provides: ‘If an accused person arraigned on an indictment pleads “not guilty”, the accused person is taken to have put himself or herself on the country for trial, and the court is to order a jury for trial accordingly’. The history is explained in Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol 2, 623–4.

from the provision made under various statutes for the prosecution of minor offences in the name of the private informant and before justices of the peace or magistrates.

The mechanism of the grand jury was considered unsuited to the colony of New South Wales in its early days. The *New South Wales Act 1823* (Imp) 4 Geo 4, c 96 made provision for ‘all crimes misdemeanours and offences’ to be prosecuted on information by the Attorney-General or such other officer as may be duly appointed. The method of initiating criminal proceedings in the higher courts by filing an accusation, variously described as an indictment, information or presentment and signed by the Attorney-General or a Crown Prosecutor, was found to be convenient, and the grand jury procedure did not take firm root in any of the colonies.⁸⁰ Colonial statutes provided for the summary trial of a range of minor offences.

In *Lowenstein*, Dixon and Evatt JJ recited this history and concluded that historically, offences punishable by imprisonment were prosecuted upon indictment and should therefore be seen as within the constitutional guarantee.⁸¹ Murphy J was also inclined to that view in *Li Chia Hsing v Rankin*.⁸² However, his Honour would have allowed an offence not punishable by imprisonment for more than six months to be tried summarily.⁸³ In *Kingswell v The Queen*, Deane J considered the range of offences punishable summarily at the time of Federation as indicative that offences punishable by imprisonment for one year or more should be subject to the constitutional guarantee.⁸⁴ His central point was that the determination of the limits beyond which a charge cannot properly be dealt with summarily is a matter for judicial determination and not legislative policy.⁸⁵ In this regard, as his Honour observed, in 19th century legislation it was common for a justice or magistrate ‘to determine whether a particular charge was “fit” to “be disposed of summarily”’.⁸⁶

The difficulty of giving a fixed meaning to the words ‘trial on indictment’ was recognised by the Judicature Sub-Committee of the Australian Constitutional Convention in 1985.⁸⁷ The committee was unable to formulate a satisfactory standard to differentiate those offences which might properly be dealt with

80 *R v McKaye* (1885) 6 LR (NSW) 123, 130 (Martin CJ).

81 (1938) 59 CLR 556, 582–4.

82 (1978) 141 CLR 182, 201–2.

83 *Ibid* 202.

84 (1985) 159 CLR 264, 319.

85 *Ibid* 310–11.

86 *Ibid* 310, citing *Hall v Braybrook* (1956) 95 CLR 620, 630–2 (Dixon CJ), 649–50 (Fullagar J).

87 Australian Constitutional Convention, Judicature Sub-Committee, Parliament of Australia, *Second Report to Standing Committee May 1985* (1985) ch 4 [4.1].

summarily from those that should be subject to the constitutional guarantee.⁸⁸ It noted that one option would be to remove the provision altogether.⁸⁹ However, for the reason that Professor La Nauze surmised the framers left s 80 in the final draft, the committee also reported there would be obvious difficulties standing in the way of a referendum campaign to repeal the provision.⁹⁰ It considered that the only satisfactory alternative was to leave the provision in its present form for the time being.⁹¹

XI DEFINING THE OFFENCE

In *Lowenstein*, Dixon and Evatt JJ saw the difficulty of s 80 as lying in the words ‘trial on indictment’ and not the words ‘any offence’.⁹² In the event, it has been the interpretation of ‘offence’ which has posed the more lively threat to the ‘right’ to trial by jury for serious offences. The Court was divided over the question in *Kingswell v The Queen*.⁹³ The issue was raised by the drafting technique used in the *Customs Act 1901* (Cth) in relation to offences involving importation of narcotic goods.⁹⁴ The *Customs Act 1901* (Cth) s 233B(1)(cb) created the offence of conspiring to import narcotic goods and provided that a person convicted of the offence was subject to punishment as provided by s 235. Under s 235(2)(c) the maximum sentence in a case in which the court was satisfied of the specified circumstances of aggravation was life imprisonment. A lesser maximum penalty applied in a case in which the court was not satisfied of the circumstances of aggravation.⁹⁵

Mr Kingswell was convicted after trial by jury of an offence under s 233B(1)(cb). The sentencing judge was satisfied of the presence of the matters of aggravation and sentenced Mr Kingswell on the basis that the maximum penalty for his

88 The Constitutional Convention was replaced by the Constitutional Commission in 1985. The Advisory Committee on the Australian Judicial System under the chairmanship of D F Jackson QC prepared a report in May 1987, which included a chapter on trial by jury. The report recommended that s 80 should be amended to make it an effective guarantee respecting offences properly described as ‘serious’. It considered the most practical line to draw was at offences punishable by more than two years’ imprisonment. It proposed that the guarantee should extend equally to trial for offences against the laws of the states and territories: Constitutional Commission, Australian Judicial System Advisory Committee, Parliament of Australia, *Report* (1987) [6.13]–[6.14]. The four proposals for constitutional change submitted for determination by referendum on 3 September 1988 included that the guarantee of trial by jury be clarified and extended to the states. The proposal was not carried nationally or in any state.

89 Australian Constitutional Convention, Judicature Sub-Committee, Parliament of Australia, *Second Report to Standing Committee May 1985* (1985) ch 4 [4.3].

90 La Nauze, above n 60, 228; Australian Constitutional Convention, Judicature Sub-Committee, Parliament of Australia, *Second Report to Standing Committee May 1985* (1985) ch 4 [4.9].

91 Australian Constitutional Convention, Judicature Sub-Committee, Parliament of Australia, *Second Report to Standing Committee May 1985* (1985) ch 4 [4.9].

92 (1938) 59 CLR 556, 581.

93 (1985) 159 CLR 264.

94 Offences arising out of the importation of prohibited drugs are now provided under the *Criminal Code Act 1995* (Cth) sch 1 div 307.

95 See *Customs Act 1901* (Cth) ss 235(2)(d)–(e), (3).

offence was life imprisonment.⁹⁶ On appeal, Mr Kingswell's counsel argued that "[o]ffence" in s 80 ... [refers to a] combination of facts which make the accused liable to a criminal penalty'.⁹⁷ He contended that, if by the addition of a further ingredient a person is made liable to an increased penalty, there is a different offence, and that the further ingredient could only be established by the finding of a jury.⁹⁸ The majority rejected Mr Kingswell's argument. Their Honours considered that the law does not require the Parliament to include, in the definition of an offence, 'any circumstance whose existence renders the offender liable to a maximum punishment greater than that which might have been imposed if the circumstance did not exist'.⁹⁹ Brennan J, in dissent, said that s 80 is a constitutional guarantee of trial by jury and said that it followed that 'the term "offence" is not left to be defined by Parliament'.¹⁰⁰ His Honour considered that if liability to greater punishment depends upon establishment of a factual ingredient, that ingredient is an element of the offence to be proved at trial to the satisfaction of the jury.¹⁰¹ Deane J reiterated his view that the dissenting judgment in *Lowenstein* 'should be accepted as ... correct'.¹⁰² In his Honour's view, Mr Kingswell was entitled to have the jury determine each of the factual ingredients which exposed him to the penalty under s 235(2)(c).¹⁰³

The potential threat to the institution of trial by jury posed by the drafting technique discussed in *Kingswell* has been ameliorated by the practice of pleading the circumstances of aggravation in the indictment and requiring the prosecution to prove those matters to the satisfaction of the jury.¹⁰⁴ An application to reconsider *Kingswell* was refused in *Cheng*. In *Cheng* Gleeson CJ, Gummow and Hayne JJ, acknowledged that some 'issues of construction' presented by s 80 'may still be open to debate'.¹⁰⁵ Nonetheless, in light of 'the practice of charging and trying the aggravating circumstance' the occasion to reconsider *Kingswell* might not arise.¹⁰⁶

In practice, the 'sterile' interpretation of the words 'trial on indictment' or 'any offence' has not led to an erosion of trial by jury for offences properly viewed as indictable offences. It remains that the conclusion, that the subject to which s 80 is directed is the freedom of the Parliament to choose which offences are to be tried by jury,¹⁰⁷ is not entirely satisfying. Why confer this freedom on the Parliament when its power to determine whether an offence was indictable was not in doubt and the only mode of trial in such a case was by jury?

96 *Kingswell* (1985) 159 CLR 264, 298.

97 *Ibid* 266.

98 *Ibid*.

99 *Ibid* 276 (Gibbs CJ, Wilson and Dawson JJ).

100 *Ibid* 292.

101 *Ibid* 293.

102 *Ibid* 318–19.

103 *Ibid* 319–20.

104 *R v Meaton* (1986) 160 CLR 359, 363–4 (Gibbs CJ, Wilson and Dawson JJ).

105 *Cheng* (2000) 203 CLR 248, 262–3 [29].

106 *Ibid* 268 [48].

107 *Ibid* 295 [141] (McHugh J).

XII A NON RIGHTS-BASED PURPOSE FOR S 80

A faint suggestion that constitutional warrant was needed for trial by jury of offences against Commonwealth law is found in the Commonwealth's argument in *Brown*.¹⁰⁸ Michael Brown was presented for trial in the Supreme Court of South Australia on an information charging him with a *Customs Act 1901* (Cth) offence. He sought to avail himself of the then novel procedure under the South Australian jury statute of electing to be tried by judge alone.¹⁰⁹ The trial judge ruled that s 80 precluded the making of that election in the case of an offence against Commonwealth law. Following his conviction Brown appealed to the Full Court of the Supreme Court contending that the ruling was wrong. This aspect of the proceeding was removed into the High Court under s 40(1) of the *Judiciary Act 1903* (Cth).¹¹⁰

The principal argument of the Commonwealth, which intervened in support of Brown, was that s 80 guarantees to the accused the right or privilege to trial by jury for an offence tried on indictment and that this did not preclude the 'voluntary and informed waiver ... of that right or privilege'.¹¹¹ The Commonwealth also submitted that s 80 had been devised, at least in part, 'in response to doubts that "the Commonwealth common law" might not bring with it the right to trial by jury, ... [which] had not been introduced ... on settlement as partf [sic] the common law'.¹¹² Neither the majority nor the dissentients found it necessary to deal with the argument. The judgment of Forbes CJ in *R v Magistrates of Sydney*¹¹³ may call into question the assumption on which the argument is based.

The judgments in *Brown* highlight an important distinction between the conception of s 80 as a guarantee of individual rights and the conception of s 80 concerned with the functioning of the judicial arm of government. The majority favoured the latter analysis. The dissentients, Gibbs CJ and Wilson J, approached s 80 as a provision enacted for the benefit and protection of the accused. Viewing the section in this way, as a right or privilege, their Honours held that it was appropriate to allow for its informed and voluntary waiver.¹¹⁴

The majority held that s 80 precludes an accused from making an election for trial by judge alone. Although they differed in their reasons for that conclusion, each saw s 80's insistence on trial by jury in the case of offences tried on indictment as concerned with more than the conferral of a right or privilege on the individual accused. Brennan J rested his conclusion on the common law history of trial by jury, noting that after trial by ordeal ceased, trial by jury became the 'only mode of trial'; '[F]ar from permitting waiver of trial by jury,' his Honour pointed out that the common law of England had 'for centuries compelled an accused to plead and

108 (1986) 160 CLR 171.

109 *Juries Act 1927* (SA) s 7(1).

110 *Judiciary Act 1903* (Cth) s 40(1).

111 *Brown* (1986) 160 CLR 171, 184.

112 *Ibid.*

113 [1824] NSWKR 3.

114 *Brown* (1986) 160 CLR 171, 178–80 (Gibbs CJ), 189 (Wilson J).

thereby to put himself upon the country'.¹¹⁵ His Honour saw s 80 as entrenching the jury as an 'essential constituent of any court exercising the jurisdiction to try persons charged on indictment'.¹¹⁶ The provision, he said, 'is not concerned with a mere matter of procedure but with the constitution or organization of any court exercising that jurisdiction'.¹¹⁷

Deane J reiterated his view that s 80 is a 'guarantee against the arbitrary determination of guilt', but his Honour differed from the dissentients in holding that the guarantee is 'for the benefit of the community as a whole as well as ... [the individual] accused'.¹¹⁸ The 'prescription of trial by jury as the method of trial on indictment of any [Commonwealth] offence', in Deane J's view, was an 'element of the structure of government and the distribution of judicial power which were adopted ... for the benefit of the people, of the federation as a whole'.¹¹⁹

The determinative consideration for Dawson J was that '[t]he only mode of trial ... [at common law for indictable offences] was by jury' and that waiver was unknown.¹²⁰ In his Honour's view, the location of s 80 in ch III was indicative that 'trial by jury for indictable offences was intended to be part of the structure of government rather than the grant of a privilege' to the accused.¹²¹ He put it this way:

Dixon and Evatt JJ in their dissenting judgment in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*, thought that s 80 was such an exception but did not turn their attention to the ultimate scope of s 80, which is not limited to individual privilege. The privilege which it does confer is contained within the wider prescription of trial by jury in all prosecutions upon indictment. It is thus that the section spells out positively, and not by way of restriction, the method by which a particular function is to be performed. Notwithstanding that it may operate to secure a privilege, s 80 speaks in terms of function rather than freedom.¹²²

XIII THE JURY EXERCISING THE JUDICIAL POWER OF THE COMMONWEALTH?

The majority reasons in *Brown*, particularly those of Brennan and Dawson JJ, provide a foundation for the analysis of s 80 that has been proposed by Stellios.¹²³

115 Ibid 196, citing Holdsworth, above n 78, 326–7.

116 *Brown* (1986) 160 CLR 171, 196–7.

117 Ibid 197.

118 Ibid 201.

119 Ibid 202.

120 Ibid 211, citing William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) vol 4, 280.

121 Ibid 214.

122 Ibid 214 (citations omitted).

123 James Stellios, 'The Constitutional Jury — "A Bulwark of Liberty"?' (2005) 27 *Sydney Law Review* 113.

Stellios suggests that s 80 serves to '[regulate] the exercise of Commonwealth judicial power' in trials on indictment prosecuted in federal courts.¹²⁴ The argument draws on the statement in the joint reasons in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*: 'There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth'.¹²⁵

In Stellios' analysis, absent s 80, the lay members of a jury 'could not exercise the exclusively judicial power to adjudge guilt'.¹²⁶ The thesis does not depend upon considerations of history. It is an analysis provoked by the Court's modern ch III jurisprudence. Stellios seeks to provide a coherent explanation for s 80 which does not depend on a rights-protective foundation.

The jury is a constituent element of the Court trying an offence on indictment. The idea that the jury, as distinct from the Court, exercises judicial power is controversial. In *Huddart, Parker & Co Pty Ltd v Moorehead*, Isaacs J characterised the essence of s 80 as the requirement that 'a jury, and not a judicial officer, shall pronounce upon the guilt or innocence of the accused'.¹²⁷ In context, this was no more than the conventional recognition of the jury's exclusive function of determining the facts.¹²⁸ The finding of the facts is an essential step in the exercise of the sovereign power to decide the controversy.¹²⁹ In the trial of a civil action by jury, the controversy is quelled by the judgment of the court: 'a verdict on facts should, as a matter of the practice of the Court, be regarded as a matter merely preliminary to judgment, and not as a judgment of the Court'.¹³⁰ In a criminal trial, while the judge may not refuse to accept the verdict, it remains that as in a civil trial, legal effect is given to the verdict by the court. At Federation, conviction following trial by jury was not final until judgment because it 'might have been quashed on a motion in arrest of judgment'.¹³¹

Brennan J put it this way in *Brown*: 'the issues joined between the Crown and the accused are determined by the verdict of a jury and, once the verdict is accepted, the judgment of the court is founded on and conforms with that verdict'.¹³²

124 Ibid 114.

125 Ibid 134, quoting *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ, Mason CJ generally agreeing on this point).

126 Ibid 136.

127 (1909) 8 CLR 330, 386.

128 See, eg, *Brown* (1986) 160 CLR 171, 196–7 (Brennan J).

129 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffiths CJ); *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

130 *Musgrove v McDonald* (1905) 3 CLR 132, 141–2; see also *Tronson v Dent* (1853) 8 Moo PC 419, 442; 14 ER 159, 168.

131 *Griffiths v The Queen* (1977) 137 CLR 293, 315 (Jacobs J), citing Sir William Oldnall Russell, *A Treatise on Crimes and Misdemeanours* (Butterworth, 2nd ed, 1828) vol 2, 594.

132 (1986) 160 CLR 171, 196 (citations omitted); see also his Honour's analysis in *Nicholas v The Queen* (1998) 193 CLR 173, 185–91 [13]–[26].

The insistence that the judicial power of the Commonwealth be vested only in the III courts has been to ensure that ‘judicial power would be exercised by those courts acting as courts with all that that notion essentially requires’.¹³³ ‘[T]he *Constitution* is informed by the common law, including ... that which forms “part of the exercise of judicial power as understood in the tradition of English law”’.¹³⁴ At Federation ‘the common law institution of trial by jury ... [applied] in all the Australian Colonies as the [only] method of trial of serious criminal offences’.¹³⁵ To posit s 80 as necessary to permit lay jurors to carry out their ancient constitutional function of determining the facts under the superintendence of the trial judge may be to substitute one ‘queer intention’¹³⁶ for another.

XIV SECTION 80: A LIMIT OF THE EXERCISE OF JUDICIAL POWER

A more satisfying rationale, that does not depend upon a rights-protective foundation, builds on *Brown* and may be found in Gaudron J’s analysis in *Cheng*.¹³⁷ Her Honour characterised s 80 as a ‘constitutional command’ limiting judicial power by ‘prevent[ing] the trial of indictable offences by judge alone’.¹³⁸ Consistently with the statements of the majority in *Brown*, she laid emphasis on the importance of trial by jury to ‘the rule of law, ... the judicial process and the judiciary’.¹³⁹ Respect for each is enhanced by placing the determination of criminal guilt in the hands of ordinary members of the community.¹⁴⁰

Other states have followed South Australia’s example in making provision for the accused to be tried by judge alone.¹⁴¹ In most jurisdictions the accused must agree to that course.¹⁴² In New South Wales the court may order trial by judge alone over the prosecution’s opposition.¹⁴³ I do not propose to discuss the merits of trial by judge alone. It is sufficient to observe that it is not an option in the case of Commonwealth offences tried on indictment. No matter how much the accused may desire to have his or her guilt determined by a judge alone, and no matter how much the interests of justice in an individual case may favour that course,

133 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J).

134 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 395 [19], quoting *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J) (citations omitted).

135 *Cheatle v The Queen* (1993) 177 CLR 541, 549 (‘*Cheatle*’), citing Alex C Castles, *An Australian Legal History* (Law Book, 1982); see also Herbert Vere Evatt, ‘The Jury System in Australia’ (1936) 10 *Australian Law Journal* (Supplement) 49, 66.

136 *Lowenstein* (1938) 59 CLR 556, 581.

137 (2000) 203 CLR 248, 277–8 [78]–[82].

138 *Ibid* 277.

139 *Ibid*.

140 *Ibid* 277–8.

141 See, eg, *Criminal Procedure Act 1986* (NSW) s 132; *Criminal Code Act 1899* (Qld) sch 1 s 614(1) (‘*Criminal Code*’); *Criminal Procedure Act 2004* (WA) s 118.

142 *Criminal Procedure Act 1986* (NSW) s 132(3); *Criminal Code* (Qld) s 615(2); *Criminal Procedure Act 2004* (WA) s 118(4).

143 *Criminal Procedure Act 1986* (NSW) s 132(4).

s 80 stands in the way. McHugh J rightly points out that the inability to waive the constitutional guarantee is no ‘boon’ to the accused.¹⁴⁴ Not uncommonly, the accused would prefer the verdict of a judge to that of 12 of his or her peers.

Far from being a constitutional remnant, the command in s 80 denies to those tried on indictment for Commonwealth offences any capacity to dispense with trial by jury. Trial by jury is necessarily a cumbersome mode of trial that imposes considerable costs on the community and on the accused. Without questioning that it is the appropriate mode of trial for serious offences, it should not be overlooked that, were the interpretation favoured by Dixon and Evatt JJ in *Lowenstein* adopted, a very large number of relatively minor offences would be subject to trial by jury, a consequence burdensome for many accused.

In light of *Brown*, s 80 can be seen as reflecting a judgment about the peculiar legitimacy of the verdict of the jury on a trial on indictment and the importance of community participation in the administration of Commonwealth criminal law. Critically, s 80 entrenches the essential features of the ‘institution [of trial by jury] as understood at common law at the time of federation’.¹⁴⁵ Given the various and far-reaching statutory modifications to the procedure of trial by jury enacted by the states, s 80 has assumed increasing importance.

XV THE ESSENTIAL FEATURES OF THE INSTITUTION

In *Cheatle*, the provision of the South Australian jury statute¹⁴⁶ which permits the return of a majority verdict was held to be inconsistent with s 80 and for that reason it was not picked up by s 68(2) of the *Judiciary Act 1903* (Cth).¹⁴⁷ Notwithstanding the absence of provision in any colonial legislation requiring unanimity, the Court considered that, at the time of Federation ‘a basic principle of the administration of criminal justice in each of the Colonies, [was] that the verdict of a criminal jury could be returned only by the agreement of all the jurors’.¹⁴⁸ The Court pointed to the difference between a ‘deliberative process’ in which a verdict is the product of consensus and one ‘in which a specified number of jurors can override any dissent and return a majority verdict’.¹⁴⁹ It also noted the view of the Supreme Court of Canada that ‘the jury only exists as a collectivity, and not as a group of individuals’.¹⁵⁰

144 *Cheng* (2000) 203 CLR 248, 299 [150].

145 *Ng v The Queen* (2003) 217 CLR 521, 526 [9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); see also *Cheatle v The Queen* (1993) 177 CLR 541, 549, citing *R v Snow* (1915) 20 CLR 315, 323 (Griffith CJ) (*‘Snow’*); *Brownlee* (2001) 207 CLR 278, 284 [4]–[5] (Gleeson CJ and McHugh J), 298 [54] (Gaudron, Gummow and Hayne JJ).

146 *Juries Act 1927* (SA) s 57.

147 (1993) 177 CLR 541, 562–3.

148 *Ibid* 551.

149 *Ibid* 552.

150 *R v Bain* [1992] 1 SCR 91, 128 (Gonthier, McLachlin and Iacobucci JJ), quoted at *ibid* 553.

The latter idea has a long pedigree. Pollock and Maitland explained the history this way:

The verdict of the jurors is not just the verdict of twelve men; it is the verdict of a *pays*, a ‘country’, a neighbourhood, a community. ... especially in criminal procedure, the voice of the twelve men is deemed to be the voice of the country-side, ... The justices seem to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the country.¹⁵¹

The determination of the essential features of the institution of trial by jury has served to highlight differences in approach to constitutional interpretation. They are exemplified in *Brownlee*,¹⁵² which involved a challenge to two provisions of the New South Wales jury statute: permitting the discharge of one or more jurors provided the number is not reduced below 10 and permitting the jury to separate during retirement.¹⁵³ Kirby J stated his view that ‘constitutional expressions must be given a contemporary meaning, as befits the character of a national basic law ... which must ... apply to new, unforeseen and possibly unforeseeable circumstances’.¹⁵⁴ His Honour observed that the framers of the *Constitution* would not have contemplated separation during deliberation, a circumstance which was suggested to illustrate the dilemma for those adhering to ‘the 1900 criterion in construing our Constitution’.¹⁵⁵

In the event, the Court in *Brownlee* was unanimous in holding that the provisions of the New South Wales statute did not trench on the essential characteristics of trial by jury. The other members of the Court came to that conclusion against the background of the functions of the institution at the time of Federation. As Gleeson CJ and McHugh J pointed out in their joint reasons, ‘[i]f the meaning of “trial ... by jury” ... [were] to be determined solely by reference to contemporary standards, there [would be] nothing to argue about. Contemporary standards are reflected in the [jury statutes]’.¹⁵⁶ Their Honours acknowledged that s 80 ‘speaks continually to the present and it operates in and upon contemporary conditions’, but said that this is not to ignore how the provision is to be ‘construed in the light of its history, [and] the common law’.¹⁵⁷

Gaudron, Gummow and Hayne JJ in their joint reasons looked to the function served by sequestration, concluding that its purpose was directed to ensuring the jury’s deliberations were ‘uninfluenced by an outsider to the trial process’.¹⁵⁸ Permitting the number of jurors to be reduced to 10 did not deny the representative

151 Pollock and Maitland, above n 79, vol 1 624 (citations omitted).

152 (2001) 207 CLR 278.

153 *Jury Act 1977* (NSW) ss 22, 54(1)(b).

154 *Brownlee* (2001) 207 CLR 278, 320 [123].

155 *Ibid* 325 [133], citing the further illustrations in *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 522–5 [110]–[118] (Kirby J).

156 *Brownlee* (2001) 207 CLR 278, 285–6 [9].

157 *Ibid* 286 [10], quoting *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 143–4.

158 *Brownlee* (2001) 207 CLR 278, 302 [65]–[67].

character of the jury.¹⁵⁹ However, a ‘real question’¹⁶⁰ would arise as to whether the trial of a Commonwealth offence might continue with a jury reduced to below 10 members.¹⁶¹

XVI DOUBLE JEOPARDY

The reach of Commonwealth criminal law has been extended very greatly in recent years. Each of the states has modified the common law rules against double jeopardy.¹⁶² New South Wales, South Australia and Western Australia have each conferred a right of appeal against a directed verdict of acquittal.¹⁶³

In *R v LK*¹⁶⁴ the respondents unsuccessfully contended that the provision of the New South Wales statute conferring jurisdiction on the Court of Criminal Appeal to entertain an appeal by the Director of Public Prosecutions against a directed verdict of acquittal was not picked up by s 68(2) of the *Judiciary Act 1903* (Cth) because it was inconsistent with s 80.¹⁶⁵ The respondents relied on *Snow* ‘for the proposition that the finality of a verdict of acquittal, even a directed verdict of acquittal, is an essential function of trial by jury protected by s 80’.¹⁶⁶ As explained in *LK*, the question in *Snow* was not ‘whether a law of the Commonwealth could validly authorise an appeal against a directed verdict of acquittal ... [but] whether s 73 of the *Constitution* authorised such an appeal’.¹⁶⁷

French CJ, with whose reasons the other members of the Court agreed, observed that *Snow* ‘did not establish authoritatively that s 80 required s 73 to be read as excluding appeals against acquittals ... [and a] fortiori it did not determine the ... question [respecting] ... a directed verdict of acquittal on an indictment for an offence against the Commonwealth’.¹⁶⁸ His Honour noted that although s 80 was ‘modelled upon Art III §2 cl 3 of the *United States Constitution*’ it did not incorporate a ‘protection against double jeopardy as found in the Fifth and Seventh Amendments of the *United States Constitution*’.¹⁶⁹

Reference is made in *LK* to the commentary on s 80 in Quick and Garran:¹⁷⁰

159 Ibid 303 [71].

160 Ibid 304 [73].

161 As is provided for in *Jury Act 1977* (NSW) s 22(a)(iii).

162 *Crimes (Appeal and Review) Act 2001* (NSW) pt 8 div 2; *Criminal Code* (Qld) ch 68; *Criminal Law Consolidation Act 1935* (SA) pt 10; *Criminal Code Act 1924* (Tas) sch 1 ch XLIV (‘*Criminal Code*’); *Criminal Procedure Act 2009* (Vic) ch 7A; *Criminal Appeals Act 2004* (WA) pt 5A.

163 *Crimes (Appeal and Review) Act 2001* (NSW) s 107; *Criminal Law Consolidation Act 1935* (SA) s 352(1)(ab)(ii); *Criminal Appeals Act 2004* (WA) s 24(2)(e)(i).

164 (2010) 241 CLR 177 (‘*LK*’).

165 Ibid 216 [88].

166 Ibid 199 [37] (French CJ), referring to *Snow* (1915) 20 CLR 315.

167 *LK* (2010) 241 CLR 177, 199 [39] (French CJ).

168 Ibid 199 [40].

169 Ibid 198 [34] (French CJ), citing *Lowenstein* (1938) 59 CLR 556, 581 (Dixon and Evatt JJ); *Cheatle* (1993) 177 CLR 541, 556.

170 *LK* (2010) 241 CLR 177, 198 [35].

Trial by jury, in the primary and usual sense of the term at common law and the American Constitution, is a trial by a jury of 12 men, in the presence and under the superintendence of a judge empowered to instruct them upon the law and to advise them upon the facts, and (except upon acquittal upon a criminal charge) to set aside their verdict if in his opinion it is against the evidence.¹⁷¹

French CJ explained that ‘the verdict of acquittal, which the judge could not set aside, clearly ... [was] an acquittal after trial’.¹⁷²

Each state has made provision in limited circumstances for the court of criminal appeal or a full court of a state to order the re-trial of a person who has been acquitted by the verdict of a jury.¹⁷³ The approach adopted in each jurisdiction is modelled on the provisions of the English *Criminal Justice Act 2003* (UK) c 44, pt 10. This approach provides for the Director of Public Prosecutions to apply to the appellate court for an order quashing the acquittal and directing a new trial in a case in which fresh and compelling evidence against the acquitted person is available and in which, in all the circumstances, it is in the interests of justice for the order to be made. Provision for the making of like orders is also made respecting ‘tainted’ acquittals.

In *Snow*, Gavan Duffy and Rich JJ identified as one of the ‘benefits incidental to a trial by jury’ protected by s 80 that the verdict of ‘not guilty’ is conclusive on the issue the jury is sworn to try.¹⁷⁴ The statement was not necessary to the decision. The question of whether a verdict of not guilty returned at the conclusion of a trial that has run its course is inviolate may yet arise for determination.

The right of a jury to return a verdict of not guilty, notwithstanding that the prosecution case has been proved beyond reasonable doubt, is well recognised. In *Kingswell*, Deane J characterised it as the power to ‘side with a fellow-citizen who is ... being denied a “fair go”’.¹⁷⁵ Viewed in this light, the inviolability of the verdict of not guilty is the feature of trial by jury that protects against oppression. It is a feature that was at the forefront of the discussion on the jury clause at the Melbourne sitting of the Australasian Federal Convention.¹⁷⁶ Bernhard Wise argued for retention of the clause on the ground that jury nullification of an unpopular Commonwealth law afforded protection to the state and the citizen alike.¹⁷⁷

171 Quick and Garran, above n 57, 810, slightly misquoting *Capital Traction Co v Hof* 174 US 1, 13–14 (1899).

172 *LK* (2010) 241 CLR 177, 198 [35].

173 *Crimes (Appeal and Review) Act 2001* (NSW) ss 100, 101; *Criminal Code* (Qld) ss 678B, 678C; *Criminal Law Consolidation Act 1935* (SA) ss 336, 337; *Criminal Code* (Tas) ss 393, 394; *Criminal Procedure Act 2009* (Vic) ss 327L, 327M, 327N, 327O; *Criminal Appeals Act 2004* (WA) s 46H.

174 *Snow* (1915) 20 CLR 315, 365.

175 *Kingswell* (1985) 159 CLR 264, 301, citing Eberhard Knittel and Dietmar Seiler, ‘The Merits of Trial by Jury’ (1972) 30 *Cambridge Law Journal* 316, 320–1.

176 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898.

177 *Ibid* 354 (Bernhard Wise).

XVII CONCLUSION

The essential features of the institution of trial by jury that have been acknowledged require that the jury be adequately representative of the community, act as the exclusive arbiter of the facts, be randomly selected and return a unanimous verdict.¹⁷⁸ Recently, the High Court has considered the incidents of the accusatorial criminal trial.¹⁷⁹ In *Lee v New South Wales Crime Commission*, Kiefel J queried whether ‘derogation, in a fundamental respect,’ from the accusatorial nature of the trial of a Commonwealth offence would raise an issue of validity under s 80.¹⁸⁰

Professor Sawyer’s estimate that s 80 had proved to be practically ‘worthless’¹⁸¹ has not been confirmed by the decisions of the High Court in the years since that assessment was made. The confidence of the convention delegates that the Parliament would not legislate to provide for the summary trial of serious offences has to date proven not to have been misplaced. Section 80’s work has been to preserve the essential features of the jury trial from legislative modification.

178 See *Cheatle* (1993) 177 CLR 541.

179 See generally *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* (2013) 302 ALR 363.

180 (2013) 302 ALR 363, 417–18 [177]–[178].

181 Sawyer, above n 3, 19.