THE SENATE
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Inquiry into the

Military Court of Australia Bill 2012

and

Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012

SUBMISSION OF ALEXANDER W STREET SC

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A. Introduction

1. I greatly appreciate the privilege of being invited by email dated 3 July 2012 to make this submission on the Inquiry into the *Military Court of Australia Bill 2012* and *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012*.

2. The major deficiencies in my opinion are:

   (i) The Military Justice design flaws in excluding s80 trial by jury (see topic B below);

   (ii) The prosecution power given to the ODMP to pursue what in reality are civilian offences (see topic B below);

   (iii) The inappropriate use of s60 as a prejudicial conduct offence that should only be used by Command for maintenance of discipline without a civilian conviction record (see topic B below);

   (iv) Disciplinary punishment of detention exceeding 30 days (see topic C below);

   (v) The need for appeals to the Full Court of the Federal Court of Australia (see topic D below);

   (vi) The inappropriate costs power (see topic E below);

   (vii) The inappropriate constraint of the jurisdiction of the Federal Court of Australia (see topic F below);

   (viii) The invalid constraint upon appeals to the High Court of Australia (see topic G below); and

   (ix) The need for additional jurisdiction (see topic H below);

   (x) Transitional Provision deficiency (see topic I below).

   (xi) Breadth of grounds of appeal to the Military Court of Australia (see topic J)

3. In my opinion a Constitutional issue may arise in terms of the deployment of the Military Court of Australia outside Australia under clause 51 of the Military Court of Australia Bill.

4. In my opinion a Constitutional issue may also arise in relation to the exclusivity of the judicial power of the commonwealth vested in the Military Court of Australia and inability to pursue alternative non-judicial power alternative processes in Schedule 3B to the *Defence Force Discipline Act 1982*.

5. In my opinion a Constitutional issue may arise concerning s63 of the DFDA as jurisdiction vested in a federal Court cannot be subject to an administrative step and this may raise an issue in relation to the operation of State criminal laws.

6. There are also major deficiencies concerning Federal Magistrates, the inappropriateness of that description for a Chapter III "justice", and requirements for Chapter III justices that remain unaddressed.

B. Trial by jury – The Military Justice System design flaws

7. This new proposed Chapter III Court is a wonderful step forward into the 20th Century (but not the 21st Century) and advances our current military discipline system into a real Military Justice System. Only real Courts administer justice and it is high time the outstanding Australians that serve in our great ADF are recognised as entitled to a real Military Justice System. This legislation is a major step forward into a proper Military Justice System administered by Courts created by Chapter III of the Constitution. I congratulate all involved in the step forward.

8. But this legislation in clause 64 of the *Military Court of Australia Bill* and in the proposed new s3A to the *Defence Force Discipline Act 1982* ("**DFDA**") in the *Transitional Provisions Bill*, in my opinion, is still not consistent with either the standard of best practice for a Military Justice System design or the Constitutional protections found in our Constitution. A prisoner of war tried in Australia is given greater protective rights as they have the benefit of s80 as it would be applied to indictable federal offences in the ordinary Courts[1]. The consequential amendments to the *Geneva Conventions Act* make patent this deficiency, notwithstanding the work done by s7 of the DFDA.

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[1] See Articles 84 and 87 of the third Geneva Convention *Relative to the Treatment of Prisoners of War* of 12 August 1949 in Schedule 3 to the *Geneva Conventions Act 1957*

9. This draft legislation reflects a persistent endeavour to excise the protection of the right to trial by jury for indictable offences under s80 of the Constitution. This is deeply troubling. The Explanatory Memorandum whilst laudably addressing a Statement of Compatibility of Human Rights is seriously deficient in its attention to this important issue of Constitutional validity and it is difficult to see why there should not be a Statement of whether compatible with the Constitution.

10. Why should the Australians serving in the ADF be deprived of their civilian right to the protection of s80 of the Constitution? Why should prisoners of war be in a better position than the members of our ADF by having a right to trial by jury?

11. The rule of law binds all Australians and the source of the rule of law as well as its supremacy is the Constitution. To devise a Military Justice System that deprives ADF members of their rights under s80 falls below the standard of best practice in Military Justice System design and the deprival of that right will inevitably be held invalid by reason of being contrary to Chapter III. This means it has been designed by interests that have been blinkered as to the importance of the rule of law and the consequential importance of compliance with Chapter III of the Constitution. That compliance protects and maintains public confidence in the Constitutional institutions and this includes public confidence in both the Chapter III Courts and the exercise of the judicial power of the Commonwealth in a trial by jury under s80 and the resultant conviction or acquittal.

12. The source of the defence power and the ADF is the Constitution. The source of the vested command of the ADF is the Constitution. Command of the ADF, all military missions and rules of engagement are limited by the rule of law and the Constitution. All exercises of Commonwealth, Executive, Command and legislative power are constrained by the Constitution. Why then is there this persistent pre-federation focus on a Military Justice System design that does not accord with Chapter III?

13. In my opinion, it is one thing to create a Military Court under Chapter III because of the arguments that special military offences are required to preserve discipline in a specialised unique profession trained to be deployed under rules of engagement that include use of deadly force and who are exposed to being legitimate targets under the laws of armed conflict. But there is no compelling

substance in the notion that military offences should be tried by a Military Justice System that is Chapter III noncompliant and which deprives these unique Australians from the protections and benefit of the right to trial by jury for indictable offences under s80 of the Constitution.

14. The added grievance in this flawed design is that military offences include a power to prosecute civilian offences as if a military offence. Civilian based offences are properly dealt with by civilian prosecutors. The Commonwealth DPP has the system, procedures, experience, balance and expertise to properly deal with prosecution of indictable federal civilian offences. The State DPPs have similar expertise.

15. The Office of the Director of Military Prosecutions ("**ODMP**") simply does not have that same level of expertise and it is both unfair and unreasonable to leave the prosecution decisions concerning ordinary civilian offences of ADF personnel to the ODMP. This prosecutorial power vested in the ODMP that permits pursuit of civilian offences in the name of a military offence is not appropriate and is even less appropriate when a decision to prosecute a civilian type offence by the ODMP results in the ADF personnel being deprived of the benefits and protection of s80 to which every other Australian is entitled.

16. One example will suffice. In 2010 the ODMP launched a prosecution for an alleged civilian offence in a particular war zone. That prosecution was utterly misconceived and thrown out at the jurisdictional level for want of being a proper offence. That prosecution was highly damaging to Australia's national security interests. That prosecution would never have been launched by the Commonwealth DPP. That prosecution was one in which the protections of a civilian jury under s80 would have inevitably upheld the innocence of the accused. The ODMP simply is not a repository of expertise in the prosecution of civilian offences even in a war zone environment.

17. But it also needs to be pointed out that some of what is prosecuted by the ODMP is at a level of triviality that should have been dealt with summarily at the Captain's table (or by a Commanding Office). That pursuit of a prosecution in a trivial matter is in tension with the object of Command discipline. Real disciplinary offences should be dealt with by Command and criminal offences by

a justice system. The ODMP is not Command. Command because of the statutory independence of the ODMP could not, if it had wished to, stop the ODMP pursuing the inappropriate prosecution referred to above.

18. A number prosecutions by the ODMP are pursued in the context of what are really contractual errors as to beneficial entitlements or constraints in use of credit cards but which contractual concepts are re-enforced by Command order in the form of general Directives. Whilst this legitimises the military nexus the scope of these prosecutions are by and large again all matters that should have been deal with at the Captain's table (or by a Commanding Officer) not by application of the might of the criminal law. It is discipline by Command that fosters discipline not prosecution by a statutory independent ODMP. A result of prosecution by the ODMP may be criminal conviction by the Military Court of Australia which is likely to have a very significant impact on the individual once they leave the ADF.

19. There is a generic offence under s60 of the DFDA that is a catchall provision creating a criminal offence (or at least it will be under this new Bill) for "*prejudicial conduct*". Now that is properly a unique service nexus offence and a very useful command discipline provision, but only when used by Command. There is no similar offence under civilian criminal law. In a significant number of prosecutions that have been launched by the ODMP involving alleged civilian offences this fall back allegation of an alleged offence of "prejudicial conduct" has been included in the prosecution. That is something that the DPP would not have done and it invites careful reflection on what criminal matters the Military Court of Australia should have power to create a criminal record for an ADF member who is convicted.

20. Squarely put, no ADF personnel should be exposed to the existence of a criminal record for contravention of this prejudicial conduct service offence under s60 of the DFDA. The better solution is to recognise that what most promotes discipline within the ADF is the Command discipline through Command, not prosecution by the ODMP. The ODMP should not have power to prosecute any offence under s60 of the DFDA, this offence should only be dealt with by Command and a conviction of that offence by Command should have no civilian consequence.

21. There are always arguments as to the overlap of real military discipline offences with civilian offences but that is why the rights under Chapter III should not be watered down by an attempt that will inevitably fail being the exclusion of the right to trial by jury under s80 for all indictable offences. To try and define discipline offences that give rise to exposure to imprisonment in excess of two years as not indictable offences within s80 is, in my opinion, bound to be held invalid. The Constitution is not a frozen fossil in the principles of interpretation that applies to our living Constitution which is the foundation of and preserves our democracy.

22. There is, in my opinion, unpersuasive and substantially unreasoned early High Court of Australia authority arising from legislation not consistent with the standards of our modern multicultural society that indictable offences are at the whim and pleasure of Parliament. That early authority essentially turns on the subjective views of Mr Isaacs, as his Honour then was, at the Constitutional debates. This unpersuasive concept of procedural form cannot be reconciled with modern principles of Constitutional interpretation or the recognised status of s80 as a Constitutional guarantee that is a restraint on the legislature.

23. More recent High Court of Australia authority, some of which I have referred to in the Appendix to this Submission, recognises the inviolable features of trial by jury within s80 when there is a trial on indictment and, in my opinion, supports the proposition that the law as to s80 being subject to procedural evasion by mere choice of Parliament is not settled. In my opinion it is inevitable that the procedural evasion in this *Military Court of Australia Bill* by clause 64 and by s3A of the DFDA in the *Transitional Provisions Bill* will be held to offend the inviolable features of s80 and as such invalid.

24. The role of Chapter III makes patent the inability to reconcile the notion that Parliament can defeat these inviolable features within s80 by the draftsman's whim. Further the notion that s80 is a mocked Constitutional guarantee able to be excised by artifice of form and drafting device is utterly unsound in principle. Of overwhelming significance is the complete inability to advance any rational argument as to why ADF service personnel should be exposed to a System of Military Justice that has less protections in its design than applies to every other Australian in respect of the rights under s80.

25. There is unquestionably a greater flexibility that becomes necessary in war time to expand the scope of the defence power to maintain the Commonwealth but even then the defence power is subject to the judicial power of the Commonwealth and is subject to Chapter III. The rule of law continues to prevail even in war.

26. The argument advanced as to need for deployability of Military Courts is utterly without substance in peacetime. The validity of the provisions permitting deployability of the Military Court of Australia overseas are highly questionable and, in my opinion, probably Constitutionally invalid. Indeed, it is a gossamer thin proposition of any such need, even in wartime, given modern transportation and communication, as well as practical realities that constrict deployment of non-combat personnel into a war zone. Moreover, there is no practical difficulty within Australia to implement a Military Justice System that ensures trial by jury is available for military offences where two or more years of imprisonment is a potential punishment.

27. Australian criminal law does not require any different set of principles in its application to the prosecution of offences whether labelled as civilian criminal offences or military discipline offences. Other than s60 referred to above, and which is not identified in paragraphs 533 or 534 of the Explanatory Memorandum as a core discipline offence, it is in the two spheres of decision to prosecute and imposition of punishment that military discipline has a real function to perform. But even then the function of discipline is an objective criterion that can be comprehended and applied by civilian prosecutors and civilian institutions.

28. The physical and mental elements of any military discipline offence must be proved in the same way as any other criminal offence and there is no clergical or secret discipline element for the proof of guilt that attaches to any military disciplinary offence. Insubordination is a defiance of authority that is not different in principle to contempt of Court and by analogy contempt of Court also includes disobeying a lawful order. The important offences in Items 1 to 18 of Schedule 1 to the Bill do not involve a discipline element in the offence and could be determined by any criminal Court.

29. There is, in fact, no military discipline offence so called, in my opinion, that a civilian criminal jury could not determine. Other than the prejudicial conduct

offence under s60, that should only be used by Command, any suggested requirement for specialist military discipline knowledge for the constitution of the jury to try and determine indictable military offences is, with the greatest respect, a myth.

30. Indeed a specialist military jury to determine indictable offences rather than a randomly selected jury of ordinary Australians offends the inviolable features of s80 and the requirements of Chapter III. Nor does the worthy object of military discipline by Command dictate or require a different a set of principles for the prosecution of criminal offences.

31. There is no rational foundation for depriving ADF personnel of their rights under s80 of the Constitution in the design of this new Military Court of Australia. Nor, in my opinion, will the legislation withstand the inevitable Constitutional challenge to its validity if this flawed model is enacted.

32. The question why the right to trial by jury has been excised from this new Military Court of Australia when that right is given to all other Australians is not just unanswered, it rings with serious deficiency in the design of this Military Justice System. A new Military Court under Chapter III should not be exposed to this design flaw. But even more importantly neither ADF members nor the rest of Australians should be exposed to the creation of a new Chapter III Court with this design flaw.

Recommendation

(a) Amend clause 64 of the Bill to accord with the right to trial by jury under s80 of the Constitution for all offences in which two or more years imprisonment may be imposed.

(b) Exclude all civilian offences from the authority to prosecute by the ODMP.

(c) Exclude from the power to prosecute by the ODMP under s60 of the DFDA and confine this disciplinary offence to Command with no consequential civilian criminal record.

C. Punishment of detention for two years – confine to 30 days

33. Prisoners of war have a limitation in relation to "*disciplinary punishments*" which under Article 90 records "*The duration of any single punishment shall in no case exceed thirty days*". One again wonders why a greater disciplinary punishment in the form of detention for up to two years should be able to be imposed on those who seek to serve in the ADF. The punishment of detention for a short limited period does provide the opportunity for rehabilitation rather than dismissal from the Defence Force. However, there can be no justification for using the power of detention for a period in excess of that which would be permissible under the said *Geneva Convention* and although this punishment presently exists under the DFDA there is no reason to perpetuate this serious error. The history of the drafting of the DFDA does not reflect any proper consideration as to its Constitutional validity.

D. Appeals from the Military Court of Australia – should be to the Full Court of the Federal Court of Australia

34. The Full Court of the Federal Court of Australia is the proper repository for the judicial power of the Commonwealth to hear appeals from the Military Court of Australia. It is the Full Court of the Federal Court of Australia that currently hears appeals from the Defence Force Discipline Appeals Tribunal. That has been and remains a most useful power of appellate review. There are a combination of reasons why given the limited size of the Military Court of Australia the present right of appeals on questions of law to the Full Court of the Federal Court of Australia should be entrenched.

35. In principle, all federal matters should be determined by the same intermediate Federal Court of Australia for reasons of consistency and given the likely binding effect of that intermediate authority. Further, there is a significant public benefit in ensuring specialist jurisdictions in relation to the exercise of appeals are exposed to the benefit of determination by a federal appellate Court of general jurisdiction and this also gives symmetry to the structure of our federal judicature with the High Court of Australia at the apex.

36. The High Court of Australia in its Constitutionally entrenched appellate jurisdiction in s73 of Chapter III of the Constitution has power to hear appeals

from all jurisdictions and this ensures certainty, consistency and coherence in the law. These same principles are equally applicable at the intermediate appellate level and are why appeals from the Military Court of Australia should lie to the Full Court of the Federal Court of Australia.

37. Further, the way the *Military Court of Australia Bill* is currently drawn, a matter could be heard by the Full Court without any further appellate right. This would be contrary to Article 14 paragraph 5 of the *International Convention on Civil and Political Rights* that provides "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*". This is a further reason why an appeal on questions of law should lie to the Full Court of the Federal Court of Australia from all decisions of the Military Court of Australia (whether a Full Court decision of the Military Court of Australia or a decision at first instance).

E. Costs – inappropriate burden under clause 109

38. In the Court of Criminal Appeal for ordinary Australians no adverse orders as to costs is made against an accused appealing conviction or sentence. One wonders again, why it is that members of the Australian Defence Force should be deprived by any of their rights to trial by jury under s80 but exposed to an appellate regime under which an adverse order as to costs might be made. The regime for adverse costs orders is also inconsistent with the spirit of s190D in the *Transitional Provisions Bill*. The proposed clause 109 provision is inappropriate provision except insofar as it might provide for a power to order costs against the ODMP.

F. Constraints in relation to the jurisdiction of the Federal Court of Australia

39. The Federal Court of Australia has currently been vested with jurisdiction under s75(v) of the Constitution and this a most important jurisdiction which is part of the federal structure for the benefit of all Australians. Whilst there is good reason why the Military Court of Australia should have concurrent jurisdiction with the Federal Court of Australia in relation to matters that might fall within s75(v) concerning the ADF and the ODMP there is, in my opinion, no sound reason for taking away this important jurisdiction as currently vested in the Federal Court of

Australia. Further, it is not, in my opinion, appropriate to permit the Military Court of Australia to stay proceedings that might have been properly commenced in the Federal Court of Australia.

G. Appeals to the High Court of Australia

40. The constraints on appeals to the High Court of Australia do not reflect the appellate structure of s73 of the Constitution and supremacy of the rule of law. This attempted constriction of the ability to appeal to the High Court of Australia is likely to be the cause of injustice and, in any event, will in my opinion be held to be Constitutionally invalid.

H. Conferral of other jurisdiction on the Military Court of Australia

41. If the Bill is amended to ensure the recognition of the right to trial by jury under s80, it would, in my opinion, be sound to also confer concurrent jurisdiction on the Military Court of Australia to hear alleged crimes under the *War Crimes Act 1945*, Part 4 of the *Crimes Act 1914* and Division 268 of the *Criminal Code*. I would also recommend enactment of the draft *Prize Act* in Appendix A of the ALRC Report 48 on *Criminal Admiralty Jurisdiction and Prize (ALRC Report 48)* and conferral of concurrent jurisdiction on the Military Court of Australia with the Federal Court of Australia.

I. Transitional Provision deficiency

42. Schedule 5 of Part 4 s17(4) of the *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012* is too narrow and needs to be expanded to include "*or an appeal to the High Court of Australia*" as it is possible to have a current matter pursued to the High Court of Australia and for the matter to be remitted by the High Court of Australia for determination according to law.

J. Breadth of grounds of appeal to the Military Court of Australia

43. The power to appeal against conviction in clause 105 of the *Military Court of Australia Bi*ll is too narrow and should be expanded to reflect the same broader

scope of grounds to appeal as in s23 of the *Defence Force Discipline Appeals Act 1955*. Likewise in relation to these alternative processes the power of appeal to the Military Court of Australia under Schedule 1 of the *Transitional Provisions Bill* inserting s61 of the Schedule 3B to the DFDA, should be expanded to reflect the same broader scope of grounds to appeal as s23 of the *Defence Force Discipline Appeals Act 1955*.

I am grateful for the privilege of being invited to make this submission.

Alexander W Street SC

11 July 2012

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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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Appendix to Submission of Alexander W Street SC

Section 80

80. *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.*

The *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012* provides in Schedule 1 insertion of into the DFDA:

> "*3A(1) For the purposes of any law of the Commonwealth other than this Act or the regulations, a service offence is an offence against a law of the Commonwealth.*
>
> *(2) A service offence is not an indictable offence*"

The *Military Court of Australia Bill 2012* provides in s64:

> "*Charges of service offences are to be dealt with otherwise than on indictment.*"

The Explanatory Memorandum to clause 64 provides:

> "*135. This clause provides that charges of service offences are to be dealt with otherwise than on indictment. This means that they will not be tried before a jury. This is consistent with the determination of service offences under the* Defence Force Discipline Act 1982, *which also does not provide for trial by civilian jury. Amendment of that Act to reflect the status of service offences and make clear the intent that service offences are not to be tried on indictment is contained in the* Military Court of Australia (Transitional and Consequential Amendments) Bill 2012.
>
> *136. The* Defence Force Discipline Act 1982 *complements, and does not replace, the criminal law in force in Australia. Under the* Defence Force Discipline Act 1982, *jurisdiction is restricted to the prosecution of service offences, in circumstances in which prosecution can reasonably be regarded as substantially servicing the purpose of maintaining or enforcing service discipline. Offences the* Defence Force Discipline Act 1982 *provides for are service offences. Sometimes, conduct which is a service offence may*

> *also constitute a serious criminal offence. If conduct is to be prosecuted as a criminal offence, service personnel, like civilian citizens, will be afforded trial by jury if prosecution is of a criminal offence by a civilian Director of Public Prosecutions on indictment.*"

1. This Explanatory Memorandum extract uses an inappropriate benchmark for a new Military Justice System as the *Defence Force Discipline Act* was not designed as a Chapter III justice system and was itself the subject of inadequate attention to the question of Constitutional validity. Moreover the last statement is inaccurate as under this Bill the members of the ADF are not entitled to elect for trial by the Commonwealth or State DPPs. Further the ADF members are exposed to the ODMP pursing a prosecution for civilian offences that the Commonwealth or State DPPs would never have brought.

2. In *R v Bernasconi* (1915) 19 CLR 629 Griffiths CJ said (at 632-633):

> "*This matter came before the Court on a case stated by the Central Court of the Territory of Papua upon a conviction for an assault occasioning bodily harm. The accused was tried before the Central Court without a jury in accordance with the provisions of Ordinances of that territory.*
>
> *The first question raised by the case is whether he was entitled to be tried by a jury. The objection is founded upon sec. 80 of the Constitution, which provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. ...*
>
> *By an Ordinance, No. VII of 1907, passed after the transfer of the Possession to the Commonwealth, to which I will directly refer, it was enacted that the trial of persons of European descent charged with a crime punishable with death should be held before a jury of four persons, but that 'save as aforesaid the trials of all issues, both civil and criminal, shall as heretofore be held without a jury.'*"

3. The Chief Justice proceeded to deal with the question on the basis (at 635) that

> "*Chapter III. is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories.*"

4. There is no reasoning by Griffiths CJ that supports trial by indictment being at the whim of the Parliament. Gavan Duffy and Rich JJ concurred with the Chief Justice.

5. Isaacs J said (at 637)

> "*By force of the various sections of Chapter III. other than sec. 80 and aided by sub-sec. xxxix. of sec. 51, Parliament might have enacted, or might*

> *have enabled Courts to provide by rules, that all offences whatever should be tried by a Judge or Judges without a jury. Sec. 80 places a limitation on that power. Neither Parliament nor Courts may permit such a trial. If a given offence is not made triable on indictment at all, then sec. 80 does not apply.*"

6. There is an inconsistency in the reasons of Isaacs J recognising a limitation in that power found in s80 on the Parliament in respect of a trial before a judge without a jury but the limitation is given no content by the last quoted sentence.

7. That decision was purportedly applied in *R v Archdall & Roskruge; ex parte Carrigan and Brown* (1928) 41 CLR 128 where the majority, Knox CJ, Isaacs, Gavan Duffy and Powers JJ, in a passage bare of reasoning said (at 136):

> "*The suggestion that the Parliament, by reason of sec. 80 of the* Constitution, *could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition.*"

8. Higgins J said (at 139-140):

> "*... that is to say, if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment (and see R. v Bernasconi).*"

9. These decisions provide no reasoning of principle in support of the narrow procedural construction adopted in the interpretation of s80 of the Constitution.

10. In *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 Latham CJ noted (at 570-571): "*No argument based upon sec. 80 was addressed to the court in these proceedings.*" and then followed *R v Archdall*.

11. Dixon and Evatt JJ delivered a powerful dissent and in relation to part of their reasoning in *R v Archdall* said (at 581-582)

> "*It is a queer intention to ascribe to a constitution; for it supposes that the concern of the framers of the provision 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 to prevent a procedural solecism, namely, the use of an indictment in cases where the legislature might think fit to authorize the court itself to pass upon the guilt or innocence of the prisoner. There is high authority for the proposition that 'the Constitution is not to be mocked.' A cynic might, perhaps, suggest the possibility that sec. 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory. No court could countenance such a suggestion, and, if this explanation is rejected and an intention to produce some real operative effect is conceded to the section, then to say that its application can always be avoided by authorizing the substitution of some other form of charge for an indictment seems but to mock at the provision.*"

12. And after some criticism of the majority in *R v Archdall* Dixon and Evatt JJ continued (at 584):

> "*We admit the difficulties which the form of sec. 80 creates, but to treat such a constitutional provision as producing no substantial effect seems rather to defeat than to ascertain its intention.*"

13. In *Sachter v Attorney-General (Cth)* (1954) 94 CLR 86 the appellant in argument (at 87) said "*It is only when the trial takes place on indictment that s. 80 of the Constitution applies*" and no argument appears to have been directed or heard challenging the correctness of the earlier authorities and without analysis of the argument or reason, Dixon CJ said (at 88) "*the relevant bankruptcy provision authorised a summary trial and that the section had been considered by the Court in Lowenstein's case. We have at this sittings declined to allow the correctness of that decision to be canvassed; we have declined to reconsider it*" (emphasis added). The words "*at this sittings*" were significant words of reservation and certainly provided no authoritative answer to the arguments developed by Dixon and Evatt JJ in their dissent in *Lowenstein.*

14. In *Zarb v Kennedy* (1968) 121 CLR 283 Barwick CJ said (at 294):

> "*But, in my opinion, the proposition that the Parliament is unable to provide that any offence shall be tried summarily is untenable. The question of the scope of s. 80 has, in my opinion, not only been long settled but ought not now to be reopened.*"

15. That decision provided no reasoning in answer to the issues raised in dissent by the joint judgment of Dixon and Evatt JJ in *Lowenstein.*

16. In *Li Chia Hsing v Rankin* (1978) 141 CLR 182 Barwick CJ observed (at190):

> "*Summary prosecution for a wide variety of offences has a long history, though punishment upon summary conviction is generally limited so far as imprisonment is provided to a term of twelve months or less.*"

17. And having cited *R v Bernasconi* and *R v Archdall* applied the same without any detailed analysis and after reference to *Zarb v Kennedy* said (at 191): "*the question of its meaning and scope ought not now to be reopened*". Gibbs J (at 193) followed the earlier authorities without any analysis but importantly added "*This is not an appropriate case in which to consider further the scope of s. 80*".

18. Stephen and Jacobs JJ (at 195) posited an assumption as to the construction, which they rejected, that "*s. 80 means that every offence against any law of the Commonwealth must be prosecuted on indictment*". That assumption, in my

opinion, is erroneous and does not provide any reasoned interpretation as to the construction of s80. Murphy J delivered a powerful dissent holding (at 198) "*In my opinion, s. 80 contains a guarantee of a fundamental right to trial by jury in criminal cases (at least in serious ones)*".

19. In *Kingswell v R* (1985) 159 CLR 264 Gibbs CJ, Wilson and Dawson JJ (at 277) acknowledged the criticism of the earlier authorities but refused to permit the question to be reopened adding an assumption that appears to incorporate an erroneous understanding:

> "*To understand s.80 as requiring the Parliament to include in the definition of any offence any factual ingredient which would have the effect of increasing the maximum punishment to which the offender would be liable would serve no useful constitutional purpose; indeed the Parliament might feel obliged to provide that some offences, which would otherwise be made indictable, should be triable summarily.*"

20. This assumption of factual ingredient and increased punishment is erroneous. In my opinion it does not provide any reasoned interpretation as to the construction of s80 and does not support the contention that (at 277) "*the construction the section should be regarded as settled*". Mason J agreed with the reasons given by the joint judgment. Both Brennan and Deane JJ gave detailed reasons in two powerful dissents as to why the earlier decisions were wrong and that the decisions of Dixon and Evatt JJ dissenting in *Lowenstein* should be followed.

21. In *Cheng v R* (2000) 203 CLR 248 Gleeson CJ, Gummow and Hayne JJ touched on an attack sought to be advanced on *Kingswell* and said at [37]:

> "*Since* Kingswell *was decided in 1985, courts and prosecuting authorities throughout the Commonwealth have acted on the basis of that decision, and many people have been convicted and sentenced upon the assumption that the law was as declared in* Kingswell. *That is not fatal to the applicants, especially bearing in mind that their attack on* Kingswell *is based upon constitutional grounds. But it is a consideration not lightly to be disregarded.*"

22. And then at [43] having distinguished the applicant's argument said:

> "... *If s80 were to be re-interpreted as a constitutional requirement for trial by jury in the case of all serious Commonwealth offences, the occasion for doing so will be in a case, unlike the present, where there was a legislative denial of trial by jury and there arose in the conduct of the prosecution issues susceptible of trial by jury.*"

23. And further at [51]:

> "... *In the events that occurred, whatever the content of the guarantee contained in s80, it was not relevant to the present applicants, because they pleaded guilty.*"

24. Gaudron and Kirby JJ provided two powerful dissents and would have overruled *Kingswell*. Materially, Gaudron J addressed the principles of construction in [82] and [83]:

> "82. *The importance of jury trial to the individual and to the judicial system renders it imperative, in my view, that s80 be approached in the same manner as those other provisions which have been recognised as constitutional guarantees. More precisely, that consideration necessitates that s80 be construed by reference to the same canons of construction. And in this regard, it is well settled that constitutional guarantees are to be construed liberally and not pedantically confined.*
>
> *83. In Bank of NSW v The Commonwealth, it was said by Dixon J of the guarantee in s51(xxxi) that it 'should be given as full and flexible an operation as will cover the objects it was designed to effect'. Similarly, in Street v Queensland Bar Association, it was said that because s117 'was designed to enhance national unity', by providing for the equal rights of all residents in all States, it should be given 'a liberal, rather than a narrow, interpretation ... an interpretation which will guarantee to the individual a right to non-discriminatory treatment in relation to all aspects of residence'. In my view, the fact that s80 was designed to protect the individual requires that that provision be construed no less liberally than the guarantees in s51(xxxi) and s117 of the Constitution. In my view, the fact that s80 was designed to protect the individual requires that that provision be construed no less liberally than the guarantees s51(xxxi) and s117 of the Constitution".*

25. Callinan J, at [283], although acknowledging:

> "*It is impossible not to feel disquiet about a proposition that might leave it entirely for the legislature to define what is, and what is not to be an offence charged on indictment, and its elements.*"

rejected the challenge advanced by the applicant in that case.

26. McHugh J, at [127], acknowledged that s80 contains a guarantee, but without applying modern principles of interpretation, said that text, history and purpose supported *Kingswell* as being correct.

27. As to history Quick and Garran's *The Annotated Constitution of the Australian Commonwealth* (at 807) there are, in my opinion, two most significant entries which support a substantive restraint upon Parliament by s80 and which, in my

opinion, diminish the significance of the observations of Mr Isaacs, as his Honour then was, and subsequent drafting:

> "*At the Adelaide session, 1897, the clause was introduced almost verbatim as in 1891. Mr Higgins opposed the clause, on the ground that the question of trial by jury might safely be left to the Federal Parliament; but it was agreed to.*"

28. The second entry (at 807) is that of Mr Wise, who supported the clause "*as a necessary safeguard of individual liberty*".

29. In *White v Director of Military Prosecutions* (2007) 231 CLR 570 Kirby J said (at [167]) :

> "*In past cases, a majority of this Court has favoured the tautological view that s80's guarantee of 'trial by jury' is limited to cases in which the Parliament and the Executive provide for the commencement of prosecution by filing an indictment. However, a persistent minority has rejected this view as inconsistent with the function of s80 as providing a guarantee of jury trial which could not so easily be circumvented. With respect, I favour what is presently the minority view. It is more harmonious with the language, constitutional context, purpose and function of the section. The contrary view renders trial by jury for the applicable federal offences optional in the hands of the very governmental agencies against whom jury trials can be a precious protection for the individual. That cannot be the meaning of the Constitution. When Australian judges and lawyers become more accustomed to reasoning by reference to fundamental rights, they will see the truth of this proposition more clearly.*"

30. In *R v LK* (2010) 241 CLR 177, French CJ after referring to s80 said (at [24]):

> "*It also places a limitation on the legislative power of the Commonwealth. That limitation is enlivened when a law of the Commonwealth provides that the trial of an offence against a law of the Commonwealth shall be on indictment. When that condition (which lies in the discretion of the Commonwealth Parliament) is satisfied the law cannot provide for the trial to be other than trial by jury.*"

31. And the Chief Justice then referring to s80 said (at [26]):

> "*As the Court said in* Cheatle, *the guarantee of trial by jury in s80 prima facie encompasses the essential features of the "institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England".*"

32. The Chief Justice continued (at [40]):

> "*Such an appeal against a directed acquittal, turning, as it did in this case, solely upon questions of law, does not offend against s80. Involving, as it did, only questions of law, it did not infringe upon any of the essential functions of trial by jury. The grounds set out in the notices of contention disclose no error by the Court of Criminal Appeal.*"

33. Gummow, Hayne, Crennan, Kiefel and Bell JJ said (at [88]):

> *"The Chief Justice explains why the submissions by the respondents on these issues should not be accepted and we agree with his Honour's reasons."*

34. In summary the proposition that *Kingswell* is wrong, is supported by well-reasoned dissents from Dixon and Evatt JJ, Murphy, Brennan, Deane, Gaudron and Kirby JJ. That s80 contains a limitation on legislative power is supported by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ although acknowledging the current authority of *Kingswell*. The question of reopening *Kingswell* when necessary, as foreshadowed by Gleeson CJ, Gummow and Hayne JJ in *Cheng,* and re-open *Lowenstein* (and thereby *Archdall* and *Bernasconi*) as foreshadowed by Dixon CJ in *Satcher,* will arrive, if this Bill, in this form is enacted.

35. In my opinion, s80 provides a real guarantee of trial by jury for any offence against a law of the Commonwealth that should be tried on indictment. In my opinion s80 applies to both offences that the Parliament specifies are to be tried on indictment and, as a limit on the power of the Parliament, any offence that should be tried on indictment. In my opinion any offence in which the exercise of judicial power of the Commonwealth may give rise to a sentence of imprisonment of two or more years is likely to be held to be an offence that should be tried on indictment.

Alexander W Street SC

11 July 2012