

SECTION 80 OF THE *CONSTITUTION* AND FUNCTIONALISM: A CASE NOTE ON *ALQUDSI V THE QUEEN*

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I INTRODUCTION

The High Court of Australia's decision in *Alqudsi v The Queen*¹ displays clearly 'functionalist' elements of constitutional reasoning. However, whilst the judges of the High Court of Australia used various degrees of functionalist reasoning in their respective judgments, they did so in an opaque and piecemeal manner that is not normatively desirable. By embracing a more wholehearted engagement with functionalist reasoning, the members of the Court would have delivered a more transparent and coherent decision.

In *Alqudsi*, the Court considered the compatibility of waiver of a jury trial for an indictable offence under federal law with section 80 of the *Constitution*. The majority of the Court held that, in the circumstances of the case, waiver of a jury trial was not permitted by section 80. French CJ's dissent was the only judgment which held that waiver of a jury trial in this instance was consistent with section 80. In reaching this decision, French CJ and Gageler J, who both produced separate judgments, adopted relatively explicit functionalist reasoning in their analysis of the purposes or values protected by section 80. By contrast, the other members of the Court relied heavily on the wording of section 80 of the *Constitution* and dismissed the opportunity for explicit functionalist reasoning. The result was an unsatisfactory set of judgments that neither settled the meaning of the words of section 80 nor the specific functional values section 80 upholds. This, in general, continues the unsettled tradition of section 80 within constitutional jurisprudence.

Given the somewhat unsatisfactory judgments delivered by the Court in this instance, this case note aims to demonstrate how those judges who adopted a textual reading of section 80 concealed the formal legal indeterminacy of the text, history and meaning of the provision, as well as the flexibility in which section 80 has been interpreted in other judicial contexts.²

In critiquing this textual approach in *Alqudsi*, this case note argues the joint judgment of Kiefel, Bell and Keane JJ and the joint judgment of Nettle and Gordon JJ could have more transparently acknowledged the legitimate functionalist arguments that supported their decisions. There are important functional value and policy reasons that support the idea that indictable offences under federal law should *not* permit waiver of a jury trial. However, by relying on a textual reading of section 80, these judges missed the opportunity to clearly elucidate these values, meaningfully engage with the act of balancing these values and consider the broader consequences of their decision. When

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¹ (2016) 258 CLR 203 ('*Alqudsi*').

² See, eg, *Kingswell v The Queen* (1985) 159 CLR 264 ('*Kingswell*').

they mentioned values, they were in the form of vague formulations of the way in which section 80 protects the ‘principles which underpin our federal system of government’³ or brief allusions to the role of section 80 in ‘the structure of government’⁴ at the end of their judgment.

By explicitly acknowledging the functional values and interpretive decisions made in their reasoning, Kiefel, Bell, Keane, Nettle and Gordon JJ would have offered a more transparent and clear set of judgments, which would be more predictable. This is normatively desirable and consistent with modern notions of good government and judicial decision-making.⁵ More broadly, this critique of *Alqudsi* highlights the desirability of more explicit functionalist reasoning in constitutional interpretation in Australia.

II BRIEF CONTEXT TO *ALQUDSI* AND FUNCTIONALISM

By way of summary, *Alqudsi* concerned an applicant who was charged with seven offences against section 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). This section makes it an offence to give money, goods or services to another person or body for the purposes of supporting or promoting an incursion into a foreign country for engaging in hostile activities.⁶ Under section 132 of the *Criminal Procedure Act 1986* (NSW), the applicant made a motion to be tried by judge alone. After an application by the Commonwealth Attorney-General, the question ultimately before the Court in *Alqudsi* was:

Are s 132(1)-(6) of the *Criminal Procedure Act 1986* (NSW) incapable of being applied to the Applicant’s trial by s 68 of the *Judiciary Act 1903* (Cth) because their application would be inconsistent with s 80 of the *Constitution*?⁷

This question was essentially whether the applicant’s motion to be tried by judge alone was incompatible with section 80 of the *Constitution*, as applied by section 68 of the *Judiciary Act 1903* (Cth). Section 80 provides that the ‘trial on indictment of any offence against any law of the Commonwealth shall be by jury’. The majority of the Court (Kiefel, Bell and Keane JJ in a joint judgment, Gageler J in a separate judgment and Nettle and Gordon JJ in a separate joint judgment) held that the application of section 132 of the *Criminal Procedure Act 1986* (NSW) was inconsistent with section 80 of the *Constitution*. This was because it allowed for waiver of a jury trial for an indictable offence under federal law. French CJ dissented, holding that such voluntary waiver of a jury trial was consistent with section 80.

³ *Alqudsi v The Queen* (2016) 258 CLR 203, 265 [166] (Nettle and Gordon JJ).

⁴ *Ibid* 251 [115] (Kiefel, Bell and Keane JJ).

⁵ Rosalind Dixon, ‘The Functional Constitution: Re-reading the 2014 High Court Constitutional Term’ (2015) 43 *Federal Law Review* 455, 461, citing Sir Anthony Mason, ‘Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?’ (2003) 24 *Adelaide Law Review* 15, 21.

⁶ See also *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 6.

⁷ *Alqudsi* (2016) 258 CLR 203, 211 [12] (French CJ), 239 [82] (Kiefel, Bell and Keane JJ), 263 [158] (Nettle and Gordon JJ). See also Jeremy Gans, ‘*Alqudsi v The Queen*’ on *Melbourne Law School: Opinions on High* (15 June 2016) <<https://blogs.unimelb.edu.au/opinionsonhigh/2016/06/15/alqudsi-case-page/>>.

Given this brief overview of *Alqudsi*, what does functionalism have to do with this case? The key point is that the counsel supporting the applicant in his appeal to the Court raised functionalist arguments in support of their case. In arguing that the terms of section 80 were consistent with waiver of a jury trial, counsel for the applicant argued that section 80 was a constitutional guarantee that should accordingly be read purposively or functionally. They suggested this was similar to the way in which sections 92 and 117 of the *Constitution* have been interpreted broadly by the Court as constitutional guarantees.⁸

Jeremy Kirk SC argued on behalf of the applicant that ‘the text is not an ultimate answer’ when interpreting section 80 of the *Constitution*.⁹ He suggested instead that section 80 allows for waiver of a jury trial as long as the purposes or values of the provision are upheld. He suggested these values were ‘the advancement of the liberty of an accused’ and the ‘proper administration of criminal justice’, which are consistent with the text, context and purpose of section 80 and the *Constitution* more broadly.¹⁰ Gleeson SC likewise suggested section 80 upholds the values of ‘the protection of the accused’ and ‘community interest in community fact finding in the judicial process’ sourced from the history, purpose and context of the provision.¹¹ He argued for ‘not a formalistic approach but a functional approach’¹² to section 80 that would allow for waiver of a jury trial in circumstances where waiver promotes these values. Indeed, counsel for the applicant suggested waiver would *best* pursue the values enshrined by section 80 and the *Constitution* in the circumstances of the case.¹³

In arguing that section 80 should allow for waiver, counsel for the applicant suggested that the Court should apply functionalist reasoning. Functionalism is an approach to interpretation that acknowledges there are instances where recourse to formal legal materials such as precedent and text are unable to resolve a particular issue or point of interpretive indeterminacy. In such instances, to rely on formal legal materials to resolve the issue has been labelled by Felix Cohen as a form of ‘transcendental nonsense’.¹⁴ This is because it ignores the real zone of *constructional choice* a judge works within in choosing between the range of legitimate interpretations available for an ambiguous provision. Functionalism suggests the only meaningful way to operate within this zone of constructional choice is to choose the interpretation of a provision that would lead to the *best* implications or consequences.¹⁵ For functionalism, the ‘best’ consequences are those most likely to promote the functional values of the provision or the law in general.

⁸ *Cole v Whitfield* (1988) 165 CLR 360; *Street v Queensland Bar Association* (1989) 168 CLR 461.

⁹ Transcript of Proceedings, *Alqudsi v The Queen* [2016] HCATrans 13 (10 February 2016).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Felix S Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Columbia Law Review* 809, 811. See generally Erwin Chemerinsky, ‘Formalism and Functionalism in Federalism Analysis’ (1997) 13 *Georgia State University Law Review* 959; William Eskridge Jr, ‘Relationships between Formalism and Functionalism in Separation of Powers Cases’ (1998) 22 *Harvard Journal of Law & Public Policy* 21; Peter Gerangelos, ‘Interpretation Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate’ (2005) 8 *Constitutional Law and Policy Review* 1.

¹⁵ Cohen, above n 14, 838. See also Dixon, ‘The Functional Constitution’, above n 5, 464.

As outlined by Rosalind Dixon in her analysis of functionalist reasoning as applied to constitutional interpretation in Australia, functionalism requires a commitment to two broad principles.¹⁶ Firstly, a commitment to asking what purposes or values various constitutional provisions or structures can be seen to promote.¹⁷ Secondly, a commitment to asking how these provisions or structures can be interpreted in a way that best advances or balances these purposes or values.¹⁸ This also necessarily requires an acknowledgment that judges do have constructional choices and a range of ways in which they can interpret many formal legal sources.¹⁹ This also requires attention to the potential outcome of a particular constructional choice, and the balancing of this potential outcome against the counterfactual consequences of alternate constructional choices.²⁰ Whilst noting functionalist reasoning will not necessarily be applicable to all circumstances or constitutional provisions, Dixon persuasively argues functionalism ‘offers a potentially attractive middle-path between the extremes of pure formalism and pragmatism’.²¹ This is because it allows for consideration of purposes and values (favoured by pragmatism), but only those purposes or values supported by, or consistent with, formal legal materials (favoured by formalism).²² In the case of constitutional interpretation in Australia, the foremost of these formal legal materials would be the text, history and structure of the *Constitution*.

Dixon is not alone in arguing for more consistent functionalist reasoning in constitutional interpretation. James Stellios has acknowledged the ‘enormous potential for transparent engagement with constitutional meaning’²³ of functionalism. Peter Strauss has noted how functionalism openly accepts the contextual analyses involved in judicial reasoning, whilst formalism obscures these analyses.²⁴ Functionalist reasoning has been received by scholars in Australia as offering the potential for predictability, transparency and clarity in constitutional reasoning.²⁵

III CRITIQUING THE REASONING OF THE COURT IN *ALQUDSI*

Whilst counsel representing the applicant in *Alqudsi* promoted a functionalist approach to section 80 of the *Constitution*, only French CJ and Gageler J engaged with functionalist reasoning in a wholehearted manner. By contrast, the other judges of the Court relied predominantly on the wording of section 80 to dismiss the applicant’s motion for waiver of a jury trial. The transparency, clarity and persuasiveness of their judgments would have been strengthened had they wholeheartedly engaged with the functionalist arguments of the applicant.

¹⁶ Dixon, ‘The Functional Constitution’, above n 5, 462.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.* 464–5.

²⁰ *Ibid.* 474.

²¹ *Ibid.* 456 (emphasis omitted).

²² *Ibid.* 462.

²³ James Stellios, ‘Conceptions of Judicial Review: Commentary on Dixon’ (2015) 43 *Federal Law Review* 511, 512.

²⁴ Peter L. Strauss, ‘Formal and Functional Approaches to Separation-of-Powers Question – A Foolish Inconsistency?’ (1987) 72 *Cornell Law Review* 488, 526.

²⁵ See generally Gabrielle Appleby, ‘Functionalism in Constitutional Interpretation: Factual and Participatory Challenges; Commentary on Dixon’ (2015) 43 *Federal Law Review* 493; Brendan Lim, ‘The Convergence of Form and Function: Commentary on Dixon’ (2015) 43 *Federal Law Review* 505; Stellios, ‘Conceptions of Judicial Review’, above n 23.

A French CJ

French CJ's dissenting judgment offers the most explicitly functionalist approach to section 80. His Honour accepted the applicant's argument that section 80, as a constitutional guarantee, was not so clear and unambiguous to prevent a functionalist reading.²⁶ Acknowledging the indeterminacy of the text of section 80 and the flexibility in which prior decisions of the Court have read the provision to afford wide discretion to Parliament, French CJ went on to examine whether the history and structure of the provision within the broader context of the *Constitution* provided guidance to interpreting section 80.²⁷ This is a typically functionalist approach that focuses on the importance of giving effect to the 'evident purpose' of section 80 that is consistent with the text, history and structure of the *Constitution* (rather than simply *any* values or policies).²⁸ Importantly, in doing so, French CJ acknowledged the zone of 'constructional choice'²⁹ inherent in such an act of judicial reasoning and interpretation of section 80.

Referring to the Convention Debates,³⁰ decisions of the Supreme Court of the United States³¹ and prior decisions of the Court,³² French CJ held that section 80 has an *institutional* value that protects judicial power for trials on indictment under federal law and strengthens the judicial process by ensuring the involvement of the wider community in the criminal justice system.³³ He also held that section 80 has a *rights protective* value in ensuring the right of an accused to trial by jury.³⁴ Applying these functional values to the circumstances of the case, French CJ held waiver of a jury trial if both the accused and the prosecutor agreed, or if a court considered it in the interests of justice to do so, would *best* respect the institutional and rights protective values of section 80.³⁵

B Gageler J

Gageler J also engaged with a functionalist reading of section 80, although in a more qualified manner than French CJ. Gageler J, in holding that section 80 of the *Constitution* did not allow for waiver of a jury trial, dismissed the applicant's argument that section 80 should be interpreted in a functionalist way that pursued two institutional and rights protective purposes. His Honour instead argued:

The deeper flaw in the applicant's argument is that the two purposes which the applicant ascribes to the relevant prescription are simply too limited. Not only does confining the prescription by reference to those two purposes fail to accommodate the sweeping and unqualified language in which the prescription is couched. It fails to explain the content

²⁶ *Alqudsi* (2016) 258 CLR 203, 238 [75]–[76].

²⁷ *Ibid* 213–14 [18], 238 [74].

²⁸ *Ibid* 221 [34].

²⁹ *Ibid*.

³⁰ *Ibid* 213–14 [18].

³¹ *Ibid* 222–7 [37]–[45].

³² See, eg, *ibid* 231–2 [58], citing *Cheng v the Queen* (2000) 203 CLR 248 ('*Cheng*'). See also *ibid* 236 [70], citing *Brown v The Queen* (1986) 160 CLR 171 ('*Brown*').

³³ *Ibid* 214 [18], 236 [70].

³⁴ *Ibid* 214 [18], 236 [70], 238 [75].

³⁵ *Ibid* 238 [75].

of the prescription. And it fails to heed the full significance of trial by jury within our constitutional tradition.³⁶

Gageler J instead focused on both the text and the *democratic* purpose of section 80, a purpose his Honour found was consistent with the history, structure and text of the *Constitution*.³⁷ His Honour explicitly referred to the values of a jury trial elucidated by Deane J in *Kingswell*, focusing foremost on the value of a jury trial for allowing community input into the administration of criminal justice.³⁸ In adopting this functionalist reasoning, Gageler J held section 80 did not allow for waiver of a jury trial for an indictable offence under federal law in this case.³⁹

Both French CJ's and Gageler J's judgments represent a promising approach to section 80 that both acknowledges its ambiguity and attempts to resolve this ambiguity by reference to functional values and purposes consistent with the text, history and structure of the *Constitution*. As is inevitable in functionalist reasoning, both French CJ and Gageler J ascribed different weights to these values and defined them at different levels of abstraction. There was also a degree of slippage in their published reasons between purposive reasoning (which considers *any* policies or values) and functionalist reasoning (which considers only those policies or values internal or immanent to formal constitutional sources).⁴⁰ For example, French CJ's reference to United States jurisprudence on jury trials stretches the bounds of functionalist reasoning by considering precedent arguably divorced from the values immanent to Australian constitutional and formal legal sources. Their judgments would also have been strengthened had they better considered the factual (and counterfactual) consequences of their decisions to determine which interpretation of section 80 would best promote formal constitutional values.

Nevertheless, French CJ and Gageler J delivered promising judgments because they acknowledged the role that values played in their reasoning with respect to an ambiguous provision. This is a normatively desirable approach because it involves an acceptance of both the zone of constructional choice judges work within in interpreting equivocal provisions and the influence of values in choosing between alternative interpretations. It accepts what Sir Anthony Mason calls the Court's 'law-making role'.⁴¹ This is because it acknowledges how the Court does not simply declare the law, but exercises discretion in instances of ambiguity to *create* legal precedent that is (ideally) justifiable and reasonable. As noted by George Williams, Sean Brennan and Andrew Lynch, diverse legal theorists such as Jack Balkin and Jeffrey Goldsworthy both admit that judicial interpretation does inevitably require some element of judicial creativity, such as in flexible or purposive interpretation.⁴² Whereas French CJ and

³⁶ Ibid 254 [127].

³⁷ Ibid 254 [129], 256 [133].

³⁸ Ibid 257 [135], citing *Kingswell* (1985) 159 CLR 264, 301 (Deane J).

³⁹ Ibid 258–9 [140]–[141].

⁴⁰ Dixon, 'The Functional Constitution', above n 5, 461.

⁴¹ Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court: A Comment' (1998) 20 *Adelaide Law Review* 173, 173.

⁴² George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory: Commentary & Materials* (Federation Press, 6th ed, 2014) 213. See also Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation*

Gageler J acknowledged the degree of choice, creativity and discretion involved in their interpretation of section 80, the joint judgments of Kiefel, Bell and Keane JJ and Nettle and Gordon JJ largely avoided such acknowledgments.

C Kiefel, Bell and Keane JJ

Kiefel, Bell and Keane JJ's joint judgment focused primarily on the 'command' of the text of section 80 to dismiss the applicant's motion for waiver of a jury trial.⁴³ They argued that nothing about the wording of section 80 was 'ambiguous or qualified' and therefore did not allow for a more flexible purposive or functionalist reading of the provision to permit waiver.⁴⁴ They argued:

Nothing in the decisions of this Court since *Brown* supports the proposition that the plain words of s 80 may be read as subject to exception when a court assesses it is in the interests of justice that the trial on indictment of an offence against any law of the Commonwealth be by judge alone.⁴⁵

Their judgment evidently appealed to a more common-sense approach to section 80 supported by references to the statedly unambiguous, unqualified and plain words of the provision. Kiefel, Bell and Keane JJ dismissed the balancing of values proposed by the applicant as part of a broader functionalist approach as 'not to the point' at hand.⁴⁶ Rather, they said what 'was to the point were the clear terms' of section 80 of the *Constitution*.⁴⁷

The undesirability of this approach is that it conceals the formal legal indeterminacy of the text, history and meaning of section 80, as well as the way in which section 80 has been interpreted in other contexts by the Court to afford maximum flexibility to Parliament. For example, whilst the plain text of section 80 states that trials for indictable federal offences 'shall be by jury', it is unclear whether this confers on the accused a *right* to a jury (which may be waived) or mandates jury trials in *all* instances. In addition, as noted by French CJ in his own judgment in *Alqudsi*, the Convention Debates offer little insight into the purpose of section 80 of the *Constitution*.⁴⁸ French CJ argued the Convention Debates offer no record of discussion between the delegates on whether or not section 80 would allow for waiver of a jury trial on indictment.⁴⁹ In refusing to reopen *Brown*, Kiefel, Bell and Keane JJ also inadequately addressed the diverse and indeterminate prior reasoning of the Court in that decision regarding section 80 waiver.⁵⁰

The general ambiguity of the framing history of section 80 is emphasised by Amelia Simpson and Mary Wood, who highlight how the Convention Debates offer at best an

(Cambridge University Press, 2011) 42, 64; Jack M Balkin, 'Framework Originalism and the Living Constitution' (2009) 103 *Northwestern University Law Review* 549, 549.

⁴³ *Alqudsi* (2016) 258 CLR 203, 250 [113].

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, citing *Brown* (1986) 160 CLR 171.

⁴⁶ *Alqudsi* (2016) 258 CLR 203, 251 [118].

⁴⁷ *Ibid.*

⁴⁸ *Ibid* 213 [18].

⁴⁹ *Ibid* 222 [35].

⁵⁰ James Stellios, *The Federal Judicature: Chapter III of the Constitution: Commentary and Cases* (LexisNexis Butterworths, 2010) 537–42.

indeterminate view of section 80 and at worst represent a ‘minefield of contradictions and ambiguities’.⁵¹ Dixon likewise notes the Court’s typical approach to section 80 ‘seems somewhat puzzling – or at least cannot be explained simply by reference to the relevant text, or the timing of key cases’.⁵² By adopting a strict textual view of section 80 whilst offering the benefit of apparent objectivity, Kiefel, Bell and Keane JJ ignored the ambiguities that exist beneath the surface of its text.

Furthermore, this textual view of section 80 runs contrary to how the provision has been interpreted in other contexts by the Court. In *Kingswell*, the majority of the Court affirmed that it is entirely at the discretion of Parliament to determine whether or not to define an offence as ‘on indictment’ and hence enliven section 80.⁵³ This accords maximum flexibility to Parliament. By contrast, the approach of Kiefel, Bell and Keane JJ in *Alqudsi*, whilst continuing the Court’s tradition of reading section 80 literally, restricts Parliament’s ability to provide for waiver of a jury trial. The restrictive outcome of their decision in *Alqudsi* is incongruous with the flexibility given to Parliament under the established interpretation of section 80 in other contexts, an incongruity likewise noted by French CJ in his dissent.⁵⁴ Whilst it should be noted that *Kingswell* dealt with the phrase ‘on indictment’ and *Alqudsi* with the phrase ‘shall be by jury’ in section 80, in outcome they demonstrate an inconsistent approach to this provision. This is because *Alqudsi* and *Kingswell* accord Parliament varying degrees of flexibility with respect to section 80, with little coherent reason for such a distinction beyond textualism. Moreover, as demonstrated in *Pearson*, other seemingly unqualified terms of the Constitution, such as section 41, have been interpreted in a more purposive manner than a purely textual view would first suggest, a fact also noted by Gageler J in his judgment in *Alqudsi*.⁵⁵

The more significant problem with the approach of Kiefel, Bell and Keane JJ in *Alqudsi* is that their reliance on the text of section 80 prevented a more wholehearted consideration of the functional values supporting their interpretation. Towards the end of their judgment, these judges admitted that a consideration of constitutional context and purpose promoted by the applicant’s functionalist argument ‘should not go unremarked’.⁵⁶ In support of their reading of section 80, the judges noted their construction was ‘consistent with the object of the provision being to prescribe how the judicial power of the Commonwealth is engaged in the trial on indictment of Commonwealth offences’.⁵⁷ In the proceeding paragraphs, Kiefel, Bell and Keane JJ referred to the purpose of section 80 as foremost promoting community confidence in and protecting the administration of criminal justice.⁵⁸ This appears to be their attempt to acknowledge the functionalist arguments raised by the applicant, before turning back again to their emphasis on the ‘clear terms’ of section 80.⁵⁹

⁵¹ 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, 111.

⁵² Rosalind Dixon, ‘An Australian (Partial) Bill of Rights’ (2016) 14 *International Journal of Constitutional Law* 80, 82.

⁵³ (1985) 159 CLR 264, 276–7 (Gibbs, Wilson and Dawson JJ). See also *Cheng* (2000) 203 CLR 248.

⁵⁴ *Alqudsi* (2016) 258 CLR 203, 238 [74].

⁵⁵ *Ibid* 253 [125], citing *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 (*‘Pearson’*).

⁵⁶ *Ibid* 251 [115].

⁵⁷ *Ibid*.

⁵⁸ *Ibid* 251 [115]–[117].

⁵⁹ *Ibid* 251 [118].

This allusion to functionalist reasoning is unsatisfactory. Firstly, it is brief and bookended by references to the clear terms of section 80. This prevents clear engagement with the zone of constructional choice surrounding provisions like section 80 that are ambiguous in origin and purpose. It ignores what Sir Anthony Mason calls the Court's 'law-making role'.⁶⁰ Secondly, it defines the functional values of section 80 broadly. Referring to the broader functional purpose of section 80 within the 'structure of government'⁶¹ and its role in protecting community confidence in the administration of justice,⁶² these judges did not clearly explain how these values and purposes were to be sourced from the text, history and structure of the *Constitution*, as opposed to *any* policy values or purposes. Thirdly, Kiefel, Bell and Keane JJ did not consider how best to balance the various values or purposes of section 80 and the *Constitution* to decide upon an interpretation that would lead to the *best* outcome that supports these values. At best, these judges entertained a weak purposive approach to section 80 at the end of their judgment, rather than the more overt functionalist approach raised by the applicant.

This judgment is also unsatisfactory because Kiefel, Bell and Keane JJ could have justifiably reasoned their decision on explicit functionalist grounds. There are legitimate functionalist reasons supporting the interpretation that section 80 should *not* allow for waiver of a jury trial in the circumstances of *Alqudsi*. To take Deane J's formulation of the values of a jury trial in *Kingswell*, section 80 has three broad functionalist purposes: first, protecting the individual accused; second, ensuring community input into the criminal justice system; and third, promoting community confidence in the administration of justice.⁶³ In the factual circumstances of *Alqudsi* (as a terrorism-related trial), allowing for waiver would promote the first of those values, in that it would likely protect the individual accused from adverse pre-trial publicity and a potentially hostile jury. This is evinced by *Alqudsi*'s decision to waive a jury trial.⁶⁴ However, allowing for waiver in this instance would *not* ensure the second value of community input into the trial and would *not* promote the third value of community confidence in the administration of justice. If Kiefel, Bell and Keane JJ were to have adopted functionalist reasoning in support of their reading of section 80, they could have openly acknowledged that, in their assessment, the second and third values of a jury trial *outweighed* the first value of protecting the individual accused. This would have been a legitimate functionalist argument. This would have required them to explicitly balance the functional values they defined as consistent with the text, history and structure of the *Constitution* and use this to decide upon an interpretation of section 80. This would have also required attention to the likely factual consequences of their decision. However, in relying on the text of section 80, Kiefel, Bell and Keane JJ only offered a weak and piecemeal consideration of values and functional purposes

In the reasoning of Kiefel, Bell and Keane JJ, a more wholehearted functionalist approach would not only have been legitimate but normatively desirable. This is because a functionalist approach would have acknowledged the formal legal indeterminacy of section 80 and provided the judges with a legitimate method of

⁶⁰ Mason, above n 41, 173.

⁶¹ *Alqudsi* (2016) 258 CLR 203, 251 [115].

⁶² *Ibid* 251 [117].

⁶³ *Kingswell* (1985) 159 CLR 264, 300–1.

⁶⁴ *Criminal Procedure Act 1986* (NSW) s 132.

resolving this indeterminacy. By referring vaguely to the purposive value of section 80 within the ‘structure of government’,⁶⁵ these judges indicated that they were to an extent informed by values-based logic, or at least by an uneasiness with waiver of jury trial within the criminal justice system. However, by relying predominantly on textualism, they missed the opportunity to clearly define or clarify the influence of this values-based reasoning in their judgment. Functionalist reasoning would therefore have been desirable in this instance because it would have offered increased *transparency*. It would also have offered increased *clarity* by better defining the values enshrined within section 80 and the *Constitution* more generally, providing a coherent theory in which to justify a particular interpretation of section 80 by reference to constitutional text, history and structure. This is especially desirable as Stellios has clearly demonstrated that the Court has still not provided a coherent theory or doctrinal foundation for section 80.⁶⁶

This is not to say that functionalist reasoning should be necessarily applied to all issues of constitutional interpretation or all provisions of the *Constitution*. There are settled provisions of the *Constitution* which may provide, in their text and structure alone, unambiguous answers to the potentially various legal disputes placed before them. In these instances, functionalist reasoning has a restricted role to play and should be logically limited to circumstances where there is some textual ambiguity or formal uncertainty. However, as evinced by the judgment of Kiefel, Keane and Bell JJ, the Court should be more willing to acknowledge provisions of the *Constitution* which are legitimately uncertain and ambiguous, such as section 80. This would also entail acknowledging the ambiguity of many provisions of the *Constitution* and other formal legal sources when scrutinised closely by lawyers and courts under different factual circumstances. Under close analysis, seemingly unambiguous mandatory provisions have been read to accommodate ambiguity, values or limitations, as again noted by Gageler J in *Alqudsi*.⁶⁷ This further highlights the desirability for a broader consistent theory of how to direct such ambiguities, value judgments or limitations when judges are motivated to go beyond the words of the text of the *Constitution*.

D Nettle and Gordon JJ

The judgment of Nettle and Gordon JJ likewise offers little engagement with functionalist reasoning. On the contrary, their judgment focused primarily on the ‘unqualified’⁶⁸ and ‘absolute terms’⁶⁹ of section 80 to dismiss the applicant’s motion for waiver of a jury trial. These judges argued the ‘mandatory terms of s 80 cannot be ignored’ and dismissed the functionalist submissions of the applicant.⁷⁰ The reason for this was that, unlike sections 92 and 117 of the *Constitution*, Nettle and Gordon JJ suggested section 80 had ‘nothing open-textured or undefined about its terms’ to admit a functionalist gloss on its words.⁷¹

⁶⁵ *Alqudsi* (2016) 258 CLR 203, 251 [115].

⁶⁶ James Stellios, ‘The Constitutional Jury: “A Bulwark of Liberty”?’ (2005) 27 *Sydney Law Review* 113, 120.

⁶⁷ *Alqudsi* (2016) 258 CLR 203, 253 [125], citing *Pearson* (1983) 152 CLR 254.

⁶⁸ *Ibid* 266 [173].

⁶⁹ *Ibid*.

⁷⁰ *Ibid* 268 [178].

⁷¹ *Ibid* 172 [187].

The same criticism of Kiefel, Bell and Keane JJ can therefore be directed at Nettle and Gordon JJ in their approach to section 80 in *Alqudsi*. This includes the ambiguity that nevertheless exists as to the purpose of section 80 and the intention of the framers in their drafting of the provision, particularly regarding the availability of waiver. Nettle and Gordon JJ's reliance on the text of section 80 precluded meaningful engagement with the purposes or values promoted by section 80 and the *Constitution* in *Alqudsi*. In their judgment, they referred broadly to the purpose of section 80 and Chapter III within the 'federal compact'⁷² and the separation of powers in the *Constitution*.⁷³ Referring to these broad 'principles which underpin our federal system',⁷⁴ they dismissed a functionalist reading of section 80 that would allow for waiver in some instances where it is in the interests of justice to do so. Nettle and Gordon JJ defined the functional values and purposes supporting section 80 broadly and did not engage with any meaningful functionalist balancing of values or potential consequences. Again, this is not normatively desirable.

IV THE BROADER CASE FOR FUNCTIONALIST REASONING IN *ALQUDSI*

Alqudsi provides an insight into the mix of formalist and functionalist reasoning that informs the Court's approach to constitutional issues such as the right to a jury trial. The aim of this case note is not only to critique the formalist reasoning in *Alqudsi*. It also aims to demonstrate how a more wholehearted application of functionalist reasoning in cases such as *Alqudsi* would be normatively desirable. As noted, this is because functionalism offers a legitimate middle ground between pragmatism and formalism.⁷⁵ Furthermore, as demonstrated in *Alqudsi*, the conclusion reached by the Court could have legitimately been reasoned on functionalist grounds. This would have had the benefit of both acknowledging the formal legal indeterminacy of section 80⁷⁶ and resolving this indeterminacy according to values legitimately sourced from the text, history and structure of the *Constitution*.

To emphasise the normative desirability of this functionalist approach to section 80 and constitutional interpretation in general, it is appropriate to briefly address potential criticisms of functionalist reasoning as applied to the facts of *Alqudsi*.

One critique would be to argue that the formal textual approach of Kiefel, Bell, Keane, Nettle and Gordon JJ in *Alqudsi* was legitimate and desirable. This is because the text of section 80 is undoubtedly important in constitutional interpretation. This argument accords generally with proponents of constitutional originalism, such as Jeffrey Goldsworthy, who sees the primary duty of a judge as to 'reveal and clarify' the pre-existing meaning of a constitutional provision.⁷⁷ When the text is sufficiently clear, Goldsworthy suggests there is no need for a judge to act creatively to supplement it.⁷⁸

⁷² Ibid 266 [169].

⁷³ Ibid 269 [179]. See generally James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113.

⁷⁴ *Alqudsi* (2016) 258 CLR 203, 270 [183].

⁷⁵ Dixon, 'The Functional Constitution', above n 5, 456.

⁷⁶ Simpson and Wood, above n 51, 107; James Stellios, 'The Constitutional Jury', above n 66, 133–4.

⁷⁷ Goldsworthy, above n 42, 60.

⁷⁸ Ibid.

This literalist or textualist approach to interpretation also has a legitimate and venerable background in Australia, promoted by Sir Garfield Barwick and Dyson Heydon.⁷⁹

However, in *Alqudsi* the text of section 80 may belie its ambiguity and disguise value judgments and discretion. As noted previously, Simpson and Wood have emphasised the ambiguity of the framers' intention as to section 80.⁸⁰ Stellios has likewise noted that section 80 does not represent any clearly expressed intention or theory.⁸¹ Moreover, Kiefel, Bell, Keane, Nettle and Gordon JJ in *Alqudsi*, in choosing to read the word 'shall' in section 80 as clear and mandatory, arguably made a *choice* to do so. As argued by the applicant, there are other instances where the Court has decided that clear and mandatory words such as 'absolutely free' should not be read as an inflexible command.⁸² By arguing on textualist or literalist grounds that they had *no choice* but to read 'shall' in section 80 as a clear and mandatory command, these judges foreclosed meaningful consideration of the values and discretion that may have motivated their decision in this choice in interpretation. Functionalist reasoning is normatively desirable in this instance because it acknowledges the choice that judges have in interpreting a provision such as section 80. It also has the potential to substantiate these constructional choices by supporting them with functional purposes consistent with the formal text, history and structure of the *Constitution*.

Accordingly, a functionalist approach to section 80 exposes the discretion often involved in constitutional interpretation and provides a legitimate method for addressing this discretion. This is acknowledged by Dixon, who highlights functionalist reasoning 'explicitly acknowledges the existence of interpretive discretion and choice of this kind'.⁸³ The benefit of this approach, as opposed to the approach of Kiefel, Bell, Keane, Nettle and Gordon JJ who suggested they had *little choice*, is transparency and open engagement with the discretion judges have in interpreting unsettled provisions like section 80.

A second point of criticism would be that functionalism raises new areas of judicial discretion and hence unpredictability. In *Alqudsi*, there was disagreement as to *how* to define the various functional values of section 80 and from *where* to source the functional values of the provision. For example, French CJ and Gageler J defined the relevant functional values or purposes of section 80 and the *Constitution* at different levels of abstraction. French CJ argued the jury trial has both an 'institutional and a rights protective dimension'⁸⁴ whereas Gageler J focused primarily on the 'democratic purpose'⁸⁵ of jury trials. In addition, in locating these functional values, French CJ was willing to refer extensively to decisions of the Supreme Court of the United States for direction, ideas and insight.⁸⁶ By contrast, Gageler J reasoned predominantly from

⁷⁹ Williams, Brennan and Lynch, above n 42, 170–2, quoting *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiii; *Retirement of Sir Garfield Barwick as Chief Justice* (1981) 148 CLR v, ix–x; J D Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' [2007] (Winter) *Bar News: The Journal of the NSW Bar Association* 12, 26.

⁸⁰ Simpson and Wood, above n 51, 107.

⁸¹ Stellios, 'The Constitutional Jury', above n 66, 120.

⁸² See, eg, *Cole v Whitfield* (1988) 165 CLR 360. See also *Alqudsi* (2016) 258 CLR 203, 253 [125] (Gageler J), citing *Pearson* (1983) 152 CLR 254.

⁸³ Dixon, 'The Functional Constitution', above n 5, 465.

⁸⁴ *Alqudsi* (2016) 258 CLR 203, 227 [45].

⁸⁵ *Ibid* 257 [135].

⁸⁶ *Ibid* 227 [45].

precedent, the historical tradition of jury trials and the structural place of section 80 within Chapter III of the *Constitution*.⁸⁷ Evidently, in entertaining functionalist arguments, these two judges exposed themselves to new sites of judicial discretion, choice and indeterminacy.

This potential for increased discretion is recognised by Brendan Lim. Lim argues functionalist reasoning creates widened opportunity for judicial discretion over *what* constitutional values are relevant, *where* these constitutional values can be sourced from and *how* to balance these various constitutional values.⁸⁸ This concern is echoed by Gabrielle Appleby, who suggests functionalism does not ‘resolve the question of unrestrained judicial choice’.⁸⁹ Jonathan Turley likewise suggests the ‘weakness of functionalism in constitutional interpretation is the definition of the relevant function’,⁹⁰ as does Adrienne Stone, questioning the extent to which the text and structure of the *Constitution* provides guidance to lawyers or judges.⁹¹ Rebecca Welsh highlights that a consequence of this increased functionalist discretion could be a gradual erosion of judicial principle, independence and impartiality.⁹²

There are persuasive reasons suggesting against this critique of functionalism and for more wholehearted functionalist reasoning. The foremost is that whilst functionalist reasoning invites values-based conflict and potentially new sources of legal indeterminacy, it encourages judges to be more *transparent* in acknowledging these zones of indeterminacy. Functionalism also provides a solution to this indeterminacy: resolving ambiguity by reference to those values or policies consistent with, or inherent to, the *Constitution*.⁹³ By *exposing* rather than obscuring judicial discretion, functionalism encourages increased predictability and transparency in judicial reasoning, consistent with modern notions of good government.⁹⁴ Dixon herself acknowledges this potential for new sources for legal indeterminacy, but argues a turn to more explicit (rather than implicit) engagement with these zones of indeterminacy is most likely to ‘sharpen or improve our current constitutional discourse’⁹⁵ rather than hinder it. Moreover, the values disagreement between French CJ and Gageler J is likely to better contribute to a clearer conception of section 80 in the long term. This is because some level of *open* debate is likely to provide a coherently reasoned and clarified theory for section 80 in the future.

V THE FUTURE FOR FUNCTIONALISM IN AUSTRALIA

The Court’s decision in *Alqudsi* accordingly represents the broader challenges and opportunities of functionalist reasoning within constitutional interpretation in Australia. The joint judgment of Kiefel, Bell and Keane JJ and the joint judgment of Nettle and

⁸⁷ Ibid 257–8, [135]–[139].

⁸⁸ Lim, above n 25, 507–9.

⁸⁹ Appleby, above n 25, 493.

⁹⁰ Jonathan Turley, ‘Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation’ (2015) 83 *George Washington Law Review* 305, 314.

⁹¹ Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28 *University of New South Wales Law Journal* 842, 844.

⁹² Rebecca Welsh, ‘A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality’ (2013) 39 *Monash University Law Review* 66, 94–5.

⁹³ Dixon, ‘The Functional Constitution’, above n 5, 461.

⁹⁴ Ibid.

⁹⁵ Rosalind Dixon, ‘Response to Commentators’ (2015) 43 *Federal Law Review* 517, 521.

Gordon JJ relied on unsatisfactory references to the text of section 80. This was problematic as it obscured the legitimate uncertainty surrounding section 80 and led these judges to engage with functional or constitutional values in only a piecemeal way. This is particularly unsatisfactory because their decision could have legitimately been justified on functionalist grounds.

Rather than deciding the outcome of the case on an unsatisfactory mixture of textualism and weak purposivism, Kiefel, Bell, Keane, Nettle and Gordon JJ in *Alqudsi* should have more wholeheartedly engaged with functionalist reasoning. This is because functionalist reasoning offers a more transparent and predictable method of interpreting provisions which are ambiguous. By using values consistent with the formal text, history and structure of the *Constitution*, an interpretation that *best* pursues these constitutional values can be adopted. This highlights the broader desirability of functionalism in Australian constitutional interpretation.

In the future, commentators, lawyers and judges should be more willing to engage with the challenges and opportunities of functionalist reasoning in constitutional interpretation in Australia. There are undoubtedly challenges associated with functionalism, including the potential for increased judicial discretion noted above. Functionalist reasoning may also not be applicable to all provisions of the *Constitution*, if these certain provisions provide no legitimate grounds for ambiguity or constructional choice. However, this case note emphasises that the opportunity for more transparent and clear judicial reasoning associated with functionalism outweighs any potential challenges. As demonstrated in a brief analysis of *Alqudsi*, functionalist reasoning is worthy of more sustained attention and development in Australia.