HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY

BETWEEN: **SIMON VUNILAGI**
Appellant

AND: **THE QUEEN**
First Respondent

ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (intervening) by:

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PART I FORM OF SUBMISSIONS

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

PARTS II AND III BASIS OF INTERVENTION

2. The Commonwealth Attorney-General intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the validity of s 68BA of the *Supreme Court Act 1933* (ACT) (**the Act**).

PART IV ARGUMENT

3. The Attorney-General makes submissions on both issues raised by the appeal:

   3.1. Was s 68BA of the Act, in its continuing operation by virtue of s 116 of that Act, invalid by reason of incompatibility with the principle in *Kable v Director of Public Prosecutions (NSW)* (***Kable***)?[1] (Ground 1)

   3.2. Was s 68BA of the Act, in its continuing operation by virtue of s 116 of that Act, invalid by reason of inconsistency with s 80 of the Constitution? (Ground 2).

4. The Attorney-General submits that the answer to each question is 'no'.

Ground 1: *Kable*

Construction of section 68BA

5. With *Kable*, as with other grounds of constitutional challenge, the correct starting point is the legal and practical operation of the impugned legislation, discerned as a matter of statutory construction.[2] The appellant's Ground 1 proceeds from a wrong construction of s 68BA of the Act. Specifically, the appellant divorces sub-s (4) from sub-s (3) and thus mischaracterises sub-s (4) as serving an "antecedent gatekeeping function" with respect to sub-s (3): AS [13].

6. Properly construed, sub-ss (3) and (4) operate together. If anything, sub-s (4) is ancillary to sub-s (3), rather than fulfilling a "gatekeeping" function. Subsection (3) confers on the

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1 (1996) 189 CLR 51.

2 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [1] (Kiefel CJ), [116] (Gageler J).

Supreme Court a power to "order that the proceeding will be tried by judge alone". The power is discretionary, as indicated by the word "may".[3] The discretion is engaged only when a specified state of satisfaction is formed. The satisfaction has two elements: that the order "will ensure the orderly and expeditious discharge of the business of the court"; and that the order "is otherwise in the interests of justice".

7. Subsection (4) imposes an additional precondition to an exercise of power under sub-s (3). The additional precondition is that the court give a written notice as described. Implicitly, the additional precondition is also that the court consider any submissions made in response to the notice. Subsection (4) gives precise expression and content to what would otherwise have been implicit in sub-s (3) in any event: namely, that the Supreme Court, acting judicially, would afford procedural fairness in relation to the exercise of its power to order that a proceeding be tried by judge alone.[4]

8. It would be wrong to construe sub-s (4) as serving an "antecedent gatekeeping function". Several aspects of the statutory text underscore the necessity to read the provisions together. *First*, sub-s (4) begins with language identifying that the duty is an incident of the power conferred by sub-s (3): "Before making an order under subsection (3), the court must…". The appellant construes the provisions as though sub-s (3) said instead: "If notice is given under sub-s (4), the court may…". *Second*, the power and duty to give the written notice focuses on notice "of the proposed order" and the required invitation to make submissions "about the proposed order" under sub-s (3). *Third*, the sequence in which sub-ss (3) and (4) have been enacted tell against an "antecedent gatekeeping function": it would be odd to enact the gatekeeping function after rather than before the power said to be gatekept. There is, rather, a single operative power (that in sub-s (3)), which is conditioned not only on the state of satisfaction described in sub-s (3) but also on compliance with the natural justice duty spelled out in sub-s (4).

9. Subsection (3) is exercisable according to express criteria that the appellant concedes raise no constitutional difficulties: AS [12]. If a court considers that it might wish to exercise the power under sub-s (3) (because the unimpeached criteria and discretion might appropriately be engaged) then it has a duty to comply with sub-s (4) before doing

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3 *Legislation Act 2001* (ACT) s 146(1), read with s 6(1).

4 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [146] (Heydon J). See also *Barton v Atlantic 3-Financial (Aus) Pty Ltd* [2010] QCA 223 at [31] (Muir JA, with whom White JA and Mullins J agreed).

so (thereby affording natural justice with respect to the order that the court considers might be appropriate, that being the "proposed order" of which sub-s (4) speaks). Notice must be given if there is a proposed order, and not otherwise. There is no uncontrolled "gatekeeping" function. The court either complies with sub-s (4) as a precondition to proceeding under sub-s (3), or it does not comply with sub-s (4) because it does not seek to proceed under sub-s (3).

10. Subsection (3) confers a case management power that the legislature decided was appropriately available in the context of the pandemic. Courts frequently and routinely exercise powers of case management, in an effort to ensure that the court's processes, procedures and resources are appropriately managed and deployed. The fact that particular case management powers are available does not mean that the court is required to consider their possible exercise in every case. The appellant's submissions that "the health risks posed by COVID-19 affected every jury trial" (AS [11]) and that "each jury trial presented the same mischief" (AS [15]) is unsupported by evidence and manifestly wrong (there being obvious differences, for example, in the number of defendants and lawyers from trial to trial, the physical capacity of available courtrooms, and whether or not the defendant is on remand and would therefore be prejudiced by a long pre-trial delay). It is also contrary to the factual findings (or lack thereof) below: CA [232] (CAB 195).

11. While the court is under no duty to consider whether to make an order under sub-s (3), if the case management circumstances are such that the court is contemplating making such an order, no discretion arises under sub-s (4) (uncontrolled or otherwise). The complaint that there was "no duty on a trial judge to consider whether a notice should be given" under sub-s (4) is misdirected: AS [13]. Once the court is proposing to make an order under sub-s (3), there is a duty not just to consider giving notice under sub-s (4), but actually to give that notice as a precondition to exercising power under sub-s (3). On the other hand, if the court is not proposing to exercise the power under sub-s (3), sub-s (4) has no role to play.

12. The appellant submits that the court is "not required to give reasons for proposing an order": AS [13]. However, the Constitution does not require courts to give reasons for merely proposing case management orders or directions, which may or may not be made, depending on the submissions of the parties. The usual requirement to give reasons, as a defining characteristic of a court, applies to "final decisions and important interlocutory

rulings" and is "often … linked to the availability of rights of appeal".[5] That requirement has no application to the giving of notice of a proposed order, which is not itself an order and which is not amenable to appeal. If, having heard the parties, an order is actually made under sub-s (3), that would be an interlocutory order amenable to appeal to the Court of Appeal by leave.[6] An accused could request reasons for such an interlocutory order and would, at least ordinarily, be entitled to reasons. The interlocutory order may alternatively found a ground of appeal against any subsequent conviction, as happened in this case (here, with leave, as explained at CA [211] (CAB 192)).

Content of the *Kable* principle

13. Once s 68BA is properly construed, it is clear that it does not contravene the *Kable* principle. Indeed, Ground 1 can be resolved against the appellant entirely on the basis of the appellant's own concessions: AS [12], [14]. The standards in sub-s (3) being accepted as valid, once the relationship between sub-s (3) and (4) is correctly identified the argument falls away.

14. For completeness, one specific matter should be addressed. The appellant appears to submit that *Kable* will be infringed by a law which requires a court to depart in significant degree from a concept of "equal justice", which is said to require identity of outcome in cases that are relevantly identical and different outcomes in cases that are relevantly different: AS [10]. That submission conflates a range of different legal principles developed for distinctive purposes.

15. In particular, the appellant's notion of equality or non-discrimination, as like *outcomes* in like cases, and different *outcomes* in different cases, is a description of a *result* that our constitutional system seeks to secure through particular features of the judicial process: decisional independence and impartiality, observance of procedural fairness, provision of reasons, and availability of appeals or review for jurisdictional error. Those more concrete features of the judicial process are calculated to secure, among other things, results broadly consistent with the Aristotelian ideal of equality. But this outcomes-focused notion of equality or non-discrimination cannot properly be deployed as a top-down legal concept not anchored in the text or structure of the Constitution.[7]

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5 *Wainohu v New South Wales* (2011) 243 CLR 181 at [54]-[55] (French CJ and Kiefel J); see also [108]-[109] (Gummow, Hayne, Crennan and Bell JJ).

6 *Supreme Court Act 1933* (ACT) s 37E(4).

7 *McGinty v Western Australia* (1996) 186 CLR 140 at 232 (McHugh J).

The mere possibility that a broad discretionary power *might* be exercised from time to time in ways that could be seen to result in outcomes that might give rise to arguments about equality does not undermine the institutional integrity of a court.

16. A different notion of equality or non-discrimination is equality *before* the law, rather than equality *in the content* of the law. A law of general application, applied by courts accessible to all, can raise no issue about this notion of equality before the law. Under s 68BA, every accused is exposed to the possible loss of the jury mode of trial by exercise of power conferred by sub-s (3). On the other hand, no accused will be deprived of a jury trial under sub-s (3) without being given notice and an opportunity to be heard under sub-s (4). There is no foundation for any submission that s 68BA requires or authorises the Supreme Court to act contrary to any possible notion of equality in the judicial process. It follows that Ground 1 must fail.

Ground 2: Section 80

17. The appellant's submissions with respect to Ground 2 seek to have this Court decide far more than is necessary to resolve that ground. In particular, the appellant invites (AS [24]) the Court to re-open and overrule *R v Bernasconi* (1915) 19 CLR 629 (***Bernasconi***), in circumstances where Ground 2 should fail for reasons that do not depend on that case.

18. Contrary to the premise for the appellant's "primary contention" in support of Ground 2 (AS [32]-[36]), the offences at issue in this appeal were Territory offences. Ground 2 therefore can and should be resolved on the basis that s 80 of the Constitution, which in its terms applies only to "any offence against any law of the Commonwealth", has no application to those offences because an offence against Territory law is not an offence against "a law of the Commonwealth". That conclusion – which involves the rejection of the appellant's secondary contention (AS [37]-[44]) – is supported by, but does not depend upon, *Bernasconi*.

19. It is only if the Court holds that the offences at issue in this appeal are Commonwealth offences that any question need be decided concerning whether *Bernasconi* is distinguishable, or whether it should be re-opened and overruled. If those questions are reached, the Commonwealth submits that: (i) *Bernasconi* is not distinguishable because no distinction should be drawn between internal and external territories; (ii) leave to re-open *Bernasconi* should be refused; (iii) if necessary, the actual decision in *Bernasconi* concerning the relationship between ss 80 and 122 of the Constitution should be affirmed.

The offences with which the appellant was charged were Territory offences

20. The appellant was charged with offences against ss 54 (sexual intercourse without consent) and 60 (act of indecency without consent) of the *Crimes Act 1900* (ACT). The appellant's primary contention rests on the premise that those two sections are "given direct force" by the Commonwealth Parliament pursuant to s 122 of the Constitution: AS [32]. For three reasons, that premise cannot be established.

21. *First*, from 1 July 1990, when the *Crimes Act 1900* (NSW) was removed[8] from Sch 3 to the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (***Self-Government Act***) (such that the exception in s 34(5) no longer applied), s 34(4) operated to convert the *Crimes Act 1900* into a Territory law. That is the natural meaning of the stipulation that a law "shall be taken to be an enactment, and may be amended or repealed accordingly". The phrase "taken to be an enactment" in s 34(4) did not simply deem some laws previously in force in the Territory to be amenable to amendment or repeal by the ACT legislature: cf AS [34]. That is plain from the language of s 34(4), which "had the substantive operation of conferring … the status of a law made by the Assembly".[9] The above operation of s 34(4) is confirmed by the relevant extrinsic material, which explained that "all legislation in force in the Territory other than Commonwealth Acts will become converted into Assembly law on the appropriate day".[10]

22. Contrary to AS [34], nothing in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[11] nor *Eastman v The Queen*[12] supports a more limited interpretation of s 34(4). The offence of which Mr Eastman was convicted was alleged to have occurred on 10 January 1989, which was before the *Self-Government Act* entered into force. At that time, the *Crimes Act 1900* (NSW) was in force in the ACT by reason of Commonwealth law.[13] That explains the High Court's remarks. It was only "later" that the offence

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8 By operation of the *ACT Self-Government (Consequential Provisions) Act 1988* (Cth) s 12.

9 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [75] (Gummow and Hayne JJ), concerning the materially identical language in s 34(2) of the *Self-Government Act*.

10 Explanatory Memorandum to the Australian Capital Territory (Self-Government) Bill 1988 (Cth) at 11. That is in contrast to the laws included in Sch 3, which would "continue to be administered by the Commonwealth".

11 (1999) 200 CLR 322 at [44] (Gummow and Hayne JJ).

12 (2000) 203 CLR 1 at [159] (McHugh J).

13 *Seat of Government (Administration) Act 1910* (Cth) s 4.

provision of the *Crimes Act 1900* was "transmuted into an enactment" of the Territory Assembly by operation of s 34(4) of the *Self-Government Act*.[14]

23. *Secondly*, the status of the *Crimes Act 1900* as a Territory law was put beyond doubt by the *Crimes Legislation (Status and Citation Act) 1992* (ACT) (***Status and Citation Act***), which was an Act of the ACT Legislative Assembly that commenced on 28 May 1992. Section 3(1) of the *Status and Citation Act* provided that the *Crimes Act 1900* (NSW), in its application in the Territory, "shall be taken to be, for all purposes, a law made by the Legislative Assembly as if the provisions of the applied State Act had been re-enacted in an Act passed by the Assembly". By operation of s 4, the *Crimes Act 1900* (NSW) in its application to the Territory was to be cited as the *Crimes Act 1900* (ACT).

24. The appellant seeks to explain away the effect of the *Status and Citation Act* by contending that it was enacted "merely to overcome the citation convention of referring to the *Crimes Act* as a NSW Act which was continued in force by Commonwealth legislation": AS [36], fn 74. That submission should be rejected. There is nothing to suggest that the *Status and Citation Act* was intended to achieve anything less than the words of s 3(1) suggest: namely, to ensure that the *Crimes Act 1900* (NSW), in its application to the Territory, was "for all purposes" "taken to be … a law made by the Legislative Assembly", as if its provisions "had been re-enacted in an Act passed by the Assembly". The appellant's submission is also inconsistent with the separate treatment in the Act of, as the title suggests, "status" (s 3) and "citation" (s 4). The relevant extrinsic materials confirm that the *Crimes Legislation (Status and Citation) Bill 1992* (ACT) "asserts the status of the Crimes Act as a law of the ACT by providing that the Crimes Act is to be treated as an Act passed by the Legislative Assembly".[15]

25. *Thirdly*, and in any event, both ss 54 and 60 have been amended by the Legislative Assembly.[16] The appellant appears to acknowledge that a repeal and re-enactment of the provisions would be sufficient to convert them into Territory laws: AS [36]. There is no warrant for treating amended provisions any differently. The appellant's argument

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14 See *Hoffman v Chief of Army* (2004) 137 FCR 520 at [196] (Lindgren J); *Canberra Drag Racers Club Inc v Australian Capital Territory* [2001] FCA 332 at [62] (Higgins J); *Corkhill v Commonwealth (No 3)* [2018] ACTSC 87 at [75] (Refshauge J); *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 2)* (2016) 311 FLR 187 at [78] (Mossop AsJ).

15 Explanatory Memorandum to the Crimes Legislation (Status and Citation) Bill 1992 at 2.

16 The amending provisions are cited at AS [35], fn 70.

assumes that there is a stable distinction between the concepts of amendment and repeal, but the decided cases indicate that this is a "false dichotomy".[17] In any event, nothing in the text or context of s 34(4) suggests it operates differentially upon laws that have been amended and laws that have been repealed. Nor does the appellant gain any assistance from the reasons of the plurality in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 that are quoted at AS [36]. The "central meanings" of the words "amend" and "repeal" say nothing about how those words operate in the context of s 34(4). If anything, the plurality's observation that "the words can be used in ways in which there appears to be some overlapping in their meanings"[18] points against the submission that the use of the two words, without more, was intended to draw some sharp distinction between them.

Territory laws are not "laws of the Commonwealth"

26. If the above submissions are accepted, the appellant can succeed only if he can establish his "secondary contention" (AS [37]-[44]), being that the phrase "any law of the Commonwealth" in s 80 includes a law made by a subordinate legislature of a territory. That submission is, of course, directly contrary to *Bernasconi*, and could therefore be accepted only if that case is re-opened and overruled.

27. However, quite independently of *Bernasconi*, the submission should be rejected because it is contrary to *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 (***Capital Duplicators***). In that case, this Court held that the passage of a law by a territory legislature created by the Parliament in the exercise of its power under s 122 is not an exercise of the legislative power of the Commonwealth. While such a territory legislature derives its legislative power from a law of the Commonwealth Parliament passed pursuant to s 122,[19] the exercise of "that distinct legislative power"[20] does not itself result in a law of the Commonwealth.[21] Thus, the "Legislative Assembly of the

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17 See *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [66]-[67] (Gummow and Hayne JJ); see also at [9] (Brennan CJ and McHugh J).

18 (2003) 217 CLR 545 at [46], quoting *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [67] for the proposition that '[a]n amendment may take the form of, or include, a repeal'.

19 See, eg, *Self-Government Act* s 22.

20 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [105]-[106] (Gageler J); see also [171] (Keane J).

21 *Svikart v Stewart* (1994) 181 CLR 548 at 562 (Mason CJ, Deane, Dawson and McHugh JJ).

[ACT] has been erected to exercise not the Parliament's powers but its own".[22] The appellant's argument (AS [41], [44]) that a law made "indirectly pursuant to authority conferred by the Parliament under s 122" is itself a "law of the Commonwealth" is irreconcilable with *Capital Duplicators.*[23]

28. The above submission derives further support from authorities holding that the term "law of the Commonwealth" refers to laws made by the Commonwealth Parliament itself (or to regulations made under such laws).[24] The error in equating a law enacted by a territory legislature with a law of the Commonwealth is highlighted by the fact that, if that is correct, it would follow that laws passed by a territory legislature would prevail over inconsistent State laws by reason of s 109 of the Constitution.[25]

29. The appellant's submission that *Fittock v The Queen* (2003) 217 CLR 508 (***Fittock***) "left open" the question of whether a law enacted by a territory legislature is a law of the Commonwealth substantially overstates the position: cf AS [37]. The plurality evidently entertained grave doubts as to whether s 80 "could have had any application" to an offence against the statute law of a territory, given that s 80 speaks of "any offence against any law of the Commonwealth".[26] The plurality said nothing to suggest that they regarded this question as "open". Special leave was refused in *Fittock* simply because, even if s 80 did apply, the appeal would have failed.[27] That falls well short of leaving the point "open".

30. Nor does the appellant gain any assistance from *Re Colina; Ex parte Torney* (1999) 200 CLR 386: cf AS [39]. There, Gleeson CJ and Gummow J described as "settled by a long

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22 *Capital Duplicators* (1992) 177 CLR 248 at 282 (Brennan, Deane and Toohey JJ, Gaudron J relevantly agreeing at 284).

23 See the explanation of that case in *Svikart v Stewart* (1994) 181 CLR 548 at 562 (Mason CJ, Deane, Dawson and McHugh JJ); *NAAJA* (2015) 256 CLR 569 at [105]-[106] (Gageler J); see also [171] (Keane J).

24 *Bernasconi* (1915) 19 CLR 629 at 635 (Griffith CJ). See also *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431 (Knox CJ and Gavan Duffy J); *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [25] (Gleeson CJ and Gummow J).

25 Cf Geoffrey Lindell and Sir Anthony Mason, "The Resolution of Inconsistent State and Territory Legislation" (2010) 38(3) *Federal Law Review* 391 at 392, 407 (advancing an argument, based on *Capital Duplicators*, that "laws passed by separate and independent Territory legislatures are *not* 'law(s) of the Commonwealth' within the meaning of s 109"). See also Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) at 242-244.

26 *Fittock* (2003) 217 CLR 508 at [4]-[6] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

27 *Fittock* (2003) 217 CLR 508 at [8]-[9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

line of authority" the proposition (quoted at AS [39]) that "'law of the Commonwealth' refers to laws made under the legislative powers of the Commonwealth".[28]

31. For the foregoing reasons, the offences with which the appellant was charged – being offences against laws of the ACT Legislative Assembly – were not "laws of the Commonwealth". In its terms, s 80 had no application to those offences (just as it has no application to offences against State law). Ground 2 should therefore be dismissed.

Bernasconi

32. The same result would follow from applying *Bernasconi*. That case is authority for the proposition that the exercise of legislative power under s 122 – whether directly by the Commonwealth Parliament or through a subordinate legislature – is not restricted by s 80 of the Constitution.[29] That is how its ratio was identified by both Barwick CJ and Windeyer J in *Spratt v Hermes*.[30] In so far as *Bernasconi* decided that s 80 is not engaged by an offence created by a subordinate legislature, there is no reason to doubt its correctness. To the contrary, for the reasons advanced above it is entirely consistent with subsequent decisions of this Court.

33. In so far as *Bernasconi* decided that s 80 is not engaged by an offence created by the Commonwealth Parliament itself it is more controversial. However, the correctness of that aspect of the decision would fall for decision in this appeal only if the Court holds (contrary to the submissions above) that the offences with which the appellant was charged were offences against laws created by the Commonwealth Parliament.

34. The appellant seeks to cast doubt upon the entirety of *Bernasconi* by drawing attention to aspects of the reasoning – including in particular Griffith CJ's statements that Ch III "has no application to territories" – that were expressed more widely than was necessary to the decision in that case. However, those statements have not subsequently been treated as forming part of the ratio of *Bernasconi*. As the appellant correctly submits (AS [21]), subsequent decisions have recognised that there is no "blanket rule that quarantines

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28 (1999) 200 CLR 386 at [25]. None of the authorities their Honours cited for that uncontroversial proposition concerned a law of a subordinate legislature.

29 (1915) 19 CLR 629 at 634-635 (Griffith CJ, Gavan Duffy and Rich JJ agreeing at 640).

30 (1965) 114 CLR 226 at 244 (Barwick CJ), 275 (Windeyer J). To similar effect see 257 (Kitto J). See also *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [9] (Gleeson CJ, McHugh and Callinan JJ); *Northern Territory v GPAO* (1999) 196 CLR 553 at [169] (McHugh and Callinan JJ); *Ffrost v Stevenson* (1937) 58 CLR 528 at 556 (Latham CJ).

s 122 from the rest of the Constitution", and that the relationship between s 122 and a given constitutional provision should be approached as "a question of construction" to be considered "as the matter arises".[31] The appellant places particular emphasis on this Court's acceptance: that a law passed under s 122 prevails over a State law to the extent of any inconsistency pursuant to s 109;[32] that Parliament's exclusive power to impose duties of customs and excise cannot be exercised by a territory legislature;[33] and that a law passed under s 122 may be subject to the "just terms" requirement of s 51(xxxi).[34]

35. In truth, those matters are not relevant to the disposition of this appeal. That follows because, notwithstanding the above matters, this Court has continued to recognise the distinctive position of s 122 in the constitutional structure with respect to Ch III. In particular, it remains well settled that the Commonwealth's legislative power under s 122 is not constrained by the separation of powers.[35] In *R v Kirby; Ex parte Boilermakers' Society of Australia* (***Boilermakers***), it was recognised that "the exclusive or exhaustive character of the provisions of [Ch III] describing the judicature and its functions has reference only to the federal system of which the Territories do not form a part".[36] That observation was affirmed by the Privy Council,[37] and has subsequently been cited with approval.[38] It is the ongoing recognition of the separation between Ch III and s 122 that underpins the Court's decision that the Supreme Court of a territory may be vested with federal jurisdiction by the Commonwealth Parliament pursuant to s 71,[39] notwithstanding the fact that it is neither a federal court within the meaning of s 73,[40] nor a court "created

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31 *Spratt v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ), cited in *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at [53] (French CJ).

32 *Lamshed v Lake* (1958) 99 CLR 132 at 141.

33 *Capital Duplicators* (1992) 177 CLR 248 at 279 (Brennan, Deane and Toohey JJ), 290 (Gaudron J).

34 *Wurridjal* (2009) 237 CLR 309. AS [21] asserts that in *Wurridjal* "a majority of the Court" held that s 51(xxxi) limits s 122. That majority is identified as comprising French CJ, Kirby, Gummow and Hayne JJ. In fact, Kirby J was in dissent. The precedential significance of *Wurridjal* with respect to s 51(xxxi) and s 122 is presently in issue in proceedings in the Full Federal Court to be heard in late October 2022, and may well arise on further appeal to this Court. It need not be considered in this appeal.

35 *Kruger v Commonwealth* (1997) 190 CLR 1 at 44 (Brennan CJ), 62 (Dawson J), 141-142 (McHugh J), 170, 176 (Gummow J); *NAAJA* (2015) 256 CLR 569 at [107], [118] (Gageler J), [146]-[147], [161] (Keane J).

36 (1956) 94 CLR 254 at 290 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

37 *Attorney-General (Cth) v The Queen (Boilermakers' Case*) (1957) 95 CLR 529 at 545.

38 *Spratt v Hermes* (1965) 114 CLR 226 at 251 (Kitto J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 43-44 (Brennan CJ), 62 (Dawson J); *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 (***Capital TV***) at 615 (Walsh J), 625 (Gibbs J); *NAAJA* (2015) 256 CLR 569 at [168] (Keane J); see also at [118] (Gageler J).

39 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

40 *Capital TV* (1971) 125 CLR 591.

by the Parliament" for the purposes of s 72.[41] It also underpins the Court's acceptance that Parliament may authorise an appeal to the High Court from a territory court under s 122,[42] as it has done via s 35AA of the *Judiciary Act 1903* (Cth). The same separation supports the continuing recognition that s 80 is inapplicable to territory offences.

36. Against the above background, the appellant's recourse to "first principles" (AS [25]) is apt to mislead. It is far too late to embark on a wholesale re-imagining of the relationship between s 122 and Ch III. In any case concerning that relationship, the question is "not how the question might best be answered if the historical slate were to be wiped clean and the Constitution were to be read anew, but whether there is sufficient justification for now reopening, and, if so, departing from the answer already given".[43]

37. The only question concerning *Bernasconi* that can arise in this appeal is a specific question concerning the relationship between s 80 and s 122 of the Constitution. Even that question is reached only if the Court rejects the submission above that the offences with which the appellant was charged were Territory offences. It is only if the Court rejects that submission that it should consider whether *Bernasconi* can be distinguished and, if it cannot, whether leave should be given to re-open that decision.

(i) Bernasconi is not distinguishable

38. The appellant seeks to distinguish *Bernasconi* by submitting that its ratio is confined to external territories: AS [18]. That submission should be rejected not only because it finds no foundation in Griffith CJ's reasoning in *Bernasconi*, but also because it is inconsistent with: (i) the text of s 122, which does not draw any distinction, as to the scope of power that is conferred, between the different territories the Commonwealth administers; (ii) the purpose of s 122, which is intended to apply in respect of potentially diverse territories and to confer a flexibility that does not conform to an assumed binarity between internal and external territories; and (iii) the weight of authority.[44]

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41 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [9] (Gleeson CJ, McHugh and Callinan JJ), [41] (Gaudron J), [71] (Gummow and Hayne JJ); *Spratt v Hermes* (1965) 114 CLR 226.

42 *Porter v The King* (1926) 37 CLR 432 at 440-441 (Isaacs J), 446 (Higgins J), 448 (Rich J), 449 (Starke J); *Boilermakers* (1956) 94 CLR 254 at 290 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Capital TV* (1971) 125 CLR 591 at 604 (Menzies J), 612 (Windeyer J), 622-623 (Walsh J).

43 *NAAJA* (2015) 256 CLR 569 at [108] (Gageler J).

44 See *NAAJA* (2015) 256 CLR 569 at [167] (Keane J); *Spratt v Hermes* (1965) 114 CLR 226 at 240-241 (Barwick CJ); *Porter v The King* (1926) 37 CLR 432 at 440 (Isaacs J); *Fittock* (2003) 217 CLR 508, 513

39. The appellant's posited distinction between internal and external territories turns on whether a territory was, on the one hand, "placed by the Queen under the authority of and accepted by the Commonwealth" or, on the other hand, surrendered by a State (under s 111) or acquired by the Commonwealth (under s 125): AS [18]. Three territories presently meet that description of an "internal" territory: the Australian Capital Territory, the Northern Territory and the Jervis Bay Territory.[45]

40. There is no suggestion in the text of s 122 that the scope of the legislative power that it confers varies depending on whether a territory is internal or external. Section 122 expressly identifies three categories of territory: "territory surrendered by any State to and accepted by the Commonwealth"; "territory placed by the Queen under the authority of and accepted by the Commonwealth"; and territory "otherwise acquired" by the Commonwealth. However, despite identifying three different modes by which territory may be acquired, the text draws no distinction between the scope of the power conferred in respect of territories acquired in any of those ways, let alone by reference to whether they are "internal" or "external" territories. However a territory comes to form a part of the Commonwealth, s 122 provides that the Parliament "may make laws for the government" of such territories, and "may allow" their representation in Parliament "to the extent and on the terms which it thinks fit".

41. Nor is there any contextual reason to apply s 122 differently to the internal and external Territories. Covering clause 5, for example, draws no distinction between internal and external territories when it refers to the "people of every State and of every part of the Commonwealth". At the time the Commonwealth was established, there were in fact no Commonwealth Territories, although it was foreseen that possible territories of the Commonwealth might one day include British New Guinea, the Fiji Islands and the northern territory of South Australia.[46] The appellant advances no reason why *Bernasconi* should not be read as applying to all of the territories, including the ACT and the Northern Territory, which had been surrendered to the Commonwealth some years

(Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Capital TV* (1971) 125 CLR 591, 599 (Barwick CJ), 620 (Walsh J), 628 (Gibbs J).

45 *Seat of Government Surrender Act 1909* (NSW), s 6; *Seat of Government Acceptance Act 1909* (Cth), s 5(1); *Northern Territory Surrender Act 1907* (SA), s 7; *Northern Territory Acceptance Act 1910* (Cth), s 6(1); *Seat of Government Surrender Act 1915* (NSW), s 6; *Jervis Bay Territory Acceptance Act 1915* (Cth), s 4(1).

46 *Capital Duplicators* (1992) 177 CLR 248 at 271 (Brennan, Deane and Toohey JJ).

before *Bernasconi* was decided. When those territories were surrendered to the Commonwealth, "Commonwealth power, not federally circumscribed, was at that moment attracted both to the area and its inhabitants".[47] The residents of territories formerly belonging to a State did not gain a constitutional entitlement, or freedom from Commonwealth power, not available to the residents of other territories.

42. The Commonwealth does not embrace Isaacs J's reasoning that the power in s 122 implies that the territories to which it applies are "in a state of dependency or tutelage" and "not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers": cf AS [20]. The scope of s 122 does not turn on an evaluative assessment of that kind. An interpretation of s 122 that depended on judgments about whether a territory has met unspecified preconditions of Statehood would render the scope of the Commonwealth's powers uncertain and unstable. Indeed, the notion that there is some unspecified precondition for entry into Statehood is at odds with the breadth of s 121 of the Constitution, which permits the Parliament to admit to establish new States on such terms and conditions "as it thinks fit". Further, the historical position of the territories is not consistent with the appellant's implicit assumption that internal territories are more likely than external territories to be conferred self-government.[48]

43. As to authority, the appellant's submission that the position of the internal territories was "left open" by *Mitchell v Barker* (1918) 24 CLR 365 overstates the position: AS [18]. In that case Griffith CJ, after observing that a distinction "may some day be drawn between Territories which have and those which have not formed part of the Commonwealth", went on to state that "the Court, as now constituted, cannot say so".[49] In over a century of jurisprudence on Ch III and the territories, the Court has never drawn that distinction. To the contrary, in *NAAJA* Keane J said that "[n]o distinction is made between Territories which are internal and those which are external".[50]

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47 *Attorney-General (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527 at 533 (Barwick CJ).

48 Compare the Jervis Bay Territory (an "internal" territory which has never exercised self-government) to Norfolk Island (an "external" territory which exercised self-government until 2015).

49 (1918) 24 CLR 365 at 367. The Court in *Mitchell* was constituted by four justices.

50 (2015) 256 CLR 569 at [167]. See also *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527 at 533, where Barwick CJ expressed a similar view in the context of s 24 of the Constitution.

44. As *Bernasconi* is not distinguishable, the appellant can succeed on Ground 2 only if this Court re-opens, and then overrules, *Bernasconi*. The Court should not take either step.

(ii) Bernasconi should not be re-opened

45. In deciding whether to re-open a previous authority, the Court will be "informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken".[51] The appellant acknowledges the established principles in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 (***John v FCT***) at 438-439 (AS [24]), but offers no explanation of how those principles are said to favour a departure from *Bernasconi*. That is unsurprising, for those principles point powerfully against re-opening *Bernasconi*.

46. As the first of the factors in *John v FCT* underscores, an important consideration against re-opening is whether the earlier decision rests upon a principle carefully worked out in a significant succession of cases. *Bernasconi*, as an early decision of this Court, did not rest on a line of earlier decisions, but the Court has had numerous occasions to consider the correctness of *Bernasconi* and has never overruled it.[52] For example, as long ago as 1965, in *Spratt v Hermes*[53] the Court declined to disturb *Bernasconi* as to what it actually decided (ie that s 80 does not apply to cases arising under "the local laws of a territory, whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it"[54]). As Barwick CJ put it, "[w]hatever doubts there may be as to that decision, in my opinion, what it actually decided … ought not now to be disturbed. For one thing, it

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51 *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ); *NAAJA* (2015) 256 CLR 569 at [162] (Keane J).

52 *Spratt v Hermes* (1965) 114 CLR 226 at 244 (Barwick CJ) 257-259 (Kitto J), 275 (Windeyer J); *Capital TV* (1971) 125 CLR 579 at 598-599 (Barwick J), 606 (Menzies J), 620 (Walsh J), 628 (Gibbs J); *Lamshed v Lake* (1958) 99 CLR 132 at 142 (Dixon CJ); *Porter v The King; Ex Parte Yee* (1926) 37 CLR 432 at 440-441 (Isaacs J); *Ffrost v Stevenson* (1937) 58 CLR 528 at 556 (Latham CJ). See also, *Brownlee v the Queen* (2001) 207 CLR 278 at 279, where the Court refused leave sought by the applicant to reopen *Bernasconi.*

53 *Spratt v Hermes* (1965) 114 CLR 226 at 244 (Barwick CJ), 252, 257 (Kitto J), 275 (Windeyer J).

54 *Spratt v Hermes* (1965) 114 CLR 226 at 275 (Windeyer J); see also 244 (Barwick CJ). See also *Lamshed v Lake* (1958) 99 CLR 132 at 148 (Dixon CJ); *Fittock* (2003) 217 CLR 508 at 513 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 619 (Kirby J, dissenting); *Kruger v Commonwealth* (1997) 190 CLR 1 at 60 (Dawson J), 80 (Toohey J, dissenting); *Capital TV* (1971) 125 CLR 591 at 606 (Menzies J); *Northern Territory v GPAO* (1999) 196 CLR 553 at 590-591 (Gleeson CJ and Gummow J, approving the statement by Menzies J in *Capital TV* (1971) 125 CLR 591 at 606).

is a decision of long standing upon the basis of which legislation has frequently been passed".[55]

47. That observation has even greater weight now. For over one hundred years, the Commonwealth and the self-governing territories have proceeded on the reasonable footing, reflective of the authorities in this Court, that within the territories trials on indictment before a judge sitting without a jury are permissible. Legislation has provided for judge-alone trials on indictment in both inhabited[56] and uninhabited[57] territories. Untold convictions have no doubt been entered in such judge-alone trials on the premise that a jury trial was not required. A constitutional referendum has even been held on the premise that s 80 does not apply to trials on indictment in the territories.[58] These matters speak powerfully against the fourth of the *John v FCT* factors being satisfied (ie that the earlier decision has not been independently acted upon in a manner that militates against reconsideration).

48. Moreover, there is nothing to suggest that the settled understanding of the relationship between s 80 and s 122 has "led to considerable inconvenience" (that being the third of the factors in *John v FCT*). On the other hand, profound uncertainty would be caused if the settled understanding of the relationship between ss 80 and 122 were to be disturbed, both with respect to the validity of past convictions going back decades, and with respect to the administration of justice in Territories the circumstances of which do not presently accommodate jury trials. In those circumstances, leave should not be given to re-open

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55 *Spratt v Hermes* (1965) 114 CLR 226 at 244 (Barwick CJ).; see also 275 (Windeyer J). The passages quoted in AS [23] concerning the meaning of "law of the Commonwealth" must be read in light of their Honours actual decision that *Bernasconi* should not be re-opened.

56 *Supreme Court Act 1933* (ACT) s 68B (since 6 September 1993); *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4A, applying ACT laws to the Jervis Bay Territory (since 6 September 1993); *An Ordinance Relating to Trials Upon Indictment of Offences against the Laws of the Commonwealth and of the Northern Territory* (No 2 of 1933) s 2 (in force from 25 May 1933 to 30 June 1962); *Observance of Law Ordinance 1921* (No 13 of 1921) s 6 (in force from 21 October 1921 to 6 July 1930); *Criminal Procedure Act 2004* (WA) s 118 (in its application to Christmas Island by operation of the *Christmas Island Act 1958* (Cth) ss 8, 8A, 8C) (since 2 May 2005); *Criminal Code 1913* (WA) s 651A (in its application to Christmas Island, in force from 1 January 1995 to 1 May 2005); *Supreme Court Ordinance* (No 4 of 1955) s 12 (in force from 23 November 1955 to 18 June 1989, in its application to the Cocos (Keeling) Islands); *Juries Act 1960* (Norfolk Island) s 5A (since 27 March 1997).

57 *Ashmore and Cartier Islands Acceptance Act 1933* (Cth) s 6, applying NT laws (29 July 1938 to 30 June 1962); *Australian Antarctic Territory Act 1954* (Cth) s 6(2) (since 6 September 1993), applying criminal law applicable in Jervis Bay Territory; *Application of Laws Ordinance 1973* (Coral Sea Islands) s 3 (since 6 September 1993), applying ACT laws; *Heard Island and McDonald Islands Act 1953* (Cth) s 5 (since 6 September 1993), applying criminal law applicable in Jervis Bay Territory.

58 Constitutional Alteration (Rights and Freedoms) Bill 1988 (Cth) s 2; Explanatory Memorandum to the Constitutional Alteration (Rights and Freedoms) Bill 1988 at [3].

Bernasconi, irrespective of any doubts the Court might have as to aspects of the reasoning. The point it decides has been settled for too long to now be disturbed.

(iii) Bernasconi should not be overruled as to the point it actually decided

49. If leave is granted to re-open *Bernasconi*, this Court should affirm its central finding that s 80 does not apply to offences created by laws of the Commonwealth Parliament pursuant to s 122 or to offences created by subordinate legislatures within a territory.

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50. The object of s 80, which operates as a limit on power,[59] and which is situated in Ch III, is "to prescribe how the judicial power of the Commonwealth is engaged in the trial on indictment of Commonwealth offences".[60] At the time of Federation, the common law institution of trial by jury had been adopted in each of the Australian colonies as the method of trial for serious offences.[61] Section 80 ensured that an equivalent method of trial was prescribed for the trial on indictment of offences against Commonwealth laws. Given that the laws of all the States provided for the trial by jury of persons tried on indictment, "it was thought desirable to lay down the rule that the trial of persons charged with new indictable offences created by the Commonwealth Parliament should be tried in the same way".[62] In that way, s 80 serves a distinctly federal purpose. It was a recognition of that purpose that underpinned Griffith CJ's observation in *Bernasconi* 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".[63]

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51. The object of s 122, which is a conferral of power, and which is situated in Ch VI, is different. Its structural separation from s 80 reinforces that those provisions are directed to different topics. The first five Chapters of the Constitution "belong to a special universe of discourse, namely that of the creation and the working of a federation of States, with all the safeguards, inducements, checks and balances" that attend the federal

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59 *Alqudsi v The Queen* (2016) 258 CLR 203 (***Alqudsi***) at [139] (Gageler J), [174] (Nettle and Gordon JJ); *R v LK* (2010) 241 CLR 177 at [24] (French CJ); *Cheng v The Queen* (2000) 203 CLR 248 at [79] (Gaudron J).

60 *Alqudsi* (2016) 258 CLR 203 at [115] (Kiefel, Bell and Keane JJ).

61 *Clyne v Director of Public Prosecutions* (1984) 154 CLR 640 at 651 (Deane J); *Cheatle v The Queen* (1993) 177 CLR 541 at 549 (The Court), cited with approval in *Alqudsi* (2016) 258 CLR 203 at [100] (Kiefel, Bell and Keane JJ).

62 *Bernasconi* (1915) 19 CLR 629 at 635 (Griffith CJ, with whom Rich and Gavan Duffy JJ agreed).

63 *Bernasconi* (1915) 19 CLR 629 at 635 (Griffith CJ, with whom Rich and Gavan Duffy JJ agreed).

compact.[64] In contrast, Ch VI, titled "New States", concerns the methods by which the composition of the federation may be altered. It confers upon the Parliament the power to make laws for territories that do not have (and may never attain) the status of statehood.[65] The legislative power conferred by s 122 is "non-federal" in character in the sense that, in contrast to the powers conferred by Ch I, it is not shared with the States.[66] So much is underscored by the wide terms in which s 122 is cast, which are "as large and universal a power of legislation as can be granted"[67] and confer on the Commonwealth all the flexibility required to deal with the varied nature and circumstances of the different territories.[68]

52. The different purposes served by Chs III and VI of the Constitution explain why a rights-protective vision of s 80 has not prevailed (notwithstanding the fact that it has found occasional favour in dissenting opinions).[69] Contrary to AS [30], it should now be regarded as settled that s 80 does not create a right or privilege that is personal to the accused and capable of being waived.[70] To the extent that s 80 operates to secure democratic participation in the criminal trial process,[71] it does so as an element of the federal bargain, rather than in recognition of a fundamental right of participation. For this reason, the appellant gains no assistance from authorities that anchor the application

64 *Spratt v Hermes* (1965) 114 CLR 226 at 250 (Kitto J). See also *Kruger v Commonwealth* (1997) 190 CLR 1 at 42-43 (Brennan CJ).

65 *Spratt v Hermes* (1965) 114 CLR 226 at 250 (Kitto J); *Bernasconi* (1915) 19 CLR 629 at 638 (Isaacs J); *Capital Duplicators* (1992) 177 CLR 248 at 271 (Brennan, Deane and Toohey JJ).

66 *Attorney-General (Cth) v The Queen (Boilermakers' Case)* (1957) 95 CLR 529 at 545; *Lamshed v Lake* (1958) 99 CLR 132 at 142 (Dixon CJ); *Spratt v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ) and 250 (Kitto J); *Capital Duplicators* (1992) 177 CLR 248 at 272 (Brennan, Deane and Toohey JJ); *Kruger v Commonwealth* (1997) 190 CLR 1 at 42 (Brennan CJ).

67 *Spratt v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ); see also at 250 (Kitto J).

68 *Bennett v Commonwealth* (2007) 231 CLR 91 at [37] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 (Mason J, with whom Barwick CJ, McTiernan and Murphy JJ agreed); *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [9] (Gleeson CJ, McHugh and Callinan JJ); *NAAJA* (2015) 256 CLR 569 at [167] (Keane J), citing *Bernasconi* (1915) 19 CLR 629 at 637-638 (Isaacs J).

69 See, eg, *Alqudsi* (2016) 258 CLR 203 at [68]-[71] (French CJ); *Brown v The Queen* (1986) 160 CLR 171 at 180 (Gibbs CJ), 190 (Wilson J).

70 *Alqudsi* (2016) 258 CLR 203 at [115]-[116] (Kiefel, Bell and Keane JJ), [140]-[141] (Gageler J), [178] (Nettle and Gordon JJ); *Brown v The Queen* (1986) 160 CLR 171 at 196-197 (Brennan J), 202 (Deane J), 216 (Dawson J); *Cheng v The Queen* (2000) 203 CLR 248 at [57] (Gleeson CJ, Gummow and Hayne JJ), [268] (Callinan J).

71 *Alqudsi* (2016) 258 CLR 203 at [133]-[134], [140] (Gageler J).

of other constitutional limitations on s 122 in a rights-protective conception of those limitations.[72]

53. Once ss 80 and 122 are understood in their respective constitutional contexts, there is no reason why their interrelationship should be governed by the interpretation that has been given to entirely separate constitutional provisions. In particular, *Lamshed v Lake* (1958) 99 CLR 132 does not compel the conclusion that "any law of the Commonwealth" for the purposes of s 80 must include a law passed under s 122: cf AS [21], [30]. It is true that it has been accepted since *Lamshed v Lake* that s 109 of the Constitution is capable of operating upon a law made under s 122, with the effect that a law passed by the Commonwealth Parliament made for the governance of a territory may prevail over a State law. It does not, however, follow that s 122 must be interpreted as subject also to s 80. Indeed, in *Lamshed v Lake* itself, Dixon CJ (with whom Webb and Taylor JJ agreed) did not consider that *Bernasconi* stood in the way of the Court's interpretation of s 109.[73] The central feature of Dixon CJ's reasoning was that s 122 should not be construed so narrowly as to prevent the Commonwealth Parliament from governing for the Territory "wherever territorially the authority of the Commonwealth runs".[74] Dixon CJ saw no tension between that conclusion and the notion that s 80 did not apply to s 122. To the contrary, his Honour observed that "since Chap. III has been considered to be concerned with judicature in relation to the division of powers (*R v Bernasconi*) it may be treated as inapplicable so that laws made mediately or immediately under s 122 are primarily not within the operation of the Chapter".[75]

54. Finally, contrary to AS [29], the second half of s 80 does not favour a conclusion that s 80 applies to a territory. The words contemplate the possibility that offences against Commonwealth laws may be *committed* elsewhere than in a State (including in a territory). But that does not require the extension of s 80 to offences *against the laws of* a territory, or to *all* Commonwealth laws (including those sourced exclusively in s 122).

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72 See. eg, *Wurridjal* (2009) 237 CLR 309 at [79] (French CJ); *Kruger v Commonwealth* (1997) 190 CLR 1 at 122-123 (Gaudron J); cf 61 (Dawson J).

73 (1958) 99 CLR 132 at 148.

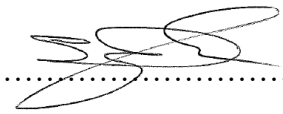
74 (1958) 99 CLR 132 at 141.

75 (1958) 99 CLR 132 at 142.

PART V ESTIMATED HOURS

55. It is estimated that 1 hour will be required for the presentation of the oral argument of the Commonwealth.

Dated: 16 September 2022



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IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY

BETWEEN: **SIMON VUNILAGI**
Appellant

AND: **THE QUEEN**
First Respondent

ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY
Second Respondent

ANNEXURE TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Commonwealth Attorney-General sets out below a list of the particular constitutional provisions and statutes referred to in his submissions.

Commonwealth		Provision(s)	Version
1.	Commonwealth Constitution	ss 51(xxxi), Ch III, 109, 111, 122, 125	Current
2.	*ACT Self-Government (Consequential Provisions) Act 1988* (Cth)	s 12	As at 1 July 1990
3.	*Australian Capital Territory (Self-Government) Act 1988* (Cth)	ss 22, 34	Current (Compilation No. 24, 1 July 2016 – present)
4.	*Australian Capital Territory (Self-Government) Act 1988* (Cth)	s 34, Sch 3	As at 1 July 1990
5.	*Ashmore and Cartier Islands Acceptance Act 1933* (Cth)	s 6	As made
6.	*Australian Antarctic Territory Act 1954* (Cth)	s 6	Current (22 September 2012 – present)

7.	*Christmas Island Act 1958* (Cth)	ss 8, 8A, 8C	Current (Compilation No. 13, 18 December 2020 – present)
8.	*Heard Island and McDonald Islands Act 1953* (Cth)	s 5	Current (4 July 2008 – present)
9.	*Jervis Bay Territory Acceptance Act 1915* (Cth)	s 4	As made
10.	*Jervis Bay Territory Acceptance Act 1915* (Cth)	s 4A	Current (2 October 2001 – present)
11.	*Judiciary Act 1903* (Cth)	ss 35AA, 78A	Current (Compilation No. 49, 18 February 2022 – present)
12.	*Northern Territory Acceptance Act 1910* (Cth)	s 6	As made
13.	*Seat of Government (Administration) Act 1910* (Cth)		As at 10 January 1989
14.	*Seat of Government Acceptance Act 1909* (Cth)	s 5	As made
State and Territory			
15.	*Crimes Act 1900* (ACT)	ss 54, 60	Version No. R124 (10 October 2019 – 6 December 2019)
16.	*Crimes Legislation (Status and Citation Act) 1992* (ACT)	ss 3, 4	As made
17.	*Legislation Act 2001* (ACT)	ss 6, 146	Version No. R116 (1 July 2019 – 29 April 2020); Version No. R117 (30 April 2020 – 31 May 2020); Version No. R118 (1 June 2020 – 31 October 2020)
18.	*Supreme Court Act 1933* (ACT)	s 68B	Current (17 August 2022 – present)
19.	*Supreme Court Act 1933* (ACT)	s 116	Version No. R60 (9 July 2020 – 31 August 2020)
20.	*Supreme Court Act 1933* (ACT)	ss 37E, 68BA	Version No. R59 (8 April 2020 – 8 July 2020)
21.	*Juries Act 1960* (Norfolk Island)	s 5A	Current (Compilation No. 4, 18 October 2017 – present)
22.	*Crimes Act 1900* (NSW)		(19 December 1988 – 15 January 1989)
23.	*Seat of Government Surrender Act 1909* (NSW);	s 6	As made
24.	*Seat of Government Surrender Act 1915* (NSW)	s 6	As made

25.	*Northern Territory Surrender Act 1907* (SA)	s 7	As made
26.	*Criminal Procedure Act 2004* (WA)	s 118	Current (1 July 2022 – present)
27.	*Criminal Code 1913* (WA)	s 651A	Reprint 3 September 2004
Statutory Instruments			
28.	*Application of Laws Ordinance 1973* (Coral Sea Islands)	s 3	As made
29.	*An Ordinance Relating to Trials Upon Indictment of Offences against the Laws of the Commonwealth and of the Northern Territory* (No 2 of 1933)	s 2	As made
30.	*Observance of Law Ordinance 1921* (No 13 of 1921)	s 6	As made
31.	*Supreme Court Ordinance* (No 4 of 1955)	s 12	As made