HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

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

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1 – *Kable* (Cth [5]-[13])

2. The Appellant's *Kable* argument depends on an erroneous construction of s 68BA. Section 68BA(3) was the single operative power in s 68BA, being a power to "order that the proceeding will be tried by judge alone". As the Appellant accepts, that power was exercisable according to express criteria susceptible of judicial application and attracted the usual incidents of the judicial process (**AS [12]**). Whether exercised at the court's own motion or otherwise, the power was engaged only when the court had formed a state of satisfaction specified in s 68BA(3)(a)-(b) and had complied with a duty to give natural justice codified in s 68BA(4).

3. Section 68BA(4) therefore did not serve an "antecedent gatekeeping function", and nor did it require an "arbitrary selection" from a relevantly identical class or "differential judicial processes" (**ASR [3]-[4]; AS [13]-[16]**). All accused persons were exposed to the possibility that the court would propose making an order under s 68BA(3), and all accused persons were entitled to natural justice before such an order could be made. The Appellant's submission that all cases during the pandemic were equally amenable to jury trials and that "each jury trial presented the same mischief" (**AS [15]; ASR [4]**) is unsupported by evidence and common sense suggests otherwise, as the Court of Appeal found (**CAB 195 [232]**). The provision therefore did not infringe the *Kable* principle.

Ground 2 – s 80

The offence provisions in issue, being laws of the ACT, are not laws of the Commonwealth

4. Ground 2 should be dismissed on the basis that the offences of which the Appellant was convicted – ss 54 and 60 of the *Crimes Act 1900* (ACT) – have force as laws of the ACT Legislative Assembly and therefore are not "laws of the Commonwealth" within the meaning of s 80 (**Cth [18]; cf AS [37]**). The Appellant's argument to the contrary, identified as his "primary contention" (**AS [32]**), must be rejected in light of:

   (a) Section 34(4) of the *Self-Government Act* (**Vol 2, Tab 15**), which converted the *Crimes Act 1900* (NSW) into an enactment of the ACT Legislative Assembly

from 1 July 1990, when the *Crimes Act* 1900 (NSW) was removed from Sch 3 to the *Self-Government Act* (**Cth [21]-[22]**): *ACT Self-Government (Consequential Provisions) Act*, s 12(2) (**Vol 2, Tab 16**); *Re Governor; Ex parte Eastman* (1999) 200 CLR 322 at [75] and see also [44], [78]-[81] (**Vol 3, Tab 47**).

(b) The fact that the ACT Legislative Assembly has amended those offences and thus, on any view, adopted them as its own (**AS [35]; Cth [25]**).

(c) Section 3(1) of the *Crimes Legislation (Status and Citation Act) 1992* (ACT) (**Vol 2, Tab 26**), which expressly provided that the *Crimes Act 1900* (NSW), in its application in the ACT, "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" (**Cth [23]-[24]**).

5. Offences that have force as territory laws are not laws of the Commonwealth, notwithstanding that the ultimate authority to enact them derives from the Commonwealth Parliament (**Cth [26]-[31]**). The Appellant's argument to the contrary – his "secondary contention" (**AS [37]-[44]**) – is irreconcilable with the well-established proposition that, by granting territories self-government, the Commonwealth created new bodies politic the laws of which are distinct from laws of the Commonwealth Parliament: *Capital Duplicators* (1992) 177 CLR 248 at 281-283, 284 (**Vol 3, Tab 33**); *Svikart* (1994) 181 CLR 548 at 562 (**Vol 3, Tab 49**); *NAAJA* (2015) 256 CLR 569 at [105]-[106], [117]-[118], [170]-[171] (**Vol 3, Tab 42**).

Bernasconi

6. The Court should dismiss the appeal on the basis addressed above without reaching the Appellant's application to re-open *Bernasconi* (1915) 19 CLR 629 (**Vol 3, Tab 43**) (**Cth [37]**). If, however, that application is reached, the Court should hold that *Bernasconi* is not distinguishable, and that leave to re-open that decision should be refused.

7. The ratio of *Bernasconi* is that a law passed pursuant to s 122, whether by the Commonwealth Parliament or a subordinate legislature, is not a "law of the Commonwealth" within s 80: see (1915) 19 CLR 629 at 633-635 (**Vol 3, Tab 43**); *Spratt v Hermes* (1965) 114 CLR 226 at 244, 275 (**Vol 3, Tab 48**); **Cth [32]-[34]**; **NT [15]**.

8. *Bernasconi* cannot be distinguished on the basis that, on its facts, it concerned an external territory (**AS [18]**). The argument to the contrary disregards the reasoning in the case. Further, nothing in the text or context of s 122 supports the submission that the scope of

legislative power conferred varies depending on whether a territory is internal or external. As Keane J observed, "[n]o distinction is made between Territories which are internal and those which are external": *NAAJA* (2015) 256 CLR 569 at [167] (**Vol 3, Tab 42**); see also *Attorney-General (NSW); Ex rel McKellar v Cth* (1977) 139 CLR 527 at 533 (Barwick CJ); *Berwick Ltd v Gray* (1976) 133 CLR 603 at 608 (Mason J).

Bernasconi should not be re-opened **(Cth [45]-[48])**

9. There are powerful reasons why the Court should not re-open *Bernasconi*, having regard to the factors identified in *John v FCT* (1989) 166 CLR 417 at 438-439:

   (a) the decision has stood for over 100 years and this Court has never overruled it: see, eg, *Spratt v Hermes* (1965) 114 CLR 226 at 244, 252, 257 (**Vol 3, Tab 48**); *Capital TV* (1971) 125 CLR 591 at 605-606 (**Vol 3, Tab 34**), approved in *Northern Territory v GPAO* (1999) 196 CLR 553 at [88]-[89] (Gleeson CJ and Gummow J);

   (b) there were no differences in the reasoning of the majority;

   (c) the settled understanding of the relationship between s 80 and s 122 has not led to inconvenience, but profound uncertainty would be caused by disturbing that understanding; and

   (d) the Commonwealth and the territories have acted upon the decision over many years, including by providing for judge-alone trials and majority verdicts in the territories.

Dated: 8 February 2023

Stephen Donaghue Brendan Lim Christine Ernst