HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C13 of 2022

BETWEEN:

SIMON VUNILAGI
Appellant

THE QUEEN
First Respondent

10 and

ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY
Second Respondent

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INTERVENER'S SUBMISSIONS
(NORTHERN TERRITORY OF AUSTRALIA)

Part I: Certification

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

Part II: Intervention

2. The Northern Territory of Australia (**Northern Territory**) intervenes pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth).

Part III: Argument

A SUMMARY

3. The Northern Territory supports the submissions of the Australian Capital Territory (**ACT**). The Northern Territory's submissions engage with (a) the first ground of appeal, (b) the status of *R v Bernasconi* (1915) 19 CLR 629 (***Bernasconi***), and (c) the Appellant's secondary contention on the second ground of appeal.

4. The first ground should be dismissed because s 68BA(4) (now repealed) of the *Supreme Court Act 1933* (ACT) had no relevant effect on the institutional integrity of the Supreme Court.

5. As to the second ground, the Appellant cannot avoid re-opening *Bernasconi* by arguing that it concerned an external territory.

6. In the event the Court decides to re-open *Bernasconi*, the Northern Territory addresses the relationship between ss 80 and 122 of the Constitution from first principles. It advances the following two propositions for that purpose:

   (a) A law made by the Parliament (whether sustained by ss 51, 52 and 122, or a combination thereof) is a "law of the Commonwealth" to which s 80 applies.

   (b) A law of the ACT Legislative Assembly, being the legislature of a separate body politic to the Commonwealth, with its own plenary legislative powers, and which does not exercise the legislative power of the Commonwealth, is not a "law of the Commonwealth" to which s 80 applies.

7. Aside from being the preferable construction on the text, those propositions are consistent with an integrationist approach to s 122, cohere with the democratic purpose of s 80 and take into account the significance of self-government.

B GROUND 1: THE *KABLE* PRINCIPLE

8. The principle for which *Kable*[1] stands is that State or Territory[2] legislation which purports to confer upon a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with the court's role as a repository of federal jurisdiction, is constitutionally invalid.[3]

9. A court's institutional integrity is taken to be impaired in the relevant sense where the legislation conscripts or enlists the court in the implementation of the legislative or executive policies of the State or Territory or the legislation requires the court to depart to a significant degree from the methods and standards which have historically characterised the exercise of judicial power.[4]

10. The Appellant's central contention is that s 68BA(4) conferred on the Supreme Court a function incompatible with the judicial process because the absence of specified criteria in that subsection meant that, as between cases that were equal, only some would be exposed to the *risk* of a judge alone trial: AS[13].

11. That argument divorces s 68BA(4) from its statutory context. The constitutional character of the provision is to be assessed by its operation and effect in terms of the rights, duties, powers and privileges which it creates,[5] which in turn can only be identified by reference to its statutory context.[6] A notice given under s 68BA(4)(a) had no adverse effect on a person's rights or interests unless and until the parties had been given an opportunity to be heard (s 68BA(4)(b)) and the Court had exercised its discretion under s 68BA(3), including by reference to the matters in s 68BA(3)(a) and (b). Thus, the operation and effect of s 68BA as a whole was mediated by what the Appellant (correctly) concedes is a "regular exercise of judicial power that was to be exercised judicially": AS[12]. Section 68BA(4)(a) was a mere "procedural necessity"[7], the sole purpose of which was to ensure procedural fairness to the parties, consistent with the usual judicial process.

12. Further, because s 68BA(4)(a) is open-textured, the Appellant can only rely on the *possibility* that the power would be exercised "arbitrarily": AS[16]. But the

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1 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***).
2 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 (***Emmerson***) at [42] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
3 Ibid at [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
4 *Kuczborski v Queensland* (2014) 254 CLR 51 at [140] per Crennan, Kiefel, Gageler and Keane JJ.
5 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [12] (the Court).
6 *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at [124] per Gordon J.
7 cf. *Emmerson* (2014) 253 CLR 393 at [61] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

validity of s 68BA(4)(a) is not to be assessed by reference to "extreme examples and distorting possibilities"[8], nor on the assumption that the repository of the power "will act improperly or venally". [9] On the contrary, the Court retained its capacity to act fairly and impartially and the fact that the Supreme Court can and is expected to act fairly and impartially points firmly against invalidity.[10]

13. As to the suggestion that there was "no discernible test or criteria" by which the power might be exercised (AS[14]), there is nothing impermissible about an open-textured power which reflects a legislative intention to confer on courts the widest possible power to do what is appropriate to achieve justice in the circumstances.[11] Regardless, the criteria for exercise were supplied by the statutory context, including the criteria in s 68BA(3) and the purpose for which s 68BA was introduced.[12]

14. Finally, the Appellant's submission rests on the premise that all cases committed to the Supreme Court for trial were relevantly identical, so that merely exposing some accused persons to the risk of a judge alone trial created unequal treatment: AS[11] and [16]. That premise falls away if it is accepted that different cases presented different risks to the administration of justice. Concurrent findings were made to that effect by the primary judge and Court of Appeal.[13] The Appellant does not cavil with those findings. In *Kuczborski v Queensland* (2014) 254 CLR 51, Hayne J would have dismissed a *Kable* challenge based on the courts' involvement in dispensing "unequal justice" because the premise of unequal treatment was not made good.[14]

C GROUND 2: SECTION 80

15. The proposition for which *Bernasconi* stands is that the power of the Commonwealth Parliament to make laws for the government of a territory under s 122 of the Constitution, whether exercised directly or through a subordinate

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8 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [46] per Gleeson CJ.

9 *Egan v Willis* (1998) 195 CLR 424 at [160] per Kirby J.

10 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [167] and [169] per Hayne, Crennan, Kiefel and Bell JJ.

11 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [123] per Nettle J (and the authorities therein); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [23] per Bell, Keane, Nettle and Edelman JJ; *Garlett v Western Australia* [2022] HCA 30 at [66] per Kiefel CJ, Keane and Stewart JJ

12 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [23] per French CJ.

13 *Vunilagi v The Queen* (2021) 17 ACTLR 72 at [231]-[232] (the Court); *R v Vunilagi* (2020) 354 FLR 452 at [27]-[36], [40] per Murrell CJ.

14 *Kuczborski v Queensland* (2014) 254 CLR 51 at [108]-[109] per Hayne J.

legislature, is not restricted by the provision in s 80 that the trial on indictment of any offence against any law of the Commonwealth shall be by jury.[15]

16. Subsequent authorities have correctly disapproved of the broad reasoning upon which that proposition rested.[16] That reasoning went "beyond the occasion" by considering the general relationship between s 122 and Chs I and III.[17]

17. As such, *Bernasconi* should be understood as speaking only to the relationship between ss 80 and 122, and not as requiring a general "disjoinder" between s 122 and the rest of the Constitution or Ch III in particular.[18] On that understanding, *Bernasconi* is explicable on the basis that, at Federation, the laws of all the States provided for the trial by jury of persons tried on indictment and there was a desire to lay down a rule that the trial of persons charged with new indictable offences created by the Commonwealth Parliament in respect of the States should be tried in the same way.[19] This included the requirement in s 80 that, where the offence was committed in a State, the trial must be held in that State, and by extension, the jury would be chosen from the residents of that State.

18. By contrast, because of the diversity of territories which may come within Commonwealth control and their differing degrees of political development[20], the Commonwealth should have discretion over the mode of trial in those territories where the offence was created by a law under s 122.[21] This construction is achieved by reading the words "any law of the Commonwealth" in s 80 as if they were followed by the words "other than a law made under s 122".[22] Understood as confined to what it decided, *Bernasconi* has been referred to or considered on many occasions and has never been overruled.[23]

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15 *Spratt v Hermes* (1965) 114 CLR 226 (***Spratt***) at 243-4 per Barwick CJ.

16 See the authorities in *Fittock v The Queen* (2003) 217 CLR 508 (***Fittock***) at [30] per Kirby J.

17 Ibid at 245 per Barwick CJ.

18 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 85 per Dixon J; *Lamshed v Lake* (1958) 99 CLR 132 (***Lamshed***) at 145 per Dixon CJ (Webb, Kitto and Taylor JJ agreeing); *Spratt* (1965) 114 CLR 226 at 278 per Windeyer J.

19 *Bernasconi* (1915) 19 CLR 629 at 635 per Griffiths CJ.

20 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [7] per Gleeson CJ, McHugh and Callinan JJ.

21 *Bernasconi* (1915) 19 CLR 629 at 637-8 per Isaacs J; *Spratt* (1965) 114 CLR 226 at 244 per Barwick CJ. See similarly *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [167] per Keane J.

22 *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 605-6 per Menzies J.

23 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585 per Dixon J; *Ffrost v Stevenson* (1937) 58 CLR 528 at 556 per Latham CJ, 566 per Dixon J and 591-3 per Evatt J; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 84-5 per Dixon J and 103 per Williams J; *Johnston, Fear & Kingham & Offset Printing Co Pty Ltd v*

19. The Appellant cannot avoid re-opening *Bernasconi* by confining its authority to external territories: AS[18]. That was not a distinction drawn in *Bernasconi* and, while such a distinction has been mooted from time to time in the context of other constitutional provisions[24], it has never been embraced by a majority of the Court. There is also no textual basis for the distinction in ss 80 or 122.[25]

20. As such, the Appellant can only succeed if *Bernasconi* is re-opened. The remainder of these submissions addresses the relationship between ss 80 and 122 from first principles, in the event the Court determines to re-open *Bernasconi*.

The reasoning in *Bernasconi* should be discarded

10 21. The Northern Territory agrees with the Appellant and the ACT that the broad reasoning in *Bernasconi* – that s 122 stands wholly outside Ch III – can no longer be sustained: AS[19]-[24] and ACT[48]. That broad reasoning marked the highpoint of the separationist view of s 122. It was premised on an understanding that Chs I, II and III of the Constitution are exclusively *federal* in character and that s 122 and the territories are exclusively *non-federal* in character, such that the

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Commonwealth (1943) 67 CLR 314 at 317-8 per Latham CJ; *Waters v Commonwealth* (1951) 82 CLR 188 at 190-2 per Williams J; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 289-90 per Dixon CJ, McTiernan, Fullagar and Kitto JJ and 327-8 per Webb J; *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529 at 545 (PC); *Lamshed* (1958) 99 CLR 132 at 142, 145 and 148 per Dixon CJ (Webb, Kitto and Taylor JJ agreeing) and 150-1 per Williams J; *Spratt* (1965) 114 CLR 226 at 243-8 per Barwick CJ, 251-60 per Kitto J, 266 and 269-70 per Menzies J and 277-8 per Windeyer J; *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 598-9 per Barwick CJ, 605-6 per Menzies J, 620-1 per Walsh J, 628 per Gibbs J; *Western Australia v Commonwealth* (1975) 134 CLR 201 at 282 per Murphy J; *Attorney-General (Vic) v Commonwealth* (1981) 146 CLR 559 at 593-4 per Gibbs J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 216 and 222 per Gaudron J; *Kruger v Commonwealth* (1997) 190 CLR 1 (***Kruger***) at 44 per Brennan CJ, 55, 59-61 per Dawson J, 80-83 per Toohey J, 108, 117 and 122 per Gaudron J, 172 per McHugh J; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 536-8 per Brennan CJ, 556-9 per Dawson J, 606-7 per Gummow J, 650-1 per Kirby J; *Northern Territory v GPAO* (1999) 196 CLR 553 at [88]-[89] and [92] per Gleeson CJ and Gummow J, [109] per Gaudron J, [166]-[176] per McHugh and Callinan JJ; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [173]-[174] per Gummow and Hayne JJ and [232] per Kirby J; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [7]-[9] per Gleeson CJ, McHugh and Callinan JJ, [65] per Gaudron J, [98], [108], [124], [130]-[132], [149], [151] and [154] per Kirby J; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [25] per Gleeson CJ and Gummow J (Hayne J agreeing); *Bennett v Commonwealth* (2007) 231 CLR 91 at [185] per Callinan J; *NAAJA* (2015) 256 CLR 569 at [167] per Keane J. Contra. *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 202 per Aickin J and *Gould v Brown* (1998) 193 CLR 346 at [131]-[133] per McHugh J.

24 For example s 90 (*Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 (***Capital Duplicators No. 1***) at 289 per Gaudron J) and s 51(xxxi) (*Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at [459]-[460] per Kiefel J). The closest this Court has come to embracing that proposition was in *Bennett v Commonwealth* (2007) 231 CLR 91 at [36], where the plurality said that whether an external territory is regarded as "part of the Commonwealth" may depend upon the purpose for which the question is asked.

25 As to s 122, see *NAAJA* (2015) 256 CLR 569 at [167] per Keane J.

two occupy separate universes of discourse and s 80 could never have any application in the territories.

22. Thus, Griffiths CJ (Gavan Duffy and Rich JJ agreeing) said in *Bernasconi* that Ch III is limited in its application to the exercise of the judicial power of the Commonwealth "in respect of those functions of government as to which it stands in the place of the States" and "has no application to territories."[26] By contrast, the power in s 122, "although conferred by the same instrument, stands on a different footing."

23. Similarly, Isaacs J said that s 80 was a limit on the exercise of Ch III jurisdiction, but those provisions only applied to "the Commonwealth proper", being the "Commonwealth as a self-governing community" of the States to which the territories do not form part but which are merely annexed and subordinate to.[27] However, when the Constitution reached "a new consideration" (the government of the territories) s 122 confers an "unqualified grant" unrestricted by those matters which confine the legislative powers in s 51.

24. Subsequent authorities have shown that the separationist views on which *Bernasconi* depends are wrong. Contrary to the interpretative method in *Bernasconi*, the modern approach to constitutional interpretation requires that (a) the Constitution be construed as a whole[28], (b) the provisions of Chs I, II, III and VI not be compartmentalised merely because "for drafting convenience [the Constitution] has been divided into chapters"[29], and (c) the Constitution be treated as "one coherent instrument for the government of the federation, "not as two constitutions, one for the federation and the other for its territories."[30] As such, it is now seen as "erroneous to construe s 122 as though it stood isolated from other provisions of the Constitution which might qualify its scope"[31] and it can no longer be said that the ACT and the Northern Territory should not be properly regarded as part of the Commonwealth.[32]

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26 *Bernasconi* (1915) 19 CLR 629 at 635 per Griffiths CJ, Gavan Duffy and Rich JJ agreeing.
27 Ibid at 637 per Isaacs J.
28 *Spratt* 1965) 114 CLR 226 at 242 per Barwick CJ.
29 Ibid at 246 per Barwick CJ, quoted with approval in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 603 per Gummow J (Gaudron J agreeing).
30 *Lamshed* (1958) 99 CLR 132 at 154 per Kitto J, quoted with approval in *Capital Duplicators No. 1* (1992) 177 CLR 248 at 272 per Brennan, Deane and Toohey JJ.
31 *Capital Duplicators No. 1* (1992) 177 CLR 248 at 272 per Brennan, Deane and Toohey JJ.
32 *Lamshed* (1958) 99 CLR 132 at 143-4 per Dixon CJ (Webb, Kitto and Taylor JJ agreeing) and *Spratt* (1965) 114 CLR 226 at 247 per Barwick CJ and 270 per Menzies J.

25. Consistent with those broad propositions, authorities after *Bernasconi* show that the territories are not wholly disjoined from Chs I, II and III. As to Ch I, representatives from the Northern Territory and ACT sit in the Commonwealth Parliament[33], the legislative powers conferred by s 51 generally apply to the territories[34], and s 51(xxxi) abstract from s 122 the power to make laws for the acquisition of property otherwise than on just terms.[35] As to Ch II, s 61 embraces the executive power of the Commonwealth in relation to territories.[36] As to Ch III, territory courts can and do exercise federal judicial power[37] and, in those circumstances, they are courts exercising federal jurisdiction from which an appeal to this Court lies under s 73(ii). Therefore, there is no longer any doubt that territory courts form part of the integrated national judicial system which Ch III creates.

26. Conversely, s 122 is not disjoined from the federation. The Parliament may make laws pursuant to s 122 which apply within the States[38] and, where it does so, those are "laws of the Commonwealth" given paramountcy over State laws by s 109.[39] A law in force in a territory may be sustained by a combination of ss 51, 52 or 122, particularly where the law is one which applies throughout the nation.[40]

27. Thus, the sharp division drawn in *Bernasconi* between territories and Chs I, II and III of the Constitution can no longer be sustained. If it is re-opened, its reasoning should be discarded.

The relationship between ss 80 and 122

28. Any reassessment of the relationship between ss 80 and 122 must start with the constitutional text.[41] In its terms, s 80 is triggered where there is a trial on

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33 *Western Australia v Commonwealth* (1975) 134 CLR 201 and *Queensland v Commonwealth* (1977) 139 CLR 585.

34 *Berwick Ltd v Gray* (1976) 133 CLR 603 (***Berwick***) at 608-9 per Mason J (Barwick CJ, Murphy and McTiernan JJ agreeing); *Lamshed* (1958) 99 CLR 132, 141-3 per Dixon CJ (Webb, Kitto and Taylor JJ agreeing). Cf. *Wurridjal* (2009) 237 CLR 309 at [74] per French CJ.

35 *Wurridjal* (2009) 237 CLR 309 at [81] per French CJ, [189] per Gummow and Hayne JJ, [287] per Kirby J and [325] per Heydon JJ.

36 *Kruger* (1997) 190 CLR 1 at 168 per Gummow J; *Spratt* (1965) 114 CLR 226 at 246 per Barwick CJ; *Lamshed* (1958) 99 CLR 132 at 142 per Dixon CJ (Webb, Kitto and Taylor JJ agreeing).

37 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [28] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

38 *Wurridjal* (2009) 237 CLR 309 at [74] per French CJ and [175] per Gummow and Hayne JJ.

39 *Lamshed* (1958) 99 CLR 132 at 148 per Dixon CJ, Webb, Kitto and Taylor JJ agreeing.

40 *Spratt* (1965) 114 CLR 226 at 278 per Windeyer J, cited with approval in *R v Hughes* (2000) 202 CLR 535 at [15] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Wurridjal* (2009) 237 CLR 309 at [181] and [187] per Gummow and Hayne JJ and [457]-[460] per Kiefel J.

41 *Wurridjal* (2009) 237 CLR 309 at [73] per French CJ.

indictment of an offence against "any law of the Commonwealth". Although the word "Commonwealth" is used in the Constitution in different senses[42], in s 80 it refers to the central government of the Federation[43] whose legislative powers are vested in the Parliament by s 1 of the Constitution. Section 122 then provides that "the Parliament may make laws for the government of any territory…" It follows that, on a natural reading of the two provisions, a law made by the Parliament under s 122 meets the description of a "law of the Commonwealth" in s 80.

29. That construction is supported by five further matters. The *first* is the expansive language of s 80 ("*any* law of the Commonwealth").

30. The *second* is the ways in which the phrase is used elsewhere in the Constitution. As noted earlier, laws made under s 122 are "laws of the Commonwealth" for the purposes of s 109. Similarly, the executive power of the Commonwealth vested by s 61 – which "extends to the execution and maintenance… of *the laws of the Commonwealth*" – includes the execution and maintenance of laws made under s 122.[44] Further, s 122 can be the source of "a law made by the Parliament" for the purposes of s 76(ii),[45] which is a narrower phrase than a "law of the Commonwealth".[46] As was adverted to by Gummow J, if a law of the Commonwealth may include a law made under s 122 for those purposes, it is not clear why it should not bear the same meaning in s 80.[47]

31. The *third* lies in the second half of s 80. Where it is triggered, s 80 requires that "every such trial shall be held in the State where the offence was committed, *and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes*." In its terms, s 80 thus contemplates that the Commonwealth offence in question may not have been committed within any State. The most obvious alternative is that an offence

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42 *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at [74] per Kiefel CJ, Bell, Gageler and Keane JJ and [212]-[215] per Edelman J.

43 S Hartford-Davis, "The Legal Personality of the Commonwealth of Australia" (2019) *Federal Law Review* 47(1), 7-8.

44 See fn 39 above.

45 *GPAO* (1999) 196 CLR 553 at [91] per Gleeson CJ and Gummow J, [132] per Gaudron J and [254]-[258] per Hayne J. .

46 *Spratt* (1965) 114 CLR 226 at 276 per Kitto J; *R v Kidman* (1915) 20 CLR 425 at 438 per Griffiths CJ.

47 *Kruger* (1997) 190 CLR 1 at 172-3 per Gummow J.

would occur within a territory under a law of the Commonwealth made pursuant to s 122.[48]

32. The *fourth* is consequential. Now that it is accepted that ss 51 and 52 may have application in the territories, and that s 122 may have application in the States, a construction which wholly separated s 122 from s 80 would produce incongruous results. A resident of a State would have the benefit of s 80 in respect of laws passed by the Commonwealth Parliament in respect of the States under ss 51 and 52, but not if the law was solely supported by s 122.[49] Conversely, the residents of the territories would generally not have the benefit of the guarantee, but s 80 may have application where the law was passed in reliance on ss 51 and 52. Those distinctions are arbitrary and an integrated approach to the various sources of Commonwealth legislative powers throughout the Commonwealth should be preferred.[50]

33. The *fifth* is purposive. Section 80 has been variously described as serving rights-protective and democratic purposes. Both have resonance in the territories.

34. As a rights-protective provision, s 80 has been described as "protect[ing] the citizen from the executive and judicial power of the Commonwealth by ensuring that trials on indictment will be determined by representatives of the community who are unanimous in their verdicts."[51]

35. Although s 80 has been referred to as a "mere procedural provision"[52], where it does apply it guarantees important minimum standards. It ensures (a) a trial by a jury of peers rather than by another, potentially less favourable or experimental, mode[53], (b) a jury that is independent and randomly and impartially selected[54], (c) that there will be a minimum number of jurors to present a plurality of views[55], and (d) a division of functions between the judge and jury, which provides a further check on government power. The organising principle behind those

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48 Ibid at 172 per Gummow J, referring to *Ffrost v Stevenson* (1937) 58 CLR 528 at 592 per Evatt J.

49 See, by analogy concerning s 51(xxxi), *Wurridjal* (2009) 237 CLR 309 at [80] per French CJ and *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 601-2 per Gummow J.

50 *Wurridjal* (2009) 237 CLR 309 at [74] per French CJ and [184] per Gummow and Hayne JJ.

51 *Fittock* (2003) 217 CLR 508 at [23] per McHugh J.

52 *Spratt* (1965) 114 CLR 226 at 244 per Barwick CJ.

53 J Stellios, 'The Constitutional Jury: "A Bulwark of Liberty"?' (2005) 27(1) *Sydney Law Review* 113, 136-7.

54 *Ng v The Queen* (2003) 217 CLR 521 at [14] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

55 *Brownlee v The Queen* (2001) 207 CLR 278 at [21] per Gleeson CJ and McHugh J, [71]-[73] per Gaudron, Gummow and Hayne and [184] per Callinan J.

standards is what is functionally required for a fair trial by jury[56], preserving "the essential features of the jury trial from legislative modification."[57]

36. An alternative conception of s 80 is that it performs a democratic function. The participation of people in the exercise of Commonwealth judicial power through their service on juries enhances the rule of law, provides a basis for community acceptance of verdicts in criminal trials, and increases the public's appreciation of the judicial process.[58] Those objects are as important in the territories as they are in the States, where the laws being enforced are those of the central government and not those of the democratically elected local legislature.

10 37. For those reasons, s 80 should be understood to apply to an indictable offence against a law made by the Parliament under ss 51, 52 or 122 of the Constitution.

Section 80 does not apply to a law of a self-governing territory

38. The same result does not apply to a law of a self-governing territory and the Appellant's secondary contention should not be accepted: AS[37]-[44]. On established authority:

(a) a "law of the Commonwealth" within the meaning of s 80 must be one "made under the legislative powers of the Commonwealth"; and

(b) the Legislative Assembly of the ACT does not exercise the legislative power of the Commonwealth, as delegate or otherwise.

20 *Law of the "Commonwealth"*

39. That result turns textually on the word "Commonwealth" in s 80. As noted above, that word is used to denote the Commonwealth as the central government of the Federation. That conception agrees with how the provision was described in the *Convention Debates*, where it was said that:

(a) "[s 80] is only for indictable offences committed under laws passed *by the Federal Parliament*"[59];

(b) section 80 would apply "however small might be the offence created by *any Commonwealth enactment*"[60]; and

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56 J Stellios, *The Federal Judicature: Chapter III of the Constitution* (2020, 2nd ed, LexisNexis), [12.73].
57 V Bell, 'Section 80 – The Great Constitutional Tautology' (2014) 40(1) *Monash University Law Review* 7, 28.
58 *Cheng v The Queen* (2000) 203 CLR 248 at 277-8 per Gaudron J.
59 Record of Convention Debates, Melbourne, 31 January 1898 at 350 (Mr Wise).

(c) "[t]here will be numerous *Commonwealth enactments* which would prescribe, or properly prescribe, punishment, and summary punishment; and if we do not alter the clause in this way they will have to be tried by jury."[61]

40. It may also be accepted that the phrase extends to the *delegated* legislation of the Commonwealth Parliament, such as regulations and ordinances.[62] Consistent with that, this Court has held that, to be a "law of the Commonwealth" for the purposes of s 80, the law must be "made under the legislative powers of the Commonwealth"[63] or "by the authority of the Parliament of the Commonwealth."[64]

10 *The significance of self-government*

41. The critical error in the Appellant's contention is that it fails to grapple with the fact that the Legislative Assembly does not exercise (directly or indirectly) the legislative power of the Commonwealth: cf. AS[40]-[41].

42. By s 7 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**ACTSGA**), the ACT is established as a body politic distinct from the Commonwealth body politic, with its own legislature (Parts III-IV), executive (Part V) and judiciary (Part VA).[65] Its establishment as a body politic "under the Crown" (rather than under the authority of the Commonwealth) is consistent with this separation.[66] It is a manifestation of the capacity within s 122 to "endow a
20 Territory with separate political, representative and administrative institutions, having control of its own fiscus."[67]

43. The Legislative Assembly is vested with the power to make laws for the peace, order and good government of the Territory.[68] That power is plenary and

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60 Record of Convention Debates, Melbourne, 4 March 1898 at 1894 (Mr Barton).
61 Record of Convention Debates, Melbourne, 4 March 1898 at 1895 (Mr Barton) (in discussion concerning the alteration of the words "of all indictable offences" to "on indictment of any offence").
62 See, by parity of reasoning concerning s 109, *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 at [56] per Moore and Stone JJ and [118] per Flick J.
63 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [25] per Gleeson CJ and Gummow J (Hayne J agreeing).
64 Ibid at [45] per McHugh J.
65 See, by analogy, *Northern Territory (Self-Government) Act 1978* (Cth) (**NTSGA**), s 5 and Parts III and IV. The Northern Territory judiciary is established "directly" by territory legislative power (not the judicial power of the Commonwealth): *NAAJA* (2015) 256 CLR 569 at [147] per Keane J; e.g. *Supreme Court Act 1979* (NT), s 10.
66 D Mossop, *The Constitution of the Australian Capital Territory*, (2021, The Federation Press), [7.9].
67 *Berwick* (1976) 133 CLR 603 at 607 per Mason J (Barwick CJ, McTiernan and Murphy JJ agreeing).
68 ACTSGA, s 22(1). See, similarly, NTSGA, s 6.

independent, having the same character as that of the self-governing colonies established by the Imperial Parliament before federation.[69]

44. The Legislative Assembly cannot (and does not) exercise the legislative power of the Commonwealth. That power is vested by s 1 of the Constitution exclusively in the Commonwealth Parliament.[70] This conferral of legislative power does not prevent the Parliament from *delegating* part of its power to the Commonwealth executive or to a subordinate law-making body.[71] But the Legislative Assembly is not a delegate of the Parliament.[72] It follows that, if the Legislative Assembly were to exercise (directly or indirectly) the legislative power of the Commonwealth, that would offend s 1 of the Constitution.

45. As such, the Legislative Assembly "exercises not the [Commonwealth] Parliament's powers but its own" – a "new legislative power".[73] It is "a body separate from the Commonwealth Parliament, so that the exercise of its legislative powers, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power."[74]

46. Further, the Legislative Assembly is not responsible to the Commonwealth or to the Commonwealth Parliament for the manner in which its legislative powers are exercised.[75] The Parliament has no power under the ACTSGA to disallow any legislation made by the Assembly.[76] The Parliament must, if it wishes to override an enactment, pass a new law to achieve that result as it has done in respect of territory laws permitting euthanasia.[77]

47. The enactments of the Legislative Assembly are therefore not laws made "under the legislative powers of the Commonwealth" or "by the authority of the

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69 *Capital Duplicators No. 1* (1992) 177 CLR 248 at 281-2 per Brennan, Deane and Toohey JJ (Gaudron J agreeing).

70 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373 per Barwick CJ.

71 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 83-4 per Gavan Duffy and Starke JJ, 86 per Rich J, 101 per Dixon J and 117 per Evatt J; *Attorney-General (Cth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529 at 545-6 (PC).

72 *Capital Duplicators No. 1* (1992) 177 CLR 248 at 282 per Brennan, Deane and Toohey JJ (Gaudron J agreeing).

73 Ibid at 282-3 per Brennan, Deane and Toohey JJ and 284 per Gaudron J agreeing.

74 *Svikart v Stewart* (1994) 181 CLR 548 at 562 per Mason CJ, Deane, Dawson and McHugh JJ; *NAAJA* (2015) 256 CLR 569 at [105] per Gageler J and [170]-[171] per Keane J.

75 *NAAJA* (2015) 256 CLR 569 at [171] per Keane J.

76 *Capital Duplicators No. 1* (1992) 177 CLR 248 at 283 per Brennan, Deane and Toohey JJ (Gaudron J agreeing).

77 ACTSGA, s 23(1A), inserted by *Euthanasia Laws Act 1997* (Cth), s 3, Schedule 2.

Parliament" of the Commonwealth and, as such, are not "laws of the Commonwealth" for the purposes of s 80.[78]

48. None of the authorities referred to in AS[40]-[41] point to a different conclusion. In *R v Foster; Ex parte Commonwealth Steamship Owners' Association* (1953) 88 CLR 549, the Court said that Commonwealth industrial awards were not "laws of the Commonwealth" for the purpose of s 405Q of the *Navigation Act 1912-1915* (Cth). The comments of Dixon J in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585 were made before self-government, when the ACT was administered either by Commonwealth legislation or delegated legislation, and, in any event, his Honour expressed no concluded view ("[i]t *may well be*…"). In *O'Neill v Mann* (2000) 101 FCR 160, Finn J considered the enforcement of rights which owed their existence to Commonwealth legislation enacted before self-government, not enactments of the Legislative Assembly: see [26] and [29]. Similarly, in *Kruger* (1997) 190 CLR 1 at 169, Gummow J was considering the effect of s 7(1) of the *Northern Territory Acceptance Act 1910* (Cth), which gave the force of Commonwealth statute to laws in force in the Northern Territory before its acceptance by the Commonwealth in 1911.

The Appellant's arguments

49. Against this, the Appellant contends that his construction should be preferred because the ACT "remains part of the body politic of the Commonwealth": AS[42]. That submission elides the different senses in which "the Commonwealth" may be understood.

50. By covering clause 3, the Constitution brought into existence the Commonwealth of Australia as a nation, which comprises (at least) the States, the ACT and the Northern Territory.[79] But that is obviously not the sense in which s 80 or s 109 uses the phrase "the Commonwealth". If imported into s 109, its operation would

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78 This view did not commend itself to Kirby J in *Fittock* (2003) 217 CLR 508, but his Honour expressed no concluded view about the issue (see [31]), his comments were *obiter* (see [32]), and no other member of the Court endorsed those comments.

79 See, e.g., *Capital Duplicators No. 1* (1992) 177 CLR 248 at 286 per Gaudron J and S Hartford-Davis, "The Legal Personality of the Commonwealth of Australia" (2019) *Federal Law Review* 47(1), 7-8 referring to the "Commonwealth (nation)".

be incoherent, and it has been established that s 80 does not apply to a law of a State.[80]

51. Sections 80 and 109 use the phrase "the Commonwealth" to describe the central government of the Federation. For the reasons above, where the Commonwealth has created an independent, self-governing body politic for a territory, the laws of that body politic are not "laws of the Commonwealth".

52. The Appellant also contends his construction should be preferred because the disapplication of s 80 from a law of the Legislative Assembly "would place the ACT on the same footing as a State": AS[42]. That argument assumes the answer to the question. It takes as its premise that it is *only* the laws of the States to which s 80 does not apply. It then says that, by *disapplying* s 80 to self-governing territories, the ACT and Northern Territory would be elevated to a position they were not otherwise in. The premise is flawed because the criterion on which s 80 operates is not, negatively, whether the offence is not one against a law of a State but, positively, whether the offence is one against a law of the Commonwealth.

53. Finally, the Appellant contends that the ACT and Northern Territory's construction should be avoided because it would allow the Commonwealth to do indirectly that which it could not do directly, invoking the metaphor that the "stream cannot rise above the source": AS[43]. As Keane J observed of a similar argument in *NAAJA*, such metaphors may have considerable force as a matter of rhetoric, but they are not a substitute for legal analysis.[81]

54. The submission proceeds from three erroneous premises. The *first* is that it treats the Legislative Assembly as an extension of the Commonwealth Parliament and through which it may do things indirectly. That is inconsistent with the holding in *Capital Duplicators No.1* that the Legislative Assembly is an independent law-making body, which is neither a delegate of nor accountable to the Parliament.

55. The *second* is that it assumes the ACT's legislative powers are bound by the same matters as those of the Commonwealth Parliament, but "[t]here is no good reason to think that the power of the Legislative Assembly to make laws for the peace, order and good government of the Northern Territory [or the ACT] is a facsimile

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80 *Rizeq v Western Australia* (2017) 262 CLR 1 at [32] per Kiefel CJ, [40] per Bell, Gageler, Keane, Nettle and Gordon JJ and [204] per Edelman J.

81 *North Australian Aboriginal Justice Agency* (2015) 256 CLR 569 at [159] per Keane J.

of the legislative power of the Commonwealth Parliament conferred by s 122 of the Constitution."[82] For example, the creation under s 122 of a legislative body does not carry with it the constraints on Commonwealth legislative power contained in Ch III[83] and the prevailing view is that s 116 constrains the Commonwealth's power under s 122 but not the powers of territory legislatures.[84]

56. The *third* is that the argument obscures the relevant inquiry, which turns on the constitutional text. The result in *Capital Duplicators No.1* depended on the word "exclusive" in s 90: cf. AS[43]. Matters of text, history and purpose suggested that this must mean exclusive of the legislatures of the States and the self-governing territories. Nothing in the text, history or purpose of s 80 suggests that it should apply to laws of a body politic independent of the Commonwealth. On the contrary, as the next section argues, that would produce incongruous results.

Contextual problems with the Appellant's construction

57. The Appellant's construction cannot be coherently reconciled with the broader statutory context.

58. On the Appellant's construction, the executive power vested by s 61 of the Constitution would extend to the execution and maintenance of the laws of a self-governing territory. That would frustrate the premise of self-government and was obviously not the understanding of the Parliament when it conferred self-government on the Northern Territory and the ACT.

59. Section 31 of the *Northern Territory (Self-Government) Act 1988* (Cth) effects its own vesting of the executive power of the Northern Territory body politic, which extends to "the execution and maintenance of... the laws of the Territory". Similarly, s 37(b) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides that the ACT executive has the responsibility for "executing and maintaining enactments and subordinate laws", being (generally) enactments of the Legislative Assembly and subordinate legislation made under those enactments (s 3).

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82 Ibid at [161] and [166] per Keane J.

83 Ibid at [107] per Gageler J and [161[per Keane J, referring to *Kruger* (1997) 190 CLR 1 at 41-44 per Brennan CJ, 53-58 and 62 per Dawson J, 141-2 per McHugh J and 176 per Gummow J.

84 cf. *Lamshed* (1958) 99 CLR 132 at 143 per Dixon CJ (Webb, Kitto and Taylor JJ agreeing) and *Kruger* (1997) 190 CLR 1 at 121-3 per Gaudron J.

60. Similarly, if territory laws were "laws of the Commonwealth" for the purposes of s 109, they would enjoy greater extraterritorial operation than those of the States in two senses. First, they would prevail over any State law to the extent of any inconsistency, regardless of which law had a superior "connection" or "nexus" with the enacting polity.[85] Secondly, the territory law would prevail where it evidences an intention to cover the field. By contrast, this Court has said that there can be no indirect inconsistency between State laws because of the absence of a paramountcy provision such as s 109.[86] It would be surprising if the legislation of a self-governing territory, not yet admitted into the family of States, should be given paramountcy over the legislation of the States.[87]

Practical problems with the Appellant's construction

61. Finally, the Appellant does not acknowledge the practical consequences of his construction, both for the ACT and the Northern Territory.

62. Both jurisdictions have relied on the understanding that s 80 does not apply to their laws. Since 1983, s 68B of the *Supreme Court Act 1933* (ACT) has allowed an accused person to waive the right to a jury trial for certain indictable offences. However, if s 80 applies, a trial must be by jury regardless of the wishes of the accused.[88]

63. Similarly, s 368 of Schedule 1 to the *Criminal Code Act 1983* (NT) permits conviction by majority verdicts in all offences tried by jury in the Northern Territory. If s 80 is engaged, it precludes conviction other than by a unanimous verdict.[89] Northern Territory courts have relied on the understanding that *Bernasconi* is authority for the proposition that s 80 of the Constitution has no application to the trial of Territory offences.[90]

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85 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 374 (the Court).

86 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [48] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

87 An alternative conception of the relationship, consistent with the submissions advanced here, is set out in G Lindell and A Mason, 'The Resolution of Inconsistent State and Territory Legislation' (2010) 38 *Federal Law Review* 391, 407.

88 *Brown v The Queen* (1986) 160 CLR 171 at 197 per Brennan J, 202 per Deane J and 214 per Dawson J, affirmed in *Alqudsi v The Queen* (2016) 258 CLR 203.

89 *Cheatle v The Queen* (1993) 177 CLR 541 at 562 (the Court).

90 See, for example, *R v Woods and Williams* (2010) 207 A Crim R 1 (NTSCFC) at [24] (the Court); *R v Ahwan* [2005] NTSC 47 at [58]-[67] per Riley J; *Fittock v The Queen* (2001) 11 NTLR 52 (NTCCA) at [11] (the Court).

64. Therefore, one consequence of the Appellant's construction would be to call into question the validity of a large number of convictions and sentences in both jurisdictions.[91]

65. Further, the Appellant's construction would deprive the ACT and the Northern Territory of the flexibility enjoyed by the States to regulate the manner in which territory offences are tried. It may be argued that this is inconsistent with the submissions in [35] above that s 80 is an important guarantee. The difference lies in self-government. Through the democratic franchise, the people of the Territory have control over their legislature. In that way, they may decide when a trial for a territory offence is or may be conducted summarily or by jury and which aspects of jury trial entrenched by s 80 should be retained or modified, as occurs in the States.

Part V: Estimate

66. The Territory estimates that no more than 20 minutes will be required for oral submissions.

Dated 16 September 2022

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91 See, by analogy, *NAAJA* (2015) 256 CLR 569 at [117] per Gageler J and [169] per Keane J.

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY No. C13 of 2022

BETWEEN: **SIMON VUNILAGI**
Appellant

THE QUEEN
First Respondent

and

ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY
Second Respondent

ANNEXURE TO THE ATTORNEY-GENERAL OF THE NORTHERN TERRITORY'S SUBMISSIONS

1. Commonwealth Constitution, ss 1, 51, 52, 61, 73, 76, 80, 90, 109, 116, 122: Current Version.
2. *Australian Capital Territory (Self-Government) Act 1988* (Cth), ss 3, 7, 22, 23, 37(b): Current Version.
3. *Criminal Code Act 1983* (NT), Schedule 1, s 368: Current Version.
4. *Euthanasia Laws Act 1997* (Cth), s 3, Schedule 2: As Enacted.
5. *Northern Territory (Self-Government) Act 1978* (Cth), ss 5, 6 and 31 and Parts III-VA: Current Version.
6. *Supreme Court Act 1933* (ACT), s 68BA: Version No. R59 (8 April 2020 – 8 July 2020).
7. *Supreme Court Act 1933* (ACT), s 68B: Current Version.
8. *Supreme Court Act 1979* (NT), s 10: Current Version.