



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
CANBERRA REGISTRY

No. C13 of 2022

BETWEEN:

**SIMON VUNILAGI**  
Appellant

and

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**THE QUEEN**  
Respondent

**ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY**  
Second Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE  
NORTHERN TERRITORY (INTERVENING)**

**Part I INTERNET PUBLICATION**

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- 20 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**

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**Ground 2: Section 80 of the Constitution**

The correctness of *Bernasconi* need not be decided

2. The correctness of *R v Bernasconi* (1915) 19 CLR 629 (**JBA 43**) need not be decided.  
Ground 2 is resolved by two propositions:
- (a) the Appellant was tried for an offence against a law of the Legislative Assembly;
  - (b) a law of the Legislative Assembly is not a “law of the Commonwealth” for the purposes of s 80 of the *Constitution*.
- 30 3. The first proposition is addressed by the Second Respondent and the Commonwealth:  
**2R[76]-[79]; CS[20]-[25].**

4. As to the second proposition, a “law of the Commonwealth” is “law made under the legislative powers of the Commonwealth” or with “the authority of the Parliament of the Commonwealth”: **NT[39]**; **AS[38]-[39]**; *Re Colina*; *Ex parte Torney* (1999) 200 CLR 386 at [25] (Gleeson CJ and Gummow J, Hayne J agreeing) and [45] (McHugh J) (**JBA 46**).
5. A law has that character if it is made in exercise of Commonwealth legislative power, either immediately (by the Parliament) or mediately (by a delegate): **NT[40]**.
6. If that construction is accepted, it is dispositive of Ground 2. The Legislative Assembly does not exercise Commonwealth legislative power and is not a delegate of the Parliament: **NT[41]-[48]**; *Capital Duplicators Pty Ltd v Australian Capital Territory (No. 1)* (1992) 177 CLR 248 at 281-2 (Brennan, Deane and Toohey JJ, Gaudron J agreeing) (**JBA 33**).
7. The Appellant’s contrary construction of s 80 – that a “law of the Commonwealth” includes a law of a self-governing territory – should not be accepted:
  - (a) It is inconsistent with past observations by this Court: *Re Colina* at [25] (Gleeson CJ and Gummow J, Hayne J agreeing) (**JBA 46**) citing *Bernasconi* at 635 (Griffiths CJ) (**JBA 43**) and *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431 (Knox CJ and Gavan Duffy J).
  - (b) It reads the word “Commonwealth” as referring to something other than the Federal government, but it cannot coherently operate either by reference to the Commonwealth as a geographic area or as a nation in ss 80 and 109: **NT[49]-[51]**.
  - (c) The Constitution uses the same of similar phrase in ss 61, 109 and 120. The provisions should be given a consistent meaning. It would be incoherent to extend those provisions to the laws of a self-governing territory: **NT[58]-[60]**.
- (a) Acceptance of the Appellant’s argument would call into question the validity of the territories’ self-government arrangements: **NT[44]**. The legislative power of the Commonwealth is vested exclusively in the Parliament. That power may be delegated but may not be abdicated: *Capital Duplicators No. 1* (1992) 177 CLR 248 at 283 (Brennan, Deane and Toohey JJ, Gaudron J agreeing) and 264 (Mason CJ, Dawson and McHugh JJ) (**JBA 33**). The Legislative Assembly is not a delegate of the Parliament: *ibid* at 281-2 (Brennan, Deane and Toohey JJ,

Gaudron J agreeing). If a law of the Assembly is a “law made under the legislative powers of the Commonwealth”, it may offend s 1 of the Constitution.

*Bernasconi* held s 80 does not apply to an Act passed under s 122

8. If that primary submission is not accepted, the Appellant must overturn *Bernasconi* to succeed. The proposition for which *Bernasconi* stands is that s 80 does not apply to a law passed (directly or indirectly) under s 122. There is no basis in *Bernasconi*, or in the text of ss 80 or 122, to confine that result to a law passed in respect of an external territory: *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [167] (Keane J) (**JBA 42**).

10 If *Bernasconi* is re-opened, a s 122 law is a law for the purpose of s 80

9. If this Court re-opens *Bernasconi* a law made by the Parliament (directly or indirectly) under s 122 is a “law of the Commonwealth” for the purpose of s 80: **NT[28]-[37]**.

10. There is an obvious connection between ss 80 and 120. The “laws of the Commonwealth” in s 120 include an offence created under s122: *Lamshed v Lake* (1958) 99 CLR 132 at 143 (Dixon CJ, Webb, Kitto and Taylor JJ agreeing) (**JBA 41**). Sections 80 and 120 should be given a consistent meaning.

**Ground 1: Kable**

11. The Attorney-General for the Northern Territory relies on his submissions in writing concerning Ground 1.

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Dated: 8 February 2023



**Nikolai Christrup**

**Lachlan Peattie**