HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY **No C13/2022**

BETWEEN: **Simon Vunilagi**

Appellant

and

The Queen

First Respondent

Attorney-General of the Australian Capital Territory

Second Respondent

SECOND RESPONDENT'S SUBMISSIONS

Part I: Certification of suitability for publication

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

Part II: Issues

2. The Second Respondent agrees with the articulation at [2] of the Appellant's submissions (**AS**) that the issue raised by ground one of the appeal is whether s 68BA (now repealed) of the ***Supreme Court Act*** *1933* (ACT), in its continuing operation on the Appellant by virtue of s 116 of the *Supreme Court Act*, contravened the limitation first identified in ***Kable*** *v Director of Public Prosecutions (NSW)*.[1]

3. The issue raised by ground two of the appeal is whether s 68BA (now repealed) of the *Supreme Court Act*, in its continuing operation on the Appellant by virtue of s 116 of the *Supreme Court Act*, was inconsistent with the requirement in s 80 of the Constitution that "*the trial on indictment of any offence against any law of the Commonwealth shall be by jury*". The articulation at AS [2] wrongly assumes that the Constitution requires "*the appellant's mode of trial be by jury*".

Part III: Notice of Constitutional issue

4. Notice has appropriately been given by the Appellant.[2]

Part IV: Material Facts

5. Save in the following respects, the Second Respondent agrees with the Appellant's statement of material facts at AS [5]-[8].

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[1] (1996) 189 CLR 51.

[2] Core Appeal Book (**CAB**), 234-241.

6. In addition to the decision of the Australian Capital Territory **Court of Appeal** appealed from (*Vunilagi v The Queen* [2021] ACTCA 12; (2021) 17 ACTLR 72; **Appeal Judgment**)[3] and the judgment of the trial judge (*R v Vunilagi (No 2)* [2020] ACTSC 274; **Primary Judgment**)[4], this Court should have regard to the interlocutory judgment of Murrell CJ in relation to the making of the order pursuant to s 68BA(3): *R v Vunilagi; R v Vatanitawake; R v Masivesi v R v Macanawai* [2020] ACTSC 225 (**Interlocutory Judgment**)[5].

7. Three matters of clarification arise in relation to AS [5]-[6]. *First*, the *COVID-19* ***Emergency Response Act*** *2020* (ACT) was passed by the Legislative Assembly for the Australian Capital Territory (**ACT**) on 2 April 2020, but not enacted on that date. It was enacted once it was notified on 7 April 2020.[6] It commenced operation on 8 April 2020. *Secondly*, s 68A of the *Supreme Court Act,* referred to at AS [5], has remained in the same terms since it was introduced in 1993.

8. *Thirdly,* the Explanatory Statement to the *Emergency Response Act* sets out the purposes and rationale of s 68BA at pages 18 to 19 and 39 to 40. Those purposes are broader than those described by the Appellant. Section 68BA facilitated the continuation of the effective administration of justice in the context of the early phase of the pandemic. In particular, it sought to protect the right under s 22(2)(c) of the *Human Rights Act 2004* (ACT) for a person charged with a criminal offence to be tried without unreasonable delay. It noted the adverse effects of delay, including the potential for loss of evidence, denial to the accused of a fair trial, and impacts on victims and witnesses. A further purpose of s 68BA was to avoid "*placing members of a jury at unnecessary risk*" (at p 19). The Explanatory Statement stated that "*[d]ue to section 80 of the Constitution, the provisions relating to judge alone trials only apply to Territory offences*" (at p 40). Finally, the Explanatory Statement stated that "*[i]t is important to note that the discretion can only be exercised once the parties to the proceedings have had the opportunity to consider the issue and make any submissions to the court*" (at p 18).

9. In relation to AS [8], in accordance with s 68BA(4), the notice received by the Appellant's representatives on 18 June 2020 invited the Appellant to make submissions concerning the making of an order pursuant to s 68BA(3).[7] The Appellant provided submissions in response to that invitation.[8] While both the Appellant and the Crown

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[3] CAB, 148-205.
[4] CAB, 62-128.
[5] CAB, 12-19.
[6] See *Legislation Act 2001* (ACT), s 29.
[7] Interlocutory Judgment at [5] (CAB, 13).
[8] Interlocutory Judgment at [6] (CAB, 13).

opposed the making of a s 68BA(3) order (as did one of the co-accused initially), at the hearing on 13 August 2020, each of the three co-accused indicated that they supported the proposed s 68BA(3) order.[9] In this context, it is important to note that after time on remand, the Appellant was on bail between 23 April 2020 and his conviction on 9 October 2020. By contrast, the Appellant's co-accused remained remanded in custody from their arrest in November 2019 until trial.[10] Consequently, delay to the trial would have different consequences for the different accused.

10. Finally, this Court should have regard to the fact that during the period in which s 68BA was in operation, the ACT Supreme Court considered that orders should be made for judge-alone trials pursuant to s 68BA(3) in only four proceedings. In addition to the Interlocutory Judgment in this matter, those decisions were *R v* ***Ali (No 3)*** (2020) 15 ACTLR 161; *R v* ***UD (No 2)*** [2020] ACTSC 90;[11] and *R v* ***Coleman*** [2020] ACTSC 97. In the matter of *UD*, the s 68BA(3) order the Court had decided should be made was later reconsidered in light of changing circumstances in the ACT: *R v* ***UD (No 3)*** [2020] ACTSC 139. In another matter, a notice given pursuant to s 68BA(4) was revoked following the repeal of s 68BA: ***R v Booth; R v Fisher*** [2020] ACTSC 204.[12]

11. Section 116 of the *Supreme Court Act* was repealed on 9 July 2022.

Part V: Argument

12. The Second Respondent submits that the appeal ought to be dismissed because:

a. As to Ground 1, the Court of Appeal was correct to find that s 68BA of the *Supreme Court Act* did not contravene the limitation first identified in *Kable.* In particular, s 68BA(4) was an unobjectionable tool of case management, designed to afford procedural fairness to accused persons.

b. As to Ground 2, the Court of Appeal was correct to find that s 68BA did not engage the requirement in s 80 of the Constitution that the trial on indictment of an offence against "any law of the Commonwealth" be by jury. The offences with which the Appellant was charged and convicted are not offences against "any law of the Commonwealth" within the meaning of s 80.

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[9] Interlocutory Judgment at [6]-[7] (CAB, 13); Appeal Judgment at [221] (CAB, 193).
[10] See Interlocutory Judgment at [8] (CAB, 13); Primary Judgment at [406] (CAB, 108); Appeal Judgment at [221] (CAB, 193).
[11] In *UD (No 2)*, the s 68BA(3) order was not perfected, pending a constitutional challenge to s 68BA by the accused in that proceeding which ultimately fell away.
[12] The Second Respondent notes that in this judgment, the Court appears to erroneously refer to the notice given pursuant to s 68BA(4) as having been given under s 68BA(3). That it was a s 68BA(4) notice, rather than a s 68BA(3) order, is evident from the description at [8] as a notice "proposing a judge alone trial".

Ground 1 – Application of the *Kable* principle

13. The Second Respondent accepts that laws enacted by the Legislative Assembly are subject to the *Kable* limitation.[13] However, the Appellant seeks to extend that limitation to argue that an ordinary case management procedure is unconstitutional. At AS [12], the Appellant now rightly concedes that the operation of s 68BA(3) of the *Supreme Court Act* was unobjectionable. Instead, his challenge focuses on the notice-giving procedure established by s 68BA(4).

14. The Second Respondent submits, contrary to AS [9]-[16], that an exercise of the power under s 68BA(4) did not undermine the Court's independence or impartiality, or otherwise depart from processes which characterise the exercise of judicial power. In particular, the Appellant's reliance on the "*concept of equal justice*" is misplaced.

Section 68BA(4) was a merely facilitative provision

15. Section 68BA(4) is properly understood as a facilitative, rather than a "gatekeeping", provision (*contra* AS [13]). It is the trigger for the process by which procedural fairness is afforded before any s 68BA(3) order is made by the Supreme Court. The Supreme Court was never obliged to make an order under s 68BA(3); it was a discretionary matter for the decision of the Court. Instead, the only requirement imposed on the Court was to give notice of any proposed order, and to invite parties to make submissions.

16. It is and always has been recognised that it lies within the inherent power of a Supreme Court to control its own process.[14] There is nothing atypical or objectionable in the fact that the Court acted on its own motion pursuant to s 68BA(4) to notify the parties that an order under s 68BA(3) was being considered. Even absent express legislative provision, a superior court has an inherent power to invite submissions from the parties to a dispute in relation to a particular issue, and procedural fairness may require a court to do so.[15]

17. Far from being unconstitutional, processes by which courts act on their own motion, including in criminal proceedings, are mundane and unobjectionable in courts across Australia. There are many such provisions in the ACT. Following committal, the Supreme Court has jurisdiction in relation to the conduct of a proceeding against a

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[13] Now as set out in *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
[14] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 74 per Gaudron J; *Walton v Gardiner* (1993) 177 CLR 378 at 393 per Mason CJ, Deane and Dawson JJ.
[15] *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J; *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396 per Dixon CJ and Webb J; *Taylor v Taylor* (1979) 142 CLR 1 at 4 per Gibbs J; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156] per Hayne, Crennan, Kiefel and Bell JJ.

person accused of an indictable offence.[16] At any stage, the Court may give any direction about the conduct of the proceeding which it considers appropriate.[17] The *Court Procedures Rules* specifically provide that the Court may "*give a direction about the conduct of the proceeding on application by a party* ***or on its own initiative***" (emphasis added).[18] On its own motion, the Court may direct an acquittal.[19] ACT statutes also make specific provision for the Court to correct a defective indictment, to make orders concerning witnesses, and orders concerning the use of documents and technology in a trial.[20]

18. At AS [14], the Appellant complains that s 68BA(4) identified no statutory criteria for determining which accused persons should receive a notice. Consistently with s 68BA(4)'s character as a facilitative provision, the criteria relevant to its exercise can be identified from the internal context of the provision, specifically s 68BA(3)(a) and (b). Indeed, there is a direct connection, because the opening words of s 68BA(4) are "*[b]efore making an order under subsection (3)*". The s 68BA(4) procedure must also be invoked consistently with the purposes for which s 68BA was enacted (see AS [6], and [8] above). If the Supreme Court considered that a s 68BA(3) order may be appropriate on the basis of the s 68BA(3) criteria, then the first step was to issue a s 68BA(4) notice to afford procedural fairness to the parties in relation to that possibility. Given the inherent power of courts to invite submissions from parties on a particular issue, in relation to which there are definitionally no statutory criteria, it would be an incongruous outcome if the lack of such express criteria in s 68BA(4) rendered the provision unconstitutional.

No unfairness to those who received a s 68BA(4) notice, nor to those who did not

19. The procedure established by s 68BA did not occasion any unfairness to accused persons who received a notice pursuant to s 68BA(4). That can be seen from the Appellant's own circumstances.

20. After the Appellant received a notice pursuant to s 68BA(4) on 18 June 2020, a hearing was held before Murrell CJ on 13 August 2020.[21] The parties were able to raise issues

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[16] *Court Procedures Act 2004* (ACT), s 76(1).
[17] ***Court Procedures Rules*** *2006* (ACT), r 4738(2).
[18] *Court Procedures Rules*, r 4738(3).
[19] *Doney v The Queen* (1990) 171 CLR 207 at 214-215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ; *R v LK* (2010) 241 CLR 177 at [29] per French CJ.
[20] *Crimes Act 1900* (ACT), s 264(1); *Evidence Act 2011* (ACT), ss 26, 29(2), 41; *Evidence (Miscellaneous Provisions) Act 2011* (ACT), ss 4AB, 4AJ, 20.
[21] The relevant practice direction, the Supreme Court of the Australian Capital Territory, 'Practice Direction 1 of 2020: Special Arrangements in Response to COVID-19' provided at [24] that if there was an objection to the making of a s 68BA(3) order, the matter would be listed for an interlocutory hearing.

and make submissions about the proposal to make a s 68BA(3) order both prior to, and during, that hearing. The parties did so. There is no suggestion that the parties were not accorded procedural fairness. Murrell CJ decided to make a s 68BA(3) order, and published her reasons for that decision (the Interlocutory Judgment)[22]. The Appellant could have sought leave to appeal from the interlocutory decision, but did not do so.[23]

21. The procedure established by s 68BA also did not occasion any unfairness to accused persons who did not receive a notice pursuant to s 68BA(4). A court is not obliged to issue an invitation to parties in another proceeding to make submissions about an equivalent issue unless procedural fairness requires it.

22. In such a case, the default mode of trial remained trial by jury.[24] Pursuant to s 68B(1) of the *Supreme Court Act*, however, an accused person could elect to be tried by a judge alone. Pursuant to s 68B(3A), during the COVID-19 emergency period (which covered the period in which s 68BA(4) notices could be given), a s 68B(1) election could be made in relation to all offences, including excluded offences.

23. As a result, the mode of trial for an accused person who did not receive a s 68BA(4) notice remained entirely within the control of that accused person. In such circumstances, there could be no unfairness to them arising from s 68BA.

No violation of "equal justice"

24. The central argument now made by the Appellant is that s 68BA(4) was contrary to the "*fundamental precept of equal justice*" (AS [16]). The Appellant contends that s 68BA(4) unconstitutionally resulted in different outcomes in cases that were "*relevantly identical*". The supposed differential outcome is rather inchoately characterised as being "*exposed to the risk of losing a jury trial*" (AS [13]). The Appellant has failed to establish the premises of his argument.

25. *First,* s 68BA did not require different procedures to be applied to different accused persons.[25] As set out above, it established a facilitative procedure which could be applied to all accused persons.

26. *Secondly,* as also set out above, there was no unfairness to accused persons, whether or not they received a s 68BA(4) notice. Despite this, the implication of the Appellant's argument (which is predicated on the proposition at AS [11] and [15] that each jury trial presented the same mischief) is that everyone committed for trial in the Supreme Court

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[22] CAB, 12-19.
[23] *Supreme Court Act,* s 37E(4).
[24] *Supreme Court Act,* s 68A.
[25] Contrary to the provision considered in *Leeth v Commonwealth* (1992) 174 CLR 455, which Gaudron J in dissent characterised as *requiring* discriminatory treatment.

should have been given a s 68BA(4) notice. Practically, this would have been highly inefficient, and it is not apparent that justice would in any way have been advanced by the Court issuing notices irrespective of individual circumstances.

27. *Thirdly,* the legal premises of the Appellant's argument have not been established. The Appellant has not identified any previous case in which inequality of treatment has formed the basis for a conclusion that the *Kable* limitation has been infringed.

28. The Appellant's reliance at AS [10] on *Wong v The Queen,*[26] which in essence attempts to apply the "parity principle" from criminal sentencing to the s 68BA(4) notice procedure, is misplaced. *Wong* cannot be applied directly to the issue in this proceeding.[27] In any case, the plurality in *Wong* noted at [65], after the passage quoted by the Appellant, that the guidelines at issue in that case tended to mask the differences which existed between cases. The outcome in *Wong* demonstrates that even if the principle were applicable, very rarely do "*identical*" cases exist.

29. Moving beyond the context of criminal sentencing, in cases where a judicial discretion is to be exercised, particularly in relation to a matter of practice and procedure, it is well-established that there may be a range of appropriate outcomes. Indeed, the case law concerning error of the kind identified in *House v The King*[28] is premised on the reality that different judges may weigh considerations in different ways, without either acting unreasonably or erroneously.

30. As noted by the Court of Appeal in the Appeal Judgment at [233][29], the result is that a discretionary case management power leaves open the possibility that two "relevantly identical cases" will, as a result of different judicial decisions, have different outcomes. The decision whether to issue a s 68BA(4) notice is a decision squarely in the category of a discretionary case management decision.

31. *Fourthly,* fundamental to the Appellant's argument is a factual proposition at AS [11] that all accused persons committed for trial in the Supreme Court were in a "*relevantly identical*" position because they all risked delay to their trials due to COVID-19. That is not sufficient to make them presumptively a "*relevantly identical*" class. The nature, extent and significance of delay might still differ between different accused.

32. Further, no court has found, and the Appellant has not sought to point to, any occasion in which relevantly identical cases were in fact treated unequally by virtue of a decision to issue a notice under s 68BA(4) in one case but not another. To the contrary, the

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[26] (2001) 207 CLR 584.
[27] Similarly, *Cameron v The Queen* (2002) 209 CLR 339, cited at fn 14 to AS [10], was a sentence appeal.
[28] (1936) 55 CLR 499.
[29] CAB, 195.

decisions in which s 68BA(3) orders were considered demonstrate the important individual factors which were at play in each decision.

33. In the Appellant's own case, an unusual combination of factors favoured making an order, as set out in the Interlocutory Judgment at [40].[30] They included that because the matter involved four co-accused, it was simply not possible to conduct a jury trial in compliance with the applicable social distancing requirements. Further, the three co-accused, who remained in custody and were entitled to be tried without unreasonable delay, supported the order being made. In that regard, a jury trial in the Appellant's case did not present the "*same mischief*" as other jury trials (*contra* AS [15]).

34. In *Ali (No 3)*, the Supreme Court considered the fact that the complainant had given recorded evidence and been cross-examined at a previous trial pursuant to the *Evidence (Miscellaneous Provisions) Act 1991* (ACT). As a result, delay would not have a significant impact on the quality of evidence at trial (at [13], [120]). The Court also considered the nature of Mr Ali's specific criminal charges, his prospects of obtaining bail, and the time which had elapsed since the alleged offences (at [121]).

35. In *Coleman*, the Supreme Court expressly acknowledged that there "*will be cases where an accused will establish that his or her trial is only suited to a determination by a jury*" (at [9]). After weighing matters, including the nature of the charges, the prosecution's case, the fact the accused was on bail, the possibility that witness evidence would deteriorate, the impact on victims and the lack of any specific distinguishing feature favouring trial by jury, the Court held it was not such a case.[31]

36. In *UD (No 3)*, the Supreme Court reconsidered its previous conclusion that a s 68BA(3) order should be made in light of the limited recommencement of jury trials in the ACT from 15 June 2020. It was significant to the Court's reasoning that there was only one accused in the matter, and that a jury trial could be safely conducted in accordance with expert advice received by the Court (at [13]).

37. In *R v Booth; R v Fisher*, the Supreme Court revoked a s 68BA(4) notice in circumstances where each of the co-accused sought trial by jury, as did the Crown. That decision was also informed by the status of the pandemic in the ACT, and the decision of the Legislative Assembly to revoke s 68BA.

38. From this universe of decisions concerning s 68BA(3), this Court can safely deduce that there was no class of "*relevantly identical*" accused persons who were treated differently.

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[30] CAB, 18. See also Appeal Judgment at [231]-[232] (CAB, 195).
[31] *Coleman* at [24]-[42] per Elkaim J.

Ground 2 – Section 80 of the Constitution

39. Section 80 is to be read and applied on its terms. The Second Respondent's position does not require any "reading down" of that provision (*contra* AS [29]). That is because the indictable offences with which the Appellant was charged were not "*any law of the Commonwealth*". They were laws of the ACT, made by the Legislative Assembly exercising its plenary power with respect to a self-governing polity.

40. Following the structure of the AS, these submissions first consider the significance of the decision in *R v* ***Bernasconi***,[32] before turning to consider the application of ss 80 and 122 of the Constitution to the issue in this case from first principles.

10 ***R v Bernasconi***

41. *Bernasconi* remains good law for its *ratio*, which is that s 80 does not apply to laws passed by the legislature of a self-governing territory. The correctness of that conclusion follows from the first-principles analysis set out from [57] below, and it should be applied by this Court.

42. The Second Respondent accepts that the broader reasoning in *Bernasconi*, to the effect that the power conferred by s 122 is not restricted by the provisions of Chapter III, is inconsistent with the reasoning in later decisions of this Court, and no longer good law.[33] Further, the reasoning in *Bernasconi* directed to the issue of whether s 80 has application to laws made directly by the Commonwealth Parliament in reliance on s 122 of the
20 Constitution must now be doubted.[34] That question, however, does not arise for determination in this case.

The ratio in Bernasconi

43. The territory of Papua, as it then was, became the Possession of British New Guinea on 4 September 1888 by Letters Patent. In 1905, the Possession of British New Guinea was placed by the King under the authority of and accepted by the Commonwealth.[35] The ***Papua Act*** *1905* (Cth) was passed to give effect to that acceptance. Pursuant to s 6(2) of the *Papua Act,* the Ordinances of the Possession of British New Guinea were continued in force, subject to exceptions. Section 8 likewise continued the existence of the Courts of Justice in Papua. Papua was self-governing and had its own legislature,

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[32] (1915) 19 CLR 629.
[33] *Spratt v Hermes* (1965) 114 CLR 226 at 244-245, 248 per Barwick CJ, 253 per Kitto J, 266, 269-270 per Menzies J, 275, 277 per Windeyer J; *Kruger v The Commonwealth* (1997) 190 CLR 1; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.
[34] See, for example, *Lamshed v Lake* (1958) 99 CLR 132, which held that a law made by the Commonwealth Parliament in reliance on s 122 was a "*law of the Commonwealth*" within the meaning of s 109 of the Constitution.
[35] *Bernasconi* at 632-633 per Griffith CJ.

the Legislative Council.[36] The Legislative Council had "*power to make Ordinances for the peace, order, and good government of the Territory*".[37]

44. **Ordinance No. VII of 1902** of British New Guinea picked up and applied the ***Criminal Code*** *1899* (Queensland) in several respects. **Ordinance No. VII of 1907** of Papua provided that, save in certain circumstances, criminal trials in the territory were to be "*held without a jury*". *Bernasconi* was an appeal to this Court from the Central Court of Papua pursuant to s 43 of the *Papua Act*. The case concerned an indictable offence of assault occasioning actual bodily harm in contravention of s 339 of the *Criminal Code* as applied by Ordinance No. VII of 1902. Pursuant to Ordinance No. VII of 1907, Mr Bernasconi had been tried and convicted without a jury. The High Court held that Mr Bernasconi's mode of trial did not contravene s 80 of the Constitution, because s 80 did not apply to invalidate Ordinance No. VII of 1907. That, and no more, was the *ratio* of the decision.

The reasoning in Bernasconi

45. In *Bernasconi*, Griffith CJ[38] and Isaacs J reached the same answer by different routes.

46. Griffith CJ referred to, but found it unnecessary to resolve, the question of "*whether a law passed by the legislature of a territory under the authority of a law passed by the Parliament of the Commonwealth can properly be regarded as a law of the Commonwealth in any sense*".[39] Instead, his Honour held that s 80 had no application to the local laws of a territory, "*whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it*".[40] As noted at AS [19], that conclusion was based on a view that Chapter III of the Constitution has no application to territories of the Commonwealth.[41]

47. Isaacs J considered that though both the *Papua Act* and Ordinance No. VII of 1907 were a "law of the Commonwealth" (in the latter case because "*its present force subsists by virtue of the declared will of the Commonwealth Parliament*"), s 80 had no application because his Honour also concluded that s 80's sole operation was as a limitation on the other provisions in Chapter III, "*applying to the Commonwealth as a self-governing community*", and not to s 122.[42]

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[36] *Papua Act*, s 29.
[37] *Papua Act*, s 36.
[38] With whom Gavan Duffy and Rich JJ agreed at 640.
[39] *Bernasconi* at 634.
[40] *Bernasconi* at 634.
[41] *Bernasconi* at 635.
[42] *Bernasconi* at 636-637.

48. As Toohey J made clear in ***Kruger*** *v The Commonwealth*,[43] despite the terms of the reasoning by Griffith CJ and Isaacs J, it has long been accepted that *Bernasconi* is not authority for the "*broad proposition*" that the power conferred by s 122 is not restricted by the provisions of Chapter III of the Constitution.

49. Further, because *Bernasconi* was concerned with the validity of a Papuan law, the Court's comments concerning the application of s 80 to laws passed by the Commonwealth Parliament were *obiter*. The question of whether s 80 applies to laws passed by the Commonwealth Parliament in reliance on s 122 has not subsequently arisen for determination, and does not arise in this case.

10 50. At AS [22], the Appellant submits that *Bernasconi* should not be applied to resolve this case because of the steps this Court has subsequently taken to "*integrate s 122 and Chapter III of the Constitution*". That characterisation is questionable, but regardless of whether it is correct, none of the developments set out at AS [22] bear on the narrow *ratio* of *Bernasconi*. Each of those developments concerned the Commonwealth Parliament exercising its legislative power under s 122, rather than laws passed by the legislature of a self-governing territory.

51. Finally, it is significant that *Bernasconi* did not resolve the question raised by Griffith CJ of whether a law passed by the legislature of a self-governing territory can properly be regarded as a law of the Commonwealth.[44] Though the Appellant agitates

20 in his submissions for an affirmative answer to that question (for example, at AS [37]ff), the Second Respondent submits that subsequent decisions of this Court have decisively resolved that question in the negative, in a manner which should be applied to s 80 (see [64]ff below).

The Appellant's attempt to distinguish Bernasconi

52. Contrary to AS [18], the Court of Appeal was correct to find that *Bernasconi* remained binding upon it to determine the outcome of the Appellant's case.[45]

53. Before both the Court of Appeal and this Court, the Appellant has sought to distinguish *Bernasconi* on the basis of supposed differences between Papua and the ACT. Contrary to those submissions (see AS [20]), the character of a territory as internal or external

30 was not a significant element of the Court's reasoning. In a passage relied on by the Appellant, Justice Isaacs referred to a territory not yet "*fused with [the*

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[43] (1997) 190 CLR 1 at 80 per Toohey J.
[44] *Bernasconi* at 634.
[45] Appeal Judgment at [269] (CAB, 203).

Commonwealth]",[46] but this was an expression his Honour had previously used to describe the Northern Territory, rather than one denoting an external territory.[47]

54. As found by the Court of Appeal in the Appeal Judgment at [268][48], the suggestion that a distinction relevant to the operation of s 80 can be drawn between territories derived by the surrender of territory by States and other territories cannot be grounded in the Constitution. That is so notwithstanding the tentative suggestion in *Mitchell v Barker*.[49] Indeed, the Constitution contemplates the advancement of external territories to Statehood.[50]

55. The Appellant has not articulated why a distinction based on the method of a territory's acquisition would be relevant to s 80, or why the ACT should be seen as being in "*a constitutionally distinct position*" (AS [18]). As set out further below, it is the character of a territory as self-governing which is of significance. Relevantly, Papua was, and the ACT is, self-governing. There is no reason for differential treatment between external and internal self-governing territories.[51]

Bernasconi should not be reconsidered

56. At AS [24], the Appellant submits that if *Bernasconi* cannot be distinguished, such that it would "*control the operation of s 80 in this case*", then it should be reconsidered. Contrary to that submission, the question for this Court is not one of whether *Bernasconi* "controls" the operation of a constitutional provision. *Bernasconi* was a decision made in particular historical circumstances, and the Second Respondent submits that its narrow *ratio* remains good law. The argument at [57] to [75] below supports the correctness of the conclusion that s 80 has no application to invalidate laws made by the legislature of a self-governing territory. There is, therefore, no cause to formally reconsider the decision in *Bernasconi*. That is especially so in light of the myriad ways in which the territories have, over an extended period, relied on the principles arising from *Bernasconi*'s narrow *ratio* and subsequent authorities (see [84] to [86] below).[52]

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[46] *Bernasconi* at 637.
[47] *Buchanan v The Commonwealth* (1913) 16 CLR 315 at 335 per Isaacs J.
[48] CAB, 203.
[49] (1918) 24 CLR 365 at 367 *per curiam*.
[50] In s 121.
[51] See *Spratt v Hermes* (1965) 114 CLR 226 at 259 per Kitto J; ***Capital Duplicators** Pty Ltd v Australian Capital Territory [No 1]* (1992) 177 CLR 248 at 289 per Gaudron J; and *Berwick Ltd v Gray* (1976) 133 CLR 603 at 608 per Mason J (Barwick CJ, McTiernan, Jacobs and Murphy JJ agreeing).
[52] *John v FCT* (1989) 166 CLR 417 at 438-9 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

Applying ss 80 and 122 to this case from first principles

57. As noted at AS [21], since *Bernasconi*, this Court has held that s 122 is qualified by other provisions of the constitution, including ss 51(xxxi) and 90.[53] The reasoning from such cases cannot be used presumptively in relation to the operation of s 80. Instead, the starting point is analogous to that articulated by Justice Gaudron in *Capital Duplicators* in relation to ss 90 and 122. The relationship "*can only be ascertained by having regard to the Constitution as a whole, for the meaning and operation of s 90 necessarily depend on the meaning given to s 122 and vice versa*".[54] The Second Respondent agrees with AS [21] and [25] that it also requires "*close consideration of the text, context and purpose of the respective provisions*".

58. Determining whether laws passed by the Legislative Assembly are "*any law of the Commonwealth*" within the meaning of s 80 requires an examination of s 80 itself, followed by consideration of the ACT's establishment and its legislative power. These submissions then consider the Appellant's primary and secondary contentions.

Section 80 of the Constitution

59. Section 80 provides that "*the trial on indictment of any offence against any law of the Commonwealth shall be by jury*". It also contains a second imperative concerning the venue of the trial. Neither the text, context nor purpose of s 80 suggests or compels its application to laws passed by the legislature of a self-governing territory.

60. Though the purpose of s 80 does not emerge clearly from the debates which occurred at the constitutional conventions,[55] this Court has understood s 80 to be "*integral to the structure of government and to the distribution of judicial power and not as a right or privilege personal to the accused*".[56] The object of s 80 is to prescribe how the judicial power of the Commonwealth is engaged in the trial on indictment of Commonwealth offences.[57] This Court has held that the imperatives of s 80, when they apply, are unambiguous and unqualified, admitting of no other mode of trial on indictment "*for a Commonwealth offence*".[58]

61. It has always been clear that s 80 does not apply to trials in the State courts, unless those courts are prosecuting a Commonwealth offence (even if the State court is otherwise

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[53] *Wurridjal v Commonwealth* (2009) 237 CLR 309; *Capital Duplicators.*
[54] *Capital Duplicators* at 284.
[55] See Amelia Simpson & Mary Wood, "'A Puny Thing Indeed': *Cheng v The Queen* and the Constitutional Right to Trial by Jury" (2001) 29 Fed LR 95.
[56] *Brown v The Queen* (1986) 160 CLR 171 at 197 per Brennan J; at 202 per Deane J; at 214 per Dawson J; as cited in ***Alqudsi*** *v The Queen* (2016) 258 CLR 203 at [94] per Kiefel, Bell and Keane JJ.
[57] *Alqudsi* at [115] per Kiefel, Bell and Keane JJ.
[58] *Alqudsi* at [113], [115] per Kiefel, Bell and Keane JJ.

exercising federal jurisdiction).[59] Trial by jury had not been entrenched in the colonies at the time of Federation, and the colonial legislatures were able to define the circumstances in which it was to occur.[60] That remains true in the States.

The establishment of the ACT

62. The geographic area which is now the ACT was surrendered by the State of New South Wales (**NSW**) and accepted as a territory by the Commonwealth pursuant to s 111 of the Constitution only. That surrender occurred for *the purpose* of the ACT becoming the seat of government contemplated in s 125 of the Constitution, but not by way of it.[61] The terms of the *Seat of Government Surrender Act 1909* (NSW)[62] and the *Seat of Government Acceptance Act 1909* (Cth)[63], by using the language of "surrender" and "acceptance", clearly reflect reliance upon the mechanism in s 111. Further, the terms of s 125, by use of the past tense "*shall have been granted to*", contemplate an antecedent surrender pursuant to s 111, rather than creating an alternative (i.e., additional) mechanism for surrender. The acceptance by this Court that the ACT and the Northern Territory were established by s 111 flows from the unanimous decision of this Court in *Paterson v O'Brien*.[64] The Appellant's reliance on prior *obiter* comments to the contrary made in passing,[65] suggesting a role for s 125 in the establishment of the ACT (as distinct from its establishment as the Seat of Government), should be rejected.[66]

63. At AS [27], and throughout the Appellant's submissions, the Appellant seeks to make much of the fact that following surrender, the ACT was "*geographically and politically*" a constituent part of the Commonwealth. While that is true, it goes nowhere. The States (including the geographic area of the ACT prior to its surrender) are also "*geographically and politically*" constituent parts of the Commonwealth. Such a descriptor has no relevance to the application of s 80.

The legislative power of the Territory

64. Once a territory is accepted by the Commonwealth under s 111, s 122 of the Constitution is wide enough to permit the Commonwealth to directly administer a territory or to

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[59] *Rizeq v Western Australia* (2017) 262 CLR 1 at [41] per Bell, Gageler, Keane, Nettle and Gordon JJ.
[60] *Brownlee v The Queen* (2001) 207 CLR 278 at 286 per Gleeson CJ and McHugh J.
[61] Second Respondent's position is consistent with that of Justice Mossop quoted at the end of AS [26]. To the extent AS [27] suggests some role for s 125 in the establishment of the ACT, that should be rejected.
[62] In s 6 and the Second Schedule.
[63] In ss 4, 5(2), and the Second Schedule.
[64] (1978) 138 CLR 276 at [280]-[281] per Barwick CJ, Stephen, Mason, Jacobs, Murphy and Aickin JJ.
[65] *Capital Duplicators* at 285 per Gaudron J; ***Svikart v Stewart*** (1994) 181 CLR 548 at 561 per Mason CJ, Deane, Dawson and McHugh JJ (see also Brennan J at 565-566).
[66] In accordance with the considered comments of Justice Mossop in *Denham Constructions v Islamic Republic of Pakistan (No 2)* [2016] ACTSC 215, (2016) 311 FLR 187 at [128].

create an autonomous government for such a territory.[67] Between 1 January 1911 and 10 May 1989, the geographic area of the ACT was "*subject to the exclusive jurisdiction of the Commonwealth*",[68] and administered directly by the Commonwealth. During that period, the ACT was not a separate body politic.[69] The issue of whether statutes of the Commonwealth Parliament made pursuant to s 122, or Ordinances of the Governor-General,[70] made during this period were laws of the Commonwealth within s 80 does not arise in this proceeding (cf AS [28]-[29]).

65. In 1989, the ACT achieved self-government,[71] as the Northern Territory did in 1978.[72] At that time, the Commonwealth's direct responsibility for the government of the ACT ceased, and the ACT was no longer subject to the *exclusive* jurisdiction of the Commonwealth.

66. Upon self-government, the ACT gained legislative power, exercised by the Legislative Assembly. The Assembly has "*power to make laws for the peace, order and good government of the [ACT]*".[73] Responsibility for the ACT Courts was transferred from the Commonwealth to the ACT on 1 July 1992.[74] The transition to self-government was completed with the establishment of the independent ACT Government Service on 1 July 1994.[75] From this point onwards, the ACT was an independent body politic, and no more part of the "*Commonwealth body politic*" than the States (*contra* AS [41]).

67. The nature of the legislative power of the ACT has been well-established since shortly after self-government. It is settled that the exercise of the ACT's legislative power does not involve the exercise of Commonwealth legislative power.[76] The nature of that legislative power was described by the plurality in *Capital Duplicators* as follows:[77]

> "*...enactments of the Legislative Assembly under s 22 of the Self-Government Act do not lack 'independent and unqualified authority'. Enactments are made under a power to make laws 'for the peace, order and good government' of the Australian Capital Territory. Such a power has been recognized as a plenary power...*

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[67] *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 per Mason J.
[68] Constitution, s 111.
[69] In that sense, the Appellant is correct at AS [28] to say this is not a matter "presupposed" by s 122.
[70] Territory Ordinances have always been tabled before both houses of the Parliament and remain subject to disallowance by either house (*Seat of Government (Administration) Act 1910* (Cth), s 12(2)(c) and s 12(4)).
[71] *Australian Capital Territory* ***(Self-Government) Act*** *1988* (Cth), s 7. See also the definition of "self-government day" in the dictionary of the *Legislation Act 2001* (ACT).
[72] *Northern Territory (Self-Government) Act 1978* (Cth).
[73] *Self-Government Act*, s 22(1).
[74] On the commencement of the *ACT Supreme Court (Transfer) Act 1992* (Cth).
[75] *Public Sector Management Act 1994* (ACT), s 12.
[76] See *Svikart v Stewart*.
[77] *Capital Duplicators* at 281-282 per Brennan, Deane and Toohey J. The Second Respondent notes that the quotation at AS [43] from 269 is incomplete. The comment at 269 must be read with what follows, which makes clear that the Legislative Assembly does have general power.

Parliament did not intend the Legislative Assembly to exercise its powers in any sense [as] an agent or delegate of the ... Parliament, but ... intended [the Legislative Assembly] to have plenary powers of legislation as large, and of the same nature, as those of Parliament itself... The Legislative Assembly of the Australian Capital Territory has been erected to exercise not the Parliament's powers but its own, being powers of the same nature as those vested in the Parliament."

68. Similar comments have been made about the position of the Legislative Assembly of the Northern Territory following self-government, including that s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) grants the Assembly power to make laws that "*subject to the limits provided by the Act, is a plenary power of the same quality as, for example, that enjoyed by the legislatures of the States*".[78]

69. The Appellant has made no application to this Court to reopen the decision in *Capital Duplicators,* yet the submissions advanced by the Appellant are fundamentally inconsistent with that decision. The Legislative Assembly is not an emanation or delegate of the Commonwealth Parliament. That distinction is highlighted by the fact that the Legislative Assembly can and does pass legislation which the Commonwealth Parliament could not. For example, judicial power invested by ACT laws is not judicial power of the Commonwealth, and such laws do not have to comply with the strict doctrine of the separation of powers set out in Chapter III.[79] As a result, the Legislative Assembly has established institutional structures which blend judicial and non-judicial power, similar to those which exist in the States.[80]

70. In this context, it becomes apparent that the "six reasons" set out at AS [29]-[31] are iterations of one another directed to an illusory proposition that the Second Respondent's position requires some "reading down" of, or some unidentified "unexpressed assumption" in, s 80. For clarity, the following points are made.

71. *First*, and most importantly, the Appellant's repeated reliance on the notion of laws given "*direct force*" by the Commonwealth Parliament is imprecise and inapt. Its meaning is unclear, but is evidently directed to erasing the distinction between laws of the Commonwealth Parliament and laws of the Legislative Assembly. The arguments relied on by the Appellant may support the view that laws passed by the Commonwealth Parliament pursuant to s 122 are "*laws of the Commonwealth*". That is separate from

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[78] *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279 per Wilson J.
[79] *Kruger* at 44 per Brennan CJ, at 62 per Dawson J, at 141-142 per McHugh J, at 170, 176 per Gummow J. See also ***North Australian Aboriginal Justice Agency*** *Ltd v Northern Territory* (2015) 256 CLR 569 at [107], [117]-[118] per Gageler J.
[80] See, for example, the *ACT Civil and Administrative Tribunal Act 2008* (ACT).

the question of laws passed by the Legislative Assembly, and does not arise for determination.

72. *Secondly,* the reliance on comments from *Ffrost*[81] at AS [29] concerning the second limb of s 80, fails to recognise that there were no self-governing territories at that time, such that the comments contemplated laws of the Commonwealth Parliament only.

73. *Thirdly,* the status of s 80 as a constitutional safeguard (see AS [30]) does not advance the Appellant's position. Section 80 is a safeguard which applies on its terms, and its status as a safeguard is not a justification for expanding its operation beyond those terms. Specifically, as the Appellant acknowledges, it is a safeguard against the exercise of Commonwealth legislative power, not the ACT's legislative power.

74. *Fourthly,* the Appellant's reliance, at AS [30], on s 109 of the Constitution supports the view that laws passed by the Commonwealth Parliament pursuant to s 122 are "laws of the Commonwealth". The Appellant's attempt to apply that argument to laws passed by the Legislative Assembly is circularly premised upon the view that such laws are given "direct force by the Commonwealth Parliament". That would also have the result that laws passed by the Legislative Assembly, because they are "laws of the Commonwealth", prevail over inconsistent State law, which cannot be correct.

75. *Fifthly,* the first proposition at AS [31] is premised, circularly, on the assumption that a law of the Legislative Assembly is equivalent to a law of the Commonwealth Parliament. Further, the propositions about federal jurisdiction at AS [31] do not follow from one another. It is not apparent how s 80 could be both an imperative on the exercise of federal jurisdiction but not contingent on its creation, or why those propositions would mean that s 80 is not "*limited to circumstances where a trial court is exercising Commonwealth judicial power*". Nor is there any apparent connection between such matters and the application of s 80 to laws passed by the Legislative Assembly.

The Appellant's primary contention on s 80 (AS [32]-[36])

76. AS [32] articulates the Appellant's primary argument as being that ss 54 and 60 of the ***Crimes Act*** *1900* (ACT) (the offences of which the Appellant was convicted) were given "*direct force*" by the Commonwealth Parliament pursuant to s 122. That is, the provisions continued to operate by force of Commonwealth law after self-government, notwithstanding (indeed, because of) the operation of s 34 of the *Self-Government Act* (AS [34]).

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[81] *Ffrost v Stevenson* (1937) 58 CLR 528 at 592 per Evatt J. Gummow J's comments in *Kruger* at 172-173, cited by the Appellant at fn 53, were, in context, also about laws passed by the Commonwealth Parliament, not by a legislature of a self-governing Territory.

77. Accepting the Appellant's primary contention would have the effect that provisions within the statutes of the ACT will be "laws of the Commonwealth" if the statute itself falls within the terms of s 34(4) of the *Self-Government Act*, even if individual provisions of that statute have their origin in amending statutes passed by the Legislative Assembly (as in the present case). Other statutes passed by the Assembly, however, which do not fall within the terms of s 34(4), would not be "laws of the Commonwealth". As such, the *Crimes Act*, in its entirety, is presently a "law of the Commonwealth" but would not be if it were repealed and reenacted in precisely the same terms by the Assembly. This Court should reject that proposition, notwithstanding the Appellant's reliance on comments in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[82] and *Eastman v The Queen.*[83] Read in context, those comments reflect the fact that Mr Eastman's offences occurred in January 1989,[84] prior to the advent of self-government in the ACT. As such, they were surrogate Commonwealth laws at that time.[85]

78. Instead, this Court should apply s 34(4) on its terms. It provides that such laws shall be taken to be enactments of the Legislative Assembly. It is that, rather than, say, the *Crimes Legislation (Status and Citation) Act 1992* (ACT) (see AS fn 74), which accords the *Crimes Act* its status as an ACT statute.

79. Alternatively, even if that is not accepted, this Court should reject the Appellant's formalistic distinction between "amendment" and "repeal" (see AS [36]).[86] Both actions are expressions of the plenary power of the Legislative Assembly. Sections 54 and 60 of the *Crimes Act* are enactments of the Legislative Assembly because their origin lies in actions taken by the Assembly. As acknowledged in AS [35], those provisions were inserted into the *Crimes Act* by the *Crimes (Amendment) Ordinance (No 5) 1985*, and they have since been amended multiple times by the Legislative Assembly.[87]

The Appellant's secondary contention on s 80 (AS [37]-[44])

80. The Appellant's secondary (i.e., alternative) contention is that all laws passed by the Legislative Assembly as an exercise of legislative authority under s 22 of the *Self-*

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[82] (1999) 200 CLR 322.
[83] (2000) 203 CLR 1.
[84] See (2000) 203 CLR 1 at [51] per Gaudron J.
[85] See also (2000) 203 CLR 1 at [196] per Gummow J. That remained the case until 1 July 1992: see [66] above.
[86] Noting that in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [44], Gummow and Hayne JJ did not express a view on the effect of an amendment.
[87] *Crimes Legislation Amendment Act 2001* (ACT), s 43; *Justice and Community Safety Legislation Amendment Act 2008 (No 3)* (ACT) amendments [1.11]-[1.13]; *Crimes Legislation Amendment Act 2011* (ACT), ss 5-7; *Criminal Proceedings Legislation Amendment Act 2011* (ACT), ss 4-5.

Government Act, are "laws of the Commonwealth". For the reasons set out at [65]-[69] above, that is not so. Self-government created a legislature with plenary power.

81. As noted at AS [38], the expressions "*laws of the Commonwealth*" or "*any law of the Commonwealth"* have been held not to encompass the Constitution itself, the common law, an intergovernmental agreement or English legislation. The Second Respondent submits that the expression "*any law of the Commonwealth*" in s 80 is naturally construed as referring only to statutes passed by the Commonwealth Parliament, delegated legislation made pursuant to such statutes, and to disallowable instruments such as ordinances of the Governor-General. That broader operation explains why s 80 is not limited to "*any law made by the Parliament*" (*contra* AS [39]).

82. The comments in ***Re Colina; Ex parte Torney***[88] cited at AS [38]-[39] tend to confirm that the expression "*any law of the Commonwealth*" in s 80 does not extend to laws passed by the Legislative Assembly. Gleeson CJ and Gummow J (with Hayne J agreeing) stated that the expression refers to "*laws made under the legislative powers of the Commonwealth*".[89] Exercise of the ACT's legislative power does not involve the exercise of federal legislative power.[90] McHugh J stated that *"[a] law of the Commonwealth is simply a law made under or by the authority of the Parliament of the Commonwealth*".[91] The Legislative Assembly does not act as an agent or delegate of the Commonwealth Parliament.[92] Given the well-established nature of the ACT's legislative power, the authorities cited at AS [40], which did not concern s 80, do not advance the Appellant's argument any further. In particular, the observations of Dixon J[93] concerned a hypothetical, and were made some six decades or so before self-government in the ACT and Northern Territory.

83. Finally, there is no basis for the submission at AS [42] that concluding s 80 does not apply to laws passed by the Legislative Assembly would be somehow "*contrary to the constitutional design*". In that respect, it is telling that there is no reference to a limitation equivalent to s 80 in ss 23, 69 or elsewhere in the *Self-Government Act*. The ACT remains distinct from the States in important ways (*contra* AS [42]). The application of s 80 is not one of them.

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[88] (1999) 200 CLR 386.
[89] *Re Colina; Ex parte Torney* at [25] per Gleeson CJ and Gummow J (with Hayne J agreeing at [113]).
[90] See *Svikart v Stewart*.
[91] *Re Colina; Ex parte Torney* at [45] per McHugh J.
[92] *Capital Duplicators* at 281, 283 per Brennan, Deane and Toohey JJ, at 284 per Gaudron J.
[93] In *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585.

Implications of Appellant's arguments

84. Success by the Appellant would have extensive consequences for the administration of justice in the ACT. Without being exhaustive, the following matters are pertinent.

85. *First,* if s 80 applies to territory offences tried on indictment, then trial of those offences must be by jury, regardless of an accused's consent to judge-alone trial.[94] That would overturn a long history of practice in the Territory, where trial by judge alone is a common and well-accepted feature of the justice system. Under s 14 of the *Seat of Government Supreme Court Act 1933* (Cth) as enacted, trials in the Territory were to be by judge alone, unless the Court otherwise ordered. Following self-government, an identical provision became s 22 of the *Supreme Court Act* (later repealed). In 1993, ss 68A and 68B were inserted into the *Supreme Court Act*, creating a default position of trial by jury in the Territory with an option for trial by judge alone.[95] If the Appellant is correct, that long-standing regime is unconstitutional. That consequence is a factor against acceptance of the Appellant's arguments.[96]

86. *Secondly,* if the Territory is not an independent polity, it is not apparent how ACT Courts are not federal courts in which Commonwealth judicial power is vested by s 71 of the Constitution, with all the consequences that would entail. That would impact, for example, the validity of appointments of Acting Judges and Special Magistrates, the scheme for inquiries into convictions,[97] the permissibility of declarations of incompatibility under the *Human Rights Act 2004* (ACT), and the exercise of judicial power by non-court bodies, such as the ACT Civil and Administrative Tribunal.

Part VI: Estimate of time

87. It is estimated that 2 hours will be required for presentation of oral argument.

Dated: 2 September 2022

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[94] See *Alqudsi*; and *Brown v The Queen* (1986) 160 CLR 171.
[95] Section 68B was amended in 2011 to introduce the "excluded offences" regime by way of the *Criminal Proceedings Legislation Amendment Act 2011* (ACT). In relation to such offences, an accused could not elect for trial by judge alone (until the amendments effected by the Emergency Response Act).
[96] See *North Australian Aboriginal Justice Agency Ltd* at [113]-[117] per Gageler J.
[97] See *Crimes Act,* part 20.

Annexure A

Pursuant to Practice Direction No 1. of 2019, the Second Respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

Constitution, Statutes and Statutory Instruments	**Provisions**	**Version**
Constitution	ss 51(xxxi), 80, 90, 109, 111, 121, 122, 125	
Commonwealth		
ACT Supreme Court (Transfer) Act 1992 (Cth)		As made
Australian Capital Territory (Self-Government) Act 1988 (Cth)	s 7, 22, 23, 34, 69	As made; As at 1 July 1992; Current
Crimes (Amendment) Ordinance (No 5) 1985		As made
Papua Act 1905 (Cth)	ss 6(2), 8, 29, 36, 43	As made
Seat of Government Acceptance Act 1909 (Cth)	ss 4, 5(2), Second Schedule	As made
Seat of Government (Administration) Act 1910 (Cth)	ss 12(2)(c), 12(4)	Current
Seat of Government Supreme Court Act 1933 (Cth)	s 14	As made
Northern Territory (Self-Government) Act 1978 (Cth)	s 6	As made
New South Wales		
Seat of Government Surrender Act 1909 (NSW)	s 6, Second Schedule	As made
Queensland		
Criminal Code 1899 (Qld)	s 339	As at 1902
Australian Capital Territory		
ACT Civil and Administrative Tribunal Act 2008 (ACT)		Current
Court Procedures Act 2004 (ACT)	s 76(1)	As at 18 June 2020
Court Procedures Rules 2006 (ACT)	r 4738(2), r 4738(3)	As at 18 June 2020
COVID-19 Emergency Response Act 2020 (ACT)		As made
Crimes Act 1900 (ACT)	ss 54, 60; s 264(1), pt 20	As at 3 November 2019; Current
Crimes Legislation Amendment Act 2001 (ACT)	s 43	As made

Crimes Legislation Amendment Act 2011	ss 5-7	As made
Crimes Legislation (Status and Citation) Act 1992 (ACT)		As made
Criminal Proceedings Legislation Amendment Act 2011 (ACT)	ss 4-5	As made
Evidence Act 2011 (ACT)	ss 26, 29(2), 41	Current
Evidence (Miscellaneous Provisions) Act 2011 (ACT)	ss 4AB, 4AJ, 20	Current
Human Rights Act 2004 (ACT)	s 22(2)(c)	As at 8 April 2020; Current
Justice and Community Safety Legislation Amendment Act 2008 (No 3) (ACT)	[1.11]-[1.13]	As made
Legislation Act 2001 (ACT)	s 29; dictionary	As at 8 April 2020; Current
Public Sector Management Act 1994 (ACT)	s 12	As made
Supreme Court Act 1933 (ACT)	ss 37E(4), 68A, 68B, 68BA, 116	As at 8 April 2020; 18 June 2020; 8 July 2020; 13 August 2020; 9 July 2022
Other		
Ordinance No. VII of 1902 of British New Guinea		As made
Ordinance No. VII of 1907 of Papua		As made