HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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

BETWEEN: **Simon Vunilagi**
Appellant

and

The Queen
First Respondent

Attorney-General of the Australian Capital Territory
Second Respondent

SECOND RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II: Propositions

2. Section 68BA of the *Supreme Court Act 1933* (ACT) arose from the extraordinary circumstances of the first phase of the COVID-19 pandemic for the purpose of enabling the effective continuation of the criminal justice system during the period of the public health emergency: *COVID-19 Emergency Response Act 2020* (ACT) (**JBA tab 5, 145)** and Explanatory Statement at 18-19, 39-40 (**JBA tab 62, 3247-3248, 3249-3250**); **SRS [8]**.

Ground 1 – *Kable*

3. The appellant's challenge to the notice-giving procedure in s 68BA(4) is narrow: **AS [12], [14]; Reply [3].**

4. The practical operation of 68BA(4) did not undermine the Supreme Court's independence and impartiality, nor was it "*incompatible with [the] court's role as a repository of federal jurisdiction*": **SRS [13, fn 13]**; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 424 [40] (**JBA tab 31, 1428**).

5. Subsections 68BA(1) and (2) outline the conditions for application of the section, while sub-s 68BA(3) contains the discretion to be exercised by the Court. Subsection 68BA(4) is tethered to s 68BA(3), in time and function. It does not afford the Court a discretion.

6. Properly construed, s 68BA(4) was a facilitative provision ensuring procedural fairness was afforded to parties prior to any s 68BA(3) order: **SRS [12a], [15]-[18].**

7. The purpose of the s 68BA(4) notice was to give the parties an opportunity to make submissions about the proposed order, and thereby facilitate the Court's consideration of whether or not to make an order under s 68BA(3): **SRS [15], [20].**

8. The appellant's reliance on the notion of "equal justice" is misplaced. The procedure established by s 68BA did not occasion any unfairness to accused persons, whether or not they received a notice: **SRS [19], SRS [21]**. Section 68BA is of general application. Not every jury trial presented the "same mischief", nor were accused persons in a "relevantly identical class": *R v Vunilagi; R v Vatanitawake; R v Maisvesi; R v Macanawai* [2020] ACTSC 225 (**CAB, pp 12-19**): **SRS [31]-[38]**.

9. The practical operation of s 68BA(4) was not "inscrutable". There is nothing extraordinary or objectionable in the Court acting on its own motion: **SRS [16]-[17]**. The absence of a duty to consider whether to give a notice, and a duty to give reasons, did not contravene the *Kable* limitation.

<u>Ground 2 - Section 80</u>

10. Section 80 of the Constitution does not apply to offences created by the laws of a self-governing Territory, because they do not meet the description "*any law of the Commonwealth*": **SRS [39], [41]**. Section 80 is to be construed according to the ordinary and natural meaning of its text, and settled authority.

11. The ACT was established pursuant to s 111 of the Constitution.

12. Prior to self-government, the *Crimes Act 1900* (NSW) applied in the ACT as a "surrogate Commonwealth law". That position continued between 11 May 1989 and 1 July 1990, but is no longer the case: *Australian Capital Territory (**Self-Government**) **Act** 1988* (Cth), s 34, Sched 3 (**JBA tabs 14-15; tab 3**).

13. It is settled that the exercise of the ACT's legislative power does not involve the exercise of the Commonwealth's legislative power. The ACT Legislative Assembly is not an agent, delegate or otherwise an emanation of the Commonwealth Parliament: **SRS [62],**

[67]-[68]; ***Capital Duplicators*** *Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 281-282 per Brennan, Deane and Toohey JJ (**JBA tab 33, 1519**); *Svikart v Stewart* (1994) 181 CLR 548 at 562 per Mason CJ, McHugh, Deane and Dawson JJ (**JBA tab 49, 2647**); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279 per Wilson J (**JBA tab 45, 2324**).

14. The *ratio* of *Bernasconi* is that s 80 does not apply to laws passed by the legislature of a self-governing territory. *Bernasconi* did not involve an "offence enacted directly by the Commonwealth Parliament". The Territory accepts that elements of the reasoning in *Bernasconi* are no longer good law: **SRS [43]-[44]; Reply [5]**; *R v Bernasconi* (1915) 19 CLR 629 at 633 (**JBA tab 43, 2250**).

15. *Bernasconi* cannot be distinguished on the basis of the ACT's origins, or by reference to a distinction between external and internal territories. Instead, it is the status of a territory as self-governing which is key.

16. The appellant's primary contention should be rejected. Accepting the appellant's argument would create two tiers of Territory enactments. The appellant's attempted distinction between amendment and repeal is artificial. The offences of which the appellant was convicted were offences under a Territory enactment, which was not a "law of the Commonwealth": *Self-Government Act,* s 34(4) (**JBA tab 3**); *Eastman v The Queen* (2000) 203 CLR 1 at [159] (**JBA tab 54, 1656**); *Re The Governor, Goulburn Correctional Centre & Anor; Ex parte Eastman* (1999) 200 CLR 322 at [43]-[44] (**JBA tab 47, 2512**).

17. The appellant's secondary contention should also be rejected. It is inconsistent with the nature of the Territory's legislative power: ***Capital Duplicators*** at 281-282, 284 (**JBA tab 33, 1519**).

18. The Appellant's argument, if successful, would have a significant impact on the administration of justice and the administration generally of the self-governing Territories: **SRS [84]-[86]**; *NAAJA v Northern Territory* (2015) 256 CLR 569, per Gageler J at [113]-[117], Keane J at [168]-[169] (**JBA tab 42, 2163 at 2210, 2226**).

Dated: 8 February 2023

Name: P J F Garrisson SC

Solicitor-General for the Australian Capital Territory