HIGH COURT OF AUSTRALIA

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

BETWEEN:

Simon Vunilagi
Appellant

and

The Queen
First Respondent

and

Attorney-General of the Australian Capital Territory
Second Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply to submissions of the respondents and intervenors

2 In relation to SRS [10], the appellant was the only accused person to (a) contest a proposed order under s 68BA(3) of the *Supreme Court Act 1933* (ACT) (now repealed) (***Supreme Court Act***) and (b) subsequently be convicted following a judge only trial.[1]

3 The second respondent's contentions at SRS [13]-[18], [28]-[30] are premised on a mischaracterisation of s 68BA as 'an ordinary case management procedure' (SRS [13]; see also CS [10]).[2] A s 68BA order fundamentally altered 'an essential constituent of a court'[3] and removed the community's opportunity to participate in the administration of criminal justice.[4] Statutory provisions affecting the criminal justice process in this way raise different considerations to other case management procedures.[5] Neither the inherent power (SRS [15],

[1] The accused in *R v Ali (No 3)* (2020) 15 ACTLR 161; [2020] ACTSC 103 appears to have been tried by jury (*R v Ali* (No 4) [2020] ACTSC 350, [1] (Mossop J)). A s 68BA(4) notice was also given in *R v NI* [2020] ACTSC 137, but the accused was acquitted by judge sitting alone.
[2] Similarly, 'facilitative' (SRS [15], [18]), 'ancillary' (CS [6]) or 'procedural necessity' (NTS [11]).
[3] *Alqudsi v The Queen* (2016) 258 CLR 203, 243 [95] (Kiefel, Bell and Keane JJ).
[4] *Alqudsi v The Queen* (2016) 258 CLR 203, 256 [133] (Gageler J). See also at 251 [117] (Kiefel, Bell and Keane JJ): 'The verdict of the jury has unique legitimacy' in 'protect[ing] the courts from controversy and secur[ing] community support for, and trust in, the administration of criminal justice'.
[5] See, by analogy, *H A Bachrach Pty Limited v Queensland* (1998) 195 CLR 547, 563 [18] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

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[16], [18], [19]), nor the usual procedural powers of the Court (SRS [17]), can be incompatible with constitutional requirements. The appellant's *Kable* argument does not turn on any unfairness to other accused persons who did not receive a s 68BA(4) notice (cf SRS [21]-[23]), or the fairness of the process once a s 68BA(4) notice was given (cf SRS [19]-[20], [26]); CS [16]; NTS [11]). The appellant does not deny that the considerations in s 68BA(3) might have informed the exercise of discretion under s 68BA(4) (cf CS [6]-[9], [13]; NT [13]). The appellant's *Kable* challenge is not directed to the criteria that might relevantly differentiate within an identical class for the making of an order under s 68BA(3) (cf: SRS [29]-[30], [32]-[38]), nor to the *exercise* of the inscrutable discretion in s 68BA(4) (cf CS [15]; NT [12]). The constitutional flaw lay in the power to select arbitrarily from a relevantly identical class of accused persons to whom the s 68BA(3) criteria were prima facie applicable (AS [15]-[16]). The fact that an order was made on the Court's own motion (cf SRS [17]), and the absence of (a) a duty to consider whether to give a notice under s 68BA(4) and (b) a requirement to give reasons, were features of the inscrutability of the process under s 68BA(4) (cf CS [11]-[12]).

4 It is undisputed that, immediately prior to the enactment of s 68BA, the Supreme Court ceased empanelling jury trials because of the difficulty of maintaining social distancing. The very reason for its enactment was to allow for the administration of criminal justice to continue. The very reason for its repeal was that the Supreme Court recommenced jury trials (AS [5]-[7]). It is accurate, then, to say that the health risks posed by COVID-19 affected every jury trial (AS [11]) and that each jury trial presented the same mischief (AS [15]) (cf CS [10]). What was said by the Court of Appeal at CA [231]-[232] (CAB 195) was relevant to the differentiation between accused persons, in a relevantly identical class, for the purpose of making an order under s 68BA(3): not to the selection of accused persons under s 68BA(4) (cf CS [10]; NTS [14]). The circumstances where a *Kable* challenge may be established are not closed (cf SRS [27]-[28]).[6] The constitutional complaint is directed to differential judicial *processes* leading to disparate outcomes (AS [14]-[16]; cf CS [15]-[16]). The vice is anchored to the institutional integrity and defining features of the Supreme Court, not 'a top-down legal concept' of equality (contra CS [15]).

5 The major premise of the appellant's primary submission under Ground 2 is that a law enacted by the Commonwealth Parliament for the government of a territory is a 'law of the Commonwealth' for the purposes of s 80 (contra SRS [42], [49], [64], [71]). The decision in *R*

[6] *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89 [124] (Hayne, Crennan, Kiefel and Bell JJ).

v Bernasconi[7] turned on that major premise. It involved a law[8] continued in force by s 6(2) of the *Papua Act 1905* (Cth) and, thus, concerned an offence enacted directly by the Commonwealth Parliament (cf SRS [47]; CS [26], [33]).[9] It did not involve an offence enacted pursuant to a separate authority given to a territory legislative assembly by the Commonwealth Parliament (contra SRS [41], [51], [56]). The respondents (FRS [14]; SRS [42]) accept that the reasoning in *Bernasconi* directed to that major premise 'must now be doubted' (see also NTS [16]; contra CS [49]). The Northern Territory agrees with the appellant and respondents 'that the broad reasoning in *Bernasconi* … can no longer be sustained' (NTS [20]) and supports the major premise of the appellant's primary submission (NTS [6](a); [21]-[37]).

6 Subsection 34(4) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (***Self-Government Act***) does not operate 'to convert the *Crimes Act 1900* into a Territory law' (CS [21]), if that is intended to suggest that Commonwealth laws are to be enactments of the *separate* legislative authority of the Legislative Assembly. First, the statutory source of legislation applying in the ACT can only be an Act of the Commonwealth Parliament or an Act of the *separate* legislative authority of the Legislative Assembly under s 22. Secondly, the definition of 'enactment' in s 3 recognises, in the clearest terms, those separate sources of legislative authority. The transmutation effected by s 34(4) was strictly within the frame of the *Self-Government Act* that operated in various ways upon that definition (cf CS [22]). The observations in the *Eastman* cases were not confined to the legislative source of the offence in question as it existed prior to the operation of s 34(4) of the *Self-Government Act* (contra SRS [78]; CS [22]). Subsection 34 was said by McHugh J to 'continue[] the operation of s 18 of the *Crimes Act* 1900 (NSW) as a law made by the Parliament of the Commonwealth'.[10] Gummow and Hayne JJ considered that s 18 was then 'subject to amendment or repeal by the Legislative Assembly',[11] with an exercise of legislative authority sourced in s 22 of the *Self-Government Act*.[12] Thus, it cannot be said that the origin of ss 54 and 60 'lies in actions taken by the Assembly' (SRS [79]). Mere

[7] (1915) 19 CLR 629 (***Bernasconi***).
[8] Ordinance No. VII of 1902 of the Legislative Council established pursuant to Letters Patent, picking up the relevant criminal offence in the Queensland *Criminal Code*: *Bernasconi* (1915) 19 CLR 629, 632-3 (Griffith CJ).
[9] See *Bernasconi* (1915) 19 CLR 629, 636 (Isaacs J). The appellant's use of the expression 'direct force' (cf SRS [71]) is directed to an offence created by the Commonwealth Parliament, whether the offence is prescribed by the terms of a Commonwealth Act, or picked up or continued in force by a Commonwealth Act.
[10] *Eastman v The Queen* (2000) 203 CLR 1, 51 [159] fn 192 (McHugh J).
[11] *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 342 [44] (Gummow and Hayne JJ).
[12] *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 351 [78] (Gummow and Hayne JJ).

amendment by the Legislative Assembly, no matter how minor, would provide an incoherent and disorderly foundation for transitioning authority upon self-government (contra CS [25]).

7 The appellant's contentions do not require reconsideration of *Capital Duplicators Pty Limited v Australian Capital Territory*[13] (cf SRS [69]; CS [27]). Nor do they require a 'wholesale re-imagining of the relationship between s 122 and Ch III' (CS [36]), although this Court has already made significant inroads into the early quarantining of s 122 from Ch III (AS [18]-[24]; NTS [21]-[27]). Whether Parliament can establish *separate* legislative, executive or judicial powers for a territory are questions distinct from the characterisation question under s 80 (cf SRS [69], [86]; CS [35]; NTS [41]-[47], [55], [58]-[59]). Acceptance of the appellant's secondary contention has no undesirable consequence for the breadth of s 109 of the Constitution, which would depend on the intended scope of the authority conferred on the ACT Legislative Assembly under s 22 of the *Self-Government Act* (contra SRS [74]; CS [28]; NTS [50], [60]). The 'federal bargain' (CS [52]) protected by s 80 is that offences against *laws of the Commonwealth* are to be tried by jury irrespective of whether that trial were to occur in federal or State jurisdiction (cf SRS [75]; CS [50]). The Commonwealth's attempt to characterise the relationship between ss 80 and 122 as 'non-federal' in nature, and distinguish s 80 from other constitutional limitations, must therefore fail (CS [50]-[52]).

8 Subsection 3(1) of the *Crimes Legislation (Status and Citation) Act 1992* (ACT) operated, by use of the words 'shall be taken to be', to create a 'statutory fiction'[14] to overcome the prevailing citation convention (cf CS [23]-[24]; SRS [78]). That was its 'main purpose' and 'key feature'.[15] There would be no need to overcome the citation convention by statutory fiction if s 3(1) operated to repeal and re-enact the *Crimes Act*.[16] The *Status and Citation Act* was later repealed[17] and kept in operation on a transitional footing:[18] hardly treatment that is congruent with re-enactment. The expressions used in *Re Colina; Ex parte Torney*,[19] were not limited to 'the exercise of federal legislative power' or legislation enacted by an authority 'as an agent or delegate of the Commonwealth' (cf SRS [82]; NTS [47]). The

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[13] (1992) 177 CLR 248.
[14] See *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49, 65 (Windeyer J); also *R v Hughes* (2000) 202 CLR 535, 550-1 [23]-[24] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[15] Debates of the Legislative Assembly for the Australian Capital Territory, Hansard (9 April 1992) 133; Explanatory Memorandum, Crimes Legislation (Status and Citation) Bill 1991, Legislative Assembly of the Australian Capital Territory (1992).
[16] Cf *Criminal Code Act 1983* (NT), ss 3 (repeal) and s 5 (enactment).
[17] *Law Reform (Miscellaneous Provisions) Act 1999* (ACT), s 5(1), sch 2.
[18] *Law Reform (Miscellaneous Provisions) Act 1999* (ACT), s 5(2) (later repealed by *Statute Law Amendment Act 2000* (ACT), s 5(1), sch 4); *Interpretation Act 1967* (ACT), s 42; *Legislation Act 2001* (ACT), ss 88, 301(2).
[19] (1991) 200 CLR 386.

observations in the *Convention Debates* (NTS [39]) must be understood in their immediate context of differentiating Commonwealth and State offences.

9 While it might be correct to say as a general proposition that the scope of the power in s 122 does not vary according to the category of territory there set out (CS [39]-[41]), the relevant question to be addressed is the relationship between ss 80 and 122; primarily the characterisation question in s 80. Section 14 of the *Seat of Government Supreme Court Act 1933* (Cth) (as enacted) applied only to civil trials (contra SRS [85]).[20] Jury trials for offences prosecuted in the Supreme Court were required by statute[21] until the insertion in 1993 of ss 68A and 68B into the *Supreme Court Act*.[22]

10 **10** *Bernasconi* should be reconsidered (cf CS [45]) because it concerns an issue of 'vital constitutional importance' and, at least in relation to the major premise of the appellant's primary contention, it is 'manifestly wrong'.[23] Its reasoning was not based on a stream of authority,[24] and has been called into question and 'weakened'[25] by subsequent developments. Its reconsideration has not squarely arisen (cf CS [46]). The fact that success by the appellant under Ground 2 might disrupt the system in place in the ACT since 1993 is not a sufficient reason to deny its acceptance (cf SRS [85]; NTS [62]-[64]).[26] Given the appellant's reliance on ss 111 and 125 of the Constitution, it does not necessarily follow, nor is it self-evident, that success under Ground 2 would have any real or material impact on the position in territories other than the ACT, the Northern Territory and Jervis Bay Territory (cf CS [47]-[48]). In any
20 event, provisions for the government of territories permitting judge only trials on indictment were enacted against the background of long-standing questions, dating back to *Mitchell v Barker*,[27] about *Bernasconi*'s correctness.

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[20] That is clear from the legislative history: Commonwealth, Parliamentary Debates, House of Representatives, 1 December 1933 (Mr Latham, Attorney-General) 5350, 5358; Commonwealth, Parliamentary Debates, Senate, 4 October 1933 (Senator McLachlan) 3174. Cf, *R v Ali (No 3)* [2020] ACTSC 103, [65] (Murrell CJ).
[21] The continuation of jury trials in the Supreme Court for criminal offences until self-government can be traced through: *Jury Act 1901* (NSW), s 28; *Seat of Government Acceptance Act 1909* (Cth), s 8; *Juries Ordinance 1932,* s 2, s 16, sch 1; *Juries Ordinance (No 2) 1933*; *Juries Ordinance 1967,* s 5, 7(1).
[22] *Supreme Court (Amendment) Act 1993* (ACT), s 6.
[23] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (The Court).
[24] *Queensland v The Commonwealth (Second Territory Senators Case)* (1977) 139 CLR 585, 630 (Aickin J).
[25] *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 370 (Dixon CJ); *Alqudsi v The Queen* (2016) 258 CLR 203, 235 [67] (French CJ, dissenting in the result).
[26] Eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Lane v Morrison* (2009) 239 CLR 230.
[27] (1918) 24 CLR 365.