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

The Queen
First Respondent

and

Attorney-General of the Australian Capital Territory
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 The appeal raises two issues. First, did s 68BA (now repealed) of the *Supreme Court Act 1933* (ACT) (***Supreme Court Act***), in its continuing operation on the appellant by virtue of s 116 of that Act, contravene the limitation deriving from the High Court's decision in *Kable v Director of Public Prosecutions (NSW)*?[1] Secondly, was s 68BA (now repealed) of the *Supreme Court Act,* in its continuing operation on the appellant by virtue of s 116 of that Act, inconsistent with the requirement in s 80 of the Constitution that the appellant's mode of trial be by jury?

Part III: Section 78B of the *Judiciary Act 1903*

3 Notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) have been given.

Part IV: Citations

4 The decision appealed from is *Vunilagi v The Queen* [2021] ACTCA 12; (2021) 17 ACTLR 72. The judgment of the trial judge is *R v Vunilagi (No 2)* [2020] ACTSC 274.

[1] (1996) 189 CLR 51 (***Kable***).

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Part V: Facts

5 On 16 March 2020, the ACT Minister for Health declared a public health emergency under the *Public Health Act 1997* (ACT) in response to the health risks posed by COVID-19. In late March 2020, the Supreme Court of the Australian Capital Territory (**ACT**) 'ceased empanelling juries because of difficulties with maintaining social distancing between panel members and between jurors'.[2] By Practice Direction 1 of 2020, dated 23 March 2020, it was directed that jury trials would proceed subject to social distancing requirements and that only two jury trials could proceed concurrently. That Practice Direction was replaced by Practice Direction 1 of 2020, dated 7 April 2020, directing that 'jury trials will not proceed until further notice' (at [23]). The *COVID-19 Emergency Response Act 2020* (ACT) (***Emergency Response Act***) was enacted on 2 April 2020 and commenced operation on 8 April 2020. Prior to its commencement, s 68A of the *Supreme Court Act* provided that '[c]riminal proceedings shall be tried by jury, except as otherwise provided by this part'. Section 68B of the *Supreme Court Act* permitted a person facing criminal prosecution of a territory offence, other than an excluded offence, to elect to be tried by judge alone. The *Emergency Response Act* re-cast s 68B to permit, during the COVID-19 emergency period,[3] election by the accused for a judge alone trial for excluded offences. It also introduced a new s 68BA authorising the Supreme Court to order a trial by judge alone in criminal proceedings for an offence against a territory law if the trial was to be conducted, in whole or in part, during the COVID-19 emergency period (s 68BA(1)).[4] The amendment to s 68B and the newly inserted s 68BA operated on trials and proceedings that began before, on or after the commencement day (ss 68B(3A) and 68BA(2)). Subsection 68BA(3) provided that '[t]he court may order that the proceeding will be tried by judge alone if satisfied the order—(a) will ensure the orderly and expeditious discharge of the business of the court; and (b) is otherwise in the interests of justice'. Subsection 68BA(4) provided that '[b]efore making an order under subsection (3), the court must—(a) give the parties to the proceeding written notice of the proposed order; and (b) in the notice, invite the parties to make submissions about the proposed order within 7 days after receiving the notice'.

6 The evident purpose of s 68BA was to address delays to the administration of justice created by COVID-19. The Explanatory Statement to the Bill stated that '[t]he amendment is required during a time of emergency to allow the effective administration of justice to

[2] *R v Ali (No 3)* [2020] ACTSC 103; (2020) 15 ACTLR 161, 164 [3] (Murrell CJ).
[3] A period commencing on 16 March 2020 (s 68B(4)).
[4] A period commencing on 16 March 2020 (s 68BA(5)).

continue, without placing members of a jury at unnecessary risk. It also means that trials of serious matters will not be delayed until after the emergency.[5] … The reason this amendment is urgent is to ensure that serious criminal matters are not unnecessarily delayed due to COVID-19 distancing measures'.[6]

7 By Media Release dated 18 May 2020, the Chief Justice announced that the Supreme Court would resume jury trials on 15 June 2020. Section 68BA was then repealed on 8 July 2020 by s 36 of the *COVID-19 Emergency Response Legislation Amendment Act (No 2) 2020* (ACT). Section 37 of that Act also inserted a new Part 12 into the *Supreme Court Act*, containing ss 115-118. Section 116 provided that s 68BA continued to apply where a notice under s 68BA(4) had been given before 9 July 2020[7] and the Court had not yet made a s 68BA order. The Explanatory Statement said that '[t]he repeal of section 68BA … is appropriate given the decision of the Supreme Court to recommence the conduct of jury trials with special measures to ensure that social distancing requirements can be complied with'.[8] Practice Direction 1 of 2020, dated 28 May 2020, was replaced by Practice Direction 2 of 2020, dated 10 September 2020. That new Practice Direction directed that '[j]ury trials have recommenced as at 15 June 2020. Jury trials will be limited by the ability to ensure a safe environment and the nature of the matter' (at [15]).

8 The appellant was arrested on 10 December 2019. He was subsequently remanded in custody. He was committed to trial on 10 February 2020. The Crown filed an indictment with the Court on 31 March 2020. It was a joint indictment with four co-accused. Legal representatives for the appellant received notice of the Court's intention to make an order for judge alone trial on 18 June 2020. Both the appellant and the Crown opposed the making of the judge alone order. The co-accused did not oppose the order. On 13 August 2020 the trial judge made orders that the joint trials for all co-accused would proceed by judge alone.[9] Prior to the enactment of s 68BA of the *Supreme Court Act*, the offences on the indictment were excluded offences for the purposes of s 68B of the *Supreme Court Act*; that is, no judge alone election was available, and the legislation required trial by jury. The trial occurred as a judge alone trial and the appellant was found guilty on seven counts, and not guilty on three counts.

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[5] Explanatory Statement, COVID-19 Emergency Response Bill 2020 (ACT) 19.
[6] Ibid 40. To the same effect, see also Australian Capital Territory, *Legislative Assembly Debates,* 2 April 2020, 797-8 (Mr Ramsay, Attorney-General).
[7] 9 July 2020 was the commencement date of s 3 of the *COVID-19 Emergency Response Legislation Amendment Act (No 2) 2020* (ACT).
[8] Explanatory Statement, COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 2) 3-4. To the same effect, see also the Presentation Speech: Australian Capital Territory, *Legislative Assembly Debates,* 18 June 2020, 1310 (Mr Ramsay, Attorney-General).
[9] *R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai* [2020] ACTSC 225 (Murrell CJ).

Part VI: Argument

Ground 1

9 The appellant contends that the Court of Appeal erred in finding that s 68BA (now repealed) of the *Supreme Court Act,* in its continuing operation on the appellant by virtue of s 116 of that Act, did not contravene the limitation deriving from the High Court's decision in *Kable.*

10 In *Attorney-General (NT) v Emmerson*[10] six members of this Court said that '[t]he principle for which *Kable* stands is that … State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid'. Laws enacted by the Legislative Assembly for the ACT are subject to the *Kable* limitation.[11] The Assembly's enactments will substantially impair a court's institutional integrity if they undermine its independence and impartiality by requiring the court 'to depart, to a significant degree, from the processes which characterise the exercise of judicial power.'[12] The concept of equal justice is 'fundamental to the judicial process'.[13] As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*, '[e]qual justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect'.[14]

11 The context against which s 68BA was enacted, and in which it would operate, was that COVID-19 had presented difficulties for the continuation of jury trials in the Supreme Court of the ACT. Necessarily, the health risks posed by COVID-19 affected every jury trial to be conducted by the Supreme Court. And, necessarily, the potential disruption to each jury

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[10] (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (***Emmerson***). See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 245-6 [55] (Bell, Keane, Nettle and Edelman JJ) (***Vella***); *Kuczborski v Queensland* (2014) 254 CLR 51, 98 [139] (Crennan, Kiefel, Gageler and Keane JJ) (***Kuczborski***).

[11] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Emmerson* (2014) 253 CLR 393; *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 (***NAAJA v NT***).

[12] *Kuczborski* (2014) 254 CLR 51, 98 [140] (Crennan, Kiefel, Gageler and Keane JJ). See also *International Finance Trust Company Limited v Crime Commission (NSW)* (2009) 240 CLR 319, 353 [52] (French CJ), 367 [98] (Gummow and Bell JJ), 379 [140] (Heydon J). Although in dissent, Hayne, Crennan and Kiefel JJ also posed the test for invalidity in these terms: at 368 [103]. See further *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617 [100] (Gummow J); *South Australia v Totani* (2010) 242 CLR 1, 66 [144] (Gummow J) (***Totani***).

[13] *Leeth v The Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J). See also *Kable* (1996) 189 CLR 51, 107 (Gaudron J); *Cameron v The Queen* (2002) 209 CLR 339, 352-3 [44]-[45] (McHugh J) (***Cameron***); *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Gaudron and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 210-11 [80]-[81] (Gaudron J).

[14] (2001) 207 CLR 584, 608 [65]. See also *Cameron* (2002) 209 CLR 339, 344 [15] (Gaudron, Gummow and Callinan JJ).

trial contributed to the mischief to be addressed: that is, delays to the administration of the criminal justice system.

12 The appellant accepts that the exercise of discretion under s 68BA(3) involved a regular exercise of judicial power that was to be discharged judicially. It involved consideration of criteria susceptible of judicial application,[15] and attracted the usual incidence of the judicial process including the essential features of procedural fairness,[16] an open and public inquiry[17] and the giving of reasons.[18] However, not all accused persons, in a relevantly identical class, were exposed to the risk of losing a jury trial under s 68BA(3). The judicial function under s 68BA(3) was only exercised if a notice was given under s 68BA(4).

10 **13** The constitutional flaw in s 68BA was in the antecedent gatekeeping function given to a trial judge under s 68BA(4) to determine the persons, from the relevantly identical class, to be subject to the exercise of judicial function under s 68BA(3). A power given to a court 'must not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards'.[19] Yet, there was no duty on a trial judge to consider whether a notice should be given[20] and the Court was not required to give reasons for proposing an order. While all trials contributed to the mischief to be addressed by s 68BA, s 68BA(4) identified no statutory criteria for differentiating between, on the one hand, the persons who were to be exposed to the risk of losing a jury trial and, on the other hand, those persons who were to retain that entitlement.

20 **14** The appellant accepts that open-textured provisions can, by judicial interpretation and application, produce legal standards capable of judicial application. As Bell, Keane, Nettle and Edelman JJ said in *Vella v Commissioner of Police (NSW)*,[21] '[g]enerally, broadly

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[15] *Hogan v Hinch* (2011) 243 CLR 506, 551 [80] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 234 [20] (Kiefel CJ), 259-260 [86]-[89] (Bell, Keane, Nettle and Edelman JJ), 284 [161]-[161] (Gageler J), 292 [187]-[189] (Gordon J) (***Vella***) (Gageler and Gordon JJ dissented in the result).

[16] *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71 [67], 77 [82] (French CJ), 99 [156], 102 [167], 103 [169] Hayne, Crennan, Kiefel and Bell JJ, 105 [177], 107 [186], 110 [194] (Gageler J) (***Pompano***).

[17] *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ), 552-4 [85]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Kuczborski* (2014) 254 CLR 51, 118-9 [226]-[227] (Crennan, Kiefel, Gageler and Keane JJ); *NAAJA v NT* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel and Bell JJ); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 553 [27] (French CJ and Gageler J); *Pompano* (2013) 252 CLR 38, 71 [67] (French CJ).

[18] *Wainohu v New South Wales* (2011) 243 CLR 181, 213-5 [54]-[59] (French CJ and Kiefel J) (***Wainohu***); *NAAJA v NT* (2015) 256 CLR 569, 593-595 [39] (French CJ, Kiefel and Bell JJ); *Pompano* (2013) 252 CLR 38, 71 [67] (French CJ).

[19] *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312, 317 (Dixon CJ, Williams, Kitto and Taylor JJ).

[20] Cf: *Wainohu* (2011) 243 CLR 181, 215 [59], 219 [68] (French CJ and Kiefel J), 228-230 [104]-[109] (Gummow, Hayne, Crennan and Bell JJ).

[21] (2019) 269 CLR 219, 259 [86], quoting Zines, *The High Court and the Constitution*, 4th ed (1997) 195, also quoted in *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91] (Gummow and Crennan JJ).

expressed criteria can be expected to be given content as "the technique of judicial interpretation [gives] content and more detailed meaning on a case to case basis. Rules and principles emerge which guide or direct courts in the application of the standard."' However, for two reasons, that is not this case. First, in s 68BA(4), 'there is *no* discernible test or criteria which might be applied by the Court in the exercise of a judicial function'[22] and, as will be further explained, s 68BA(4) was not controlled by the criteria in s 68BA(3). The wider statutory context, which otherwise provides for a jury trial (s 68A) and the waiver at the election of the accused (s 68B), provided no basis for guiding the exercise of power in 68BA(4) which deviated from those provisions. Secondly, by contrast to the function under s 68BA(3), the case by case interpretation and application of the gatekeeping function in s 68BA(4) was inscrutable.[23]

15 While the considerations in s 68BA(3), in an anticipation of their application, might have informed the exercise of power to issue a notice under s 68BA(4), that power – which, once exercised, was given permanent and ongoing effect by s 116 of the *Supreme Court Act* – was not controlled by the likelihood of an order being made according to those criteria. Because each jury trial presented the same mischief to be addressed by the enactment of s 68BA, individual cases did not inherently render themselves more or less likely candidates for selection under s 68BA(4). However, each was inherently vulnerable, at least prima facie, to the application of the criteria in s 68BA(3) upon argument by the parties through the usual judicial process. Subsection 68BA(4) operated to 'open the gate' to that judicial function, but without the existence of a principled basis for exercising that gatekeeping function.

16 Ultimately, without the specification of relevantly differentiating statutory criteria to justify exposing an accused person to the risk of losing a jury trial, the gatekeeping function given to the Supreme Court by s 68BA(4) was to be exercised, necessarily, without the guidance of a legal standard or principle, without the involvement of any party, and in an inscrutable manner. The appellant contends that, in that sense, it was relevantly arbitrary.[24] The relevant constitutional vice in s 68BA(4) was the impossibility of scrutinising the differential treatment of relevantly like cases in a way that exposed some, but not all, to the risk of losing a jury trial. The fundamental precept of equal justice was undermined, thereby

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[22] *Yanner v Minister for Aboriginal Affairs* (2001) 108 FCR 543, 574 [114] (Kiefel J) (emphasis added). See also at 545 [2]-[3] (Drummond J).
[23] See *Wainohu* (2011) 243 CLR 181, 215 [58], 219-220 [69]-[70] (French CJ and Kiefel J), 229-230 [109] (Gummow, Hayne, Crennan and Bell JJ).
[24] See *Yanner v Minister for Aboriginal Affairs* (2001) 108 FCR 543, 570 [98] (Kiefel J).

impermissibly interfering with the institutional integrity of the Supreme Court in contravention of *Kable*. Consequently, s 68BA was invalid.

Ground 2

17 The appellant contends that the offences for which he was charged and convicted were 'laws of the Commonwealth' for the purposes of s 80 of the Constitution, thereby enlivening its command that the appellant's trial on indictment be by jury.

The authority of R v Bernasconi

18 The appellant submits that the ACT Court of Appeal erroneously considered that *R v Bernasconi*[25] precluded consideration of the appellant's submissions on s 80. *Bernasconi* should not be taken as foreclosing consideration of ground 2. That case concerned 'a territory placed by the Queen under the authority of and accepted by the Commonwealth', not one 'surrendered by any State' under s 111 of the Constitution or 'acquired by the Commonwealth' under s 125 of the Constitution. The ACT, as a territory surrendered to, and acquired by, the Commonwealth, is in a constitutionally distinct position to that of the Territory of Papua considered in *Bernasconi*. That distinct position was recognised three years after *Bernasconi* in *Mitchell v Barker*,[26] where Griffith CJ said, when delivering the judgment of the Court, that '[i]t may be that a distinction may some day be drawn between Territories which have and those which have not formed part of the Commonwealth'. Whatever authority *Bernasconi* continues to have in relation to a territory of a similar character to that of Papua – a question that this Court need not consider – it should not be seen as pre-empting the answer to the question left open in *Mitchell v Barker*.

19 In any event, for two principal reasons, *Bernasconi* should not be applied by this Court to determine ground 2. First, the reasoning in the judgments of Griffith CJ and Isaacs J supporting their conclusions on the application of s 80 were profoundly affected by the view that s 122 stood apart from the remainder of the Constitution: an interpretive approach to s 122 that no longer is accepted by this Court. Griffith CJ (with whom Gavan Duffy and Rich JJ agreed) said (at 635) that '… Chapter III is limited in its application to the exercise of 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. Sec 80, therefore, relates only to offences created by the Parliament by Statutes passed in the execution of those functions, which are aptly described as "laws of the Commonwealth". … In my opinion, the

[25] (1915) 19 CLR 629.
[26] (1918) 24 CLR 365, 367.

power conferred by sec 122 is not restricted by the provisions of Chapter III of the Constitution whether the power is exercised directly or through a subordinate legislature'.

20 While Isaacs J considered that the territory law satisfied the description of 'a law of the Commonwealth', his Honour similarly considered (at 637) that s 80 'is clearly enacted as a limitation on the accompanying provisions [in Ch III], applying to the Commonwealth as a self-governing community. And that is its sole operation. When the Constitution, however, reaches a new consideration, namely, the government of territories, not as constituent parts of the self-governing body, not "fused with it" … but rather as parts annexed to the Commonwealth and subordinate to it, then sec 122 provides the appropriate grant of power'. In reaching that conclusion, it is clear that his Honour was influenced in large part by the character of the territory in question.[27] His Honour said that the power in s 122 'implies that a "territory" is not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers. It is in a state of dependency or tutelage, and the special regulations proper for its government until, if ever, it shall be admitted as a member of the family of States, are left to the discretion of the Commonwealth Parliament. If, for instance, any of the recently conquered territories were attached to Australia by act of the King and acceptance by the Commonwealth, the population there, whether German or Polynesian, would come within sec. 122, and not within sec. 80. Parliament's sense of justice and fair dealing is sufficient to protect them, without fencing them round with what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system'. Such reasoning 'made no sense at all … in the case of the Australian Capital Territory'.[28]

21 This 'disparate power' theory[29] of s 122 was considerably undermined by the Court's decision in *Lamshed v Lake*[30] where a majority of the Court held that s 122 authorised the enactment of laws operating within States and that a law enacted by the Commonwealth Parliament pursuant to s 122 was 'a law of the Commonwealth' for the purposes of s 109 of the Constitution. Contrary to the interpretive approach adopted in *Bernasconi,* it is now accepted that the relationship between s 122 and other constitutional provisions requires close consideration of the text, context and purpose of the respective provisions having regard to the Constitution as a whole, rather than a blanket rule that quarantines s 122 from the rest of

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[27] See Zines, '"Laws for the Government of any Territory" Section 122 of the Constitution' (1966) 2 *Federal Law Review* 72, 76.
[28] Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (4th ed, 2016) 222.
[29] Zines, '"Laws for the Government of any Territory" Section 122 of the Constitution' (1966) 2 *Federal Law Review* 72, 73, 75-9. The Privy Council had described the power in relation to the territories as 'a disparate and non-federal matter': *Attorney-General (Cth) v The Queen; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529, 545 (PC).
[30] (1958) 99 CLR 132.

the Constitution.[31] As Brennan, Deane and Toohey JJ said in *Capital Duplicators Pty Limited v Australian Capital Territory*,[32] '[i]t would therefore be erroneous to construe s.122 as though it stood isolated from other provisions of the Constitution which might qualify its scope'. Of considerable significance to the rejection of the 'disparate power' theory is the decision in *Wurridjal v Commonwealth*,[33] where a majority of the Court held that the 'just terms' limitation attached to s 51(xxxi) of the Constitution constrains the operation of s 122. Such a conclusion collapsed the plausibility of any remaining view that the Parliament's legislative powers can be pigeon-holed into disparate *federal* and *non-federal* categories. The 'weight of authority'[34] appears also to be that s 116 constrains the scope of s 122,[35] and the view has been expressed that s 122 is limited also by s 92.[36]

22 The second significant reason why *Bernasconi* should not be applied to determine ground 2 is that, contrary to the interpretive approach adopted in that case, this Court has taken significant steps to integrate s 122 and Ch III of the Constitution. The Commonwealth Parliament can authorise territory courts established under s 122 of the Constitution to exercise federal jurisdiction,[37] with the source of that power being s 122 of the Constitution.[38] When doing so, territory courts are exercising Commonwealth judicial power pursuant to s 71 of the Constitution and, as a consequence of doing so, territory courts are subject to the *Kable* principle. Furthermore, pursuant to s 77(i) of the Constitution, the Commonwealth Parliament can invest a federal court established by the Parliament with *federal* jurisdiction to resolve a dispute involving statutory rights sourced in a law made by the Parliament exclusively under s 122.[39] In those circumstances, the matter of federal jurisdiction arises under a law 'made by the Parliament' for the purposes of s 76(ii) of the Constitution.

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[31] (1992) 177 CLR 248, 272 (Brennan, Deane and Toohey JJ), 284-5 (Gaudron J) (***Capital Duplicators***).
[32] *Capital Duplicators* (1992) 177 CLR 248, 272.
[33] (2009) 237 CLR 309, 336 [13], 357 [80] (French CJ), 383-388 [175]-[188] (Gummow and Hayne JJ) and 418-419 [283]-[287] (Kirby J).
[34] *Kruger v The Commonwealth* (1997) 190 CLR 1, 166 (Gummow J) (***Kruger***).
[35] *Lamshed v Lake* (1958) 99 CLR 132, 143 (Dixon CJ, with whom Webb and Taylor JJ agreed); *Kruger* (1997) 190 CLR 1, 85 (Toohey J), 121-123 (Gaudron J), 166-167 (Gummow J); cf 60 (Dawson J), 142 (McHugh J).
[36] *Lamshed v Lake* (1958) 99 CLR 132, 143 (Dixon CJ, with whom Webb and Taylor JJ agreed).
[37] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Emmerson* (2014) 253 CLR 393; *NAAJA v NT* (2015) 256 CLR 569.
[38] *Eastman v The Queen* (1999) 200 CLR 322, 348 [63] (Gummow and Hayne JJ); *Bradley* (2004) 218 CLR 146,162 [27] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
[39] *Northern Territory v GPAO* (1999) 196 CLR 553, 591 [91] (Gleeson CJ and Gummow J, with Hayne J agreeing at 650 [254]), Gaudron J (605 [132]) (***GPAO***); *Spinks v Prentice* reported at *Re Wakim; Ex Patte McNally* (1999) 198 CLR 511, 596 [175] (Gummow and Hayne JJ, with Gleeson CJ at 540 [3]), 546 [27] (Gaudron J) and at 565 [82] (McHugh J).

23 The core reasoning of Griffith CJ and Isaacs J in *Bernasconi* supporting their conclusions has been criticised over time by members of this Court[40] and, in light of subsequent developments outlined above, can no longer be accepted. More particularly, Griffith CJ's conclusion, that a law enacted under s 122 cannot be a 'law of the Commonwealth', was not shared by Isaacs J and has been disapproved subsequently. As Barwick CJ said in *Spratt v Hermes*,[41] 'the expression "law of the Commonwealth" embraces every law made by the Parliament whatever the constitutional power under or by reference to which that law is made or supported'. Windeyer J expressed the same view (at 276). So much was also suggested earlier by Evatt J in *Ffrost v Stevenson*[42] in relation to territories that form part of the Commonwealth.

24 The appellant contends that, once it is accepted that in its application to a surrendered or acquired territory, s 122 cannot, as a blanket rule, stand apart from Ch III of the Constitution, then it follows that *Bernasconi* cannot control the operation of s 80 in this case. If, however, the view were taken that *Bernasconi* is binding in relation to all s 122 territories irrespective of their character and, thus, cannot be distinguished, the appellant seeks leave to have it reconsidered. The established principles for reviewing High Court authority were set out in *John v Federal Commissioner of Taxation*.[43] For the reasons already developed, in its application to territories surrendered by a State, or acquired by the Commonwealth from a State, the core reasoning underpinning the judgments in *Bernasconi* cannot be reconciled with subsequent developments of principle by this Court.

From first principles: the proper relationship between ss 80 and 122

25 From first principles, attention must turn to the text, context and purpose of the respective provisions. Whether s 80 is enlivened turns on the question of characterisation: when will a law be 'any law of the Commonwealth'? As will be explained, the answer to that question in the present circumstances depends on the constitutional character of the ACT as a 'peculiar and special'[44] territory, and its relationship to the federal body politic.

26 Section 111 of the Constitution provides that '[t]he Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the

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[40] *Ffrost v Stevenson* (1937) 58 CLR 528, 592-3 (Evatt J); *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85 (Dixon J); *Spratt v Hermes* (1965) 114 CLR 226, 244-5 (Barwick CJ), 269-70 (Menzies J), 275-6 (Windeyer J); *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591, 598 (Barwick CJ), 605-6 (Menzies J); *Kruger* (1997) 190 CLR 1, 80-1 (Toohey J), 108-9 (Gaudron J), 172-3 Gummow); *Fittock v The Queen* (2003) 217 CLR 508, 517 [31] (Kirby J).

[41] (1965) 114 CLR 226, 247.

[42] (1937) 58 CLR 528, 592-3. See also *Kruger* (1997) 190 CLR 1, 172 (Gummow J).

[43] (1989) 166 CLR 417, 438-9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[44] *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 366 [114] (Kirby J, dissenting in the result) (***Eastman***).

acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth'. Section 125 of the Constitution provides that '[t]he seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales …'. There has been some uncertainty about the constitutional foundation for the establishment of the ACT.[45] However, when the Commonwealth and States enacted the enabling legislation,[46] it is clear that they proceeded on the assumption that the territory to become the ACT was to be *surrendered* and *accepted* and, thus, language was used in the enabling legislation that was consistent with reliance on s 111 of the Constitution.[47] It is equally clear that language used in s 5(2) of the *Seat of Government Acceptance Act 1909* (Cth) – that is, 'accepted' and 'acquired' – also contemplated the operation of s 125. Accordingly, the better view of the constitutional foundation for the ACT is expressed in the following way by Justice Mossop, writing extra-curially: 'The combined effect of the New South Wales and Commonwealth Acts must be taken to amount to the surrender of that territory and its acceptance by the Commonwealth for the purposes of compliance with s 111 of the Constitution. This mechanism is then taken to involve the granting and acquisition of the territory for the purposes of s 125 of the Constitution'.[48]

27 Upon the enactment of the enabling Commonwealth and State legislation, ss 111 and 125 operated to transform the constitutional identity of the territory to become the ACT. Immediately prior to that transformative moment, the geographical territory of what was to become the ACT vested in, belonged to, and was within the jurisdiction of, the NSW body politic. By operation of ss 111 and 125, the ACT, as a geographical territory, was embraced within the 'exclusive jurisdiction' of the body politic of the Commonwealth (s 111), became 'vested in and belong[ed] to the Commonwealth' (s 125), and the legislative power to make laws for the government of the ACT under s 122 was enlivened. By virtue of ss 111 and 125, the ACT was brought within the 'territorial sovereignty' and 'political dominion' of the

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[45] The history is canvassed in detail by Mossop AsJ in *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 2)* [2016] ACTSC 215; (2016) 311 FLR 187, [90]-[129]. See also Justice David Mossop, *The Constitution of the Australian Capital Territory* (2021) 9-12.

[46] *Seat of Government Surrender Act 1909* (NSW) and *Seat of Government Acceptance Act 1909* (Cth).

[47] *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 2)* [2016] ACTSC 215; (2016) 311 FLR 187, [120]-[124] (Mossop AsJ). See also Justice David Mossop, *The Constitution of the Australian Capital Territory* (2021) 10-11.

[48] Justice David Mossop, *The Constitution of the Australian Capital Territory* (2021) 11. See *Svikart v Stewart* (1994) 181 CLR 548, 561 (Mason, Deane, Dawson and McHugh JJ), 578 (Gaudron J). Cf: *Capital Duplicators Pty Ltd* (1992) 177 CLR 248, 276 (Brennan, Deane and Toohey JJ), 285, 289 (Gaudron J).

Commonwealth:[49] it is 'geographically and politically' a constituent part of the Commonwealth.[50]

28 Thus, as a matter of characterisation, following the operation of ss 111 and 125, a law for the government of the ACT, given direct force by the Commonwealth Parliament under s 122, is capable of being described in a natural and ordinary sense as a 'law of the Commonwealth' for the purposes of s 80. That is, it is a law enacted by the Commonwealth Parliament for a territory that belongs to the Commonwealth body politic. There is nothing elsewhere in the Constitution to dislocate that constitutional identity of the ACT from the federal body politic. In particular, s 122 is expressed as a constitutional power to enact laws for a territory in a *geographical* sense[51] and, therefore, it does not identify or presuppose a territory as a separate body politic. As Professors Zines and Lindell have said, '[t]here is no warrant … in the actual terms of the Constitution for excluding the Territories from the operation of s 80'.[52]

29 Consequently, unless the natural and ordinary meaning of the text of s 80 is to be read down by unexpressed limitations deriving from an artificial distinction between *federal* and *non-federal* Commonwealth power, an offence created by the Parliament for the ACT under s 122 must enliven the operation of s 80 of the Constitution if tried on indictment. The appellant contends that there are at least six reasons why the language of s 80 should not be read down to exclude offences given direct force by the Commonwealth Parliament under s 122. First, the scope of the language attracting the operation of s 80 is broad and unqualified: an offence against '<u>any</u> law of the Commonwealth' must be by jury if tried on indictment. The exclusion from the scope of s 80 of offences given direct force by the Commonwealth Parliament under s 122 would strain the text of the provision. Furthermore, the text of s 80 recognises that 'if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes'. As Evatt J said in *Ffrost v Stevenson*,[53] '[i]t would seem plain' that that expression 'must include offences committed within the Commonwealth's own territories (properly so called)'.

30 Secondly, it is contrary to accepted interpretive methodology to read constitutional text as subject to unexpressed assumptions: 'if the text is explicit the text is conclusive, alike

[49] *Svikart v Stewart* (1994) 181 CLR 548, 561 (Mason CJ, Deane, Dawson and McHugh JJ).
[50] *Capital Duplicators* (1992) 177 CLR 248, 288, 289 (Gaudron J).
[51] *Capital Duplicators* (1992) 177 CLR 248, 275 (Brennan, Deane and Toohey JJ), 285 (Gaudron J).
[52] Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (4th ed, 2016) 222.
[53] (1937) 58 CLR 528, 592. See also *Kruger* (1997) 190 CLR 1, 172-3 (Gummow J).

in what it directs and what it forbids'.[54] Thirdly, s 80 is a constitutional safeguard against the exercise of Commonwealth legislative power that should not lightly be set aside. Section 80, like ss 51(xxxi), 92 and 116, contains a 'fundamental law of the Commonwealth' and a constitutional 'guarantee'.[55] It is not uncommonly characterised as a constitutional 'right'.[56] While it operates only when an offence is tried on indictment,[57] that narrowed scope of operation provides no warrant for further confining s 80 by reading in unexpressed limitations. Fourthly, the exclusion from the scope of s 80 of offences given direct force by the Commonwealth Parliament under s 122 would, for no good reason, drive a wedge between ss 80 and 109. As Gummow J said in *Kruger v Commonwealth*,[58] 'if a law made in pursuance of the power conferred by s 122 is a "law of the Commonwealth" for the purposes of s 109 of the Constitution, as established by *Lamshed v Lake,* it is difficult to maintain the proposition that such a law is not a "law of the Commonwealth" within the meaning of s 80'.

31 Fifthly, equally, it would be incongruent with the cases that have recognised that a law of the Commonwealth Parliament is capable of giving rise to a matter under 'any laws made by the Parliament' for the purposes of s 76(ii) of the Constitution. The natural and ordinary meaning of the broader expression 'any law of the Commonwealth' in s 80 is no less capable of accommodating a law made by the Parliament. Finally, and contrary to what was assumed by Griffiths CJ and Isaacs J in *Bernasconi*, s 80 is not, in its terms, limited to circumstances where a trial court is exercising Commonwealth judicial power. While s 80 resides in the Chapter of the Constitution that creates and defines the *federal* judicature, its operation does not turn on the establishment or operation of the federal judiciary. If federal jurisdiction had never been vested in State courts to determine Commonwealth offences, s 80 would still have required the trial of any offence against any law of the Commonwealth to be by jury.[59] While s 80 constitutes an imperative on the exercise of federal jurisdiction,[60] its operation was not

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[54] See *Gerner v Victoria* [2020] HCA 48; (2020) 95 ALJR 107, [28] (The Court), repeating the statement in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129, 150, quoting from *Attorney-General (Ontario) v Attorney-General (Can)* [1912] AC 571 at 583 (Lord Loreburn LC).
[55] *Cheatle v The Queen* (1993) 177 CLR 541, 549 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[56] *Katsuno v The Queen* (1999) 199 CLR 40, 65 [52] (Gaudron, Gummow and Callinan JJ).
[57] *R v Archdall and Roskruge; Ex parte Carrington and Brown* (1928) 41 CLR 128.
[58] (1997) 190 CLR 1, 172-3.
[59] Covering Clause 5 to the *Commonwealth of Australia Constitution Act* relevantly provides that '… all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth'. Upon Federation, State courts 'immediately acquired new State jurisdiction in respect of classes of matters which had not previously existed', including the enforcement of Commonwealth laws: *Burns v Corbett* (2018) 265 CLR 304, 347 [72] (Gageler J). See also *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619-20 [25]-[26] (Gleeson CJ, Gummow and Hayne JJ).
[60] *Alqudsi v The Queen* (2016) 258 CLR 203, 265-266 [168]-[171] (Nettle and Gordon JJ).

contingent on the creation and exercise of federal jurisdiction. Thus, the implied limitation applied in *Bernasconi* to the text of s 80 should not be accepted.

The appellant's primary contention on s 80

32 Premised on the acceptance of the analysis above, the appellant's primary contention is that ss 54 and 60 of the *Crimes Act 1900* (ACT) – the offences against which the appellant was convicted – enlivened the operation of s 80 of the Constitution because those offences were given direct force by the Commonwealth Parliament pursuant to s 122.

33 It must first be recognised that there is 'no objection to the Commonwealth making a law by adopting as a law of the Commonwealth a text which emanates from a source other than the Parliament. In such a case the text becomes, by adoption a law of the Commonwealth and operates as such'.[61] In the context of s 80, it has been accepted that there will be a 'law of the Commonwealth' where a Commonwealth provision creates a Commonwealth offence indirectly by picking up a State indictable offence and applying it as a 'surrogate' federal law.[62] This approach necessarily was adopted by Isaacs J in *Bernasconi* when accepting that it was enough that the 'present force [of the offences in question] subsists by virtue of the declared will of the Commonwealth Parliament'.[63]

34 The *Crimes Act 1900* (NSW) was continued in force by s 6 of the *Seat of Government Acceptance Act 1909* (Cth) and, by reason of s 4 of the *Seat of Government (Administration) Act 1910* (Cth), it was given effect in the ACT 'as if it were a law of the Territory', subject to any Ordinance made by the Governor-General. By operation of s 34(4) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (***Self-Government Act***), the *Crimes Act 1900* (NSW) was 'taken to be an enactment' and could 'be amended or repealed accordingly' pursuant to an exercise of legislative power by the ACT Legislative Assembly under s 22 of the *Self-Government Act*. However, s 34(4) of the *Self-Government Act* did not, itself, disturb the ongoing federal stream of authority for the continued operation of the *Crimes Act*. That the provisions of the *Crimes Act* continued to operate by force of Commonwealth law after self-government in the ACT was recognised in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[64] and *Eastman v The Queen*.[65] The offence for which Mr Eastman had been tried and convicted was s 18 of the *Crimes Act 1900* (ACT). At the relevant time, that

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[61] *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 487; see also *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 399-400 (McHugh J).
[62] *Pinkstone v The Queen* (2004) 219 CLR 444, 456 [29], 458-9 [38]-[41] (McHugh and Gummow JJ); *Mok v Director of Public Prosecutions (NSW)* (2016) 257 CLR 402, 431 [84], 435 [99] (Gordon J).
[63] *Bernasconi* (1915) 19 CLR 629, 637 (Isaacs J).
[64] (1999) 200 CLR 322.
[65] (2000) 203 CLR 1.

provision had not been amended by the ACT Legislative Assembly. In *Re Governor, Goulburn Correctional Centre; Ex parte Eastman,*[66] Gummow and Hayne JJ said that '[w]hatever may have been the situation had that been the case [ie, an amendment], in our opinion the criminal liability in respect of which the applicant was tried and convicted owed its existence to the laws made by the Parliament'. To similar effect were statements in *Eastman v The Queen*[67] that '[t]he law under which the applicant was charged was a law made by the Parliament of the Commonwealth'[68] and 'the applicant was tried for an offence constituted, for the Territory, by laws made by the Parliament'.[69]

35 This appeal raises the question of amendment left open by Gummow and Hayne JJ in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman.* The offences against which the appellant was convicted were inserted into the *Crimes Act 1900* (ACT) by s 4 of the *Crimes (Amendment) Ordinance (No 5) 1985* as, respectively, s 92D and 92J. By operation of s 34(4) of the *Self-Government Act*, they were continued in force subject to amendment or repeal by the ACT Legislative Assembly under s 22 of the *Self-Government Act*. Sections 92D and 92J were then renumbered to, respectively, ss 54 and 60, by s 43 of the *Crimes Legislation Amendment Act 2001* (ACT). Each provision subsequently was amended to clarify the fault element necessary to prove the offence.[70]

36 The appellant submits that s 34(4) of the *Self-Government Act* used the words 'amended' and 'repealed' in their ordinary senses as the means for drawing the line between, on the one hand, the continuing authority of the Commonwealth Parliament and, on the other hand, the new separate authority of the ACT Legislative Assembly. In *Attorney-General (WA) v Marquet,*[71] Gleeson CJ, Gummow, Hayne and Heydon JJ said that 'the central meaning of ''amend'' is to alter the legal meaning of an Act or provision, short of entirely rescinding it, and that the central meaning of ''repeal'' is to rescind the Act or provision in question'. In other words, it is only when the Legislative Assembly *repeals* a provision, such as that by which the creation of an offence operates, that the character of that provision as being a law made by the Commonwealth Parliament will cease so to operate. If the Legislative Assembly simply *amends* a provision, the operation of s 34(4) as the legislative force for the provision

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[66] (1999) 200 CLR 322, 342 [44].
[67] (2000) 203 CLR 1.
[68] (2000) 203 CLR 1, 51 [159] (McHugh J), citing *GPAO* (1999) 196 CLR 553.
[69] (2000) 203 CLR 1, 65 [196] (Gummow J), agreeing with the reasoning of McHugh J.
[70] Section 54 was amended by amendments [1.11]-[1.13] of the *Justice and Community Safety Legislation Amendment Bill 2008 (No 3)* (ACT); s 60 was amended by ss 5-7 the *Crimes Legislation Amendment Act 2011* (ACT). The penalties for s 60 offences were also altered by ss 4-5 of the *Criminal Proceedings Legislation Amendment Act* 2011 (ACT).
[71] (2003) 217 CLR 545, 564 [46] (***Marquet***).

continues, albeit the provision operates with an altered legal meaning picking up the textual changes made by the Legislative Assembly. Furthermore, it is clear that, in substance,[72] the alterations to ss 54 and 60 constituted *amendments* to those provisions, rather than a *repeal* of their legal operation.[73] Consequently, in the appellant's submission, the offences against which the appellant was convicted were constituted by, and owed their existence to, a law made by the Parliament. Section 80 was thus enlivened.[74]

The appellant's secondary contention on s 80

37 The appellant's secondary contention only arises if this Court were to conclude that the legislative source of ss 54 and 60 of the *Crimes Act* has shifted from s 34(4) of the *Self-Government Act* to an exercise of legislative authority by the ACT Legislative Assembly under s 22 of the *Self-Government Act.* It would then raise the question left open by the Court in *Fittock v The Queen*[75] as to whether a law enacted by a Territory Legislative Assembly established under s 122 is a 'law of the Commonwealth' for the purpose of s 80 of the Constitution.

38 The appellant contends that a law of the ACT Legislative Assembly is such a law. The cases on the expression 'laws of the Commonwealth' have denied that characterisation to the Constitution,[76] the common law,[77] an intergovernmental agreement,[78] and English legislation.[79] In the context of s 80, the Court in *Re Colina; Ex parte Torney*[80] considered whether contempt proceedings in the Family Court had to be by jury in accordance with s 80. Gleeson CJ and Gummow J (with Hayne J agreeing at 429 [113]) considered that the section providing the power to punish for contempt was 'declaratory of the power implicit in Ch III of

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[72] *Marquet* (2003) 217 CLR 545, 565 [47] (Gleeson, Gummow, Hayne and Heydon JJ), 588-9 [126]-[127] (Kirby J)).

[73] Cf *Eastman* (1999) 200 CLR 322, 349-353 [68]-[81], where Gummow and Hayne JJ considered that laws enacted by the ACT Legislative Assembly had 'substantially reconstituted' (at 353 [81]) the Supreme Court in relevant respects to warrant the conclusion that the Court was not a 'court created by the Parliament' for the purposes of s 72 of the Constitution.

[74] This position is unaffected by the *Crimes Legislation (Status and Citation) Act 1992* (ACT) which was enacted to overcome the citation convention of referring to the *Crimes Act* as a NSW Act which was continued in force by Commonwealth legislation.

[75] (2003) 217 CLR 508, 513 [9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

[76] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 431 ('laws of the Commonwealth' in s 61 of the Constitution did not include the Constitution). Cf, *Sankey v Whitlam* (1978) 142 CLR 1, 92-3 (Mason J) (a law amending the Constitution does not stand outside the expression 'laws of the Commonwealth').

[77] *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 487.

[78] *Sankey v Whitlam* (1978) 142 CLR 1, 91-2 (Mason J) (a financial agreement between the Commonwealth and the States was not 'a law of the Commonwealth' for the purposes of s 86(1)(c) of the *Crimes Act 1914* (Cth)).

[79] *Jerger v Pearce* (1920) 27 CLR 526, 531 (the English *Naturalization Act 1870* (33 & 34 *Vict c* 14) was not a 'law of the Commonwealth' with the meaning of that expression as it appeared in the *Naturalization Act 1903* (Cth)).

[80] (1999) 200 CLR 386.

the Constitution' (at 397 [25]) and, thus, the source of the liability was the Constitution and not a 'law of the Commonwealth'. In that context, their Honours said that '[t]he term "law of the Commonwealth" refers to laws made under the legislative powers of the Commonwealth' (at 397 [25]). Justice McHugh agreed that if the court were enforcing the Constitution it would not be 'enforcing an offence against a law of the Commonwealth', but his Honour considered that the Commonwealth provision punishing contempt was 'a law of the Commonwealth' even if it were also declaratory of the powers implicit in Ch III. His Honour said that '[a] law of the Commonwealth is simply a law made under or by the authority of the Parliament of the Commonwealth' (at 402 [45]). Kirby J (dissenting in the result) agreed with McHugh J that the offences charged were offences against the statutory provision and, thus, within the expression 'law of the Commonwealth' (at 416 [80]). His Honour went further by saying that he was 'far from convinced' that the expression 'laws of the Commonwealth' excluded the Constitution or the common law (at 416 [80]). Callinan J did not consider the scope of the expression.

39 Two relevant points can be taken from *Re Colina*. The first is that a 'law of the Commonwealth' must have a *statutory* source. Secondly, the language used to describe the scope of the expression emphasised its potential breadth: laws of the Commonwealth are 'laws *made under* the legislative powers *of the Commonwealth*' or 'made *under* or by *the authority of* the Parliament of the Commonwealth'. The breadth of these observations is consistent with the use in s 80 of the expression 'any laws of the Commonwealth', rather than 'any laws made by the Parliament'. This is in contrast to the language of its neighbouring provision in Ch III, s 76(ii), which uses the latter expression. In the same year that *Bernasconi* was decided, Griffith CJ in *R v Kidman*,[81] said (at 439) that '[t]he variation of language between "the laws of the Commonwealth" and "laws made by the Parliament" certainly does not suggest that the latter expression was intended to be synonymous with the former. And, having regard to the sense in which the term "the laws of the Commonwealth" is used in the Constitution, *e.g.,* in secs. 61 and 120, and the term "any law of the Commonwealth" in sec. 80, I think it is impossible to contend successfully that they can be treated as synonymous.' The expression in s 80 must then have a broader scope than simply a law enacted directly by the Commonwealth Parliament.

40 In the context of statutory language replicating s 109, the Court in *R v Foster; Ex parte Commonwealth Steamship Owners' Association*[82] said that the expression 'laws of the

[81] (1915) 20 CLR 425; see also *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 414 [75] (Kirby J).
[82] (1953) 88 CLR 549.

Commonwealth' 'relates to laws *made under* the legislative powers of the Commonwealth *directly or indirectly*' (at 56, emphasis added). The observation of Dixon J in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*,[83] that 'all claims of right arising under a law in force in the Territory come within the description [of a matter 'arising under any laws made by the Parliament' in s 76(ii)] because they arise *indirectly* as a result of' Commonwealth legislation, would seem to apply with greater force to the expression 'laws of the Commonwealth' in s 80.

41 It follows, the appellant submits, that a natural and ordinary reading of the text of s 80 is capable of embracing offences enacted *directly* by the Commonwealth Parliament under s 122, or *indirectly* pursuant to authority conferred by the Parliament under s 122 of the Constitution. In other words, offences enacted by the ACT Legislative Assembly fall within the expression 'any laws of the Commonwealth' because they 'are made under laws that have their force and effect due to a Commonwealth Act'.[84] They are *statutory* laws of the *Commonwealth body politic*.[85]

42 There are good reasons for adopting the appellant's interpretation of s 80. First, as explained above, despite self-government, the ACT remains part of the body politic of the Commonwealth.[86] This constitutional position cannot be defeated by the power under s 122 to make laws for the government of the ACT, even where the Commonwealth Parliament creates self-governing institutions and establishes a separate legislative power. The power in s 122 extends to the government of the 'territory' when used in a geographical sense. Thus, it does not presuppose the existence of a distinct territory body politic and, further, its exercise to establish a statutory body politic cannot sever the ACT from the federal body politic in contravention of the clear terms of ss 111 and 125. Secondly, the disapplication of s 80 from a law of the Legislative Assembly would place the ACT on the same footing as a State contrary to the constitutional design. Chapter VI of the Constitution sets out the scheme for a territory to become a State. Section 121, which authorises the Parliament to establish new States, extends to the establishment of territories as States. Pursuant to s 122, the Parliament can prepare a territory for its establishment as a State and, for that purpose, might create

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[83] (1929) 42 CLR 582, 585. See also *Kruger* (1997) 190 CLR 1, 169 (Gummow J); *O'Neill v Mann* (2000) 101 FCR 160, [23]-[30] (Finn J).

[84] To adopt an expression used by Justice David Mossop, *The Constitution of the Australian Capital Territory* (2021) 65.

[85] Cf *Eastman* (1999) 200 CLR 322, 344 [50] (Gummow and Hayne JJ): 'The term "the Commonwealth" in ss 1, 61 and 71 is used consistently to identify the body politic identified in the covering clauses to the Constitution'.

[86] Although it is not necessary for the Court to address the issue, this may differentiate the position of territories not brought into existence pursuant to s 111 or 125: see *Capital Duplicators* (1992) 177 CLR 248, 286 (Gaudron J).

conditions of self-government.[87] As Mason CJ, Dawson and McHugh JJ said in *Capital Duplicators*,[88] '[s] 122 was and is the source of legislative power for the advancement of the territories along this path towards the final step of Statehood, at which point s. 121 becomes the relevant source of power'. As Brennan, Deane and Toohey JJ recognised in *Capital Duplicators*, the Convention Debates considered the forerunner of s 122 as primarily 'designed to provide for the provisional government of territories as they moved towards Statehood'.[89] However, until (and unless) it reaches that final step of statehood, a territory remains a part of the federal body politic. It may not be possible for the ACT to take the pathway to statehood in which case it is not possible for it to be put in the position of a State body politic[90] and, thus, it will forever remain part of the federal body politic. However, even if statehood for the ACT were possible, until it is formed into a State, it cannot be treated by Parliament as such. In that case, the Commonwealth can prepare the ACT for statehood by conferring self-government and a separate legislative power, but it cannot, until the establishment of statehood, sever the territory from the federal body politic.

43 Thirdly, while the power in s 122 'is general' and extends to the establishment of a separate legislative power,[91] it does not permit the Parliament to 'create another legislature with general power over a territory'.[92] As the decision in *Capital Duplicators* demonstrated, s 122 and the authority conferred on the Legislative Assembly are equally subject to applicable constitutional limitations. This may be seen as a manifestation of the basic constitutional law principle that the stream of power cannot rise above its constitutional source in s 122,[93] or the orthodox principle that 'it is not permissible to do indirectly what is prohibited directly'.[94] The disapplication of s 80 from a law of the Legislative Assembly

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[87] *Capital Duplicators* (1992) 177 CLR 248, 266 (Mason CJ, Dawson ad McHugh JJ), 271-272 (Brennan, Deane and Toohey JJ); *Berwick Ltd v Gray* (1976) 133 CLR 603, 607 (Mason J).
[88] *Capital Duplicators* (1992) 177 CLR 248, 266 (Mason CJ, Dawson ad McHugh JJ). Although their Honours were in dissent in the result, this statement would appear uncontroversial.
[89] *Capital Duplicators* (1992) 177 CLR 248, 271.
[90] Cf *Capital Duplicators* (1992) 177 CLR 248, 266 (Mason CJ, Dawson ad McHugh JJ), 273 (Brennan, Deane and Toohey JJ); *Eastman* (1999) 200 CLR 322, 331 [7] (Gleeson CJ, McHugh and Callinan JJ).
[91] *Capital Duplicators* (1992) 177 CLR 248, 265-6, (Mason CJ, Dawson ad McHugh JJ), 271-272, 282 (Brennan, Deane and Toohey JJ), 282 (Gaudron J), *Svikart v Stewart* (1994) 181 CLR 548, 562 (Mason CJ, Deane, Dawson and McHugh JJ).
[92] *Capital Duplicators* (1992) 177 CLR 248, 269 (Brennan, Deane and Toohey JJ).
[93] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. See *GPAO* (1999) 196 CLR 443, 617 (McHugh and Callinan JJ): 'The Commonwealth could no more escape the operation of Ch III by setting up self-governing legislatures than it could escape its operation by giving the Governor-General in Council power to create courts under a regulation', although put in support of the view that s 122 stands apart from Ch III. See also *Eastman* (1999) 200 CLR 322, 379 [145] (Kirby J) (dissenting).
[94] *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516, 522 (Mason CJ, Gaudron and McHugh JJ), quoted with approval in *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 131 [228] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

could only be countenanced if ss 111, 122 and 125 presuppose the ACT to be, like a State, a separate body politic. For the reasons given, that is not the case.

44 In summary, even if the separate authority conferred on the ACT Legislative Assembly is to be seen as the direct source of authority for ss 54 and 60 of the *Crimes Act*, nonetheless, those offences remain laws enacted *indirectly* pursuant to authority conferred by the Parliament under s 122 and, thus, are 'laws of the Commonwealth' for the purposes of enlivening s 80 of the Constitution. Section 68BA was invalid because it authorised the appellant's trial by judge alone contrary to the command in s 80.

The appellant's trial miscarried

45 If the appellant is successful on either ground of appeal, then, contrary to the orders of the Court of Appeal, s 68BA was invalid and, consequently, the appellant's trial by judge alone, pursuant to an order made under that invalid provision, miscarried.

Part VII: Orders sought

46 The appellant seeks the following orders: (a) that the appeal be allowed; (b) that the orders made by the Court of Appeal on 9 November 2021 in relation to the appellant be set aside; (c) declarations that s 68BA (now repealed) was invalid and/or was invalidly applied to the appellant's trial by s 116 of the *Supreme Court Act*; (d) a declaration that, as a result of the invalidity of s 68BA (now repealed) and/or the invalid application of s 68BA by s 116 of the *Supreme Court Act* to the appellant's trial, that trial miscarried; (e) that the order made on 13 August 2020 by the Supreme Court of the ACT that the appellant's trial proceed before a judge alone be set aside; and (f) that the convictions on various counts of the appellant on 9 October 2020 by the Supreme Court of the ACT be quashed.

Part VIII: Time estimate

47 The appellant would seek no more than 2 hours for the presentation of the appellant's oral argument.

5 August 2022

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Annexure A

Commonwealth of Australia Constitution Act (The Constitution) **as at 9 October 2020**

Supreme Court Act 1933 **(ACT) as at 9 October 2020**

COVID-19 Emergency Response Act 2020 **(ACT) as at 9 October 2020**

Seat of Government (Administration) Act 1910 **(Cth) as at 9 October 2020**

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Public Health Act 1997 **(ACT) as at 9 October 2020**

Crimes Act 1900 **(NSW) as at 9 October 2020**