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 & Ors
Respondents

10 **APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

Part I: Certification

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

Part II: Outline

1 **Ground 1 – *Kable*** (AS [9]-[16]): The gatekeeping function in s 68BA(4) [**JBA *10**] to choose between persons in a relevantly identical class gave a power that was relevantly arbitrary in character (AS [13]-[15]): (a) there was no duty to consider whether a notice should be given; (b) there were no criteria to determine who should be subject to an exercise of power under s 68BA(4); (c) criteria were not supplied by s 68BA(3); and (d) no reasons were to be given for issuing a s 68BA(4) notice.

20 2 The constitutional vice lay in the impossibility of scrutinising the differential treatment of relevantly like cases (AS [16]): *Wainohu v New South Wales* (2011) 243 CLR 181 at 215 [58], 219-220 [69]-[70] (French CJ and Kiefel J), 229-230 [109] (Gummow, Hayne, Crennan and Bell JJ) [**JBA *51**].

3 Section 68BA substantially impaired the ACT Supreme Court's institutional integrity by departing to a significant degree from the processes which characterise the exercise of judicial power: *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [140] (Crennan, Kiefel, Gageler and Keane JJ) (AS [10]).

4 **Ground 2 – s 80 of the Constitution:** s 68BA authorised a trial judge to order a judge only trial contrary to the requirements of s 80 (AS [17]-[44]).

30 5 The ratio of *R v Bernasconi* (1915) 19 CLR 629 [**JBA *43**] is limited to criminal laws applying in a territory placed by the Crown under the authority of and accepted by the Commonwealth (AS [18], [20]): (a) Griffith CJ (with whom Gavan Duffy and Rich JJ agreed) took the view that s 6 of the *Papua Act 1905* (Cth) was *declaratory* of the continuation of the laws in force in the British Possession (at 633). The remainder of what was said by Griffith CJ

was obiter; (b) the reasoning of Isaacs J, who considered that the criminal offence was a law of the Commonwealth (at 637), was influenced by the character of the territory in question (at 637-638); and (c) the limited scope of that ratio was reflected in what was said in *Mitchell v Barker* (1918) 24 CLR 365 at 367 (AS [18]).

6 If, instead, a wider ratio were accepted as applying to laws given force by a law of the Commonwealth Parliament or enacted by a territory assembly pursuant to authority given by a law of the Commonwealth Parliament, then *Bernasconi* should be reconsidered and overruled to the extent that it applies beyond the ratio contended by the appellant: (a) a wider ratio is premised on a discredited understanding of the relationship between s 122 and Ch III of the Constitution (AS [21], [22]; Reply [10]); (b) the decision has been criticised over time by members of this Court (AS [23]); (c) it is inconsistent with (i) this Court's reading in *Lamshed v Lake* (1958) 99 CLR 132 [**JBA *41**] of the expression 'a law of the Commonwealth' in s 109 (AS [21]) and (ii) this Court's treatment of other constitutional limitations (AS [21]), particularly s 51(xxxi) in *Wurridjal v Commonwealth* (2009) 237 CLR 309 [**JBA *53**]; and (d) the decision is fundamentally wrong (Reply [10]).

7 If (i) the Court were to accept the ratio contended by the appellant or, (ii) in the event that a wider ratio is accepted, the Court were prepared to relevantly reconsider and overrule that wider ratio, then the appellant's primary and secondary contentions arise.

8 The primary contention:

(a) Sections 54 and 60 of the *Crimes Act 1900* (ACT) [**JBA *6**] are given force by s 34(4) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) [**JBA *15**] (AS [32]-[36]; Reply [5]). Section 34 sets out the mechanism for transitioning authority for the ACT from the Commonwealth to the Legislative Assembly. The *Crimes Act* is 'taken to be an enactment' within the frame of the *Self-Government Act,* subject to amendment and repeal by the separate authority of the Legislative Assembly. Section 34(4) uses the words 'amend' and 'repeal' in their ordinary sense. The stream of Commonwealth authority continues until the provisions are *repealed* and re-enacted. The *Crimes Legislation (Status and Citation) Act 1992* (ACT) [**JBA *26**] does not repeal and re-enact the *Crimes Act*.

- *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 564 [46] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (AS [36]); *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 342 [44], 351 [78] (Gummow and

Hayne JJ) (AS [34]; Reply [6]) [**JBA *47**]; *Eastman v The Queen* (2000) 203 CLR 1 at 51 [159] (McHugh J), 65 [196] (Gummow J) (AS [34]; Reply [6]) [**JBA *36**].

(b) The ordinary meaning of the words 'any law of the Commonwealth' in s 80 includes a law given force by a law enacted by the Commonwealth Parliament for a territory constituted geographically from NSW as the Seat of Government and, thereafter, existing geographically and politically as a constituent part of the Commonwealth (AS [25]-[28]). Those words should not be read down by unexpressed limitations about a distinction between *federal* and *non-federal* Commonwealth laws (AS [29]-[30]).

9 The secondary contention (AS [37]-[44]) arises only if ss 54 and 60 are not considered to have been given force by s 34(4) of the *Self-Government Act*. They nonetheless remain part of a 'law of the Commonwealth' for the purposes of s 80 because:

(a) they have a statutory source: *Re Colina; Ex parte Torney* (1999) 200 CLR 386 (AS [38]-[39]) [**JBA *46**]; and

(b) either (i) they are enacted *indirectly* under the ultimate authority of the Commonwealth Parliament (AS [41]): *Lamshed v Lake* (1958) 99 CLR 132 at 154 (Kitto J) [**JBA *41**]; or (ii) they are laws of a constituent part of the Commonwealth body politic (AS [26]-[28], [41]).

10 *Capital Duplicators Pty Limited v Australian Capital Territory* (1992) 177 CLR 248 [**JBA *33**] does not need to be reconsidered. The present question is one of characterising 'any law of the Commonwealth' for the purposes of s 80, being a question neither raised nor answered in *Capital Duplicators,* which should be read as turning on the meaning of the exclusive power of the Commonwealth Parliament to impose duties of excise.

Dated: 7 February 2023

Bret Walker

James Stellios