HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

SIMON VUNILAGI APPELLANT

AND

THE QUEEN & ANOR RESPONDENTS

Vunilagi v The Queen
[2023] HCA 24
Date of Hearing: 8 & 9 February 2023
Date of Judgment: 8 August 2023
C13/2022

ORDER

Appeal dismissed.

On appeal from the Supreme Court of the Australian Capital Territory

Representation

B W Walker SC with J S Stellios for the appellant (instructed by Hugo Law Group)

K L McCann with K V Lee for the first respondent (instructed by Office of the Director of Public Prosecutions (ACT))

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory, and H Younan SC with A M Hammond for the second respondent (instructed by Government Solicitor for the Australian Capital Territory)

S P Donaghue KC, Solicitor General of the Commonwealth, with B K Lim and C Ernst for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

N Christrup SC, Solicitor-General for the Northern Territory, with L S Peattie for the Attorney-General for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

CATCHWORDS

Vunilagi v The Queen

Constitutional law (Cth) – Judicial power of Commonwealth – Jurisdiction vested in Territory courts – Institutional integrity of Territory courts – Where s 68BA inserted into *Supreme Court Act 1933* (ACT) in response to COVID-19 pandemic – Where s 68BA(3) allowed Supreme Court of Australian Capital Territory ("ACT") to make order for trial by judge alone for previously excluded indictable offences if satisfied order would ensure orderly and expeditious discharge of Court business and in interests of justice – Where s 68BA(4) required judge to provide written notice of proposed order under s 68BA(3) – Where no requirement for election or consent by accused – Where Justice of Supreme Court proposed to and did order trial by judge alone despite appellant's submissions opposing order – Where appellant tried and convicted under ss 54 and 60 of *Crimes Act 1900* (ACT) – Whether s 68BA(4) substantially impaired institutional integrity of Territory courts as function conferred incompatible with position of Territory court as repository of federal jurisdiction.

Constitutional law (Cth) – Trial by jury – Where prior to self-government *Crimes Act 1900* (NSW) picked up and applied in ACT as surrogate federal law – Where following self-government Commonwealth law provided *Crimes Act 1900* (NSW) shall be taken to be enacted by ACT Legislative Assembly and may be amended and repealed – Where subsequent ACT law provided *Crimes Act 1900* (NSW) to be treated as an Act passed by ACT Legislative Assembly – Where ss 54 and 60 of *Crimes Act 1900* (ACT) were indictable offences – Whether ss 54 and 60 were laws of the Commonwealth within meaning of s 80 of *Constitution* – Whether "any law of the Commonwealth" within meaning of s 80 of *Constitution* includes laws of ACT Legislative Assembly as "subordinate legislature" – Whether miscarriage of justice as trial on indictment was not by jury contrary to s 80 of *Constitution* – Whether *R v Bernasconi* (1915) 19 CLR 629 should be re-opened or overruled.

Words and phrases – "amend or repeal", "case management", "Ch III court", "COVID-19 emergency period", "gatekeeping function", "independent body politic", "institutional integrity", "interests of justice", "judge alone trial", "*Kable* principle", "law of the Commonwealth", "overruling constitutional precedent", "peace, order and good government of the Territory", "picked up and applied", "plenary power", "proposed order", "prudential approach", "self-government", "statutory fiction", "subordinate legislature", "taken to be an enactment", "trial on indictment".

Constitution, Ch III, ss 80, 111, 122.
ACT Self-Government (Consequential Provisions) Act 1988 (Cth), s 12.
Australian Capital Territory (Self-Government) Act 1988 (Cth), ss 7, 8, 22, 34.

Crimes Act 1900 (ACT), ss 54, 60.
Crimes Legislation (Status and Citation) Act 1992 (ACT), s 3.
Supreme Court Act 1933 (ACT), ss 68A, 68B, 68BA, 116.

1 KIEFEL CJ, GLEESON AND JAGOT JJ. The appellant, with three co-accused, was charged with offences against ss 54 and 60 of the *Crimes Act 1900* (ACT) ("the Crimes Act (ACT)"). His trial in the Supreme Court of the Australian Capital Territory was listed to commence on 7 September 2020. On 13 August 2020, Murrell CJ made an order under s 68BA(3) of the *Supreme Court Act 1933* (ACT) that the proceeding be tried by judge alone. Following that trial, her Honour found the appellant guilty and convicted him of seven counts of sexual intercourse without consent, contrary to s 54, and one count of an act of indecency without consent, contrary to s 60[1].

2 The background to the enactment of s 68BA and the order made by Murrell CJ was the onset of the COVID-19 pandemic and the requirements of public health emergency declarations, which had an impact on jury trials. In late March 2020, the Supreme Court directed that jury trials would proceed in limited numbers and subject to social distancing requirements[2], but subsequently directed that jury trials would not proceed until further notice[3].

3 In April 2020, the Legislative Assembly of the Australian Capital Territory enacted the *COVID-19 Emergency Response Act 2020* (ACT) ("the Emergency Response Act"), which inserted provisions that had the effect of extending the circumstances in which a criminal trial could be heard by a judge alone. It commenced on 8 April 2020.

4 Prior to the commencement of the Emergency Response Act, s 68A of the *Supreme Court Act* provided that criminal proceedings were to be tried by jury, except as otherwise provided by Pt 7 of that Act. Section 68B provided for an offence, other than an excluded offence, to be tried by a judge alone if the accused person elected in writing to be tried in that manner. The Emergency Response Act inserted a provision[4] that applied the section to excluded offences.

5 Relevant to this appeal, the Emergency Response Act added s 68BA, which was in part in these terms:

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1 *R v Vunilagi [No 2]* [2020] ACTSC 274.

2 Supreme Court of the Australian Capital Territory, *Practice Direction 1 of 2020: Special Arrangements in response to COVID 19*, 23 March 2020.

3 Supreme Court of the Australian Capital Territory, *Practice Direction 1 of 2020: Special Arrangements in response to COVID 19*, 7 April 2020 at [23].

4 *COVID-19 Emergency Response Act 2020* (ACT), Sch 1 [1.65]; *Supreme Court Act 1933* (ACT), s 68B(3A).

"(1) This section applies to a criminal proceeding against an accused person for an offence against a territory law if the trial is to be conducted, in whole or in part, during the COVID-19 emergency period.

(2) To remove any doubt, this section applies—

(a) to a criminal proceeding—

(i) that begins before, on or after the commencement day; and

(ii) for an excluded offence within the meaning of section 68B(4); and

(b) whether or not an election has been made by the accused person under section 68B, including before the commencement day.

(3) The 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.

(4) Before 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 "COVID-19 emergency period" was the period from 16 March 2020 and ending on 31 December 2020[5].

7 The Explanatory Statement to the Emergency Response Act gave as two of the purposes of s 68BA: the protection of the right of a person charged with a criminal offence to be tried without unreasonable delay; and avoiding putting

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5 *Supreme Court Act 1933* (ACT), s 68BA(5) (Republication No 59).

members of a jury at unnecessary risk[6]. It noted as important that the discretion in s 68BA could only be exercised once the parties to the proceedings had the opportunity to consider whether the trial should be by judge alone and make any submissions to the Court[7]. That was clearly enough a reference to the purpose of s 68BA(4).

8 On 9 July 2020, s 68BA was repealed[8], but by s 116[9] of the *Supreme Court Act* the Court could continue to make an order under s 68BA(3) if a notice had been given under s 68BA(4) prior to the repeal of the provision.

9 On 18 June 2020, notice was given to the appellant and his co-accused (under s 68BA(4)), who were then invited to make submissions because Murrell CJ proposed to make an order under s 68BA(3). The appellant made submissions and opposed the order. By the time of the hearing, his co-accused supported the making of the order. Her Honour found that it was in the interests of justice that the trial proceed before a judge alone[10] and, as noted at the outset of these reasons, made an order accordingly. In relation to the matter stated in s 68BA(3)(a), her Honour found that the trial could not proceed as a jury trial in accordance with social distancing requirements given, in particular, the number of legal representatives. The length of the trial rendered greater the likelihood of delays being caused as a result of COVID-19 testing requirements and constraints. Her Honour considered that it was in the interests of the complainant, the witnesses and the accused that the matter be resolved expeditiously, noting that three accused were detained in custody.

10 Following his conviction, the appellant appealed to the Court of Appeal. He argued that his trial miscarried on the basis that s 68BA was invalid. The Court of Appeal dismissed the appeal[11]. The grounds for the appeal to this Court are that

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6 Australian Capital Territory, Legislative Assembly, *COVID-19 Emergency Response Bill 2020*, Explanatory Statement at 19.

7 Australian Capital Territory, Legislative Assembly, *COVID-19 Emergency Response Bill 2020*, Explanatory Statement at 18.

8 *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT), s 36.

9 Inserted by *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT), s 37.

10 *R v Vunilagi* (2020) 354 FLR 452 at 456-457 [27]-[31], 457-458 [40].

11 *Vunilagi v The Queen* (2021) 17 ACTLR 72.

the Court of Appeal was wrong to hold: (1) that s 68BA, in its continuing operation, did not contravene the limitation derived from this Court's decision in *Kable v Director of Public Prosecutions (NSW)*[12]; and (2) that the section is not inconsistent with the requirement in s 80 of the *Constitution* that the appellant's mode of trial be by jury.

11 Neither ground is made out. The appeal should be dismissed.

Ground 1: The *Kable* principle

12 It is not in issue that laws enacted by the Legislative Assembly for the Australian Capital Territory which affect the functions and processes of the courts are subject to the *Kable* principle[13]. The principle for which *Kable* stands, being the same for the courts of a Territory as it is with respect to courts of the States, is that:

> "because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, 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"[14].

13 The appellant's case is that the function given to the Supreme Court by s 68BA(4) impaired its institutional integrity by departing to a significant degree from the processes which characterise the exercise of judicial power[15]. As noted above, the appellant focuses only upon what was involved in the process prescribed by sub-s (4). The appellant does not challenge the process undertaken under s 68BA(3).

14 The appellant accepts that s 68BA(3) required conditions in the nature of jurisdictional facts to be satisfied. The discretion which then arose under that

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12 (1996) 189 CLR 51.

13 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569.

14 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40] (footnotes omitted). See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [139]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245-246 [55].

15 *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [140].

provision involved a regular exercise of judicial power that was to be discharged judicially. The appellant accepts that it involved the usual incidents of the judicial process, including an open and public enquiry, procedural fairness and the giving of reasons.

15 The constitutional flaw which the appellant identifies in s 68BA, as relevant to the *Kable* principle, was in the "gatekeeping function" given to a judge under s 68BA(4) to determine the persons, from a relevantly identical class, to be subject to the exercise of the judicial function under sub-s (3). By contrast to the function under sub-s (3), the application of the gatekeeping function in sub-s (4) was inscrutable, the appellant submits. It exposed some, but not all, persons to the risk of losing a jury trial. This latter submission appears to be based upon an incorrect premise that s 80 confers something in the nature of a personal right to a trial by jury[16], but this may be put to one side.

16 The differential treatment of persons, which the appellant says is contrary to the precept of "equal justice", is said to be brought about because the gatekeeping function of s 68BA(4) was relevantly arbitrary. It was arbitrary because there was no duty to consider whether a notice should be given and the Supreme Court was not required to give reasons for proposing an order under sub-s (3). There were no criteria and no discernible test which might be applied by the Court. In this regard it cannot be said that those criteria were supplied by s 68BA(3).

17 It may first be observed that in characterising the function under s 68BA(4) as a "gatekeeping" one, the appellant construes it as separate from, and in some respects as governing, the exercise of power under sub-s (3). Neither approach to the construction of s 68BA is correct.

18 Section 68BA was general in its application. By s 68BA(1) and (2) it applied to all criminal proceedings where the trial was to be conducted during the COVID-19 emergency period. Section 68BA(3) was central to the section and its purpose. It provided the power for the Supreme Court to determine if a criminal proceeding was to be tried by a judge alone. It was expressly subject to satisfaction of the two conditions that such an order: (a) would ensure the orderly and expeditious discharge of the business of the Court; and (b) was otherwise in the interests of justice. Section 68BA(4) added a further condition to the exercise of that power. It required that before an order for a judge alone trial was made: (a) a notice be given to the parties of the proposed order; and (b) the parties be invited to make submissions about the proposed order.

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16 *Brown v The Queen* (1986) 160 CLR 171 at 197, 202, 214.

19 Properly construed, sub-ss (3) and (4) operated together. Far from operating as a "gatekeeping" function, sub-s (4) is to be understood as facilitative of and ancillary to the power which was to be exercised under sub-s (3). The function of the sub-sections was more in the nature of case management. The appellant does not deny this. By these means the Court was able to manage its criminal caseload during a public health emergency whilst at the same time ensuring that the interests of justice were served.

20 The second error made by the appellant as to the construction of s 68BA concerns the scheme of the section and the place of sub-s (4) in it. The appellant's assumption, that sub-s (4) encompassed a decision-making process about who was to be the recipient of a notice under sub-s (4) and therefore the subject of a decision under sub-s (3), finds no support in the text of sub-s (4). The scheme of s 68BA was to provide the Supreme Court with the power to order that a criminal proceeding be tried by judge alone if the conditions in s 68BA(3) were met. It left it to the Supreme Court to propose which proceedings might be the subject of those considerations and therefore the notice under sub-s (4). It is unremarkable that a court might act on its own motion in such circumstances.

21 The appellant understandably makes no challenge to Murrell CJ's proposal that his and his co-accused's proceedings be considered under the sub-s (3) power or to the process leading to it. That process may well have involved considering the requirements of sub-s (3). However, sub-s (4) has nothing to say about such considerations or that decision.

22 The function involved in 68BA(4) was not one to consider which criminal proceedings might be a candidate for an order under sub-s (3). It did not involve any assessment or evaluation of that kind. Its sole criterion was the circumstance that an order under sub-s (3) was proposed. As soon as such a proposal was made the Court came under a duty to provide the notice and the invitation referred to in sub-s (4).

23 The evident purpose of s 68BA(4), as the Explanatory Statement confirms, was to provide procedural fairness to any person who might be affected if the order proposed to be made under sub-s (3) was made. It ensured that no accused person would have their mode of trial altered without first being given notice of that proposal and the opportunity to be heard with respect to it. The appellant accepts that procedural fairness is required if a court's procedure can be said to conform to the *Kable* principle.

24 No reasons can be said to have been required in connection with the giving of a notice under s 68BA(4). There was no decision made under s 68BA(4) in respect of which reasons would be required. The reason for the giving of the notice

is apparent from the terms of sub-s (4) itself – it is that an order under s 68BA(3) was proposed.

Ground 2: Section 80 of the *Constitution*

25 Section 80 of the *Constitution*, which appears in Ch III, provides in relevant part that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury ...". The offences in question here were against ss 54 and 60 of the Crimes Act (ACT). The first question which arises with respect to s 80 of the *Constitution*, the appellant accepts, is whether they are laws of the Commonwealth. The appellant also raises a second and alternative question. It is whether the reference in s 80 to "any law of the Commonwealth" includes a law made by the legislature of a territory. The answer to both questions is "no".

Background

26 The geographic area which is the Australian Capital Territory was surrendered by the State of New South Wales and accepted as a territory by the Commonwealth in 1909[17]. The language of the statutes effecting its establishment reflects that of s 111 of the *Constitution*.

27 Section 122 of the *Constitution* provides that the Commonwealth Parliament "may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth ...". The power conferred by s 122 has been described as a plenary power, which is sufficiently wide both to enable the passing of laws providing for the direct administration of a territory, and to create an autonomous government for such a territory[18].

28 Prior to 1989 and self-government, the Australian Capital Territory was subject to laws which applied to it as a territory by force of Commonwealth statute. That was the case respecting the provisions of the *Crimes Act 1900* (NSW)[19] ("the Crimes Act (NSW)"), which was picked up and applied as a surrogate federal

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17 *Seat of Government Surrender Act 1909* (NSW), s 6; *Seat of Government Acceptance Act 1909* (Cth), s 3.

18 *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607.

19 *Seat of Government Acceptance Act 1909* (Cth), s 6(1); *Seat of Government (Administration) Act 1910* (Cth), s 4.

law[20]. It was then true to say that offences under the New South Wales statute were laws of the Commonwealth for the purpose of s 80.

29 Section 7 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ("the Self-Government Act") established the Territory as a body politic under the Crown[21]. It created a Legislative Assembly for the Territory and, by s 22, gave it "power to make laws for the peace, order and good government of the Territory". Sections 1 and 2 of the Self-Government Act commenced on 6 December 1988, the day of Royal Assent. The remaining provisions were to commence on a day to be proclaimed[22]. Section 7 was proclaimed to commence on 11 May 1989[23]. Section 34, to which attention will now be directed, was proclaimed to commence on the same day[24].

30 Section 34 of the Self-Government Act was headed "Certain laws converted into enactments". Section 34(4) provided that:

> "A law (other than a law of the Commonwealth) that, immediately before the commencing day:
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> (a) was in force in the Territory; and
>
> (b) was an Ordinance, an Act of the Parliament of New South Wales or an Imperial Act;
>
> shall be taken to be an enactment, and may be amended or repealed accordingly."

31 A "law" was defined in s 34(1) to include "a provision of a law". An "enactment" was defined by s 3 to mean: "(a) a law (however described or entitled)

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20 *Pinkstone v The Queen* (2004) 219 CLR 444 at 456 [29], 458-459 [38]-[41]; *Mok v Director of Public Prosecutions (NSW)* (2016) 257 CLR 402 at 431 [84], 435 [99].

21 There followed the transfer of responsibility for courts of the Australian Capital Territory (*ACT Supreme Court (Transfer) Act 1992* (Cth)) and the creation of a government service (*Public Sector Management Act 1994* (ACT)).

22 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 2(2).

23 *Commonwealth of Australia Gazette*, S164, 10 May 1989.

24 *Commonwealth of Australia Gazette*, S164, 10 May 1989. Cf s 34(8), which commenced on a different day.

made by the Assembly under this Act; or (b) a law, or part of a law, that is an enactment because of section 34".

32 Section 34(5) provided that sub-s (4) did not apply to a law specified in Sch 3 to the Self-Government Act. At that time the Crimes Act (NSW) was listed in Sch 3 Pt 2 as an Act of the Parliament of New South Wales in force in the Territory. The *ACT Self-Government (Consequential Provisions) Act 1988* (Cth) provided[25] that on 1 July 1990 any laws specified in s 12(5) of that Act which had not been omitted from Sch 3 to the Self-Government Act were now omitted from that schedule "by force of this subsection and shall be taken to be enactments and may be amended or repealed accordingly". From that point s 34(4) took effect with respect to the provisions of the Crimes Act (NSW).

33 The Legislative Assembly of the Australian Capital Territory also enacted the *Crimes Legislation (Status and Citation) Act 1992* (ACT) ("the Status and Citation Act"), the source for which was clearly enough s 22 of the Self-Government Act. Its long title read:

> "An Act to provide for the Crimes Act, 1900 of the State of New South Wales in its application in the Territory to be treated as an Act passed by the Legislative Assembly and to be cited accordingly, and for related purposes".

34 Section 3(1) of the Status and Citation Act provided:

> "The applied State Act shall be taken to be, for all purposes, a law made by the Legislative Assembly as if the provisions of the applied State Act had been re-enacted in an Act passed by the Assembly and taking effect on the commencement of this Act."

35 The "applied State Act" was defined to mean "the Crimes Act, 1900 of the State of New South Wales in its application in the Territory as amended and in force immediately before the commencement of this Act"[26]. The Status and Citation Act was repealed in 1999[27] but was continued in its effect[28].

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25 *ACT Self-Government (Consequential Provisions) Act 1988* (Cth), s 12(2).

26 *Crimes Legislation (Status and Citation) Act 1992* (ACT), s 2.

27 *Law Reform (Miscellaneous Provisions) Act 1999* (ACT), s 5(1), Sch 2.

28 *Law Reform (Miscellaneous Provisions) Act 1999* (ACT), s 5(2); *Interpretation Act 1967* (ACT), s 42; *Legislation Act 2001* (ACT), ss 88, 301(2).

36 Apart from a provision respecting the re-numbering of the offence provisions[29], amendments which s 34(4) contemplated were made to ss 54 and 60 by statutes enacted by the Legislative Assembly of the Territory in 2008[30], 2011[31] and 2022[32]. The 2008 and 2011 amendments respectively altered the fault element of "recklessness" for each of the offences under ss 54 and 60. The 2011 and 2022 amendments concerned the penalty for the offences. In 2013, the definition of "sexual intercourse" in s 50(1) of the Crimes Act (ACT) was amended in a manner that affected the scope of s 54. The amending Act was the *Crimes Legislation Amendment Act 2013* (ACT). Additionally, the Court was informed by the second respondent, the Attorney-General for the Australian Capital Territory, that there were other amendments to the Crimes Act (ACT) at earlier points, but the Court was not referred to them.

The appellant's primary contention

37 Given the terms of s 34(4) and the enactment of the *ACT Self-Government (Consequential Provisions) Act 1988* (Cth) it could be argued that from 1 July 1990 the Crimes Act (NSW) became a statute of the Australian Capital Territory. The appellant's primary contention is that s 34(4) did not alter the source of authority for the continued operation of the Crimes Act (NSW). Sections 54 and 60 of that Act continued to be given direct force by the Commonwealth Parliament pursuant to s 122 of the *Constitution*.

38 The appellant relies on what was said in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[33] and *Eastman v The Queen*[34] to support this contention. Mr Eastman was charged with and convicted of an offence against

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29 *Crimes Legislation Amendment Act 2001* (ACT), s 43.

30 *Justice and Community Safety Legislation Amendment Act 2008 (No 3)* (ACT), Sch 1 [1.11]-[1.13], which amended s 54 of the *Crimes Act 1900* (ACT).

31 *Crimes Legislation Amendment Act 2011* (ACT), ss 5-7 and *Criminal Proceedings Legislation Amendment Act 2011* (ACT), ss 4-5, which amended s 60 of the *Crimes Act 1900* (ACT).

32 *Family Violence Legislation Amendment Act 2022* (ACT), ss 32-33 (which amended s 54 of the *Crimes Act 1900* (ACT)) and ss 40-41 (which amended s 60 of the *Crimes Act 1900* (ACT)).

33 (1999) 200 CLR 322.

34 (2000) 203 CLR 1.

s 18 of the Crimes Act (NSW). In *Ex parte Eastman*[35], Gummow and Hayne JJ said that the criminal liability in respect of which he was tried and convicted "owed its existence to the laws made by the [Commonwealth] Parliament". Similar statements were made in *Eastman v The Queen*[36]. The two decisions, the appellant says, identify the Commonwealth law as the source of the offence.

39 The offence for which Mr Eastman was convicted was committed in January 1989[37]. It was no doubt correct to say that at that time ss 54 and 60 had their direct source in Commonwealth law. At that time, the substantive provisions of the Self-Government Act, including s 34, had not come into effect. And as earlier mentioned, s 34 did not operate with respect to the Crimes Act (NSW) until 1 July 1990.

40 More to the point was what their Honours had to say about what occurred after s 34 took effect. Earlier in the passage cited by the appellant[38], Gummow and Hayne JJ spoke of the offence provision being "transmuted into an enactment subject to amendment or repeal by the Legislative Assembly for the Australian Capital Territory" and said that "[t]his state of affairs was brought about by the operation of s 34 of [the Self-Government Act]". Later in their reasons, they spoke of the effect of the identical phrase in s 34(2) of the Self-Government Act[39], that a specified law "shall be taken to be an enactment, and may be amended or repealed accordingly". Their Honours said that the phrase was directed to the Assembly and had the substantive operation of conferring on an existing law applying in the Territory "the status of a law made by the Assembly" and that it thereby became an enactment.

41 Far from supporting the proposition for which the appellant contends, the reasons in *Ex parte Eastman* provide support for the view that the Crimes Act (NSW) became a statute of the Legislative Assembly of the Territory from 1 July 1990. Those reasons would also appear to provide an answer to the contrary of the appellant's assumption, made with respect to the balance of his argument, that

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35 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 342 [44].

36 (2000) 203 CLR 1 at 51 [159], 65 [196].

37 *Eastman v The Queen* (2000) 203 CLR 1 at 19 [51].

38 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 342 [44].

39 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 351 [75].

because s 34(4) is a deeming provision a law does not become an enactment of the Assembly. It is merely capable of being amended or repealed.

42 It will be recalled that ss 54 and 60 had been the subject of amendment with respect to an element of the offences. The appellant, however, submits that for the character of a law to cease to operate as a law of the Commonwealth Parliament it was necessary that the Legislative Assembly had repealed it. If the Assembly merely amended a provision, s 34(4) continued to operate as the legislative force for the provision, albeit with an altered legal meaning picking up textual changes made. In substance, the alterations to ss 54 and 60 were only amendments.

43 The appellant submits that s 34(4) uses the words "amend" and "repeal" in their ordinary sense. This is said to provide a means of "drawing the line" between the continuing authority of the Commonwealth Parliament and the new separate authority of the Legislative Assembly. The appellant relies on what was said in *Attorney-General (WA) v Marquet*[40], namely that the central meaning of "amend" is to alter the legal meaning of an Act or provision, short of entirely rescinding it; and the central meaning of "repeal" is to rescind the Act or provision in question.

44 The distinction which the appellant seeks to draw is not as clear as he suggests. In *Marquet*[41] itself, it was acknowledged that the words "amend" and "repeal" may be used in ways in which there appears to be some overlapping in their meanings. In the case to which reference was made in *Marquet* in that regard, *Kartinyeri v The Commonwealth*[42], it was said that to speak of a clear distinction between amendment and repeal is to assume a false dichotomy. Given that the ordinary usage of amendment of a statute means to alter its legal meaning, it may take the form of and include a repeal. By way of illustration, if a section is deleted it can be said that it is repealed whilst the statute itself has been amended.

45 The real difficulty in applying the ordinary meaning of "amend" and "repeal" to s 34(4) is that it does not involve a process of construction. Nothing in the text or context of s 34(4) suggests that it is intended to operate differently on laws which might generally be said to amend a law and those which repeal it. The words "and may be amended or repealed accordingly" appearing after "shall be taken to be an enactment" may be better understood to convey a single idea about

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40 (2003) 217 CLR 545 at 564 [46].

41 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 564 [46].

42 (1998) 195 CLR 337 at 375-376 [66]-[68].

the changes which may be made to a statute which the Legislative Assembly of the Territory is to treat as its own.

46 The position for which the appellant contends also produces a rather strange result. Taking the 2008 and 2011 amendments as examples, the appellant would say that ss 54 and 60 of the Crimes Act (ACT) remain sourced in Commonwealth law albeit that the text is changed. This appears to comprehend a law which is mixed or hybrid. The appellant does not explain how this state of affairs was to come about by force of s 122 of the *Constitution*.

47 In any event it is not necessary to determine the question as to whether the offences were Commonwealth or Territory laws on the basis of whether the Crimes Act (NSW) became an enactment of the Territory Legislative Assembly on 1 July 1990 or whether later amendments had that effect. It is not necessary because the first question is answered by the Status and Citation Act. It puts the matter beyond doubt.

48 The Status and Citation Act notably dealt with just one topic: the Crimes Act (NSW). Its long title stated that, in its application in the Territory, the Crimes Act (NSW) was to be treated as an Act passed by the Legislative Assembly and cited accordingly. Section 3(1) provided that the Crimes Act (NSW) shall be taken "for all purposes" to be a law made by the Assembly as if its provisions "had been re-enacted in an Act passed by the Assembly". In its terms s 3(1) effected an implied repeal of the Crimes Act (NSW) and re-enactment of the law as a law of the Territory. Its intention is clear.

49 Contrary to the appellant's contention, the Status and Citation Act dealt with more than overcoming cumbersome citation conventions. So much is evident from its terms. The relevant extrinsic materials confirm that the Status and Citation Act "asserts the status of the Crimes Act as a law of the ACT by providing that the Crimes Act is to be treated as an Act passed by the Legislative Assembly"[43]. A note which later appeared in the *Statute Law Amendment Act 2001 (No 2)* (ACT) also recorded that "[t]he *Crimes Act 1900* became an Act of the Legislative Assembly because of the [Status and Citation Act]"[44].

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43 Australian Capital Territory, Legislative Assembly, *Crimes Legislation (Status and Citation) Bill 1992*, Explanatory Memorandum at 2.

44 *Statute Law Amendment Act 2001 (No 2)* (ACT), Sch 2 [2.77].

50 It may be concluded that at all times relevant to this appeal ss 54 and 60 of the Crimes Act (ACT) were laws of the Australian Capital Territory and that was the case even though s 34(4) had its source in Commonwealth law.

The appellant's secondary contention

51 The appellant nevertheless contends that s 80 continues to apply. He submits that "any law of the Commonwealth" in s 80 includes a law made by a subordinate legislature of a territory. The contention denies that the term "law of the Commonwealth" refers to a law made by the Commonwealth Parliament itself under the legislative powers of the Commonwealth[45]. In *Re Colina; Ex parte Torney*[46], this was regarded as having been settled by a long line of authority.

52 The contention would also appear to have the rather startling consequence that a law passed by a territory legislature would prevail over inconsistent State laws, by reason of s 109 of the *Constitution*. Additionally, s 61 of the *Constitution* might be thought to impose an obligation on the part of the Commonwealth to execute and administer laws of a separate and independent body politic.

53 The appellant's contention is directly contrary to the decision of this Court in *R v Bernasconi*[47] so far as it concerns s 80. In that case the accused was tried without a jury of an offence which, by ordinance of the Legislative Council of the Territory of British New Guinea, was made a law applying to that Territory. Objection was taken to the mode of trial on account of s 80 of the *Constitution*. The first question, identified by Griffith CJ[48], was whether the offence for which Mr Bernasconi was convicted was an offence against a law of the Commonwealth. The ultimate question[49] was whether s 80 had any application to the local laws of a territory, whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it. The answer was that it did not[50].

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45 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 397 [25].

46 (1999) 200 CLR 386 at 397 [25].

47 (1915) 19 CLR 629.

48 *R v Bernasconi* (1915) 19 CLR 629 at 632.

49 *R v Bernasconi* (1915) 19 CLR 629 at 634.

50 *R v Bernasconi* (1915) 19 CLR 629 at 635, 637-638, 640. See also *Spratt v Hermes* (1965) 114 CLR 226 at 275.

54 It was also said in *Bernasconi*[51] that Ch III of the *Constitution* has no application to territories, a view which is now considered to be incorrect. This is not relevant for present purposes. So far as concerns s 80, *Bernasconi* has been understood to decide that, regardless of whether the power in s 122 of the *Constitution* "is exercised directly or through a subordinate legislature"[52], it is not restricted by the requirement in s 80 that trial be by way of jury.

55 For the appellant to have any prospect of success with respect to his secondary contention it would therefore be necessary for him to obtain leave to re-open *Bernasconi* and have it overruled. The appellant may face some difficulty in doing so given that, as long ago as 1965 in *Spratt v Hermes*[53], the decision in *Bernasconi* was considered to be one of long standing which should not be disturbed. Consideration should in any event not be given to whether to re-visit *Bernasconi* given the prudential approach of this Court to providing no more than is necessary by way of answer to constitutional questions[54]. It is not necessary to do so because, regardless of the decision in *Bernasconi*, the appellant's contention cannot be reconciled with the proposition, for which there is good authority, that by granting territories self-government the Commonwealth created new bodies politic the laws of which are distinct from the laws of the Commonwealth Parliament.

56 In *Capital Duplicators Pty Ltd v Australian Capital Territory*[55], Brennan, Deane and Toohey JJ[56] said that the Legislative Assembly of the 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". Their Honours observed[57] that the Commonwealth Parliament had no powers under the Self-Government Act of

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51 *R v Bernasconi* (1915) 19 CLR 629 at 635.

52 *Spratt v Hermes* (1965) 114 CLR 226 at 244, see also 275. See also *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332-333 [9]; *Northern Territory v GPAO* (1999) 196 CLR 553 at 616 [169].

53 (1965) 114 CLR 226 at 244, 275.

54 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 247-249 [56]-[60].

55 (1992) 177 CLR 248 at 282.

56 Gaudron J agreeing at 284.

57 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 283.

disallowance of a duty imposed by the Legislative Assembly and no power to repeal or amend the enactment.

57 The view expressed in *Capital Duplicators* was further explained in *Svikart v Stewart*[58]. There Mason CJ, Deane, Dawson and McHugh JJ said that a legislature created to confer self-government upon a territory "must be regarded as a body separate from the Commonwealth Parliament, so that the exercise of its legislative power, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power"[59]. More recently this explanation was applied in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*[60], where Gageler J spoke of the exercise of "a distinct legislative power" by the Legislative Assembly of the Northern Territory[61] and Keane J referred to the law-making power conferred by the equivalent to the Self-Government Act as "an independent and unqualified law-making power"[62].

Orders

58 The appeal should be dismissed.

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58 (1994) 181 CLR 548.

59 *Svikart v Stewart* (1994) 181 CLR 548 at 562. See also *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 352-353 [79]-[80].

60 (2015) 256 CLR 569.

61 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 613 [105].

62 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 633 [171].

59 GAGELER J. The appeal must be dismissed. The consequence is that the appellant's conviction for offences against the *Crimes Act 1900* (ACT) following his trial on indictment in the Supreme Court of the Australian Capital Territory before Murrell CJ sitting without a jury must stand.

60 On the question whether the now repealed s 68BA of the *Supreme Court Act 1933* (ACT) as inserted by the *COVID-19 Emergency Response Act 2020* (ACT) infringed the limitation derived from Ch III of the *Constitution* commonly associated with *Kable v Director of Public Prosecutions (NSW)*[63], I agree with Kiefel CJ, Gleeson and Jagot JJ that it did not and have nothing to add to their Honours' reasoning in support of that answer.

61 On the question whether that provision, and the trial before Murrell CJ sitting without a jury, were inconsistent with the requirement of s 80 of the *Constitution* that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury", I agree with Kiefel CJ, Gleeson and Jagot JJ that they were not. My reasoning to that answer can be expressed without undue repetition of anything their Honours have written.

62 The acceptance in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[64] of the proposition that courts created under s 122 of the *Constitution* can answer the description of "such other courts as [the Commonwealth Parliament] invests with federal jurisdiction" in s 71 of the *Constitution*, so as to be subject to the *Kable* limitation, is sufficient to demonstrate that the statement of Griffith CJ in *R v Bernasconi*[65] that "the 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", no longer accords with the doctrine of the Court. Whether the outcome in *Bernasconi* can nevertheless continue to be accepted on the basis that the case can be taken to establish that "as a matter of construction, the words 'any law of the Commonwealth' in s 80 should be read as if they were followed by the words 'other than a law made under s 122'"[66] need not be addressed. That question would arise for consideration were we concerned with the trial on indictment of an offence created by a Commonwealth law enacted by

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63 (1996) 189 CLR 51.

64 (2004) 218 CLR 146 at 162-163 [27]-[28].

65 (1915) 19 CLR 629 at 635.

66 See *Northern Territory v GPAO* (1999) 196 CLR 553 at 590-591 [88], quoting *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 605-606. See also *Spratt v Hermes* (1965) 114 CLR 226 at 244.

the Commonwealth Parliament under s 122 of the *Constitution*. As will be seen, we are not.

63 The question of any inconsistency of s 68BA of the *Supreme Court Act* as applied to the trial in the Supreme Court of the Australian Capital Territory of offences against the *Crimes Act 1900* (ACT) with the requirement of s 80 of the *Constitution* that is raised in the present case can and should be seen to turn on the correct contemporary answer to a somewhat narrower and logically antecedent question expressly left unaddressed by Griffith CJ in *Bernasconi*. That question, in the language then used by Griffith CJ[67], is "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".

64 The appellant properly accepts that "law of the Commonwealth" in s 80 can have no different meaning from the meaning it has elsewhere in the *Constitution*. Throughout the *Constitution*, including in ss 61 and 109 as in s 80, the expression is used consistently to refer to legislation enacted by the Commonwealth Parliament[68]. On the theory that legislation once enacted operates as "the expression of the continuing will of the Legislature"[69], the expression encompasses delegated legislation the force and effect of which are dependent on legislation enacted by the Commonwealth Parliament.

65 In the specific context of s 80's reference to "any offence against any law of the Commonwealth", the expression "law of the Commonwealth" refers to the legislation enacted by the Commonwealth Parliament (and delegated Commonwealth legislation subordinate to legislation enacted by the Commonwealth Parliament) which has created, and which continues at the time of trial to sustain, criminal liability for the offence to be tried on indictment. The expression does not refer to the ultimate source of power to enact that legislation.

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67 (1915) 19 CLR 629 at 634.

68 See *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431. See also *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 547-548.

69 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 102.

66 *Capital Duplicators Pty Ltd v Australian Capital Territory*[70] established that the power conferred on the Legislative Assembly by s 22 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ("the Self-Government Act") "to make laws for the peace, order and good government of the Territory", being a legislative power conferred in the exercise by the Commonwealth Parliament of its power under s 122 of the *Constitution* to "make laws for the government of any territory", is a legislative power distinct from and of the same "plenary" nature as that vested in the Commonwealth Parliament itself. A law enacted by the Legislative Assembly in the exercise of that power is not, in any sense, a law of the Commonwealth; it is a law of the Territory.

67 Section 34(4) of the Self-Government Act, in referring to a law which is "taken to be an enactment" being able to "be amended or repealed accordingly", confirms the capacity of the Legislative Assembly to amend or repeal the law in the exercise of the power conferred by s 22. Section 34(4) is not a separate source of legislative power. Rather, s 34(4) is an amplification of the power conferred by s 22.

68 There is no need for present purposes to canvass the view taken by Gummow and Hayne JJ in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[71] as to the status of a provision of the *Crimes Act 1900* (NSW) as applied by s 6 of the *Seat of Government Acceptance Act 1909* (Cth) and s 4 of the *Seat of Government (Administration) Act 1910* (Cth) in its application to an offence found to have been committed on 10 January 1989. There is no need to examine the status of any provision of the *Crimes Act 1900* (NSW) in application to offences committed before it was "taken to be an enactment" by force of s 34(4) of the Self-Government Act through the operation of s 12(2) of the *ACT Self-Government (Consequential Provisions) Act 1988* (Cth) taking effect from 1 July 1990. There is no reason to consider whether a change in the status of the *Crimes Act 1900* (NSW) may have been brought about simply by the deeming force of s 34(4) of the Self-Government Act in combination with the plenary capacity of the Legislative Assembly to amend or repeal in the exercise of the legislative power conferred by s 22. And there is no need to trace the detailed history of the amendment of the provisions which bear on the offences for which the appellant was tried and convicted.

69 Enough for present purposes is to focus on the operation of the *Crimes Legislation (Status and Citation) Act 1992* (ACT) ("the Status and Citation Act") as enacted by the Legislative Assembly under s 22 of the Self-Government Act

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70 (1992) 177 CLR 248 at 281. See also *Svikart v Stewart* (1994) 181 CLR 548 at 562; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 613 [105]-[106], 633-634 [170]-[171].

71 (1999) 200 CLR 322 at 342 [43]-[44].

with effect from 28 May 1992 and as continued in effect by the Legislative Assembly under s 22 of the Self-Government Act after the repeal of the Status and Citation Act by s 5 of the *Law Reform (Miscellaneous Provisions) Act 1999* (ACT).

70 The Status and Citation Act, as was indicated by both its short title and its long title, was not concerned to effect a formal change in the citation of the *Crimes Act 1900* (NSW) as then taken to be an enactment by force of s 34(4) of the Self-Government Act. The purpose of the Status and Citation Act was to effect a substantive change in the ongoing status of that enactment.

71 By defining "applied State Act" to mean "the Crimes Act, 1900 of the State of New South Wales in its application in the Territory as amended and in force immediately before the commencement of this Act", s 2 of the Status and Citation Act picked up the text of the *Crimes Act 1900* (NSW) in the form in which that text, as then amended, was at that time taken to be an enactment by force of s 34(4) of the Self-Government Act. By providing that "[t]he applied State Act shall be taken to be, for all purposes, a law made by the Legislative Assembly as if the provisions of the applied State Act had been re-enacted in an Act passed by the Assembly and taking effect on the commencement of this Act", s 3(1) of the Status and Citation Act then operated to give the totality of that text the status of a law enacted by the Legislative Assembly with effect from 28 May 1992. The expression "as if" was evidently employed in the drafting of s 3(1) as "a convenient device for reducing the verbiage of an enactment"[72]. Although the expression invoked a statutory fiction[73], its fictional effect should not be taken further than is necessary to achieve its legislative purpose[74]. The purpose was to achieve the substantive legal effect of re-enactment of the text identified in s 2 as a law of the Legislative Assembly without repetition of that text. It was the text identified in s 2 as re-enacted by s 3(1) as a law made by the Legislative Assembly which s 4 thereafter permitted to be cited as the "*Crimes Act 1900*" (ACT).

72 Through the exercise of the plenary legislative power conferred on it by s 22 of the Self-Government Act, the Legislative Assembly brought about what was in legal substance, and within the terminology of s 34(4) of the Self-Government Act, a "repeal" followed immediately by a re-enactment.

73 The result is that, with effect from at least 28 May 1992, the *Crimes Act 1900* (ACT) and each of its provisions has operated substantively as a law of the

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72 *R v Hughes* (2000) 202 CLR 535 at 551 [24].

73 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203 [115]; *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 at 535 [101].

74 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at 447 [51].

Legislative Assembly, enacted in the exercise of the legislative power conferred by s 22 of the Self-Government Act, and not as a law of the Commonwealth.

74 GORDON AND STEWARD JJ. In February 2020, the appellant was committed to stand trial in the Supreme Court of the Australian Capital Territory ("the ACT") for the offences of sexual intercourse without consent (multiple counts) and an act of indecency without consent, contrary to ss 54 and 60 of the *Crimes Act 1900* (ACT). The Crown filed a joint indictment against four co-accused, all charged with offences alleged to have been committed on 3 November 2019 against the same complainant.

75 Under s 68A of the *Supreme Court Act 1933* (ACT), criminal proceedings must be tried by a jury, except as otherwise provided by Pt 7 of that Act. Section 68B(1), in Pt 7, permitted a person facing criminal prosecution for an offence, other than an "excluded offence", to elect to be tried by judge alone. Sections 54 and 60 of the *Crimes Act 1900* (ACT) were both excluded offences[75].

76 On 16 March 2020, the Minister for Health of the ACT declared a public health emergency under the *Public Health Act 1997* (ACT) in response to the health risks posed by the COVID-19 pandemic. On 7 April 2020, the Supreme Court of the ACT issued a practice direction that jury trials would not proceed until further notice. The following day, the *COVID-19 Emergency Response Act 2020* (ACT) commenced. It amended s 68B of the *Supreme Court Act* to permit an accused to elect for a judge alone trial for an excluded offence during the "COVID-19 emergency period". And, relevantly for this appeal, s 68BA was introduced to empower the Supreme Court to order a trial by judge alone during the "COVID-19 emergency period", with no requirement of election or consent by the accused[76].

77 Section 68BA of the *Supreme Court Act*, headed "Trial by judge alone in criminal proceedings – COVID-19 emergency period", relevantly provided:

> "(1) This section applies to a criminal proceeding against an accused person for an offence against a territory law if the trial is to be conducted, in whole or in part, during the COVID-19 emergency period.

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75 *Supreme Court Act*, s 68B(4) and Sch 2, Pt 2.2, items 11 and 18.

76 "COVID-19 emergency period" was defined as the period beginning on 16 March 2020 and ending on 31 December 2020 or, if another day was prescribed by regulation, the prescribed day: *Supreme Court Act*, ss 68B(4), 68BA(5). The amendments to s 68B, and the whole of s 68BA, were expressed to expire 12 months after commencement: *Supreme Court Act*, ss 68B(5), 68BA(6).

(2) To remove any doubt, this section applies –

(a) to a criminal proceeding –

(i) that begins before, on or after the commencement day; and

(ii) for an excluded offence within the meaning of section 68B(4); and

(b) whether or not an election has been made by the accused person under section 68B, including before the commencement day.

(3) The 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.

(4) Before 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."

78 On 18 June 2020, the appellant and his co-accused received notice from the Supreme Court under s 68BA(4) of a proposed order for a judge alone trial.

79 On 9 July 2020, the ACT Legislative Assembly repealed s 68BA of the *Supreme Court Act*[77], prompted by the Supreme Court's decision to recommence the conduct of jury trials[78]. Transitional provisions were inserted into the Act to

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77 *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT), s 36.

78 Australian Capital Territory, Legislative Assembly, *COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 2)*, Explanatory Statement at 3-4. See also Australian Capital Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 June 2020 at 1310.

allow for s 68BA to continue to apply to persons to whom a notice had been given under s 68BA(4)[79].

80 On 13 August 2020, the Supreme Court made an order for the joint trial of the appellant and his co-accused to proceed by judge alone[80]. In their written submissions in response to the notice, the appellant and the Crown had opposed the making of the order. The three other co-accused had supported the making of the order. The appellant did not make an application for reconsideration of the s 68BA(3) order prior to or at the time of his trial[81], nor did he seek leave to appeal the order by way of an interlocutory appeal. The trial proceeded, and the appellant was convicted of sexual intercourse without consent (seven counts) and act of indecency without consent (one count).

81 In this Court, the appellant raised two grounds of appeal challenging the constitutional validity of s 68BA of the *Supreme Court Act*. The first was whether s 68BA was invalid for infringing the *Kable* principle[82]. The second was whether s 68BA was invalid in its application to the appellant because s 80 of the *Constitution* required his trial to be by jury. For the following reasons, both grounds should be dismissed.

Ground 1 – *Kable* principle

82 The Supreme Court of the ACT is a Ch III court that is capable of exercising the judicial power of the Commonwealth in the exercise of jurisdiction conferred on it by laws made by the Commonwealth Parliament[83]. It follows that the *Kable* principle applies to the ACT Supreme Court and to the ACT Legislative Assembly[84]. Accordingly, the ACT Legislative Assembly cannot,

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79 *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT), s 37, inserting *Supreme Court Act*, Pt 12.

80 *R v Vunilagi* (2020) 354 FLR 452.

81 cf *R v UD [No 3]* (2020) 352 FLR 286.

82 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

83 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28].

84 See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 595 [41] ("*NAAJA*"), citing *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [42]. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81]; *Bradley* (2004) 218 CLR 146 at 163 [29];

consistently with Ch III of the *Constitution*, confer on the ACT Supreme Court a function or power that is incompatible with, or substantially impairs, its institutional integrity[85].

83 The appellant accepted that the power to order a judge alone trial under s 68BA(3) of the *Supreme Court Act* was a power that can, and indeed must, be exercised judicially. The appellant accepted that the criteria in s 68BA(3)(a) and (b) were susceptible of judicial application[86]. The appellant also accepted that the power in s 68BA(3) attracted the usual incidents of the judicial process, including the essential features of procedural fairness, an open and public inquiry, and the giving of reasons[87]. The appellant did not challenge the power in s 68BA(3) under which the order for a judge alone trial was made. Rather, the appellant's argument for invalidity turned on s 68BA(4) – the obligation to give notice of a proposed order.

84 The appellant contended that s 68BA(4) was an "antecedent gatekeeping function" – calling for a "screening" and "ex parte" decision – that conferred on the Supreme Court an arbitrary power to select an accused person, from a relevantly identical class of accused persons, to be exposed to the risk of losing a jury trial. The appellant submitted that s 68BA(4) was arbitrary – requiring unequal treatment of accused persons – because there was no duty to give all accused persons a notice and there were no criteria for the Court to decide which accused persons to give a notice. The appellant argued that the process for selection under s 68BA(4) was inscrutable, because there was no requirement to give reasons and the order was made on the Court's own motion.

85 In a challenge to the validity of legislation, the correct starting point is the legal and practical operation of the impugned legislation, discerned as a matter of

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South Australia v Totani (2010) 242 CLR 1 at 49 [72]; *NAAJA* (2015) 256 CLR 569 at 616-618 [115]-[122], 625 [148], 637 [182]-[183].

85 See *NAAJA* (2015) 256 CLR 569 at 594-595 [39(6)], citing *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46]. See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245-246 [55], 274-275 [138]-[140], 292 [189].

86 See *Hogan v Hinch* (2011) 243 CLR 506 at 551 [80]; *Vella* (2019) 269 CLR 219 at 234 [20], 259-260 [86]-[89], 283-284 [161]-[162], 292 [187]-[189].

87 See *Wainohu* (2011) 243 CLR 181 at 208-209 [44]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67].

statutory construction[88]. Ground 1 can be dealt with briefly. That is because, once s 68BA of the *Supreme Court Act* is properly construed, the appellant's argument falls away. Section 68BA contained a single operative power for ordering a trial by judge alone. There was no separate "gatekeeping" or "screening" power.

86 Sub-sections (1) and (2) of s 68BA set out the proceedings to which the power applied. It applied to all criminal proceedings against an accused person 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.

87 Sub-section (3) contained the power. There was no duty for the Supreme Court to consider exercising the power in s 68BA(3) in all cases. It conferred a discretion on the Court, to be exercised judicially, to order a proceeding to be tried by judge alone if satisfied of the criteria in sub-s (3)(a) and (b). The order could only be made if the Court was satisfied that it would ensure the orderly and expeditious discharge of the business of the Court and that it was in the interests of justice. Section 68BA was not simply a case management power – it had significant consequences for the conduct of the trial, for the accused and for the community. In *Newell v The King*[89], in a passage quoted by a unanimous High Court in *Cheatle v The Queen*[90], Latham CJ described trial by jury at common law as "one of the fundamental rights of citizenship and *not a mere matter of procedure*". Trial by jury has also been described as "the fundamental institution in our traditional system of administering criminal justice"[91] and as fulfilling an

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88 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 498-499 [53]; *Coleman v Power* (2004) 220 CLR 1 at 21 [3], 68 [158]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; *NAAJA* (2015) 256 CLR 569 at 581 [11], 603 [70]-[71]; *Brown v Tasmania* (2017) 261 CLR 328 at 428-429 [307], 433-434 [326], 479-480 [485]-[486], 481 [488]; *Comcare v Banerji* (2019) 267 CLR 373 at 434 [136]-[138]; *Vella* (2019) 269 CLR 219 at 229 [1], 269-270 [116]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 49 [125]; *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at 672 [64]-[65], 682 [124], 697 [219]; 403 ALR 1 at 17, 30, 51.

89 (1936) 55 CLR 707 at 711 (emphasis added); see also 712-713. See also *Kingswell v The Queen* (1985) 159 CLR 264 at 298-300; *Alqudsi v The Queen* (2016) 258 CLR 203 at 213-215 [18]-[21], 245 [100]. See also Blackstone, *Commentaries on the Laws of England* (1769), Bk 4, Ch 27.

90 (1993) 177 CLR 541 at 559.

91 *Brown v The Queen* (1986) 160 CLR 171 at 197.

important democratic function[92]. While s 68BA evinces a sufficiently clear intention to, and does, abrogate the common law right to a jury trial[93], an order under s 68BA could not be lightly made.

88 Sub-section (4) made express what would in any event be implied for such a power[94]. When the Court was proposing to exercise the power in s 68BA(3), it was required to give notice to the parties of the proposed order. Section 68BA(4) was a procedural fairness provision, giving some minimum content to the obligation by providing for seven days for the parties to respond. In that respect, the giving of notice and hearing of submissions, whether express under s 68BA(4) or implied (as it would have been in the absence of s 68BA(4)), were indeed necessary for the power in s 68BA(3) to conform with the *Kable* principle[95].

89 The duty to give notice under s 68BA(4) was therefore neither arbitrary nor devoid of criteria, nor properly construed as a power. It was a duty that needed to be complied with before the Court made an order under s 68BA(3). It was a duty that arose when the Court considered that the proceeding was a potential candidate for an order under s 68BA(3) – that is, when the Court thought it might be satisfied of the criteria in s 68BA(3) and was considering exercising the discretion to make the order.

90 The appellant was therefore incorrect in contending that, in the administration of the law, s 68BA(4) came before s 68BA(3). The text of s 68BA(4) was clear: the notice must be given "[b]efore making an order under subsection (3)". But it is equally clear that the Court would be, when notice was given, in the process of considering an order under sub-s (3) – the notice that was given was of the "proposed order".

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92 See *Cheng v The Queen* (2000) 203 CLR 248 at 277-278 [80]-[81]; *Alqudsi* (2016) 258 CLR 203 at 254-255 [129]-[131].

93 See *Tassell v Hayes* (1987) 163 CLR 34 at 50, see also 41; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 252.

94 See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [42]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 672 [117]; *RCB v Justice Forrest* (2012) 247 CLR 304 at 321 [42]; *Condon* (2013) 252 CLR 38 at 99 [156]; *SDCV v Director-General of Security* (2022) 96 ALJR 1002 at 1041 [172]; 405 ALR 209 at 251.

95 See *SDCV* (2022) 96 ALJR 1002 at 1019 [50], 1028 [91], 1030 [106], 1041-1042 [172]-[174]; 405 ALR 209 at 221, 233, 236, 251-253.

91 The appellant accepted that, if s 68BA(4) had been drafted such that giving of a notice was conditioned upon the Court's satisfaction that the case may be a candidate for the exercise of the power under s 68BA(3), given requirements as to social distancing and the like, that would overcome the problem. But that is the result of a proper construction of s 68BA and a proper understanding of the relationship between sub-ss (3) and (4).

92 Finally, although the appellant was the only accused person to be tried by judge alone, without consent, during the operation of s 68BA, there was nothing to suggest that "like cases" had been treated under s 68BA differently for arbitrary reasons[96]. In her reasons for making the s 68BA order, the trial judge emphasised the number of people who would need to be accommodated in the courtroom for a trial of four co-accused (including the co-accused, ten legal representatives and 12 jurors, as well as the judge and courtroom staff), stating that "[t]he Court's limited capacity to run jury trials means that the orderly and expeditious discharge of the business of the Court requires the Court to focus on those trials that are more likely to run to a conclusion, ie short trials involving only one (or, at most, two) accused, rather than devoting expensive resources to trials that are likely to be aborted"[97].

93 The appellant's *Kable* ground of appeal must be dismissed.

Ground 2 – s 80 of the *Constitution*

94 The appellant argued that the offences for which he was tried and convicted – ss 54 and 60 of the *Crimes Act 1900* (ACT) – were "laws of the Commonwealth" within the meaning of s 80 of the *Constitution*, thereby enlivening its command that his trial on indictment be by jury.

95 In *R v Bernasconi*[98], decided over 100 years ago, this Court held that the power of the Commonwealth Parliament to make laws for the government of a territory under s 122 of the *Constitution*, whether the power is exercised directly or through a subordinate legislature, is not restricted by the requirement in s 80. In that case, Mr Bernasconi, a man who was tried without a jury in the Territory of Papua, argued that the offence for which he was convicted was "a law of the

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96 See *R v UD* [2020] ACTSC 88; *R v UD [No 2]* (2020) 282 A Crim R 436; *UD [No 3]* (2020) 352 FLR 286; *R v Coleman* (2020) 351 FLR 297; *R v Ali [No 3]* (2020) 15 ACTLR 161; *R v NI* [2020] ACTSC 137; *R v Booth* [2020] ACTSC 204; *Vunilagi* (2020) 354 FLR 452.

97 *Vunilagi* (2020) 354 FLR 452 at 457 [34].

98 (1915) 19 CLR 629.

Commonwealth" because the *Papua Act 1905* (Cth), passed to give effect to the Commonwealth's acceptance of the Territory, had declared that all laws in force in the Territory would continue in force[99]. As Griffith CJ observed, an "interesting question" was also raised, being whether a law passed by the legislature of a territory under the authority of a law passed by the Parliament of the Commonwealth could properly be regarded as a law of the Commonwealth in any sense[100]. Isaacs J was the only judge to state his opinion on the status of the law in question, holding that the offence was a law of the Commonwealth "because its present force subsists by virtue of the declared will of the Commonwealth Parliament" but that in any event s 80 did not apply to Commonwealth laws passed under s 122[101]. Griffith CJ (with whom Gavan Duffy and Rich JJ agreed) did not construe the meaning of "law of the Commonwealth", stating instead that "there [was] a larger and more important question to be answered before these questions can become material, namely, whether s 80 has any application to the local laws of a territory, whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it"[102]. The "interesting question" about the meaning of "law of the Commonwealth" and whether it would include laws passed by territory legislatures was not decided in *Bernasconi*.

96 The decision of all members of the Court in *Bernasconi* was based on a now discredited view that Ch III of the *Constitution* "has no application to territories"[103]. *Bernasconi* has been criticised in many cases since[104], and its reasoning about the relationship between Ch III and s 122 of the *Constitution* has been heavily

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99 *Bernasconi* (1915) 19 CLR 629 at 633-634.

100 *Bernasconi* (1915) 19 CLR 629 at 634.

101 *Bernasconi* (1915) 19 CLR 629 at 636-637.

102 *Bernasconi* (1915) 19 CLR 629 at 634.

103 (1915) 19 CLR 629 at 635; see also 637, 640.

104 See, eg, *Ffrost v Stevenson* (1937) 58 CLR 528 at 592-593, see also 556, 566; *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85; *Lamshed v Lake* (1958) 99 CLR 132 at 145; *Spratt v Hermes* (1965) 114 CLR 226 at 243-245, 248, 266, 269-270, 275, 277-278; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 108-109, 168-170, 172-173; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 359 [98], 380-381 [149]-[150], 383 [154].

qualified[105], but its holding with respect to s 80 of the *Constitution* has never been overruled.

97 The appellant accepted that, if ground 2 of the appeal were to be allowed, the Court would need to distinguish, or to reopen and overrule, *Bernasconi*. The appellant argued that *Bernasconi* was distinguishable on the basis that it related to "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*. If it could not be distinguished, the appellant submitted that *Bernasconi* should be reconsidered because its conclusion was profoundly affected by the view that s 122 stood apart from the remainder of the *Constitution*: an interpretive approach to s 122 that is no longer accepted by this Court.

98 However, given that the meaning of "law of the Commonwealth" in s 80 of the *Constitution* was not decided in *Bernasconi*, there was a threshold hurdle for the appellant to surmount before it would become necessary for this Court to consider distinguishing or reopening *Bernasconi*. That hurdle takes as a premise, contrary to *Bernasconi*, that s 80 is capable of applying to laws made under s 122. The threshold question is whether the offences for which the appellant was tried and convicted – ss 54 and 60 of the *Crimes Act 1900* (ACT) – fell within the meaning of "offence[s] against any law of the Commonwealth" in s 80 of the *Constitution*. As will be explained, they did not. It is unnecessary for this Court to consider distinguishing or reopening *Bernasconi*.

Appellant's primary contention

99 The appellant's primary contention was that the offences for which he was tried were against "laws of the Commonwealth", in the sense that the offences were

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105 See *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 440-441; *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 289-290, 328; *Lamshed* (1958) 99 CLR 132 at 142, 145, 148; *Spratt* (1965) 114 CLR 226 at 243-248, 253, 266, 269-270, 275, 277-278; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 598-599, 605-606, 615-616, 620-621, 628; *Berwick Ltd v Gray* (1976) 133 CLR 603 at 608; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 222; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 272, 288; *Kruger* (1997) 190 CLR 1 at 58-59, 80-82, 108-109, 168-170, 172-173; *Northern Territory v GPAO* (1999) 196 CLR 553 at 589-592 [87]-[92]; *Re Governor* (1999) 200 CLR 322 at 332-333 [9]-[12], 348 [65]; *Bradley* (2004) 218 CLR 146 at 163 [28]; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 344-347 [46]-[54]; *NAAJA* (2015) 256 CLR 569 at 614-615 [109].

given direct force by the Commonwealth Parliament under s 122 of the *Constitution*. That primary contention therefore accepted there is a distinction between "laws of the Commonwealth" and "laws of the Territory" for the purposes of s 80 of the *Constitution* but it was argued that ss 54 and 60 of the *Crimes Act 1900* (ACT) were in the former category. The acceptance of the distinction is consistent with this Court's decision in *Capital Duplicators Pty Ltd v Australian Capital Territory*[106], decided a few years after the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ("the *Self-Government Act*") was enacted under s 122 of the *Constitution*.

100 Section 122 of the *Constitution* provides the Commonwealth Parliament with the power to "make laws for the government of any territory". It is a "plenary power"[107] – all that needs to be shown is that there is a sufficient nexus or connection between the law and the government of the relevant territory[108]. The plenary power is, of course, subject to qualifications and limitations found elsewhere in the *Constitution*[109].

101 In *Capital Duplicators*[110], the Court approved the statement of Mason J in *Berwick Ltd v Gray*[111] that, under s 122 of the *Constitution*, the Commonwealth Parliament may "endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus". That is, s 122 empowers the Commonwealth Parliament to prescribe the constitutional arrangements for the government of a territory[112].

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106 (1992) 177 CLR 248.

107 *Berwick* (1976) 133 CLR 603 at 607; *Capital Duplicators* (1992) 177 CLR 248 at 265-266, 269, 272.

108 *Berwick* (1976) 133 CLR 603 at 607; see also 605-606, 611.

109 See, eg, *Capital Duplicators* (1992) 177 CLR 248 at 279; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 561, 614, 652-657; *Bradley* (2004) 218 CLR 146 at 163 [29]-[30]; *Wurridjal* (2009) 237 CLR 309 at 359 [86], 385-386 [178]-[182], 388 [189], 418 [283]; *Emmerson* (2014) 253 CLR 393 at 425 [42]. cf *Svikart v Stewart* (1994) 181 CLR 548 at 563.

110 (1992) 177 CLR 248 at 265-266, 272, 284.

111 (1976) 133 CLR 603 at 607; see also 605-606, 611.

112 *Capital Duplicators* (1992) 177 CLR 248 at 271.

Australian Capital Territory (Self-Government) Act 1988 (Cth)

102 From 1911 until 1989, the ACT was administered by the Commonwealth directly under ss 61 and 122 of the *Constitution*. During that period, the ACT was not a separate body politic and did not have a separate legislative power.

103 The transition of the ACT to self-government was achieved in steps[113]. In 1989, the *Self-Government Act* established the Australian Capital Territory as a "body politic under the Crown"[114]. The Legislative Assembly, established under s 8, was given the power under s 22, subject to Pt IV, to make laws for the peace, order and good government of the Territory[115]. There were certain matters excluded from the power to make laws, for example with respect to the coining of money[116]. Three years later, on 1 July 1992, responsibility for the ACT courts was transferred from the Commonwealth to the ACT[117]. On 1 July 1994, the transition to self-government was arguably completed with the establishment of the independent ACT Government Service[118]. By no later than 1 July 1994[119], the ACT was an independent body politic.

104 Although the Court in *Capital Duplicators* split on the question of whether the ACT Legislative Assembly could levy an excise duty under s 22 of the *Self-Government Act* (in light of s 90 of the *Constitution*), all members of the Court agreed that an enactment of the Legislative Assembly under s 22 could not be characterised as an exercise of the legislative power of the Commonwealth Parliament[120]. All members of the Court agreed that, by passing the

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113 See, generally, *Re Governor* (1999) 200 CLR 322 at 331 [7].

114 *Self-Government Act* (as made), s 7. See also s 2 and *Commonwealth of Australia Gazette*, S164, 10 May 1989.

115 cf *Northern Territory (Self-Government) Act 1978* (Cth), ss 6 and 13.

116 *Self-Government Act* (as made), s 23.

117 On the commencement of the *ACT Supreme Court (Transfer) Act 1992* (Cth), inserting Pt VA (The Judiciary) into the *Self-Government Act*.

118 See *Public Sector Management Act 1994* (ACT), s 12; *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (Cth).

119 See, eg, *Re Governor* (1999) 200 CLR 322 at 350 [72], 353 [81], 362-363 [105]-[106]; see also 335 [20], 341 [40].

120 See *Re Governor* (1999) 200 CLR 322 at 352 [80]. cf *Capital Duplicators* (1992) 177 CLR 248 at 263, 265, 281-283, 284.

Self-Government Act under s 122 of the *Constitution*, the Commonwealth Parliament had established a Legislative Assembly with a "new" and separate plenary legislative power[121]. As Brennan, Deane and Toohey JJ (with whom Gaudron J agreed) observed, enactments of the Legislative Assembly "do not lack 'independent and unqualified authority' ... [T]he Parliament did not intend the Legislative Assembly to exercise its powers 'in any sense [as] an agent or delegate ...' ... The Legislative Assembly of the Australian Capital Territory has been erected to exercise not the Parliament's powers but its own"[122].

Crimes Act 1900 (ACT)

105 The question is whether the offences in ss 54 and 60 of the *Crimes Act 1900* (ACT) were properly characterised as an exercise of Commonwealth legislative power, or of the separate legislative power of the Legislative Assembly, at the relevant time. That requires a historical analysis of ss 54 and 60 of the *Crimes Act* and the manner of its application to the ACT.

106 The *Crimes Act 1900* (NSW) was enacted in New South Wales in 1900. It had offences for rape and indecent assault in ss 62-78.

107 The *Seat of Government Acceptance Act 1909* (Cth) allowed for the Governor-General to declare by proclamation that the Territory surrendered by New South Wales for the Seat of Government of the Commonwealth (described in a Schedule to the Act) was accepted by the Commonwealth[123]. Section 6 provided that "[s]ubject to this Act, all laws in force in the Territory immediately before the proclaimed day shall, so far as applicable, continue in force until other provision is made".

108 Section 4 of the *Seat of Government (Administration) Act 1910* (Cth) provided that, where any law of the State of New South Wales continued in force by virtue of s 6 of the *Seat of Government Acceptance Act*, "it shall, subject to any Ordinance made by the Governor-General, have effect in the Territory as if it were a law of the Territory".

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121 *Capital Duplicators* (1992) 177 CLR 248 at 265, 281-282, 284. See also *Svikart* (1994) 181 CLR 548 at 562; *NAAJA* (2015) 256 CLR 569 at 613 [105].

122 *Capital Duplicators* (1992) 177 CLR 248 at 281-282, 284; see also 263, 265. See also *Re Governor* (1999) 200 CLR 322 at 352 [79] fn 125 and cf *Svikart* (1994) 181 CLR 548 at 561-562, 574-575.

123 *Seat of Government Acceptance Act*, s 5.

109 In 1985, the Governor-General made an Ordinance under the *Seat of Government (Administration) Act*, amending the *Crimes Act 1900* (NSW) in its application to the Territory[124]. Section 4 of the Ordinance inserted a new Pt IIIA, which included s 92D (sexual intercourse without consent) and s 92J (act of indecency without consent). Section 7 repealed, among other things, the sexual offences in ss 62-81 of the *Crimes Act 1900* (NSW). At that time, the offences in the *Crimes Act 1900* (NSW) were given force in the Territory by Commonwealth law picking up and applying the text of the State law, as modified by the Commonwealth Ordinance[125].

110 As explained, the ACT Legislative Assembly – and its separate legislative power – were established in 1989. "Enactment" was defined under the *Self-Government Act* as a law made by the Legislative Assembly under the Act, or a law, or part of a law, that was an enactment because of s 34[126]. Section 34 of the *Self-Government Act* was headed "Certain laws converted into enactments". Section 34(4) provided that:

> "A law (other than a law of the Commonwealth) that, immediately before the commencing day:
>
> (a) was in force in the Territory; and
>
> (b) was an Ordinance, an Act of the Parliament of New South Wales or an Imperial Act;
>
> shall be taken to be an enactment, *and may be amended or repealed accordingly*." (emphasis added)

111 At the time of enactment of the *Self-Government Act*, s 34(4) did not apply to a law specified in Sch 3 to that Act, which listed certain "Acts of the Parliament of New South Wales in force in the Territory", including the *Crimes Act 1900* (NSW)[127]. On 1 July 1990, the *Crimes Act 1900* (NSW) was among a number of laws removed from Sch 3 by s 12 of the *ACT Self-Government (Consequential*

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124 *Crimes (Amendment) Ordinance (No 5)* (1985).

125 See *Pinkstone v The Queen* (2004) 219 CLR 444 at 456 [29], 458-459 [38]-[41]; *Mok v Director of Public Prosecutions (NSW)* (2016) 257 CLR 402 at 431 [84], 435 [99]. See also *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 484-485, 487; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 399-400 [38].

126 *Self-Government Act* (as made), s 3.

127 See *Self-Government Act* (as made), s 34(5) and Sch 3, Pt 2.

Provisions) Act 1988 (Cth). Section 34(4) of the *Self-Government Act* was then capable of applying to the *Crimes Act 1900* (NSW) as it applied in the Territory. Section 12 of the *ACT Self-Government (Consequential Provisions) Act* also provided that those laws "shall be taken to be enactments and may be amended or repealed accordingly".

112 The Attorney-General for the ACT, and the Attorney-General of the Commonwealth intervening, submitted that s 34(4) of the *Self-Government Act* in its terms conferred on the *Crimes Act 1900* (NSW), including for the purposes of the *Constitution*, the status of a law of the ACT Legislative Assembly. That is, the Attorneys-General submitted that s 34(4) did not simply deem some laws previously in force in the Territory to be enactments of the Legislative Assembly and to be capable of amendment or repeal by the Legislative Assembly but that s 34(4) had the substantive effect that they became laws of the Legislative Assembly. They sought to draw support for their submission from observations of Gummow and Hayne JJ in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[128]. That submission should be rejected.

113 As this Court's foundational decision in *Australian Communist Party v The Commonwealth*[129] made clear, no law can deem itself to be valid as an exercise of power under the *Constitution*. Similarly, a Commonwealth Act cannot conclusively deem a law not to be a Commonwealth Act. That is a question that is ultimately for this Court to determine. And, while the Commonwealth Parliament is superior to the ACT Legislative Assembly (and, indeed, could restrict or abolish its powers), the Commonwealth Parliament is not able to *itself* exercise the separate and distinct legislative power of the Assembly.

114 Section 34(4) of the *Self-Government Act* in its terms provided that the Acts to which it applied were to be taken, by way of a fiction, to be Acts made by the Legislative Assembly under s 22 of the *Self-Government Act* when they were not, by definition, such Acts. Section 34(4) was an exercise of Commonwealth legislative power under s 122 of the *Constitution*. It was a law of the Commonwealth, and the Acts which s 34(4) picked up were applied to the Territory as laws of the Commonwealth. But that was not where s 34(4) stopped.

115 By s 34(4) of the *Self-Government Act*, the Commonwealth Parliament evinced an intention to hand over the lawful authority for those enactments to the ACT Legislative Assembly – it provided that those enactments could be amended or repealed by the Legislative Assembly. Put in different terms, while, for the reasons explained, s 34(4) was not constitutionally effective in itself to make those

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128 (1999) 200 CLR 322 at 351 [75].

129 (1951) 83 CLR 1 at 205-206, 221, 258, 264.

enactments laws of the Territory, if the Legislative Assembly then sufficiently adopted the laws, such that the fiction no longer truly applied, the laws became laws of the Territory. That is, as the appellant accepted, s 34(4) contained the potential for a law to be patriated to the Territory by the Territory, by an amendment or a repeal and re-enactment of the law by the Legislative Assembly.

116 The next issue in this appeal, however, was that the appellant contended that such an amendment or repeal and re-enactment of the *Crimes Act 1900* (NSW) (as it applied to the Territory by Commonwealth law) had not occurred. The appellant did not challenge the decisions of this Court that held that the ACT Legislative Assembly is neither a delegate nor an agent of the Commonwealth and that it has its own distinct legislative power[130]. Rather, the appellant contended that the Legislative Assembly had not exercised that power to adopt the *Crimes Act 1900* (NSW), as applied in the Territory, as a law of the ACT. That contention should be rejected.

117 The *Crimes Act 1900* (NSW), as applied to the Territory by Commonwealth law, was adopted by the Legislative Assembly two years later, on 28 May 1992, when the Legislative Assembly itself took the step of enacting the *Crimes Legislation (Status and Citation) Act 1992* (ACT) ("the *Status and Citation Act*"). Section 3(1) of that Act provided that the *Crimes Act 1900* (NSW), in its application in the Territory, "shall be taken to be, for all purposes, a law made by the Legislative Assembly as if [its] provisions ... had been re-enacted in an Act passed by the Assembly". Section 4 provided that the Act may be cited as the *Crimes Act 1900* (ACT).

118 The appellant submitted that the *Status and Citation Act* was yet another "fiction" and that it was an enactment "in vain" because it did not amend or repeal and re-enact the *Crimes Act 1900* (NSW) as it applied in the Territory. However, even if the *Status and Citation Act* erected a "fiction", it was a statutory fiction *of the Legislative Assembly* which provided in terms that the *Crimes Act 1900* was to be taken to be, for all purposes, a law made by the Assembly as if it had been "re-enacted". The Legislative Assembly intended to alter the status of the *Crimes Act 1900*. As the long title to the *Status and Citation Act* stated, it was an Act to "provide for the Crimes Act, 1900 of the State of New South Wales in its application in the Territory to be treated as an Act passed by the Legislative Assembly". The attempted distinction between such a law and a repeal and re-enactment would be a triumph of form over substance[131]. It should be rejected.

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130 See [104] above.

131 cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 375 [66]-[67].

119 In 1999, the *Status and Citation Act* was repealed by the *Law Reform (Miscellaneous Provisions) Act 1999* (ACT), but the repealing Act declared that the *Status and Citation Act* was an Act to which s 42 of the *Interpretation Act 1967* (ACT) applied[132]. Section 42 of the *Interpretation Act* then provided that the repeal of an Act did not end the declaratory or validating effect of the Act[133].

120 For those reasons, the *Crimes Act 1900* became a law of the ACT Legislative Assembly no later than 1992. As a result, the appellant's arguments in relation to subsequent amendments to ss 54 and 60 of the *Crimes Act 1900* (ACT) which were passed by the ACT Legislative Assembly, although unnecessary to the rejection of the appellant's arguments, may be addressed briefly.

121 First, ss 92D and 92J of the *Crimes Act 1900* (ACT) were renumbered to, respectively, ss 54 and 60 by s 43 of the *Crimes Legislation Amendment Act 2001* (ACT). Second, each of ss 54 and 60 was amended to clarify the fault element necessary to prove the offence. In 2008, the words in s 54(1) and (2) "who knows that that other person does not consent, or who is reckless as to whether that other person consents" were omitted and substituted by "who is reckless as to whether that other person consents"[134]. A new s 54(3) was inserted at the same time which provided that "[f]or this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness". In 2011, the element of recklessness in s 60 was amended in the same manner as s 54 had been in 2008[135]. Third, also in 2011, the penalties for a contravention of s 60 were increased[136]. Finally, in 2013 the Legislative Assembly amended the definition of sexual intercourse in s 50 of

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132 *Law Reform (Miscellaneous Provisions) Act*, s 5(2).

133 See also *Legislation Act 2001* (ACT), s 88 and Dictionary, Pt 1, Note 1 to the definition of "former NSW Act", which stated: "The *Crimes Act 1900* is taken to have been enacted by the Legislative Assembly because of the *Crimes Legislation (Status and Citation) Act 1992*. The 1992 Act was repealed by the *Law Reform (Miscellaneous Provisions) Act 1999*, but its previous operation was saved (see s 5(2))."

134 *Justice and Community Safety Legislation Amendment Act 2008 (No 3)* (ACT), s 3 and Sch 1 [1.11]-[1.12].

135 *Crimes Legislation Amendment Act 2011* (ACT), ss 5-7.

136 *Criminal Proceedings Legislation Amendment Act 2011* (ACT), ss 4 and 5.

the *Crimes Act*, expanding the physical element of the offence of sexual intercourse without consent under s 54[137].

122 The appellant's contention was that the ACT Legislative Assembly would not be taken to have "adopted" the laws unless it made a sufficiently substantive change to the laws, and that adoption needed to be in the form of an amendment or re-enactment. That is, the appellant contended that none of the amendments to ss 54 and 60 were "substantive" and that only substantive amendments would have the effect of transmuting[138] the offences into offences against a law of the Territory. In particular, the appellant submitted that physical and fault elements of the offences remained the same and that there was "no enlargement or contraction of the nature of the offence". Those submissions should be rejected.

123 The appellant's submission was incorrect because the 2013 amendments to the definition of sexual intercourse expanded the physical element of the offence in s 54. But, in any event, just as in *Kartinyeri v The Commonwealth*, where Gummow and Hayne JJ observed that comparing amendment and partial repeal is a "false dichotomy" as both "alter [the statute's] legal meaning"[139], so too did the appellant's argument based on the notion of "substantive" amendment improperly rely on an illusory distinction. Each time it amended the provisions, the ACT Legislative Assembly expressed its plenary power under s 22 of the *Self-Government Act*. With respect to the offences for which the appellant was convicted, it expressed that plenary power on numerous occasions[140]. The argument that the offences derive their immediate force from the Commonwealth Parliament cannot be sustained.

Appellant's alternative contention

124 The appellant put forward an alternative contention that would only arise if the Court were to conclude that the legislative source of ss 54 and 60 of the *Crimes Act 1900* had 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*.

125 The alternative contention was that a law enacted by the ACT Legislative Assembly, exercising its legislative power derived from a law made by the

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137 *Crimes Legislation Amendment Act 2013* (ACT), ss 5-7. For example, it inserted fellatio into the definition of sexual intercourse.

138 See *Re Governor* (1999) 200 CLR 322 at 342 [44].

139 (1998) 195 CLR 337 at 375 [66]-[67].

140 cf *Re Governor* (1999) 200 CLR 322 at 350 [72]-[73], 353 [81].

Commonwealth Parliament under s 122 of the *Constitution*, is a "law of the Commonwealth" for the purposes of s 80 of the *Constitution*. The appellant argued that this Court should take that step because such a law is enacted indirectly under the ultimate authority of the Commonwealth Parliament and "s 122 entails an ineradicable Commonwealth character for laws for the government of a Territory".

126 That argument must be rejected because it is contrary to *Capital Duplicators*[141]. As explained, the Court there recognised that, by granting the ACT self-government, the Commonwealth Parliament created a separate and distinct legislative power[142]. While the exercise of that distinct legislative power by the Legislative Assembly is derived from the Commonwealth Parliament, it "is not an exercise of the [Commonwealth] Parliament's legislative power"[143]. The ACT Legislative Assembly exercises its own power – not a power under delegation or agency from the Commonwealth Parliament. That is, laws made by the ACT Legislative Assembly are *not* laws made by, or under delegation of, the Commonwealth Parliament. The term "law of the Commonwealth" refers to laws made under the legislative powers of the Commonwealth[144]. Necessarily, the laws passed by the Legislative Assembly are therefore "laws of the Territory", not "laws of the Commonwealth".

127 The appellant's argument, if accepted, would create anomalies elsewhere in the *Constitution* where the phrase "laws of the Commonwealth" is used, including in ss 61, 109 and 120. The phrase "laws of the Commonwealth" should as far as possible have a consistent meaning in the *Constitution*. While it is clear that a law enacted *by the Commonwealth Parliament* under s 122 is a "law of the Commonwealth" within the meaning of s 109[145], the appellant's construction would mean that a law enacted by an independent Territory legislature would also

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141 See [104] above.

142 *Capital Duplicators* (1992) 177 CLR 248 at 265, 281-283, 284; *Svikart* (1994) 181 CLR 548 at 562; *NAAJA* (2015) 256 CLR 569 at 613 [105]-[106], 617 [117]-[118], 633-634 [170]-[171].

143 *Svikart* (1994) 181 CLR 548 at 562, explaining *Capital Duplicators* (1992) 177 CLR 248.

144 *Re Colina* (1999) 200 CLR 386 at 397 [25], citing as examples *Bernasconi* (1915) 19 CLR 629 at 635, *Jerger v Pearce* (1920) 27 CLR 526 at 531, *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431, *Sankey v Whitlam* (1978) 142 CLR 1 at 91-92 and *Native Title Act Case* (1995) 183 CLR 373 at 436-437.

145 *Lamshed* (1958) 99 CLR 132.

be a "law of the Commonwealth" and would prevail over a State law where inconsistency arose.

Orders

128 For those reasons, the appeal should be dismissed.

EDELMAN J.

Introduction

129 Mr Vunilagi was tried on indictment for serious offences against laws that were initially laws of the Commonwealth Parliament but which had been adopted by the Legislative Assembly of the Australian Capital Territory. He was tried and convicted by a process involving a judge sitting without a jury. Mr Vunilagi brought a constitutional challenge to the law of the Legislative Assembly of the Australian Capital Territory that permitted this process, s 68BA of the *Supreme Court Act 1933* (ACT). Mr Vunilagi's challenge failed in the Court of Appeal of the Supreme Court of the Australian Capital Territory[146]. Mr Vunilagi appealed to this Court on two grounds.

130 Mr Vunilagi's first ground concerned the mechanics by which s 68BA of the *Supreme Court Act* permitted the selection of his case as one for a judge alone trial. He submitted that s 68BA provided no discernible criteria for the Supreme Court of the Australian Capital Territory to determine whether an order for a judge alone trial would be proposed to an accused person. The absence of discernible criteria was said to have impaired the institutional integrity of the Supreme Court of the Australian Capital Territory. The premise of that submission cannot be accepted. The Legislative Assembly of the Australian Capital Territory must be taken to have presupposed that criminal cases would be considered for proposed judge alone trials whether individually or by reference to a general policy. That exercise could not be performed by the Supreme Court according to caprice or whim. It could only be performed by reference to case management considerations, albeit a category of considerations of very wide denotation.

131 Mr Vunilagi's second ground concerned s 80 of the *Constitution*. Section 80 of the *Constitution* falls within Ch III, "The Judicature". Section 80 relevantly provides that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury". Mr Vunilagi submitted that he was tried for offences which were against laws of the Commonwealth contrary to s 80 of the *Constitution* with the effect that s 68BA of the *Supreme Court Act* was invalid because it authorised trials without a jury, and that consequently his convictions must be quashed.

132 The ultimate source of power for the offences for which Mr Vunilagi was tried was s 122 of the *Constitution*. The immediate issue for Mr Vunilagi's second ground of appeal, as a matter of logic and authority, is therefore whether the power in s 122 of the *Constitution* is immunised from any of the requirements of Ch III of the *Constitution* by a negative implication in Ch III of the *Constitution*. If the power in s 122 is immunised in this way, then — on any view — the constraints

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146 *Vunilagi v The Queen* (2021) 17 ACTLR 72.

of s 80 would not apply to the offences for which Mr Vunilagi was tried. The answer is that s 122 is not so immunised. The reasoning to the contrary by this Court in *R v Bernasconi*[147] should be re-opened and held to be manifestly wrong as a matter of principle and contrary to a substantial stream of authority and precedent in this Court. The result of that case cannot be re-explained on the basis that the same negative implication might somehow be discerned only within s 80 of the *Constitution*.

133 The next issue that arises from Mr Vunilagi's second ground of appeal is whether, as a matter of interpretation and application of s 80 of the *Constitution*, the offences for which he was tried on indictment were offences against laws of the Commonwealth. The answer is that they were not. The established approach to the interpretation of s 80 of the *Constitution*, the need to apply a consistent meaning of "laws of the Commonwealth" throughout the *Constitution*, and the precedent of this Court, all deny that a law of the Legislative Assembly of a self-governing Territory is a law of the Commonwealth. The offences for which Mr Vunilagi was tried were against laws of the Legislative Assembly of the Australian Capital Territory. The appeal should be dismissed.

Background and s 68BA of the *Supreme Court Act*

134 Mr Vunilagi was charged, on a joint indictment with three others, with counts of sexual intercourse without consent, sexual intercourse without consent in company, and indecency[148]. On 13 August 2020, Murrell CJ ordered that Mr Vunilagi be tried by a judge alone. At that trial he was convicted of four counts of sexual intercourse without consent and three counts of sexual intercourse without consent in company contrary to s 54 of the *Crimes Act 1900* (ACT), and one count of indecency contrary to s 60 of the *Crimes Act*.

135 Section 68A of the *Supreme Court Act* provided that "[c]riminal proceedings shall be tried by a jury, except as otherwise provided by this part". If Mr Vunilagi had been tried before the COVID-19 emergency period, he would have been tried by a judge and jury, since the offences for which he was tried were excluded offences under s 68B which precluded any election for a judge alone trial[149]. However, Mr Vunilagi was able to be tried by a judge without a jury because of an amendment to the *Supreme Court Act* that applied to trials to be conducted, in whole or in part, during the COVID-19 emergency period between

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147 (1915) 19 CLR 629.

148 *Crimes Act 1900* (ACT), ss 54, 60.

149 *Supreme Court Act 1933* (ACT), ss 68B(1), 68B(4) definition of "excluded offence" read with Sch 2, Pt 2.2, items 11, 18.

16 March 2020 and 31 December 2020[150]. The amendment, namely s 68BA, applied to Mr Vunilagi by a transitional provision despite its repeal on 9 July 2020 by s 36 of the *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT)[151].

136 Section 68BA provided as follows:

"**Trial by judge alone in criminal proceedings — COVID-19 emergency period**

(1) This section applies to a criminal proceeding against an accused person for an offence against a territory law if the trial is to be conducted, in whole or in part, during the COVID-19 emergency period.

(2) To remove any doubt, this section applies —

(a) to a criminal proceeding —

(i) that begins before, on or after the commencement day; and

(ii) for an excluded offence within the meaning of section 68B(4); and

(b) whether or not an election has been made by the accused person under section 68B, including before the commencement day.

(3) The 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.

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150 *COVID-19 Emergency Response Act 2020* (ACT), Sch 1, Pt 1.19; *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT), ss 36, 37. See *Stephens v The Queen* (2022) 273 CLR 635 at 644 [7].

151 See s 116 of the *Supreme Court Act 1933* (ACT), inserted by s 37 of the *COVID-19 Emergency Response Legislation Amendment Act 2020 (No 2)* (ACT).

(4) Before 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.

(5) In this section:

commencement day means the day the *COVID-19 Emergency Response Act 2020*, section 4 commences.

COVID-19 emergency period means the period beginning on 16 March 2020 and ending on —

(a) 31 December 2020; or

(b) if another day is prescribed by regulation — the prescribed day.

(6) This section expires 12 months after the commencement day."

137 The purpose of s 68BA was to respond to delays in criminal trials caused in part by disruption to jury trials due to social distancing requirements during the COVID-19 pandemic. The Explanatory Statement to the Bill that introduced s 68BA explained that the amendment was designed to ensure that members of a jury were not placed at unnecessary risk and to avoid delay to trials of "serious matters"[152].

138 On 18 June 2020, the Supreme Court of the Australian Capital Territory gave written notice to Mr Vunilagi of a proposed order that he be tried by judge alone. The order for a judge alone trial was made on 13 August 2020.

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152 Australian Capital Territory, Legislative Assembly, *COVID-19 Emergency Response Bill 2020*, Explanatory Statement at 19, 40. See also Australian Capital Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 April 2020 at 797-798.

Institutional integrity and s 68BA of the *Supreme Court Act*

139 Ch III of the *Constitution* contains an implication that preserves the institutional integrity of a court that exercises federal jurisdiction. That implication is not limited to State courts. It applies also to courts of the Territories[153].

140 Mr Vunilagi's first ground of appeal asserted that s 68BA of the *Supreme Court Act* was invalid because it impaired the institutional integrity of the Supreme Court of the Australian Capital Territory. Mr Vunilagi properly accepted that the institutional integrity of a court is not impaired by open-textured criteria in a legislative provision, about which more concrete rules would emerge only after judicial interpretation and application[154]. But he submitted that s 68BA(4) provided no discernible criteria at all for a court to apply in determining whether an order would be "proposed". In this respect, he submitted that s 68BA(4) was uncontrolled by the criteria in s 68BA(3). In effect, Mr Vunilagi's submission was that whether or not there was any duty upon the Supreme Court to consider the possibility of a judge alone trial, s 68BA(4) provided no criteria by which the Court could engage in such consideration and no constraints upon the approach to be taken to determine which cases would be considered for a judge alone trial.

141 If Mr Vunilagi were correct, there would be serious constitutional questions about s 68BA. It would mean that s 68BA would enable the Supreme Court to adopt a policy which would permit the Court to consider whether to propose an order for a judge alone trial if an indictment were filed on a Monday or a Tuesday, but not if an indictment were filed on a Wednesday, a Thursday or a Friday. It would mean that s 68BA, enacted to ensure that the trials of serious criminal matters were not delayed, could purport to permit judge alone trials to be considered only for the least serious offences. As the point was eloquently expressed in Mr Vunilagi's written submissions: "[t]he 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".

142 Mr Vunilagi's submission should not be accepted. Section 68BA(4) is based on a presupposition that the Supreme Court will consider in each case whether to propose to order a judge alone trial. The requirement in s 68BA(4) of written notice when an order is "proposed" is plain evidence of this presupposition. The existence

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153 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362-363 [80]-[81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]-[29]; *South Australia v Totani* (2010) 242 CLR 1 at 49 [72]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [42]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 595 [41], 617-618 [119].

154 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 259 [86].

of a presupposition, not expressly provided in a provision, is not unusual despite the possibility of misapprehension that arises: "the very nature and essence of human language ... renders a total exclusion of every imaginable misapprehension, in most cases, absolutely impossible"[155].

143 Legislative presuppositions and assumptions, like those upon which constitutional provisions are based[156], can be of two types. One type is an assumption about the way in which the meaning of the legislation will be applied. Courts interpret the meaning of legislative words and apply that meaning to facts and circumstances. In applying that meaning, a court is not bound by any assumption about the application of the legislation, however widely held those assumptions might have been. The other type is a presupposition, based upon the purpose of a provision, concerning the essential meaning of the provision. Such presuppositions affect the meaning of express terms and can give rise to separate implied terms. But whatever the assumption or presupposition on which s 68BA was based, s 68BA was not invalid.

144 If the assumption underlying s 68BA(4) only concerned the expected application of that provision, so that in deciding whether to propose an order it was expected that the Supreme Court would consider each case, then there would likely be no implied duty upon the Court to consider whether to propose a judge alone trial. Section 68BA would, prima facie, permit the Supreme Court to adopt any approach, however irrational and however unjust, to whether such consideration would be undertaken. But if s 68BA could, prima facie, be applied in a manner which permitted such irrational and absurd applications, and if such applications meant that the institutional integrity of the Court was impaired, then s 68BA would be disapplied to that extent by ss 120(2)(a) and 120(3) of the *Legislation Act 2001* (ACT).

145 Alternatively, if s 68BA(4) contained a presupposition that it would be necessary for the Court in each case to consider whether to propose a judge alone trial, then s 68BA(4) would be interpreted as including an implied duty requiring the Supreme Court to consider whether to propose a judge alone trial in each case either by individual consideration or by reference to a general policy. That required approach would not be unconstrained. Just as the exercise of a power is subject to the usual implication that the power be exercised in a reasonable manner[157], so too

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155 Lieber, *Legal and Political Hermeneutics* (1839) at 27.

156 *Palmer v Western Australia* (2021) 274 CLR 286 at 298 [20].

157 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650 [126]; *Minister for*

the performance of a duty is subject to the usual implication that it be performed in a reasonable manner[158]. The bounds of reasonableness in s 68BA(4) would be informed by reference to case management considerations. This is because the Court would be aware that the ultimate, and subsequent, decision as to whether a trial by judge alone is ordered must be made by reference to the case management considerations in s 68BA(3). As senior counsel for Mr Vunilagi properly accepted, s 68BA(3) is "a complete programmatic description" of those case management considerations. It would make no sense for a notice to be given of a proposed order unless the Court administration considered that such an order would be possible in the subsequent decision to be taken under s 68BA(3). In effect, therefore, s 68BA(4) required that the Court take into account the case management considerations in s 68BA(3) to decide whether a trial by judge alone might be ordered. That approach is wholly compatible with the institutional integrity of the Supreme Court. The first ground of appeal should be dismissed.

Sections 80 and 122 of the *Constitution*

The issues

146 Mr Vunilagi's second ground of appeal was that the Court of Appeal of the Supreme Court of the Australian Capital Territory should have held that s 68BA of the *Supreme Court Act* was invalid because it was inconsistent with s 80 of the *Constitution*, a provision contained within Ch III, "The Judicature".

147 The sexual assault and indecency offences for which Mr Vunilagi was tried and convicted were against ss 54 and 60 of the *Crimes Act*. As explained later in these reasons, predecessor rape and indecency offences were first given force in the Australian Capital Territory from 1911 by laws of the Commonwealth Parliament made under s 122 of the *Constitution* and, later, by laws of the Legislative Assembly of the Australian Capital Territory which, themselves, were supported by laws of the Commonwealth Parliament under s 122 of the *Constitution*. This ground of appeal requires two issues to be addressed.

148 First, are laws passed under s 122 of the *Constitution* immunised from the constraints of s 80 of the *Constitution*? This raises the question of whether the reasoning of this Court in *R v Bernasconi*[159] should continue to be accepted or

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Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123 at 1127 [15]; 259 ALR 429 at 433; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63].

158 *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 445 [3], 450-451 [18]-[19], 490-491 [125].

159 (1915) 19 CLR 629.

whether *R v Bernasconi* should be overruled or re-explained. If, as this Court held in *R v Bernasconi*, laws passed under s 122 of the *Constitution* are not subject to Ch III of the *Constitution*, then a law passed under the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ("the Self-Government Act"), which was itself passed under s 122 of the *Constitution*, could not be subject to Ch III of the *Constitution* and therefore would not be subject to the constraints of s 80 of the *Constitution*.

149 Secondly, if s 122 is not immunised from the requirements of s 80 then, as a matter of interpretation of s 80, is a law that is passed by the Legislative Assembly of the Australian Capital Territory under the Self-Government Act a "law of the Commonwealth" so that a trial on indictment of offences against ss 54 and 60 of the *Crimes Act* is required to be by jury and s 68BA of the *Supreme Court Act* is inconsistent in this respect with s 80 of the *Constitution*?

The proper starting point

150 In *R v Bernasconi*[160], Griffith CJ (with whom Gavan Duffy and Rich JJ agreed) said that the "larger and more important question to be answered", before addressing the second question of the interpretation of s 80 of the *Constitution*, was "whether [s] 80 has any application to the local laws of a territory, whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it". Griffith CJ therefore addressed the larger and more important first question before the second question. His answer to the first question meant that he did not need to address the second question.

151 As a matter of logic and principle, that approach is plainly correct. It would be an exercise in backwards logic to suggest that the second question, concerning the interpretation of the meaning of the words of s 80, must be decided prior to the first question of whether s 80 is applicable at all. To engage in that exercise might lead to perceptions, however unjustified, that the Court contrived an answer to the second question in order to avoid answering the logically anterior question. The Solicitor-General of the Commonwealth submitted, however, that this Court should avoid confronting the first question by applying its "usual prudential approach in constitutional cases". That usual prudential approach was said to require this very approach of starting with the second question and, if that second question were dispositive of the appeal, avoiding any answer to the first question.

152 A prudential approach has sometimes been taken by this Court to resolve a case by reference to non-constitutional issues, avoiding any decision on constitutional issues. Hence, this Court has sometimes avoided engaging with issues of constitutional invalidity if the case could be decided as a matter of

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160 (1915) 19 CLR 629 at 634.

statutory interpretation. This so-called prudential approach is "not a rigid rule"[161] and there may often be good reasons not to take that approach. Indeed, the importance of an issue can itself be a reason for the issue to be confronted rather than avoided. The constitutional role of this Court can require engagement with large and important issues even if those issues might strictly be unnecessary to resolve the dispute between the parties[162]. More importantly, the so-called prudential approach does not apply at all where two constitutional issues are involved. The so-called prudential approach does not justify the Court refusing to engage with one constitutional issue on the basis that it is perceived to be more important than another constitutional issue. And it certainly should not be extended to justify the suspension of logic by addressing a consequential constitutional issue before an anterior constitutional issue.

Principles concerning this Court's departure from earlier cases

153 Mr Vunilagi submitted that *R v Bernasconi* should be re-opened and that its reasoning should be re-explained or its result overruled. In order to address that submission, it is necessary to delineate, with precision, the different concepts of "re-opening", "re-explaining" and "overruling".

154 "Re-opening" an earlier case involves the acceptance that it is appropriate to engage in consideration of whether to depart from either, or both, of: (i) the decision, or result of the case; or (ii) all or part of the ratio decidendi. Hence, this Court's approach to re-opening is not limited to the result of a case. It extends also to the re-consideration of any ratio decidendi of the case even if the result is left undisturbed[163]. Since the inception of this Court these two closely associated aspects of a case have been stressed. In *Deakin v Webb*[164], for instance, Griffith CJ said that "[t]he learned Judges of the Supreme Court intimated that they did not consider themselves bound by the reasoning contained" in a decision of this Court. The Chief Justice politely described that intimation as "a somewhat novel mode of dealing with a judgment of a Court of final appeal", explaining that a "[c]ourt of

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161 *Clubb v Edwards* (2019) 267 CLR 171 at 193 [36], quoting *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 350.

162 See, recently, *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419; 409 ALR 65. See also *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 259-262 [98]-[107].

163 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 71 [55], 74 [65], 86-87 [100], 101-106 [153]-[167].

164 (1904) 1 CLR 585 at 604.

law performs the double function of declaring the law, and of applying it to the facts"[165].

155 The principles concerning re-opening have not, however, yet been extended beyond the result and ratio decidendi of a case to seriously considered obiter dicta despite the rule, which is binding only by virtue of the rule itself, that seriously considered obiter dicta of this Court is binding upon lower courts[166]. The classical view of the ratio decidendi that binds lower courts is as follows. It is the legal rules necessary (or sometimes sufficient where a decision might have more than one basis) for the decision, based on the material facts before the court, and expressed at an appropriate level of generality. The ratio decidendi will generally follow the expression of it where it is stated by the judge[167] or, if unstated by the judge, it will be the legal principles at the appropriate level of generality which "the judge *must logically* have considered necessary or treated as material"[168].

156 The choice to re-open an earlier case requires a preparedness to disrupt the rules that have previously been applied by the courts of Australia. It is not a consideration that should be undertaken lightly: "[u]niformity of judicial decision is a matter of great importance. Without it, confidence in the administration of justice would soon dissolve"[169]. The decision whether to re-open an earlier case, and therefore potentially depart from the result or the ratio decidendi of that case, requires a preliminary assessment of the prospects that the Court will so depart. As explained below, a number of different factors are considered which, in broad terms, involve asking: (i) the force with which it is considered that the result of the case or the ratio decidendi of the case cannot be justified; and (ii) the consequences of departure from the result of the case or the ratio decidendi of the case.

157 The general approach of this Court has been to require a person who requests this Court to depart from the result or ratio decidendi of an earlier case to seek leave for that case to be re-opened. At least where that leave requirement

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165 (1904) 1 CLR 585 at 604.

166 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 150-151 [134].

167 See Paton, *A Text-Book of Jurisprudence* (1946) at 159; Montrose, "Ratio Decidendi and the House of Lords" (1957) 20 *Modern Law Review* 124 at 124-125; Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 72; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 543 [61].

168 Blackshield, "Ratio Decidendi", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 579 at 579 (emphasis in original).

169 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 39.

concerns a constitutional matter, the requirement of leave has been controversial as a matter of principle[170]. It is also difficult in some cases, as a matter of practice, to ascertain before oral argument whether leave to re-open should be granted in the absence of full argument about the extent to which the ratio decidendi of a case is unjustified or contrary to the stream of authority and precedent or about the consequences of departure from the reasoning or result in the earlier case[171].

158 Nevertheless, in some cases, leave to re-open might be refused at the outset of a case, or during the hearing, because of the lack of prospects of the Court departing from the result of the previous case or its ratio decidendi. For instance, in *Evda Nominees Pty Ltd v Victoria*[172], this Court refused leave to re-open earlier cases[173], even though the decisions in those cases may have stood only "as authority for a result, rather than for any strand of reasoning common to a majority of Justices"[174]. Six members of this Court said, after reference to those earlier cases, that[175]:

> "In the present case, the legislation which the plaintiffs seek to impugn ... is indistinguishable from that which was upheld in [one of the earlier cases] ... The Court does not consider that it should now hear further argument urging it to depart from the actual decision reached in those cases, particularly since the States have organized their financial affairs in reliance on them."

159 The notions of "re-explaining" and "overruling" arise when an earlier case is re-opened and the result of that case or its ratio decidendi is thought to be wrong. There are then three choices: (i) leave the result and the ratio decidendi of the case undisturbed; (ii) leave the result undisturbed but re-explain the ratio decidendi of the case; or (iii) overrule the result and depart from the ratio decidendi of the case.

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170 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 407 [58].

171 See, eg, *Thompson v Judge Byrne* (1999) 196 CLR 141.

172 (1984) 154 CLR 311 at 316.

173 Namely *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177. See also *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475.

174 *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 438. See also *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188.

175 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316.

160 In choosing which approach to take, it is common for members of this Court to recite, and apparently balance, four non-exhaustive and overlapping[176] questions set out in *John v Federal Commissioner of Taxation*[177], which in turn drew from the reasoning of Gibbs CJ in *The Commonwealth v Hospital Contribution Fund*[178]. In broad terms those questions are:

1. whether the earlier case rested upon a principle carefully worked out in a significant succession of cases;

2. whether there were differences in the reasoning in the earlier case;

3. whether the earlier case had achieved no useful result but led to considerable inconvenience; and

4. whether the earlier case had not been independently acted on in a manner which militated against re-consideration.

The answers to these questions rarely resolve the overall issue of whether the result or ratio decidendi of the case should be disturbed. The answer to each of the questions depends upon broad questions of evaluation, sometimes of facts about which the Court may know very little. And the answers can point in different directions.

161 Most fundamentally, the first two questions are concerned with a different dimension from the latter two. The first two questions will affect the force with which a belief is held that the result or ratio decidendi in the earlier case cannot be justified. Justification is concerned with principle and authority. Even a decision that is contrary to legal principle might be justified if, for example, it is structurally embedded such as where a decision is reached by unanimous reasoning and is developed by a succession of cases[179]. The second two questions concern the

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176 *Queensland v The Commonwealth* ("the *Second Territory Senators Case*") (1977) 139 CLR 585 at 630.

177 (1989) 166 CLR 417 at 438-439.

178 (1982) 150 CLR 49 at 56-58.

179 See also *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 396; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 592-593 [69].

consequences of overruling the result of the earlier case, or departing from its ratio decidendi, irrespective of the force with which it is thought to be wrong[180].

162 Although both dimensions of consideration are important, greater importance lies with the dimension of justification that is concerned with the correctness of the result or reasoning, as a matter of legal principle and structural legal integrity: even an argument against re-consideration based on "widespread practical ramifications and … extraordinary confusion" cannot prevail if it is clear that the interpretation is incorrect in the sense of being unprincipled and structurally inconsistent[181].

163 Hence, even where there are large consequences for re-explaining or overruling an earlier result or ratio decidendi, the dominant approach in this Court has been to re-explain or overrule the earlier case where it is "clearly wrong" or "manifestly wrong"[182], in the strong sense that the result or ratio decidendi is not a matter upon which "[r]easonable minds may differ"[183] because it both "conflicts with well established principle" and "fails to go with a definite stream of authority"[184].

164 There may even be cases that are so fundamentally contrary to basic principle, involving reasoning that is so abhorrent or involving such significant and manifest error or injustice, that the result or reasoning should never be permitted to stand even if the decision might be thought to have become structurally embedded and even if overruling would lead to large consequences. Such cases are likely to be extremely rare. But, if and when those cases arise, a judge's ethical duty precludes timorous acceptance of grave injustice even if the price of that duty is perpetual dissent.

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180 See, generally, *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 70; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 309; Horrigan, "Towards a Jurisprudence of High Court Overruling" (1992) 66 *Australian Law Journal* 199 at 209-210.

181 See *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 591.

182 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278-279; *The Tramways Case [No 1]* (1914) 18 CLR 54 at 58, 69; *Geelong Harbour Trust Commissioners v Gibbs, Bright & Co* (1970) 122 CLR 504 at 516.

183 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 353 [71].

184 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 244.

165 After assessing all the factors, if the Court departs only from the ratio decidendi and not the result of the case this amounts to "re-explaining" the ratio decidendi of the case (or "reformulat[ing] the principle"[185]) rather than "overruling" the decision or result. In *Esso Australia Resources Ltd v Federal Commissioner of Taxation*, in the course of departing from the ratio decidendi of an earlier decision of this Court, although not the result, Gleeson CJ, Gaudron and Gummow JJ said[186]:

> "Although what is proposed does not involve an overruling of a previous decision of the Court, nevertheless the question whether to reconsider the reasoning of Stephen, Mason and Murphy JJ, and to refuse to follow it if we disagree with it, should be decided by reference to considerations of the kind discussed by Gibbs CJ in *The Commonwealth v Hospital Contribution Fund*[187]. These considerations were applied in *John v Federal Commissioner of Taxation*[188]".

The reasoning and the decision in R v Bernasconi

166 In *R v Bernasconi*, the accused had been tried without a jury on an indictable offence in what was then the overseas Territory of Papua. The Territory of Papua had been accepted as a Territory under the authority of the Commonwealth by the *Papua Act 1905* (Cth). By the *Jury Ordinance of 1907* (No 7 of 1907), passed after the transfer of the Territory of Papua to the Commonwealth, the trials of persons of European descent charged with a crime punishable with death were to be by jury, but otherwise all trials were to be held without a jury. After the conviction of the accused, a case was stated to this Court to consider whether the accused should have been tried by jury. This involved consideration of whether s 80 of the *Constitution* applied to the local laws of a Territory of the Commonwealth, thereby requiring that the accused be tried by a jury. This Court unanimously held that s 80 did not apply.

167 The basis for the decision in *R v Bernasconi* was expressed by Griffith CJ (with whom Gavan Duffy and Rich JJ agreed) as involving a negative implication

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185 *Northern Territory v Mengel* (1995) 185 CLR 307 at 338.

186 (1999) 201 CLR 49 at 71 [55]. See also at 74 [65], 86-87 [100], 101-106 [153]-[167].

187 (1982) 150 CLR 49 at 55-58.

188 (1989) 166 CLR 417 at 438-439, 450-453. See also *Northern Territory v Mengel* (1995) 185 CLR 307 at 338.

that excluded the Territories, and s 122, from the operation of Ch III of the *Constitution*[189]:

> "Chapter III is limited in its application to the exercise of the 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 ... In my opinion, the power conferred by [s] 122 is not restricted by the provisions of Chapter III of the Constitution, whether the power is exercised directly or through a subordinate legislature."

168 A more limited approach was taken by Isaacs J. His Honour focused upon a negative implication in s 80 rather than in Ch III as a whole. Isaacs J concluded that s 80 applies only "to the Commonwealth as a self-governing community" and not to a Territory which is "in a state of dependency or tutelage" where there is a discretion of the Commonwealth Parliament to pass "the special regulations proper for its government until, if ever, it shall be admitted as a member of the family of States"[190]. In effect, therefore, the difference in reasoning between Griffith CJ (with whom Gavan Duffy and Rich JJ agreed) and Isaacs J was that the former recognised an implication in Ch III that it did not apply to s 122, whilst the latter recognised an implication in s 80 that it did not apply to s 122.

169 There can be no doubt that the reasons for judgment of Griffith CJ (Gavan Duffy and Rich JJ agreeing) in *R v Bernasconi* were based on the larger proposition that Ch III of the *Constitution* has no application to the Territories. That understanding of the reasoning in *R v Bernasconi* has been reiterated many times[191]. Indeed, in *Mitchell v Barker*[192], Griffith CJ himself, delivering the judgment of this Court, reiterated that *R v Bernasconi* had decided that "the group of sections comprised in [Ch] III of the Constitution do not apply to a Territory of the Commonwealth"[193].

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189 (1915) 19 CLR 629 at 635.

190 (1915) 19 CLR 629 at 637-638.

191 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585; *Waters v The Commonwealth* (1951) 82 CLR 188 at 191; *Lamshed v Lake* (1958) 99 CLR 132 at 142; *Spratt v Hermes* (1965) 114 CLR 226 at 243, 251-252; *Gould v Brown* (1998) 193 CLR 346 at 427 [133]; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332 [9]. See also *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

192 (1918) 24 CLR 365.

193 (1918) 24 CLR 365 at 367.

170 For the reasons below, that reasoning in *R v Bernasconi* is unprincipled and contrary to the stream of authority and precedent in this Court. The reasoning must be rejected. Subject to any significant adverse consequences, the result in *R v Bernasconi* must be re-explained or overruled.

The reasoning in R v Bernasconi *is unprincipled and contrary to established stream of authority and precedent*

171 The same negative implication relied upon by Griffith CJ in *R v Bernasconi* was used as the basis for the decision in *Porter v The King; Ex parte Yee*[194]. In *Porter*, this Court relied upon *R v Bernasconi* to hold that a law under s 122 could confer appellate jurisdiction on this Court for appeals from a Territory court[195], creating an exception to the principle that Ch III was the exclusive source of the appellate jurisdiction of the High Court[196]. A so-called "workable anomaly" was thus created by which the High Court's appellate jurisdiction was not exclusive, but its original jurisdiction was exclusive[197]. As Isaacs J expressed the point in the majority in *Porter*, the reasoning in *R v Bernasconi* was thought to justify the exclusion of s 122 from the exclusive operation of Ch III on the basis that the judicial power of the Commonwealth in Ch III was "that of the Commonwealth proper"[198]. In other words, Ch III of the *Constitution* was confined to "the area included within States"[199].

172 Although there was, for some years, support for the negative implication recognised in *R v Bernasconi* and in *Porter*, based on the rationale that the Territories stand outside the "Commonwealth proper" or the "federal system"[200], the negative implication itself and that rationale are unprincipled. The principled approach is that taken by Knox CJ and Gavan Duffy J in dissent in *Porter*, in which their Honours denied the existence of any negative implication in Ch III that excluded s 122 from its scope and thus purported to authorise "an attempt to do

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194 (1926) 37 CLR 432.

195 (1926) 37 CLR 432 at 440, 446-447, 448, 449.

196 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-265; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 272.

197 *Spratt v Hermes* (1965) 114 CLR 226 at 277.

198 (1926) 37 CLR 432 at 441.

199 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290.

200 See, eg, the detailed exposition of Kitto J in *Spratt v Hermes* (1965) 114 CLR 226 at 248-260.

that which is implicitly forbidden by the Constitution", namely the conferral of appellate jurisdiction on this Court outside Ch III[201].

173 In 1998, in *Gould v Brown*[202], McHugh J said that s 122 is not an exception to the principle that "Ch III is exhaustive of the High Court's appellate jurisdiction", and that for that reason he had long believed that *R v Bernasconi* and *Porter* had been wrongly decided. McHugh J's premise about the exhaustive nature of Ch III can be accepted without necessarily accepting his Honour's conclusion that *Porter* was wrongly decided. This is because there may be other sources of constitutional authority in Ch III for legislation conferring appellate jurisdiction on the High Court for an appeal from a Territory court. One possibility may be to say that a Territory court (being a court of a Territory invested with federal jurisdiction within the meaning in s 71 of the *Constitution*[203]) always exercises jurisdiction over a federal subject matter because any rights and duties in issue are "under" a law of the Commonwealth Parliament, in the sense that the rights or duties ultimately owe their existence to[204], or ultimately depend for their enforcement upon[205], a law of the Commonwealth Parliament. This may be so whatever the scope of the geographic dimension of jurisdiction[206] and whether or not the federal jurisdiction is directly invested by the Commonwealth Parliament[207]. Consistently with the Commonwealth of Australia being "a single law area with respect to

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201 (1926) 37 CLR 432 at 439.

202 (1998) 193 CLR 346 at 426 [131].

203 See *Northern Territory v GPAO* (1999) 196 CLR 553 at 603-604 [127]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362-363 [80]-[81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-163 [27].

204 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 169, citing *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581. See Zines, *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 177-186; Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 229-244.

205 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 169; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 341 [40]; *Constitution*, s 76(ii).

206 See *Plaintiff S164/2018 v Minister for Home Affairs* (2018) 92 ALJR 1039 at 1041-1042 [6]; 361 ALR 8 at 10.

207 Compare *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 616 [114].

matters within federal jurisdiction"[208], this would mean that, like the reference to "invests with federal jurisdiction" in s 71, the reference to "exercising federal jurisdiction" in s 73 contains no implication limiting it to State courts[209]. This possibility, and the correctness of the decisions in *Capital TV and Appliances Pty Ltd v Falconer*[210] and *Spratt v Hermes*[211], need not be further explored on this appeal.

174 From 2000, the negative implication in Ch III, recognised in *R v Bernasconi* and *Porter* — based on a rationale that regarded Ch III as concerned only with the so-called "Commonwealth proper" that included the States and not the Territories — was also implicitly rejected in a series of cases in which it was repeatedly held that "courts created pursuant to s 122"[212], which may be invested with federal jurisdiction, fall within s 71 of the *Constitution* and are subject to restrictions, including the principle in *Kable v Director of Public Prosecutions (NSW)*[213], arising from implications in Ch III[214].

175 A rejection of the negative implication in Ch III, and a consequent inclusion of the Territories and s 122 within the scope of Commonwealth judicial power and Ch III of the *Constitution*, is also consistent with the treatment of the executive and legislative powers of the Commonwealth. In *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[215], Gummow and Hayne JJ observed that the executive power of the Commonwealth in s 61 is not limited to the States, and the legislative power vested by s 1 in the "Federal Parliament" is not limited to the States. And in

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208 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 518 [18].

209 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 742 §304.

210 (1971) 125 CLR 591.

211 (1965) 114 CLR 226.

212 Compare *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332 [9], 341 [39].

213 (1996) 189 CLR 51.

214 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362-363 [80]-[81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-163 [27]. See also *South Australia v Totani* (2010) 242 CLR 1 at 49 [72]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [42]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 595 [41].

215 (1999) 200 CLR 322 at 344-345 [52]-[53].

Re Wakim; Ex parte McNally, their Honours quoted from Cowen and Zines[216], surely correctly, that[217]:

> "The general approach in *R v Bernasconi*, with its emphasis on the separation of the Territories from the Commonwealth and of s 122 from the rest of the Constitution, is fundamentally opposed to the approach of *Lamshed v Lake*, which attacked this theory and underlined the fact that there is but one Commonwealth and that s 122 was meaningless unless read with other provisions of the Constitution."

176 The reference to *Lamshed v Lake*[218] was to the reasoning of this Court that there was no negative implication in Ch V of the *Constitution* that prevented a law validly made under s 122 from prevailing over an inconsistent State law by operation of s 109 of the *Constitution*. In that case, Kitto J said that the proper interpretation treated "the Constitution as one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories"[219]. As Dawson J recognised in *Kruger v The Commonwealth*[220], the reasoning in *R v Bernasconi* "is plainly inconsistent with a great deal that was said in *Lamshed v Lake*".

177 A rejection of the negative implication in Ch III permits Ch III to be treated in the same way as Chs I ("The Parliament"), II ("The Executive Government"), IV ("Finance and Trade"), and V ("The States") of the *Constitution*. In addition to Ch V, with which *Lamshed v Lake* was concerned[221], Barwick CJ observed in *Spratt v Hermes* that neither Ch I nor Ch II contains any negative implication excluding the Territories, and s 122, from the scope of those Chapters[222]. Nor is such a negative implication to be found in Ch IV. Indeed, it has even been suggested that the constitutional guarantee of freedom of trade, commerce and intercourse between the States in s 92 extends beyond instances where goods

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216 Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) at 172.

217 (1999) 198 CLR 511 at 595 [174] (footnote omitted).

218 (1958) 99 CLR 132. See also *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 513, 526.

219 (1958) 99 CLR 132 at 154.

220 (1997) 190 CLR 1 at 59.

221 See (1958) 99 CLR 132 at 143 (ss 116, 120). See also *Teori Tau v The Commonwealth* (1969) 119 CLR 564 at 570 (s 116); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 79, 123, 166-167, but compare at 41-44, 60, 142.

222 (1965) 114 CLR 226 at 246.

transit between States and pass through a Territory[223], so as to include a positive implication of the same guarantee in the Territories[224]. There is no justification for a different approach to Ch III from the approach taken to Chs I, II, IV, and V[225].

178 Once it is recognised that the negative implication in Ch III in the reasoning of Griffith CJ (Gavan Duffy and Rich JJ agreeing) in *R v Bernasconi* is manifestly wrong and is contrary to the stream of authority and precedent in this Court, leave to re-open *R v Bernasconi* must be granted and that reasoning in that case must be rejected. The result in *R v Bernasconi* must also be overruled unless: (i) the result can be re-explained on an orthodox basis; or (ii) there are consequential obstacles to overruling the result which support the result remaining as law (but confined as narrowly as possible to avoid those consequences).

179 For the reasons immediately below, the result in *R v Bernasconi* cannot be re-explained as being based upon a more confined negative implication. Nor can it be re-explained, as Mr Vunilagi submitted, as being limited to laws applying in a Territory placed by the Crown under the authority of and accepted by the Commonwealth. However, the result in *R v Bernasconi* might be re-explained by reasoning that avoids many of the extreme consequences raised by the Attorneys-General of the Commonwealth, the Australian Capital Territory and the Northern Territory. That reasoning involves interpreting "any law of the Commonwealth" in s 80 of the *Constitution* as excluding the laws of a self-governing Territory. Ultimately, this appeal should be resolved in this way, with the effect that it is unnecessary to consider whether or not the result in *R v Bernasconi* could be re-explained by reference to this point of interpretation.

Can R v Bernasconi *be re-explained by a confined implication in s 80?*

180 One attempt to re-explain the result in *R v Bernasconi* was to rely on a narrower approach that confined the negative implication to s 80, immunising s 122 from the scope of s 80 only, rather than from Ch III as a whole. The purported rationale for such a confined negative implication that treated s 122 as immunised only from s 80 rather than Ch III as a whole was expressed by Isaacs J in *R v Bernasconi*. It was essentially the same as the purported rationale for the wider negative implication. As Fullagar J and Kitto J respectively said in *Waters v*

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223 See also *Lamshed v Lake* (1958) 99 CLR 132 at 143.

224 *Palmer v Western Australia* (2021) 272 CLR 505 at 545 [117].

225 See *Spratt v Hermes* (1965) 114 CLR 226 at 248.

The Commonwealth[226] and in *Spratt v Hermes*[227], the approach of Isaacs J was "really expressing the same view" and there is "no difference in fundamental idea".

181 Like the purported rationale for the wider negative implication, the purported rationale for the confined negative implication was that s 80 is concerned only with a federal system that excludes the Territories. As Isaacs J said, when adopting the more confined negative implication, the purported rationale is that s 80 applies to the Commonwealth only "as a self-governing community" whereas the Territories are not "constituent parts of the self-governing body" and are "not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers"[228]. In *Porter*[229], after incorporating all of his reasons from *R v Bernasconi*, Isaacs J reiterated the purported rationale as being that the judicial power of the Commonwealth in Ch III "means the area included within States".

182 The more confined negative implication has occasionally been relied upon by various Justices of this Court who have sought to re-explain *R v Bernasconi*. For instance, in *Spratt v Hermes*[230], the more confined negative implication was preferred by Barwick CJ. And in *Capital TV and Appliances Pty Ltd v Falconer*[231], the more confined negative implication was supported by Menzies J, who said that the words of s 80 "any law of the Commonwealth" should be "read as if they were followed by the words 'other than a law made under s 122'".

183 Although the confined negative implication is essentially a narrower version of the same argument as the broader negative implication, there is even less that could justify a confined negative implication in s 80 than the broader negative implication in Ch III as a whole. The factors that might have supported the broader negative implication in Ch III as a whole were: the approach that had been taken to the "legislative courts" in the United States[232], particularly the "territorial courts [which] resemble state courts, which need not satisfy Article III's

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226 (1951) 82 CLR 188 at 191.

227 (1965) 114 CLR 226 at 252.

228 *R v Bernasconi* (1915) 19 CLR 629 at 637.

229 (1926) 37 CLR 432 at 440-441.

230 (1965) 114 CLR 226 at 243-244.

231 (1971) 125 CLR 591 at 606. See also *Lamshed v Lake* (1958) 99 CLR 132 at 142.

232 Compare *Constitution of the United States*, Art IV, §3, cl 2 with Art III. See, eg, *Benner v Porter* (1850) 50 US 235 and *Leitensdorfer v Webb* (1857) 61 US 176 at 182, cited in *Spratt v Hermes* (1965) 114 CLR 226 at 255.

strictures"[233]; the absence of any express mention in Ch III of the Territories or Territory courts; and the perception that the first five Chapters of the *Constitution* are concerned with the working of a federation of States but Ch VI is concerned with a different topic[234]. But no such arguments exist for a confined negative implication in s 80. Indeed, the text of s 80 refers to "any" law of the Commonwealth.

184 Mr Vunilagi denied both the broader negative implication that formed the basis of the reasoning in *R v Bernasconi*, and any attempt to re-explain the result in *R v Bernasconi* by the more confined negative implication. His challenge in this respect should be accepted. The same reasons of principle that exclude a broader negative implication in Ch III also exclude the more confined negative implication in s 80. Once it is recognised that s 122 is not "disjoined from the rest of the Constitution"[235], then it can no more be disjoined from Ch III in general than it can be from s 80 in particular. Indeed, even Menzies J, who supported the confined negative implication, recognised in *Spratt v Hermes*[236] that it is hard to "grasp how what is part of the Commonwealth is not part of 'the Federal System'". And despite supporting the confined negative implication in s 80 in *Capital TV and Appliances Pty Ltd v Falconer*, in the same case Menzies J also held that there was no confined negative implication in s 76(ii) which could permit the words of s 76(ii) "to exclude laws made by the Parliament under s 122"[237].

185 It is true that some particular provisions of the *Constitution* have been held, effectively by a confined negative implication, to exclude Commonwealth laws passed pursuant to s 122. But that aspect of the reasoning in many of those decisions has generally been seriously criticised, overruled, or re-explained without the confined negative implication.

186 One example is the view that a confined negative implication excluded the power in s 122 from the condition in s 51(xxxi) in Ch I of "just terms" that attaches to the power to acquire property from any "person for any purpose in respect of which the Parliament has power to make laws"[238]. In *Teori Tau v The*

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233 *Hart and Wechsler's The Federal Courts and the Federal System*, 7th ed (2015) at 362.

234 *Spratt v Hermes* (1965) 114 CLR 226 at 250; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 556.

235 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85.

236 (1965) 114 CLR 226 at 270.

237 (1971) 125 CLR 591 at 606.

238 *Constitution*, s 51(xxxi).

Commonwealth[239], this Court unanimously held that s 122 of the *Constitution* is a plenary power, "general and unqualified"[240], which was unconstrained by the guarantee in s 51(xxxi) of compensation on just terms for the acquisition of property. But, in 2009, this principle in *Teori Tau* was rejected by four members of this Court, with Gummow and Hayne JJ saying that *Teori Tau* involved "an error in basic constitutional principle" and had been "rendered an anomaly"[241].

187 A further example is the line of cases reaching the conclusion that the appointment of judges to Territory courts does not need to comply with the requirements of s 72 of the *Constitution*[242]. A confined negative implication in s 72, equivalent to the confined negative implication in s 80, was initially influential in the reasoning used to reach that conclusion. But that conclusion was later entirely rejected by some members of this Court[243]. And the conclusion was explained by others without reliance upon a confined negative implication. For instance, it was said that s 72 does not extend to s 122 as a matter of the proper interpretation of its terms because the "other courts created by the Parliament" to which s 72 refers are the same "other federal courts as the Parliament creates" to which s 71 refers[244]. Hence, by treating a Territory court as not being a federal court created by the Commonwealth Parliament, the Territory court would not fall within the terms of s 72.

188 That line of cases culminated in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[245], in which no member of this Court endorsed a

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239 (1969) 119 CLR 564.

240 (1969) 119 CLR 564 at 570.

241 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 388 [189]; see also at 359 [86], 387-388 [188], 419 [287]. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 565, 614, 661.

242 *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

243 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 108-109; *Gould v Brown* (1998) 193 CLR 346 at 402-403 [64]; *Northern Territory v GPAO* (1999) 196 CLR 553 at 603 [126]; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 382-383 [153]-[154].

244 See *Spratt v Hermes* (1965) 114 CLR 226 at 242-243, 274, 278, 280-281; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 610; *Northern Territory v GPAO* (1999) 196 CLR 553 at 603 [126]; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 340 [35]-[36].

245 (1999) 200 CLR 322.

confined negative implication in s 72. The reasoning of Gleeson CJ, McHugh and Callinan JJ denied the operation of s 72 to Territory courts as a matter of precedent without expressly referring to any confined negative implication. The principle they relied upon was that, as a matter of the interpretation of s 72, a Territory court created "by or pursuant to laws under s 122" is not an "other court[] created by the Parliament" within the meaning of s 72[246]. Separately, Gaudron J provided more detail as to this matter of interpretation, also without any reference to a confined negative implication. Her Honour said that contextual considerations provided a basis for reading s 72 so that the reference to "other courts created by Parliament" was "only to federal courts created pursuant to s 71"[247]. Gummow and Hayne JJ took the most nuanced approach, reasoning that whatever might have been the position beforehand, by the time of the appointment of the challenged judge to the Supreme Court of the Australian Capital Territory on 3 April 1995, that Court had been transferred to the authority of the Legislative Assembly of the Australian Capital Territory[248] and had been substantially reconstituted in relevant respects by enactments of the Legislative Assembly. It was not at that time a court created by the Parliament of the Commonwealth within s 72[249]. Kirby J dissented, reasoning that s 72 applied to the relevant enactments[250].

189 For these reasons the course of authority in this Court does not support recognising a confined negative implication in s 80, which only immunises s 122 from the reach of that particular provision, any more than it recognises the broader negative implication in Ch III as a whole based on the same purported rationale. The course of authority in this Court is opposed to both negative implications.

Can R v Bernasconi *be re-explained as not concerned with surrendered Territories?*

190 Counsel for Mr Vunilagi submitted that *R v Bernasconi* might not need to be overruled if it were confined in its application to laws applying in a Territory placed by the Crown under the authority of and accepted by the Commonwealth. In other words, s 122 of the *Constitution* could be regarded as distinguishing between two different kinds of Territories: (i) those that are "surrendered by any State to and accepted by the Commonwealth"; and (ii) those that are "placed by

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246 (1999) 200 CLR 322 at 332 [9].

247 (1999) 200 CLR 322 at 340 [36].

248 *ACT Supreme Court (Transfer) Act 1992* (Cth).

249 (1999) 200 CLR 322 at 353 [81].

250 (1999) 200 CLR 322 at 384 [158].

the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth".

191 Counsel for Mr Vunilagi relied upon a statement by Griffith CJ, speaking for this Court in *Mitchell v Barker*[251] three years after *R v Bernasconi*, where the Chief Justice said that a distinction may "some day be drawn between Territories which have and those which have not formed part of the Commonwealth". The words were followed by the Chief Justice's statement: "[b]ut the Court, as now constituted, cannot say so". Griffith CJ's refusal to distinguish between different Territories of the Commonwealth was in the context of his Honour's description of the basis for the decision in *R v Bernasconi* being that Ch III did not apply to a Territory of the Commonwealth.

192 If the negative implication, either as a wide approach in *R v Bernasconi* to all of Ch III or as a confined approach only in s 80, were still accepted today, then there may have been much to be said for reducing, as much as possible, the number of Territories that would not be part of the "Commonwealth proper" or the "federal system"[252]. There would equally be much to be said for Mr Vunilagi's submission that such Territories outside the "Commonwealth proper" should not include those which had been surrendered by the Parliament of a State under s 111 of the *Constitution* and which had, by that provision, "become subject to the exclusive jurisdiction of the Commonwealth". This would particularly be so in relation to the "seat of Government" in the Australian Capital Territory, as provided in s 125 of the *Constitution*.

193 But the rejection of any negative implication removes any justification for Mr Vunilagi's submission which draws a distinction between different types of Territories, a distinction that is not contemplated by s 122 itself. As Gleeson CJ, McHugh and Callinan JJ said in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[253], the Territories with which s 122 deals "have been, still are, and will probably continue to be, greatly different in size, population, and development. Yet they are all dealt with, compendiously and briefly, in s 122." In *Waters v The Commonwealth*[254], Fullagar J had therefore denied that any distinction could be drawn "between Territories surrendered by a State and Territories otherwise acquired by the Commonwealth".

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251 (1918) 24 CLR 365 at 367.

252 *R v Bernasconi* (1915) 19 CLR 629 at 637; *Spratt v Hermes* (1965) 114 CLR 226 at 259.

253 (1999) 200 CLR 322 at 331 [7].

254 (1951) 82 CLR 188 at 192.

A final basis upon which R v Bernasconi *might be re-explained*

194 The final way in which the result in *R v Bernasconi* might be re-explained is by reference to the smaller point involving the interpretation and application of the meaning of a "law of the Commonwealth" in s 80. This was the point to which Griffith CJ referred in *R v Bernasconi* but which he did not decide. For the reasons below, it is ultimately unnecessary to decide whether *R v Bernasconi* could be re-explained on the basis that it did not involve a law of the Commonwealth, since this appeal can be resolved on that basis. The effect of such a resolution in this appeal is to prevent many of the extreme consequences that were said, in the submissions of the Attorneys-General of the Commonwealth, the Australian Capital Territory and the Northern Territory, to arise if the result in *R v Bernasconi* were to be overruled.

195 There are three aspects to the interpretation and application of s 80 in this appeal. The first is the approach to be taken to the interpretation of the expression "law of the Commonwealth" in s 80 of the *Constitution*. The second is the meaning of a "law of the Commonwealth" in s 80. And the third is whether ss 54 and 60 of the *Crimes Act* are laws of the Commonwealth.

(1) The approach to be taken to the interpretation of a "law of the Commonwealth" in s 80 of the *Constitution*

196 Section 80 of the *Constitution* was modelled on Art III, §2, cl 3 of the *Constitution of the United States*, which relevantly provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury". But even those apparently all-encompassing words were not given their literal meaning at the time of the adoption of the *Constitution*: "all crimes" was held to exclude "numerous offenses, commonly described as 'petty', which were tried summarily without a jury"[255].

197 Section 80 was designed to be more constrained. It expressly limits the extent to which a trial by jury is required. One way that it does so is by applying only to a "trial on indictment". It is the Commonwealth Parliament that provides whether an offence is a summary offence or an indictable offence[256]. At the Convention Debates, Mr Isaacs observed that the Commonwealth Parliament

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255 *District of Columbia v Clawans* (1937) 300 US 617 at 624. See also *Natal v Louisiana* (1891) 139 US 621 at 624; *Lawton v Steele* (1894) 152 US 133 at 141-142.

256 See, generally, *Taylor v Attorney-General (Cth)* (2019) 268 CLR 224 at 245-246 [57]-[59], 264 [109], 269-270 [122]-[125].

could provide that "murder was not to be an indictable offence, and therefore the right to try a person accused of murder would not necessarily be by jury"[257].

198 The position of Isaacs J has commanded great support, although it has not been universally accepted. A dissenting view was that of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[258], who reasoned that the essential meaning of an "indictment" needed to be expressed at a high level of generality so that the requirements of s 80 were not rendered illusory. Their Honours considered that the elements of an "indictment" included: (i) the choice by a particular legal authority to proceed to a trial of an offence; and (ii) an offence that was punishable by imprisonment or something more serious. That view did not prevail and leave to re-open *R v Federal Court of Bankruptcy; Ex parte Lowenstein* was later refused[259].

199 In 1985, three members of this Court said in *Kingswell v The Queen* that it was "settled" that s 80 "leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily"[260]. Although that was not a unanimous view[261], when the issue was subsequently reagitated in *Cheng v The Queen*[262] there was again little appetite to depart from the approach of Isaacs J[263]. Gleeson CJ, Gummow and Hayne JJ refused leave to re-open *Kingswell*, and made remarks in support of that decision[264]. McHugh J and Callinan J, writing separately, also rejected the challenge to *Kingswell*. McHugh J

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257 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1895. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 808 §340. And see *R v Bernasconi* (1915) 19 CLR 629 at 637; *Cheng v The Queen* (2000) 203 CLR 248 at 268-269 [53]-[54].

258 (1938) 59 CLR 556 at 581-583.

259 *Sachter v Attorney-General (Cth)* (1954) 94 CLR 86 at 88.

260 (1985) 159 CLR 264 at 277, citing *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128, *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, *Sachter v Attorney-General (Cth)* (1954) 94 CLR 86 at 88, *Zarb v Kennedy* (1968) 121 CLR 283, and *Li Chia Hsing v Rankin* (1978) 141 CLR 182.

261 See especially the dissent of Deane J in *Kingswell v The Queen* (1985) 159 CLR 264 at 298-322.

262 (2000) 203 CLR 248.

263 Compare (2000) 203 CLR 248 at 319-332 [214]-[251] per Kirby J.

264 (2000) 203 CLR 248 at 268-270 [49], [53]-[57].

wrote of his belief in the importance of trial by jury but concluded that to give effect to his own values or beliefs would be to cross the line between constitutional interpretation and constitutional amendment; "[t]he words of s 80 were deliberately and carefully chosen to give the [Commonwealth] Parliament the capacity to avoid trial by jury when it wished to do so"[265]. And although Callinan J expressed "disquiet" about the prospect of leaving it "entirely for the legislature to define what is, and what is not to be an offence charged on indictment", his Honour referred to the "deliberate selection by the framers of the Constitution of the language to be used in s 80 of the Constitution"[266].

200 Another way that s 80 constrains the extent to which trial by jury is required is by providing that the trial is to be by jury for "any offence against any law of the Commonwealth". The interpretative issue concerning the meaning of "any law of the Commonwealth" that Mr Vunilagi raised on this appeal involves similar issues of levels of generality to those arising in the interpretation of "trial on indictment".

201 If the purpose of s 80 were to provide a strong guarantee of trial by jury, rather than a flexible and pragmatic approach ensuring trial by jury of those offences that the Commonwealth Parliament nominated as indictable, then there might be a strong argument that it should not matter whether the offence to be tried was one that was created by a Commonwealth law or whether it was one that was created by the law of a self-governing Territory, the ultimate authority for which was a Commonwealth law. In other words, if the purpose of s 80 were to provide for a robust guarantee, it should not be affected by whether a person was tried for offences under ss 54 and 60 of the *Crimes Act* (or their predecessor provisions) on:

(i) 1 January 1911, when the *Crimes Act 1900* (NSW) was picked up and adopted in the Australian Capital Territory;

(ii) 1 July 1990, when s 34(4) of the Self-Government Act was enlivened with respect to the *Crimes Act 1900* (NSW);

(iii) some date in between 1 July 1990 and 28 May 1992, when any amendments to ss 54 and 60 of the *Crimes Act* might be sufficient to signify adoption of that law by the Legislative Assembly of the Australian Capital Territory; or

(iv) 28 May 1992, being the date of commencement of the *Crimes Legislation (Status and Citation) Act 1992* (ACT), when the *Crimes*

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265 (2000) 203 CLR 248 at 291 [125], 292 [129].

266 (2000) 203 CLR 248 at 344 [283].

Act was adopted by the Legislative Assembly of the Australian Capital Territory.

202 The interpretation of "trial on indictment" that has been adopted by this Court reveals an approach to s 80 that is inconsistent with a purpose of a strong guarantee of trial by jury and instead reflects a more flexible approach to trial by jury. The formal and narrow meaning given by this Court to "indictment", as a chosen form of legal process, leaves to the Commonwealth Parliament the choice of when a trial will require a jury, even at the expense of potentially arbitrary distinctions. The policy of this approach might not appeal to those who see the jury as "the lamp that shows that freedom lives"[267]. It might appeal to those who are concerned with the failure of juries to give reasons[268] or those who see a "more effective administration of justice" without a jury in commercial fraud cases[269]. But the central focus of this Court must be upon principle, not policy. The recognised flexibility in the purpose of s 80 requires that a consistently formal approach be taken to the meaning of a "law of the Commonwealth" in the same way as a formal approach is taken to the meaning of "indictment".

(2) The meaning of a "law of the Commonwealth" in s 80 of the *Constitution*

203 The central issue of interpretation of s 80 of the *Constitution* concerns whether a law passed under the Self-Government Act is a "law of the Commonwealth". Mr Vunilagi submitted that a "law of the Commonwealth" in s 80 is not limited to laws passed by the Commonwealth Parliament or its delegates. He submitted that it includes any law with a statutory source that is either: (i) enacted indirectly under the authority of the Commonwealth Parliament; or (ii) a law of a constituent part of the Commonwealth body politic. In other words, it was submitted that a law passed under the Self-Government Act is a "law of the Commonwealth" under either of these limbs. If this submission were accepted, then every law of the Legislative Assembly of the Australian Capital Territory would be a law of the Commonwealth.

204 This submission, however, is inconsistent with the formal approach to the interpretation of s 80. Consistently with the formal approach taken to the meaning of "trial on indictment" in s 80, a "law of the Commonwealth", properly understood, means a law that is an enactment of the Commonwealth Parliament or its delegate (as delegated legislation)[270]. The formal approach to s 80 denies that a

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267 Devlin, *Trial by Jury* (1956) at 164.

268 See *Taxquet v Belgium* (2012) 54 EHRR 26.

269 *Cheng v The Queen* (2000) 203 CLR 248 at 270 [57].

270 See also *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 397 [25].

law passed by a Parliament of a Territory, whether in the seat of government or not, is a law of the Commonwealth. Such a law is not a law passed by the Commonwealth Parliament or its delegate. Nevertheless, just as the Commonwealth Parliament has the power to choose whether s 80 applies to an offence by making it indictable, so too the Commonwealth Parliament retains the power to make s 80 apply to an offence created by the Parliament of a Territory by "overriding" an enactment of the Territory and passing a "new law" under s 122 for a Territory creating any indictable offence, with the effect that the offence would be one of the Commonwealth and would therefore be required to be tried by jury[271].

205 The Self-Government Act was not a delegation by the Commonwealth Parliament of its legislative power under s 122, which would have had the effect that laws passed under the Self-Government Act constituted the exercise of delegated power. Rather, the Self-Government Act, enacted by the Commonwealth Parliament in reliance upon s 122, created a new source of power for the government of the Australian Capital Territory. As Mason CJ, Deane, Dawson and McHugh JJ said in *Svikart v Stewart*[272], the legislature of a self-governing Territory "must be regarded as a body separate from the Commonwealth Parliament, so that the exercise of its legislative power, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power". As the Solicitor-General for the Northern Territory accepted, the power exercised by the Legislative Assembly under the Self-Government Act is subordinate power, but it is not delegated power.

206 Mr Vunilagi relied upon the reasoning of Kitto J in *Lamshed v Lake*[273] that "the entire legal situation of the territory, both internally and in relation to all parts of the Commonwealth, may be determined by or by the authority of Parliament". This reasoning can be accepted. It may arguably mean that since a Commonwealth law, the Self-Government Act, is the ultimate source of authority for the power to pass laws under that Act, a matter that arises under the Self-Government Act is "under" a law of the Commonwealth Parliament for the purposes of s 76(ii) of the *Constitution*. But it does not mean that a law passed with the authority of the Self-

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271 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 283.

272 (1994) 181 CLR 548 at 561-562, citing *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 279, 289, 290; see also at 283. See also *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 353 [80].

273 (1958) 99 CLR 132 at 154.

Government Act is formally a "law of the Commonwealth" within the meaning of s 80.

207 This formal approach to the meaning of a "law of the Commonwealth" in s 80 ensures a consistent and coherent approach throughout the *Constitution*. It conforms with the conception of a law of the Commonwealth in ss 61, 109 and 120 of the *Constitution*. For instance, s 109 preserves the paramountcy of policy choices made by the Commonwealth Parliament by ensuring that State laws are inoperative to the extent that they are inconsistent with laws passed by the Commonwealth Parliament. But it does not confer the same paramountcy upon the policy choices of a Parliament of a Territory: the same State laws are not inoperative to the extent that they are inconsistent with the laws of the Parliament of a Territory.

208 The formal approach to s 80 also aligns with the approach taken by a majority of this Court to the expression "power of the Parliament" in s 90. In *Capital Duplicators Pty Ltd v Australian Capital Territory*[274], a majority of this Court held that the exercise of power by the Legislative Assembly of the Australian Capital Territory was by "its own legislative powers concurrent with, and of the same nature as, the powers of the [Commonwealth] Parliament".

(3) Are ss 54 and 60 of the *Crimes Act* "law[s] of the Commonwealth"?

209 The final issue in relation to the interpretation and application of s 80 concerns whether, at the time Mr Vunilagi was tried, ss 54 and 60 of the *Crimes Act* were laws of the Commonwealth within the formal meaning of that expression. Mr Vunilagi submitted that ss 54 and 60 were offences against laws of the Commonwealth, such that the requirement for a trial by jury in s 80 applied. That submission is correct in relation to the predecessor provisions to ss 54 and 60. But, for the reasons below, by 28 May 1992 at the latest, and therefore long before Mr Vunilagi was tried, ss 54 and 60 of the *Crimes Act* were laws of the Legislative Assembly of the Australian Capital Territory. They were not laws of the Commonwealth.

210 The *Crimes Act 1900* (NSW) contained offences for rape and indecent assault. Upon the establishment of the Australian Capital Territory on 1 January 1911, the *Seat of Government Acceptance Act 1909* (Cth) continued the *Crimes Act 1900* (NSW) in force[275], while the *Seat of Government*

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274 (1992) 177 CLR 248 at 283. See also at 284.

275 *Seat of Government Acceptance Act 1909* (Cth), s 6.

(Administration) Act 1910 (Cth)[276] gave it effect "as if it were a law of the Territory".

211 The offences under ss 54 and 60 for which Mr Vunilagi was tried and convicted were inserted into the *Crimes Act* on 28 November 1985, by the *Crimes (Amendment) Ordinance (No 5) 1985* (ACT), as ss 92D and 92J respectively.

212 In 1989, by the power in s 122 of the *Constitution*, the Self-Government Act — of the Commonwealth Parliament — established the Legislative Assembly of the Australian Capital Territory[277] and gave the Legislative Assembly the "power to make laws for the peace, order and good government of the Territory"[278]. Section 3 of the Self-Government Act defined an "enactment" as "(a) a law (however described or entitled) made by the Assembly under this Act; or (b) a law, or part of a law, that is an enactment because of section 34". Section 34, entitled "[c]ertain laws converted into enactments", contained various deeming provisions which deemed certain laws to be enactments. Relevantly, s 34(4) provided that:

> "A law (other than a law of the Commonwealth) that, immediately before the commencing day:
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> (a) was in force in the Territory; and
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> (b) was an Ordinance, an Act of the Parliament of New South Wales or an Imperial Act;
>
> shall be taken to be an enactment, and may be amended or repealed accordingly."

213 Section 34(5) provided that "[s]ubsection (4) does not apply to a law specified in Schedule 3". The *Crimes Act 1900* (NSW) was listed in Sch 3 to that Act with the effect that s 34(4) did not apply to it. But, on 1 July 1990, the *Crimes Act 1900* (NSW) was removed from Sch 3 to the Self-Government Act[279]. This meant that from 1 July 1990 s 34(4) of the Self-Government Act operated with respect to the *Crimes Act 1900* (NSW) as it applied in the Territory.

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276 *Seat of Government (Administration) Act 1910* (Cth), s 4.

277 Self-Government Act, s 8. See also *Commonwealth of Australia Gazette*, S374, 7 December 1988.

278 Self-Government Act, s 22. See also *Commonwealth of Australia Gazette*, S164, 10 May 1989.

279 *ACT Self-Government (Consequential Provisions) Act 1988* (Cth), s 12.

214 The operation of s 34(4) of the Self-Government Act by which the *Crimes Act* was "taken to be an enactment" involves a legal fiction. The reason that the Commonwealth Parliament needed to deem, by legal fiction, the *Crimes Act* to be an enactment of the Legislative Assembly of the Australian Capital Territory is that it was not, in fact, an enactment of the Legislative Assembly made pursuant to the power in s 22 of the Self-Government Act. Instead, the *Crimes Act* was a law of the Commonwealth Parliament, operating by the *Seat of Government (Administration) Act* giving the *Crimes Act* effect as a law of the Territory.

215 The Commonwealth Parliament cannot avoid the constitutional characterisation of its law by deeming it to be legislation of a subordinate polity. Constitutional interpretation does not work like that[280]. Contrary to the submissions of the Attorney-General of the Australian Capital Territory (the second respondent) and the Attorney-General of the Commonwealth, the relevant provisions did not become laws of the Legislative Assembly of the Australian Capital Territory on 1 July 1990 merely by virtue of the deeming provision in s 34(4) of the Self-Government Act[281].

216 Subsequent to 1 July 1990, the Legislative Assembly of the Australian Capital Territory made various amendments to the provisions of the *Crimes Act*, including those for which Mr Vunilagi was tried. Relevantly, in 2001, ss 92D and 92J of the *Crimes Act* were re-numbered as ss 54 and 60[282]. In 2008, the fault element necessary to prove the offence in s 54 was clarified[283]. In 2011, the element of recklessness in s 60 was amended[284]. Also in 2011, the penalties for a contravention of s 60 were increased[285]. In 2013, the definition of sexual

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280 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

281 See also *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 351 [75].

282 *Crimes Legislation Amendment Act 2001* (ACT), s 43 (commenced 27 September 2001).

283 *Justice and Community Safety Legislation Amendment Act 2008 (No 3)* (ACT), s 3 and Sch 1 [1.11]-[1.13] (commenced 27 August 2008).

284 *Crimes Legislation Amendment Act 2011* (ACT), ss 5-7 (commenced 17 March 2011).

285 *Criminal Proceedings Legislation Amendment Act 2011* (ACT), ss 4-5 (commenced 7 July 2011).

intercourse in s 50 of the *Crimes Act* was expanded, altering the physical element of the offence of sexual intercourse without consent under s 54[286].

217 It is arguable that a law of the Commonwealth Parliament does not become a law of the Legislative Assembly of the Australian Capital Territory merely because the Legislative Assembly makes some minor amendments to it which do not change the law's essential substance, and which are not sufficient to constitute adoption of the law. But even on this view, it must be the case that, at some point, amendments by the Legislative Assembly to a Commonwealth law would be so substantial that, unlike the ship of Theseus, it would be impossible to characterise the formal nature of the law as a Commonwealth law[287]. Fascinating as these issues may be, it is unnecessary to explore them further. This is because an earlier law of the Legislative Assembly of the Australian Capital Territory adopted the *Crimes Act* as a law of the Australian Capital Territory.

218 Section 3(1) of the *Crimes Legislation (Status and Citation) Act 1992* (ACT) provided that the *Crimes Act 1900* (NSW) "shall be taken to be, for all purposes, a law made by the Legislative Assembly as if the provisions of [that] Act had been re-enacted in an Act passed by the [Legislative] Assembly". The result was that from 28 May 1992, being the date of commencement of that Act, the *Crimes Act 1900* (ACT) was adopted by the Legislative Assembly and thus became a law of the Territory. As the *Statute Law Amendment Act 2001 (No 2)* (ACT)[288] relevantly provided in an explanatory note, "[t]he *Crimes Act 1900* became an Act of the Legislative Assembly because of the *Crimes Legislation (Status and Citation) Act 1992*".

219 In 2020, Mr Vunilagi was therefore tried for offences against a law of the Australian Capital Territory. He was not tried for offences against a law of the Commonwealth. The terms of s 80 of the *Constitution* did not apply to his trial.

Conclusion and consequences

220 Leave to re-open the reasoning in *R v Bernasconi* should be granted. Irrespective of the correctness of the result in that case[289], this Court should reject

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286 *Crimes Legislation Amendment Act 2013* (ACT), ss 5-7 (commenced 24 April 2013).

287 See, eg, *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 353 [81].

288 *Statute Law Amendment Act 2001 (No 2)* (ACT), Sch 2 [2.77] (commenced on 5 September 2001).

289 See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 71 [55], 74 [65], 86-87 [100], 101-106 [153]-[167].

the reasoning: (i) that s 122 sits outside Ch III of the *Constitution*, and (ii) that any negative implication is contained in Ch III or in s 80 to immunise s 122 from the operation of Ch III or s 80.

221 As to the result in *R v Bernasconi*, the Attorneys-General of the Commonwealth, the Australian Capital Territory and the Northern Territory all submitted that the consequences of overturning the result could be extreme. They pointed to legislation that, for many decades, has provided for judge alone trials on indictment in inhabited and uninhabited Territories, and legislation permitting majority verdicts in the Northern Territory[290]. That submission appeared to present this Court with a choice between, on the one hand, maintaining a decision that is manifestly wrong as a matter of both principle and the stream of authority and precedent and, on the other hand, facing extreme consequences if the result were to be overturned.

222 Ultimately, however, this appeal does not present such a choice. In the Australian Capital Territory, convictions from judge alone trials have been supported for more than three decades by laws passed under self-government legislation[291]. And the Northern Territory obtained self-government in 1978[292]. Most of the consequences of overturning the result in *R v Bernasconi* to which reference was made do not arise because, as a matter of the interpretation of s 80 of the *Constitution*, provisions such as ss 54 and 60 of the *Crimes Act* would not have fallen within the terms of s 80 because they are not laws of the Commonwealth.

223 The conclusion that, as a matter of the interpretation of s 80 of the *Constitution*, ss 54 and 60 of the *Crimes Act* have not been laws of the Commonwealth for decades concerns the smaller issue of interpretation that was raised, but not decided, in *R v Bernasconi*. It is not necessary to consider whether a similar application could re-explain the result in *R v Bernasconi*, which would have the effect that the result in *R v Bernasconi* would not be overruled. The application of this smaller issue of interpretation to the facts of *R v Bernasconi* would require a close analysis of the nature of the offence provision under which Mr Bernasconi was convicted[293], adopted as law in the Territory of Papua by the *Criminal Code Ordinance of 1902* (No 7 of 1902) (British New Guinea), and a consideration of whether the continuance of that Ordinance by the *Papua Act 1905* (Cth) had the effect that Mr Bernasconi was tried for an offence against a law

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290 *Criminal Code* (NT), s 368. See also *Cheatle v The Queen* (1993) 177 CLR 541.

291 Self-Government Act, s 22.

292 *Northern Territory (Self-Government) Act 1978* (Cth), s 6.

293 *Criminal Code* (Qld), s 339.

of the Commonwealth. It may be that such an issue is only a matter of historical interest.

224 The appeal should be dismissed.