HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C7 of 2020

BETWEEN:

UD
Applicant

10

and

The Queen
Respondent

SUBMISSIONS FOR THE APPLICANT

20

Filed for the Applicant on 11 May 2020
John Boersig
Chief Executive Officer
Legal Aid ACT
2 Allsop Street
Canberra ACT 2601

Telephone: (02) 6243 3407
Facsimile: (02) 6243 3444
Email: criminal@legalaidact.org.au
Reference: 20C345944
Solicitor: Taden Kelliher

PART I: PUBLICATION OF SUBMISSIONS

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

PART II: STATEMENT OF ISSUES

2. The questions stated for the opinion of the Full Court [CRB 66], and the answers contended for by the applicant, are:

Question 1: Is s 68BA of the *Supreme Court Act 1933* (ACT) invalid by reason of its incompatibility with the constitutional limitation deriving from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?

Answer: yes.

Question 2: Is s 68BA of the *Supreme Court Act 1933* (ACT) beyond the power of the Legislative Assembly for the Australian Capital Territory under s 22 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) and/or by reason of s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth)?

Answer: yes.

Question 3: Is s 68BA of the *Supreme Court Act 1933* (ACT) invalid by reason of s 80 of the Constitution?

Answer: yes.

PART III: SECTION 78B NOTICES

3. The applicant has filed and served notices under s 78B of the *Judiciary Act 1903* (Cth) in the form approved by the Court [CRB 69-71].

PART IV: REASONS FOR JUDGMENT BELOW

4. This proceeding involves questions reserved for the opinion of the Full Court in part of a cause removed from a proceeding in the Supreme Court of the Australian Capital Territory identified as *The Queen v UD* on Indictment SCC 282 of 2019 [CRB 6-8]. The part removed concerns the validity of s 68BA of the *Supreme Court Act 1933* (ACT). The removal order is at [CRB 64]. The reasons of the trial judge for the proposed order under s 68BA are reported in *R v UD (No 2)* [2020] ACTSC 90 [CRB 48-61].

PART V: MATERIAL FACTS

5. The material facts are set out in the reasons for judgment of the trial judge in support of the proposed s 68BA order [CRB 49-51].

PART VI: OUTLINE OF ARGUMENT

QUESTION 1 – *KABLE* REPUGNANCY

6. Section 68BA of the *Supreme Court Act 1933* (ACT) ('**the *Supreme Court Act***') is invalid by reason of its incompatibility with the constitutional limitation deriving from *Kable v Director of Public*

Prosecutions (NSW).[1] In *Attorney-General (NT) v Emmerson*[2] six members of the High Court stated the *Kable* limitation in the following way:

> The principle for which *Kable* stands 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.

7. The validity of laws passed by the Legislative Assembly for the Australian Capital Territory ('**the Assembly**') is subject to the *Kable* limitation.[3] The Assembly's enactments will substantially impair a court's institutional integrity if they undermine its independence and impartiality by enlisting the court to implement a legislative policy,[4] or by requiring the court 'to depart, to a significant degree, from the processes which characterise the exercise of judicial power'.[5]

SECTION 68BA – AN EXERCISE IN STATUTORY CONSTRUCTION

8. Before the enactment of the *COVID-19 Emergency Response Act 2020* (ACT) (**'the *Emergency Response Act*'**), s 68B of the *Supreme Court Act* allowed a person facing criminal prosecution in the Supreme Court to elect to be tried by judge alone. The *Emergency Response Act* re-cast s 68B – retaining an accused person's right to elect trial by judge alone – and introduced a new s 68BA.[6]
9. The process for making an order under s 68BA is initiated by the Court under s 68BA(4). The Court gives written notice to the parties of its proposed order to hold a trial by judge alone and invites the parties to make submissions. The Court need not give reasons for selecting an accused person's trial as a *prima facie* appropriate vehicle for an order under s 68BA.
10. In determining whether to order a trial by judge alone, the Court exercises a discretion under sub-s (3) of s 68BA. Sub-s (3) reads:

> 'The court may order that the proceeding will be tried by judge alone if satisfied the order –

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1 (1996) 189 CLR 51 ('*Kable*').

2 (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Emmerson*'). See also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236, 1251 [55] (Bell, Keane, Nettle and Edelman JJ) ('*Vella*'); *Kuczborski v Queensland* (2014) 254 CLR 51, 98 [139] (Crennan, Kiefel, Gageler and Keane JJ) ('*Kuczborski*').

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

4 *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J); 88 [226] (Hayne J), 173 [481] (Kiefel J) ('*Totani*'); *Kuczborski* (2014) 254 CLR 51, 98 [140] (Crennan, Kiefel, Gageler and Keane JJ).

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

6 By Practice Direction 1 of 2020, dated 7 April 2020, the Supreme Court directed that 'jury trials will not proceed until further notice' (at [23]). That Practice Direction replaced an earlier Practice Direction 1 of 2020, dated 23 March 2020, which had directed that jury trials would proceed subject to social distancing requirements and that only two jury trials could proceed concurrently.

(a) will ensure the orderly and expeditious discharge of the business of the court; and

(b) is otherwise in the interests of justice.'

11. Section 68BA(5) defines '***COVID-19 emergency period***' to mean the period beginning 16 March 2020 and ending either on 31 December 2020 or, if another day is prescribed by regulation – the prescribed day. Sub-s (6) of s 68BA states that s 68BA expires '12 months after' the day on which s 4 of the *Emergency Response Act* commenced (8 April 2020).

12. The evident purpose of the provision is to address delays to the administration of justice created by COVID-19. The Explanatory Statement to the Bill stated:

> Without these amendments, it is anticipated that trials in certain matters will be delayed for up to 12 months in addition to any normal listing timeframes.[7] … The amendment is required during a time of emergency to allow the effective administration of justice to continue, without placing members of a jury at unnecessary risk. It also means that trials of serious matters will not be delayed until after the emergency.[8] … The reason this amendment is urgent is to ensure that serious criminal matters are not unnecessarily delayed due to COVID-19 distancing measures.[9]

13. The Debate on the Bill in the Assembly reveals the same objective:

> In the current situation, where it is clearly more than likely that jury trials will be unable to proceed for some time, not only here in the ACT but right across Australia, these amendments will allow trials to continue to be heard without placing members of a jury, the court, the staff of the courts or the legal profession at unnecessary risk.[10]

14. The Explanatory Statement and Hansard reveal a legislative judgment that, without additional measures being taken, COVID-19 will result in the delay of *all* Supreme Court trials by jury. Minimising the risk of transmission requires *inter alia* physical distancing, and it is clear that the Assembly determined that *no* trial can proceed in the short term before judge and jury because of physical distancing measures. Without s 68BA, the only option available to address the risk of transmission is to delay jury trials until after the health emergency. Thus, the principal objective of s 68BA is to alleviate the impact of delay on the administration of justice by giving the Court the power to hear criminal trials by judge alone, even when the accused is opposed to it.

15. It is against that background that the legislative history and text are all-but silent on what circumstances justify the Court's choice of trial by judge alone, over trial by judge *and* jury, albeit after a period of some delay. Put another way, and rhetorically, what are the conditions – beyond expedition – necessitating satisfaction for the exercise of the newly enacted jurisdiction?

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7 Explanatory Statement, COVID-19 Emergency Response Bill 2020 (ACT) 18.
8 Ibid 19.
9 Ibid 40.
10 Australian Capital Territory, *Legislative Assembly Debates*, 2 April 2020, 797-8 (Mr Ramsay, Attorney-General).

16. The statutory criteria themselves, it is submitted, are without meaningful substance.

17. First, s 68BA(3)(a) will be readily satisfied in all cases during the *COVID-19 emergency period.* Because the alternative to a judge alone trial is a trial by jury *occasioning some delay*, an order under s 68BA will necessarily satisfy paragraph (a) of s 68BA(3). Section 68BA(3)(a) is self-referential. In the words of the trial judge in the Court below: 'subsection 3(a) recognises an assumption that the business of the Court should continue during the emergency period.'[11]

18. Second, the statutory condition the subject of s 68BA(3)(b) is devoid of meaningful content. While 'the interests of justice' is a familiar statutory standard, in its immediate context its operation is subsumed by the statutory condition in paragraph (a). It leads invariably and inevitably to an order for trial by judge alone. Put another way, absent the COVID-19 emergency, it would not be – and would never be – in the interests of justice to force an accused person to submit to trial without a jury. Put another way again, the delay in jury trials caused by COVID-19 is sufficient, without more, to justify the making of an order for trial by judge alone.

19. Under s 68BA(3), a trial judge is unable to make an assessment, on a case by case basis, between those considerations which ordinarily might have favoured a trial by jury without delay, and those that under s 68BA(3) favour trial by judge alone. The legislature has made the global judgment that no jury trials can proceed until after the COVID-19 emergency period. One is left – in exercising the Court's discretion under s 68BA(3) – with a choice between an expedited trial by judge alone, and an order for trial by jury commencing after the COVID-19 emergency period has expired: a date set by the legislature or the executive.

20. The applicant contends that, construed correctly, during the COVID-19 emergency period, the 'interests of justice' in sub-s (3)(b) will weigh in all cases in favour of trials by judge alone. So much was acknowledged by the trial judge in the Court below:

> Each and every aspect of daily life is now dictated by the emergency. This means that the emergency enables the imposition of the laws and regulations previously not contemplated.[12] … If it is in the interests of justice that criminal trials should continue then they must continue within the constraints imposed by the public health emergency.[13]

21. So much may also have led to the gloss given to the statutory text by the trial judge:

> If the only means of achieving this end [that criminal trials should continue] is through judge alone trials, then, subject to unique factors in individual cases, judge alone trials should be ordered. The only caveat to this should be that a judge alone trial that would not enable an accused person to have a fair trial should not be ordered.

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11 *R v UD (No 2)* [2020] ACTSC 90, [18] [CRB 52]. The trial judge described condition (a) as 'essentially self-explanatory', (*R v UD (No 2)* [2020] ACTSC 90, [10] [CRB 51]), without detailed consideration of its application.

12 *R v UD (No 2)* [2020] ACTSC 90, [29] [CRB 53].

13 Ibid [30] [CRB 53].

22. Elkaim J held that while 'the wishes of the accused may be a relevant factor' under the new amendment, 'they no longer dictate the outcome.' The 'determinative factor' in whether it is in the interests of justice to make an order is whether the trial by judge alone 'can be fair'.[14] 'A criminal justice system must continue notwithstanding that other areas of society have come to a standstill. If an accused's trial can be a fair trial, then the proposed order should be made.'[15]

23. It is evident that his Honour concluded that, to give effect to the legislative intent, s 68BA(3)(b) would be routinely satisfied except where a trial by judge alone would give rise to unfairness. Two important consequences follow. First, this gloss on the text of s 68BA(3) sets the threshold to satisfy sub-s (3)(b) at a very low level. It would be an exceptional case indeed where a trial by judge alone would produce material unfairness. Secondly, that legislative gloss merely anticipates the Supreme Court's inherent jurisdiction to prevent an unfair trial.[16] These consequences reinforce in the clearest terms that the standard the subject of sub-s (3)(b) imposes no real standard at all – no meaningful constraint on the scope of s 68BA(3) and its operation.

24. True it is that the trial judge recognised that '[t]here will be cases where an accused will establish that his or her trial is only suited to a determination by a jury.'[17] But the proposition that some issues are '*only* suited to a determination by a jury' is self-evidently misconceived[18] and, thus, cannot serve as a criterion for the operation of s 68BA(3)(b).

THE IMPLICATIONS OF *KABLE* FOR SECTION 68BA

25. The Court's exercise of power under s 68BA is incompatible with its institutional integrity. Its incompatibility is manifest in at least three respects. First, it is the *process* by which an order is made under s 68BA that contravenes the *Kable* limitation. Second, it is the *criteria* that are applied by the Court in exercising the power that render the section relevantly repugnant. Third, the transformative *impact* of the exercise of power – on the mode of trial in the Supreme Court – renders it plain that the *Kable* limitation has been contravened.

26. <u>*Process*</u>: In aterial respects, the process underpinning an exercise of s 68BA contains fundamental departures from the adversarial and accusatorial[19] nature of criminal proceedings.

    (a) Section 68BA authorises a court to *propose* its making of an order under s 68BA(4) and then *to make* the order under s 68BA(3). The process is atypical of the adversarial and accusatorial nature of criminal proceedings where discretions are exercised by courts upon application by an accused, a prosecuting authority, or both; not at the instigation of the court itself.[20]

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14 Ibid [42] [CRB 57].
15 Ibid [54] [CRB 58]. See also *R v BD (No 1) (Judge alone application)* [2020] NSWDC 150, [32], [39]-[42].
16 See, eg, *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 107-8 [187]-[188] (French CJ), 115 [212] (Gageler J); *Jago v District Court (NSW)* (1989) 168 CLR 23; *Walton v Gardiner* (1993) 177 CLR 378.
17 *R v UD (No 2)* [2020] ACTSC 90, [74] [CRB 61].
18 *Redman v The Queen* [2015] NSWCCA 110, [17].
19 *Emmerson* (2014) 253 CLR 393, 432-3 [63] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
20 Cf the discretions characteristic of executive decision-making to institute criminal prosecutions and other proceedings: see *Emmerson* (2014) 253 CLR 393, 432 [61] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Cf also the position in

(b) The decision to issue notices under s 68BA(4) is left entirely to the discretion of individual judges. On its face, the power to give notice is unfettered and absolute. It represents an affront to the precept of equal justice. Criminal justice processes are typically characterised by equality of treatment[21] and an open and public inquiry,[22] not by processes that are opaque and are incapable of prediction.[23]

(c) The basis upon which a judge decides to give notice is unknown to the parties. And yet, the parties are expected to make submissions to the Court on its proposed orders,[24] with the onus on the parties to present evidence addressing the criteria upon which those orders purport to be made.[25] An order for trial by judge alone may be made despite the joint opposition of the accused and the prosecutor.

(d) Section 68BA applies retrospectively to prosecutions on foot when the provision took effect.[26]

27. *Criteria*: This Court has recognised that the *Kable* limitation can be contravened if the criteria conditioning the exercise of a court's power are incapable of judicial application.[27] The statutory criteria in s 68BA(3) impose no meaningful constraints on the jurisdiction to order a trial by judge alone. The result is that the outcome of applying s 68BA(3)(a) and (b) is predetermined by the judgment made by the Assembly that trials must *and will* continue for the duration of the COVID-19 emergency period.

28. *Impact on mode of trial*: An order under s 68BA(3) results in a fundamental change to the way in which criminal justice is administered in the Supreme Court. As Gleeson CJ, Gummow and Hayne JJ said in *Cheung v The Queen*,[28] '[w]hen an accused person is tried upon indictment before a judge and jury, the role of the jury is to decide whether the accused is guilty or not guilty of the charge or charges laid in the indictment. … If the accused is found guilty, then it is the responsibility of the judge to determine the appropriate sentence'. The respective and separate roles of the judge and jury is a fundamental tenet

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New South Wales where an order for a judge alone trial can be initiated by the Court, but not made without the consent of the accused: *Criminal Procedure Act 1986* (NSW) s 365.

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

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

23 *Wainohu v New South Wales* (2011) 243 CLR 181, 219-20 [69]-[70] (French CJ and Kiefel J), 228-30 [104]-[109] (Gummow, Hayne, Crennan and Bell JJ); *NAAJA v NT* (2015) 256 CLR 569, 593-595 [39] (French CJ, Kiefel and Bell JJ).

24 A characteristic of the judicial process is the presentation of evidence by an adversary and the opportunity for challenge: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

25 *R v UD (No 2)* [2020] ACTSC 90, [49] (Elkaim J) [CRB 58]. While it has been accepted that the onus of proof in a criminal prosecution can be placed on the accused (see *Nicholas v The Queen* (1998) 193 CLR 173, 190 [24] (Brennan CJ), 236 [154] (Gummow J); *Kuczborski* (2014) 254 CLR 51, 122-3 [240]-[245] (Crennan, Kiefel, Gageler and Keane JJ)), there is no reversal of the burden here. The onus is placed on both parties to disprove the application of the statutory criteria if an order is to be resisted.

26 Legislation affecting pending criminal proceedings will raise 'different considerations' to, and may be expected to be scrutinised more carefully than, legislation affecting other types of civil proceedings: *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562-3 [15]-[18] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

27 *Hogan v Hinch* (2011) 243 CLR 506, 551 [80] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

28 (2001) 209 CLR 1, 9 [4] (Gleeson CJ, Gummow and Hayne JJ).

of the administration of criminal justice in the Supreme Court. A jury trial may be waived by an accused. That is a statutory right an accused is free to exercise. Measures requiring judge alone trials by compulsion go the other way and go too far: they are repugnant. While trials by judge alone on indictment are not novel, the imposition of that mode of criminal trial *at the instigation*, and *by order* of the Supreme Court, and *without the consent of the accused* (or, indeed, the prosecutor) is an unprecedented and unacceptable departure from the essential features of a criminal trial and the administration of criminal justice in this country.

29. In *Cheng v The Queen*,[29] Gaudron J said of the central role played by the jury in upholding the rule of law:

> Trial by jury is so deeply embedded in our judicial process that its importance in protecting the liberty of the individual from oppression and injustice needs no elaboration. However, what is not generally recognised is its importance to the rule of law and, ultimately, the judicial process and the judiciary itself. Respect for the rule of law and, ultimately, the judicial process and the judiciary is enhanced if the determination of criminal guilt is left in the hands of ordinary citizens who are part of the community, rather than in the hands of judges who are perceived to be and sometimes, are 'remote from the affairs and concerns of ordinary people'. The participation of the people of this country in the exercise of judicial power, through their service on juries, provides a basis for community acceptance of verdicts in criminal trials and, more broadly, an understanding of the judicial process.

30. Citing this same passage, Kiefel, Bell and Keane JJ in *Alqudsi v The Queen*[30] added that the 'verdict of the jury has unique legitimacy'; it 'protects the courts from controversy and secures community support for, and trust in, the administration of criminal justice.'[31]

31. Section 68BA authorises the Supreme Court to arrogate the traditional role of the jury, thereby undermining the very objective of dividing the power of adjudication between the judge and jury.

32. The *process* and *criteria* for making an order under s 68BA, and its *effect*, operate, it is submitted, to enlist the Supreme Court to achieve the Assembly's policy to have no jury trials for the duration of the COVID-19 emergency period. The Assembly cannot borrow the reputation of the judiciary to cloak '[its] work in the neutral colors of judicial action.'[32] Section 68BA departs, to a significant and unacceptable degree, from the processes which characterise the exercise of judicial power in criminal trials, and undermines the institutional integrity of the Supreme Court.

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29 (2000) 203 CLR 248, 277-8 [80]-[81], quoting in part from *Kingswell v The Queen* (1985) 159 CLR 264, 301 (Deane J).

30 (2016) 258 CLR 203, 251 [117] ('*Alqudsi*').

31 See also *Kingswell v The Queen* (1985) 159 CLR 264, 298-299, 301 (Deane J); *Brown v The Queen* (1986) 160 CLR 171, 201-2 (Deane J), 216 (Dawson J) ('*Brown*'); *Alqudsi* (2016) 258 CLR 203, 257-258 [135]-[138] (Gageler J).

32 *Mistretta v United States*, 488 US 361, 407 (1989), quoted in *Kable* (1996) 189 CLR 51, 133 (Gummow J); *Emmerson* (2014) 253 CLR 393, 425 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See also *Kuczborski* (2014) 254 CLR 51, 119 [228] (Crennan, Kiefel, Gageler and Keane JJ).

QUESTION 2 – BEYOND THE SCOPE OF LEGISLATIVE POWER

33. Section 68BA of the *Supreme Court Act* is, it is submitted, beyond the power of the Assembly under s 22 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ('**the *Self-Government Act***') and/or by reason of s 48A of that Act.

34. The applicant's claim arises as a consequence of one or other of the following contentions:

    (a) The reference to 'Supreme Court' in s 48A is to be taken as having adopted the constitutional conception of 'Supreme Court', as used in Chapter III of the Constitution, that precludes, it is submitted, the trial of an accused person for an indictable offence except than by judge and jury, unless the accused elects or consents to trial by judge alone (**primary submission on question 2**).

    (b) Section 22 of the of the *Self-Government Act* was not intended to confer authority on the Assembly to authorise trial on indictment by judge alone without the consent of the accused. So much is in part a product of the necessary entrenchment in s 48A of the Supreme Court's defining characteristics (**alternative submission on question 2**).

THE STATUTORY PATHWAY TO INVALIDITY

35. The Supreme Court of the Australian Capital Territory was established by s 6(1) of the *Seat of Government Supreme Court Act 1933* (Cth) ('**the *Seat of Government Act***'). The *Australian Capital Territory (Self-Government) Act* 1988 ('**the *Self-Government Act***') established the Australian Capital Territory as a body politic under the Crown by the name of the Australian Capital Territory (s 7), and the Legislative Assembly for the Australian Capital Territory (s 8). The *Self-Government Act* vested power in the Assembly to make laws for the peace, order and good government of the Territory (s 22).

36. Upon its establishment, the Assembly was denied 'the power to make laws with respect to … the establishment of courts' (*Self-Government Act*, s 23(1)(b)), and the Supreme Court remained a creature of the Commonwealth under the renamed *Australian Capital Territory Supreme Court Act 1933* (Cth) ('**the *ACT Supreme Court Act***').[33] Section 34(2) of the *Self-Government Act* provided that 'A law specified in Schedule 2 shall be taken to be an enactment, and may be amended or repealed accordingly.' The *ACT Supreme Court Act 1933* was included in Schedule 2. However, s 34(3) of the *Self-Government Act* provided that s 34(2) did not apply to the *ACT Supreme Court Act*. Thus, and upon self-government in 1988, the Assembly had no power to amend that Act.

37. The *ACT Supreme Court (Transfer) Act 1992* (Cth) ('**the *Transfer Act***') amended the *Self-Government Act* in the following material ways:

    (c) Section 22 of the *Self-Government Act* was amended to make it subject to 'Part VA'.

[33] The renaming of the Act was effected by the *Statute Law Revision Act 1950* (Cth) s 4.

(d) Section 23 was amended to remove the exclusion of power to make laws with respect to the establishment of courts (s 23(1)(b)).

(e) Section 23(3) was omitted, thereby enabling the Assembly to amend the *ACT Supreme Court Act* as a Territory enactment.

(f) Part VA, which included s 48A, was inserted.

38. Section 48A remains in force in its original form.

39. Section 22(1) of the *Self-Government Act* provides:

> 'Subject to this Part and Part VA, the Assembly has power to make laws for the peace, order and good government of the Territory.'

10 40. Part VA is entitled 'The Judiciary'. Within it, s 48A relevantly provides:

> (1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.
>
> (2) In addition, the Supreme Court may have such further jurisdiction as is conferred on it by any Act, enactment or Ordinance, or any law made under any Act, enactment or Ordinance. …

41. 'Supreme Court' is defined to mean 'the Supreme Court of the Territory existing under the *Supreme Court Act 1933* of the Territory' (s 3). While the *ACT Supreme Court Act* remained in force upon the commencement of the *Transfer Act*, and continues to remain in force, the *Supreme Court Act* is a Territory law that is now within the authority of the Assembly.

42. Any inconsistency between the laws of the Commonwealth – including the provisions of the *Self-*
20 *Government Act* itself – and an offending enactment by the Assembly is governed by s 28 of *the Self-Government Act*. Section 28(1) provides:

> A provision of an enactment has no effect to the extent that it is inconsistent with a law defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.

43. Thus, enactments of the Assembly which are inconsistent with provisions in Part VA of the *Self-Government Act* are to have no effect. In the words of Gummow and Hayne JJ in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*,[34] 'the effect of Pt VA is to establish in advance legislative provisions which, by operation of s 28 of the *Self-Government Act*, would prevail over any inconsistent legislation enacted by the Assembly.'

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[34] (1999) 200 CLR 322, 351 [77] ('*Eastman*').

THE SUPREME COURT'S PLACE IN THE FEDERAL JUDICIAL SYSTEM

44. This Court has accepted that the Parliament can vest federal jurisdiction in Territory courts.[35] Section 122 of the Constitution is the likely source of that power.[36] Appeals from the Supreme Court to the High Court are authorised by s 73(ii) of the Constitution in cases where the Supreme Court exercises federal jurisdiction;[37] they are otherwise authorised by s 35AA of the *Judiciary Act 1903* (Cth) enacted pursuant to s 122 of the Constitution.[38]

THE ASSEMBLY CANNOT ABOLISH THE SUPREME COURT

45. In *Eastman*,[39] Gummow and Hayne JJ held that '[i]t is implicit in s 48A that there must continue to be a Supreme Court.'[40] That Commonwealth provision vests jurisdiction in the Supreme Court. Its operation would be altogether frustrated if the Assembly were permitted under s 22 of the *Self-Government Act* to abolish the Supreme Court. Thus, a Territory law purporting to abolish the Supreme Court would be inconsistent with s 48A and, by operation of s 28 of the *Self-Government Act*, would be invalid.

46. The same conclusion should follow, it is submitted, from the operation of s 73(ii) of the Constitution that guarantees, subject to exceptions and regulations, an appeal to the High Court from a court exercising federal jurisdiction, and from the authority of the Parliament under s 122 of the Constitution to vest federal jurisdiction in Territory courts. This integrated constitutional scheme would be frustrated if the Assembly were permitted to abolish the apex court of its own Territory judicial hierarchy.

47. So to conclude follows logically from authority in this Court that State Parliaments cannot abolish their Supreme Courts because their continuing existence is necessary to exercise federal jurisdiction conferrable by the Commonwealth Parliament pursuant to s 77(iii) of the Constitution, and to facilitate the jurisdiction of the High Court under s 73(ii) to hear appeals from the judgments of State Supreme Courts.[41]

48. In the result, the Assembly cannot, it is submitted, abolish the Supreme Court. And whilst, in *Eastman*, it was held by Gummow and Hayne JJ that the relevant prohibition is as a result of an inconsistency

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35 *Bradley* (2004) 218 CLR 146; *Emmerson* (2014) 253 CLR 393; *NAAJA v NT* (2015) 256 CLR 569; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Blunden v The Commonwealth* (2003) 218 CLR 330.

36 *Eastman* (1999) 200 CLR 322, 348 [63] (Gummow and Hayne JJ); Geoffrey Lindell, *Cowan and Zines's Federal Jurisdiction in Australia* (4th ed, 2016) 230.

37 It is not necessary in this case to determine whether the Supreme Court *invariably* exercises federal jurisdiction in relation to all matters: see *NAAJA v NT* (2015) 256 CLR 569, 613-617 [104]-[118] (Gageler J), 634-637 [172]-[181] (Keane J).

38 It is also unnecessary in this case to reconsider whether this jurisdiction conferred on the High Court is appellate jurisdiction or, alternatively, original jurisdiction. It is understood currently as *appellate* jurisdiction, see *Porter v The King; Ex parte Yee* (1926) 37 CLR 432.

39 (1999) 200 CLR 322, further said at 352 [78].

40 This position had been recognised in the parliamentary debates on the ACT Supreme Court (Transfer) Bill 1992: Commonwealth, *Parliamentary Debates*, House of Representatives, 28 May 1992, 3125 (Mr Duffy, Attorney-General) 5.

41 *Kable* (1996) CLR 189 51, 102-103 (Gaudron J), 111-114 (McHugh J), 139-143 (Gummow J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 73-74 [57], 76 [63] (Gummow, Hayne and Crennan JJ); 124 [199] (Kirby J, dissenting in the result) ('*Forge*'). The position of Gummow, Hayne and Crennan JJ in *Forge* was endorsed by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, 580 [96] ('*Kirk*').

arising under s 28 of the *Self-Government Act*, it follows also as a negative implication of the integrated Court system intrinsic to Ch III of the Constitution.

THE ASSEMBLY CANNOT ABOLISH THE DEFINING CHARACTERISTICS OF THE SUPREME COURT

49. While the Assembly has power to amend the *Supreme Court Act*, it cannot abolish the defining characteristics of the Supreme Court. Some of those defining characteristics are protected by Ch III of the Constitution because Territory courts can exercise federal jurisdiction. For example, the Assembly may not enact provisions that undermine the Supreme Court's institutional integrity.[42]

10 50. The same must be true, it is submitted, of its other defining characteristics. They arise from the very status and character of a Supreme Court. In *Forge v Australian Securities and Investments Commission*[43] this Court held that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.' Under the Constitution it is necessary that there be a body answering to the description 'the Supreme Court of a State' for the purposes of s 73(ii).[44] Thus, in *Kirk*, the High Court held that a defining characteristic of the Supreme Court of New South Wales, protected by Ch III, was its supervisory jurisdiction to confine inferior courts and tribunals within the limits of their authority.[45] That defining characteristic was discerned from the fact that, as at 1900, Supreme Courts exercised that same supervisory jurisdiction.[46] The Court drew support for that conclusion from the constitutional utility in avoiding the creation 'of

20 islands of power immune from supervision and restraint.'[47]

QUESTION 2 – PRIMARY SUBMISSION

The ACT Supreme Court has the same status and character as State Supreme Courts

51. When the Parliament established the Supreme Court by s 6 of the *Seat of Government Supreme Court Act*, it established a court with the same status and character as State Supreme Courts referred to in s 73(ii) of the Constitution. Specifically, the *Seat of Government Supreme Court Act* aligned the jurisdiction, practice and procedure of the Supreme Court with those of the Supreme Court of New South Wales.[48] Further, nothing in the amendments made since to the *Seat of Government Act* (now reflected in the *ACT Supreme Court Act*), the *Self-Government Act* or the *Transfer Act* has altered that original conception of the Supreme Court, its status or its character.

30 52. The defining characteristics of the Territory's Supreme Court are in all material respects the same as those of the State Supreme Courts. They are entrenched by s 48A of the *Self-Government Act* in the same way that the defining characteristics of State Supreme Courts are entrenched by Ch III of the

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42 *Bradley* (2004) 218 CLR 146; *Emmerson* (2014) 253 CLR 393; *NAAJA v NT* (2015) 256 CLR 569.
43 (2006) 228 CLR 45, 76 [63].
44 See *Kirk* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
45 Ibid 566-567 [55], 580-581 [96]-[98].
46 Ibid 580-581 [96]-[98].
47 Ibid 581 [99].
48 *Seat of Government Supreme Court Act* ss 11(1)(a), 12(1)(c), 14(1), 55, 56.

Constitution. A Territory enactment that is incompatible with those defining characteristics will give rise to an inconsistency for the purposes of s 28 of the *Self-Government Act*.

A jury trial for an offence charged on indictment is a defining characteristic of a Supreme Court

53. Absent statutory warrant inhering in an accused person the right to elect or consent to trial on indictment by judge alone, criminal trial by judge and jury for offences tried on indictment is an essential feature of Supreme Courts. The history establishing jury trials in colonial Supreme Courts is well understood.[49] In 1900 an accused tried on indictment was tried by judge and jury.[50] In *Alqudsi*, this Court observed that 'by the time of Federation the common law institution of trial by jury had been adopted in all the Australian colonies as the method of trial of serious criminal offences.'[51] While some minor indictable offences could be tried summarily,[52] if an offence was tried on indictment in a Supreme Court, it was necessarily tried before a jury.

54. That trials were so conducted at the time of Federation was no accident of history. The adoption of jury trials during the colonial period was a significant constitutional development, alongside the establishment of Supreme Courts themselves; their supervisory jurisdiction over inferior courts and tribunals,[53] and colonial self-government. Each of these developments contributed to the adoption and operation of the rule of law in the colonial period, paving the way for modern constitutional government. The fact that, by 1900, an accused was entitled to be tried by a court constituted by judge *and* jury saw the convergence of the common law's recognition of the jury as 'the grand bulwark of … liberties'[54] and the colonial aspirations for self-government. It was the culmination of a 'long political struggle in New South Wales';[55] a struggle that had constitutional significance for the structures of government and the institutional form and functions of the Supreme Courts. The institution of trial by jury set the Supreme Court apart from inferior courts.

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49 See *Alqudsi* (2016) 258 CLR 203, 245 [100] (Kiefel, Bell and Keane JJ), noting *R v Valentine* (1871) 10 SCR (NSW) 113, 122-123 (Stephen CJ); *Kingswell v The Queen* (1985) 159 CLR 264, 298-300 (Deane J); *Wu v The Queen* (1999) 199 CLR 99, 112-113 [42]-[43] (Kirby J); Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal* (Supp) 49; Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3 *Sydney Law Review* 463; Pannam, 'Trial by Jury and Section 80 of the Australian Constitution' (1968) 6 *Sydney Law Review* 1, 6; Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (2002); Castles, *An Australian Legal History* (1982). See also *Alqudsi* (2016) 258 CLR 203, 245-6 [129]-[132] (Gageler J).

50 See *Jury Trials Act 1839* (NSW), *Jurors and Juries Consolidation Act 1847* (NSW) s 17, *Jury Act 1901* (NSW) s 28; *Jury Act 1867* (Qld) s 24, *Jury Act 1929* (Qld) s 17; *Jury Act 1862* (SA) s 26, *Juries Act 1917* (SA) s 133; *Jury Act 1899* (Tas) s 39; *Juries Act 1890* (Vic) s 37, *Juries Act 1915* (Vic) s 39; *Jury Act 1898* (WA) s 4.

51 *Alqudsi* (2016) 258 CLR 203, 245 [100] (Kiefel, Bell and Keane JJ). See also *Cheatle v The Queen* (1993) 177 CLR 541, 549 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Cheatle*').

52 See *Alqudsi* (2016) 258 CLR 203, 214-216 [20], [23] (French CJ); 244-245 [99] (Kiefel, Bell and Keane JJ); 271 [188] (Nettle and Gordon JJ).

53 *The Act for the Administration of Justice in New South Wales and Van Diemen's Land 1823* (4 Geo 4, c 96) provided for the supervisory jurisdiction of the Supreme Court of New South Wales over magistrates through traditional prerogative writs. A material example of the use of this jurisdiction was the decision of Forbes CJ to force magistrates to convene courts of quarter sessions with jury trials: *R v Magistrates of Sydney* [1824] NSWLR 3. See David Neal, *The Rule of Law in a Penal Colony* (CUP, 1991) 108-9, 182.

54 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, 342.

55 *Alqudsi* (2016) 258 CLR 203, 254-255 [129] (Gageler J).

55. The constitutional significance of those developments provided the context against which the Constitution, with its references to Supreme Courts, was drafted. The framers of the Constitution adopted the structure of the colonial governments as they stood at federation.[56] Part of the essential structure and features of Supreme Courts at federation was that, for offences tried on indictment, the Courts were constituted by judge and jury.

56. As a consequence, State Parliaments cannot, it is submitted, compel an accused person to be tried on indictment by judge alone. The very notion of a 'Supreme Court' adopted by s 48A of the *Self-Government Act* must be taken to have contemplated a reference to its constitutional conception. In the result, s 68BA of the *Supreme Court Act* is inconsistent with s 48A and invalid.

10 **QUESTION 2 – ALTERNATIVE SUBMISSION**

57. In any event, and irrespective of the constitutional conception of a Supreme Court, the entrenchment of the 'Supreme Court' in s 48A is to be taken, it is submitted, as precluding a law that authorises a court to order by compulsion a trial on indictment by judge alone.

58. At the time of its establishment, the *Jury Act 1901* (NSW) operated in the Australian Capital Territory as a law in the Territory.[57] Section 28 of the *Jury Act 1901* (NSW) provided that '[a]ll crimes and misdemeanours prosecuted in the Supreme Court … shall be tried by a jury consisting of twelve men chosen and returned according to the provisions of this Act.' Section 8 of the *Seat of Government Acceptance Act 1909* (Cth) provided that 'the High Court and the Justices shall have, within the
20 Territory, the jurisdiction which … belonged to the Supreme Court of the State and the Justices thereof.'[58]

59. By operation of s 2 of the *Juries Ordinance 1932*[59] ('the *1932 Ordinance*'), the *Jury Act 1901* (NSW) ceased to apply in the Territory. Section 16 of the *1932 Ordinance* provided that '[a]ll offences prosecuted in the High Court shall be tried by jury consisting of twelve men chosen and returned according to the provisions in this Ordinance.' The following year, the Supreme Court of the Australian Capital Territory was established by s 6 of the *Seat of Government Supreme Court Act*. While the general rule was that civil suits were heard by the Court without a jury (s 14), no like provision applied to criminal trials. Correspondingly, the *1932 Ordinance* was amended in 1933 to substitute the Supreme Court for the High Court.[60] Thus, s 16 of the *1932 Ordinance* required that all offences tried in the
30 Supreme Court be tried by judge and jury.

60. The *1932 Ordinance* was repealed by s 5 of the *Juries Ordinance 1967* ('the *1967 Ordinance*').[61] Section 7(1) of the *1967 Ordinance* provided that '[a]t a criminal trial, a jury shall consist of twelve

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56 *McGinty v Western Australia* (1996) 186 CLR 140, 293 (Gummow J).
57 *Seat of Government (Administration) Act 1910* (Cth) s 12; *Seat of Government Acceptance Act 1909* (Cth) s 6(1).
58 The *Jury Act 1901* (NSW) was not a law disapplied in the Territory by s 3 of the *Seat of Government (Administration) Act 1910* (Cth) (see the Schedule to that Act) and, thus, continued to be applied by s 4 of the 1910 Act.
59 See Schedule 1 to that Ordinance.
60 *Juries Ordinance (No 2)* 1933.
61 See the First Schedule to that Ordinance.

jurors.' The Ordinance operated on the clear and fundamental premise that trials in the Supreme Court were trials by judge and jury.[62]

61. The *1967 Ordinance* remained and operated relevantly unaltered until the enactment in 1988 of the *Self-Government Act*. Thus, immediately before self-government in the Territory, a foundational tenet of the criminal justice system was that trials in the Supreme Court were trials on indictment heard by judge and jury. The *ACT Supreme Court Act* also continued to operate as a Commonwealth Act, with its underlying premise that criminal trials on indictment be heard in the Supreme Court by judge and jury and only by judge and jury.[63] While the new Territory clone of the *Supreme Court Act* could be amended following the enactment of the *Transfer Act* in 1992, it too reflected the historical position that criminal trials in the Supreme Court would be by jury. The *1967 Ordinance* also became an enactment that could be amended or repealed (s 4(4)), but it too continued to provide that '[a]t a criminal trial, a jury must consist of 12 jurors' (s 7).

62. The Territory (and, before that, New South Wales), boasted a relevantly unbroken commitment to the institution of trial by jury that can be traced back to before Federation. That commitment and its history speak to its importance in the administration of criminal justice and to its place as a fundamental tenet of modern democracy and the rule of law. That same commitment was endorsed by the Commonwealth Parliament from 1933 to 1992 during which trials on indictment in the Supreme Court were trials that proceeded – and could only proceed – before a judge and jury. It is unlikely, it is submitted, that the Commonwealth intended that the Assembly be empowered to depart so drastically from that which, until the enactment of the *Transfer Act*, had been a defining feature of the Supreme Court. Rather, and as a result of its entrenchment by s 48A of the *Self-Government Act*, the Supreme Court has had preserved as one of its defining characteristics an accused person's right to be tried, if he or she so chooses, by a judge and jury.

63. The case for construing the *Self-Government Act* in this way is reinforced by the continuing operation in the Territory of the *Magna Carta*[64] and, importantly, adheres to and applies the presumptive canon 'that it is highly improbable that parliament would "overthrow fundamental principles, infringe rights, or *depart from the general system of law*, without expressing its intention with irresistible clearness."'[65] The presumption is 'well established'[66] and is 'a working hypothesis, the existence of which is known

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62 See, for example, the definition of 'civil trial' in s 6(1) which made express reference to jury trials ordered under s 14 of the *Australian Capital Territory Supreme Court Act 1933* (Cth), whereas no such reference was made in the definition of 'criminal trial' as the assumption underlying the *Australian Capital Territory Supreme Court Act 1933* (Cth) was that Supreme Court criminal trials would be by jury.

63 Section 14 did away with jury trials unless ordered by the Court. The Act was silent on criminal trials, maintaining the established position that jury trials were required.

64 (1927) 25 Edw 1 c 20, s 29: 'No freeman shall be taken or imprisoned, or disseised of his freehold, liberties or free customs, or be outlawed or exiled or in any other wise destroyed; nor will We pass upon him nor condemn him, but by lawful judgment of his peers or by the law of the land.' The *Magna Carta* was continued as Territory law first by s 4 of the *Seat of Government (Administration) Act 1910* (Cth) and then by s 34(4) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). See *Eastman v ACT DPP* [2012] ACTSFC 2, [44]; *Lukatela v Birch* [2008] ACTSC 99.

65 *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added), quoting *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

66 *NAAJA v NT* (2015) 256 CLR 569, 581-582 [11] (French CJ, Kiefel and Bell JJ).

both to Parliament and the courts, upon which statutory language will be interpreted.'[67] It 'extends to the protection of fundamental principles and systemic values' and 'exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law'.[68] Trial by jury is one of those systemic values.

64. Forcing an accused person to be tried on indictment by judge alone represents a fundamental and gross departure from the foundational precepts of the criminal justice system in the Territory. It amounts to a departure that the Parliament, in enacting the *Transfer Act*, cannot have intended. Rather, and in so far as one may look to extrinsic materials to discern the legislature's intent, the Second Reading Speech betrays the extent to which entrenching Part VA was motivated by an intention to protect *inter alia* the high standards against which proceedings were conducted and judicial power was exercised:[69]

> The new part was designed to ensure that any laws that were made in relation to the judicial power of the Territory had to be made in accordance with high standards – standards as regards continuity of proceedings, continuity of jurisdiction, protection for the independence of the judges, and so on.

65. Section 68BA contemplates an exercise of judicial power that falls short of those standards. Trial by judge alone with the consent of an accused confers upon an accused person a right to choose. Trial by judge alone – and by compulsion – is another thing altogether. It is beyond power and thereby invalid.

QUESTION 3 – SECTION 80 AND *BERNASCONI*

66. The applicant contends that s 68BA of the *Supreme Court Act* is invalid by reason of incompatibility with s 80 of the Constitution.

THE DECISION IN *BERNASCONI*

67. In *R v Bernasconi,*[70] the accused was charged with an indictable offence before the Central Court of the Territory of Papua. An Ordinance, enacted by a Legislative Council established by Letters Patent, provided that the Queensland *Criminal Code* was to be the law of British New Guinea. That Ordinance continued in force by operation of s 6 of the *Papua Act 1905* (Cth) following the transfer of the Territory of Papua to the Commonwealth. Ordinance No VII of 1907, enacted after the transfer of the Territory to the Commonwealth, provided that the trial of persons of European descent charged with a crime – other than a crime punishable by death – was to be tried without a jury.

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67 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ). See also the authorities collected in the judgment of French CJ, Kiefel and Bell JJ in *NAAJA v NT* (2015) 256 CLR 569, 581-582 [11] fn 37 and 38.

68 *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [313]-[314] (Gageler and Keane JJ), quoted by Gageler J in *NAAJA v NT* (2015) 256 CLR 569, 605-606 [81]. In its application to the power conferred on a Territory Legislative Assembly, see *NAAJA v NT* (2015) 256 CLR 569, 596-597 [45] (French CJ, Kiefel and Keane JJ).

69 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 May 1992, 3122.

70 (1915) 19 CLR 629 ('*Bernasconi*').

68. One of the questions reserved for the High Court was whether s 80 of the Constitution required that the trial be heard by a judge and jury. It was argued that, following the transfer of the Territory to the Commonwealth, the relevant indictable offence derived its authority from s 6 of the *Papua Act*, thus attracting the operation of s 80. Griffiths CJ (with whom Gavan Duffy and Rich JJ relevantly agreed) rejected the contention that the offence and its trial attracted the operation of s 80:[71]

> In my judgment, 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. Sec 80, therefore, relates only to offences created by the Parliament by Statutes passed in the execution of those functions, which are aptly described as 'laws of the Commonwealth.' … In my opinion, the 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.

69. Put another way, Ch III and s 122 were held to be mutually exclusive sources of authority.

70. Isaacs J concluded that the offence in question was 'a law of the Commonwealth', because its force subsisted 'by virtue of the declared will of the Commonwealth Parliament.' However, his Honour concluded that, when viewed in its wider constitutional context, s 80 was 'a limitation on the accompanying provisions, applying to the Commonwealth as a self-governing community.' The territories were not a constituent part of that self-governing body. Thus, the power in s 122 was 'an unqualified grant complete in itself.'[72]

DISTINGUISHING *BERNASCONI*

71. *Bernasconi* is not an insuperable obstacle to the applicant's claim that s 68BA falls foul of s 80 of the Constitution. The law in *Bernasconi* applied to an *external* territory 'placed by the Queen under the authority of and accepted by the Commonwealth' (s 122). The particular character of the Territory of Papua was an important feature of Isaacs J's ultimate finding. The Territory of Papua was, his Honour held, 'in a state of dependency or tutelage'; it was 'not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers.' Until it was 'admitted as a member of the family of States', its regulation was at 'the discretion of the Commonwealth Parliament.'[73] In like terms, Griffith CJ was to acknowledge later in *Mitchell v Barker*[74] that '[i]t may be that a distinction may some day be drawn between Territories which have and those which have not formed part of the Commonwealth.'

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71 Ibid 635.
72 Ibid 637.
73 Ibid 638.
74 (1918) 24 CLR 365, 367. See also *Waters v The Commonwealth* (1951) 82 CLR 188, 192 (Fullagar J).

72. The Australian Capital Territory is in a materially different class of Territory. It was surrendered by New South Wales and accepted by the Commonwealth.[75] That difference, and others, should have implications for the operation of s 80 within its borders that remove it from the *prima facie* binding scope of authority represented by *Bernasconi*.

DEVELOPMENTS SINCE *BERNASCONI*

73. Griffith CJ's statement about the relationship between s 122 and Ch III has not escaped at least some criticism from members of this Court.[76] Certainly, the breadth of his Honour's observations extending beyond the scope of those necessary to determine whether s 80 applied to an external territory have since been refined or overtaken. And, it is clear that there is now considerable overlap between the operation of Ch III and s 122.[77] Griffith CJ's dicta in *Bernasconi* regarding the relationship between s 122 and Ch III is not – or is no longer – an insuperable obstacle to s 80's application to trials for offences committed against the laws of a Territory.

SECTIONS 80 AND 122

74. Section 122 of the Constitution empowers the Parliament to make laws for the government of any territory. The text of s 122 recognises that territories can be acquired by the Commonwealth in different ways. The present case concerns the first limb of s 122. The Australian Capital Territory was surrendered by a State to, and accepted by, the Commonwealth. Upon its surrender and acceptance it became 'subject to the exclusive jurisdiction of the Commonwealth' (s 111 of the Constitution).
75. The scope of s 122 is wide enough to authorise the establishment of Territory assemblies which exercise independent legislative power.[78] However, the power in s 122 does not support the conferral of legislative power in general and unconfined terms: '[i]t is one thing to say that the Parliament's power over territories is general; it is another to say that Parliament may create another legislature with general power over a territory.'[79] Although an early view of s 122 (embraced, for example, in *Bernasconi*) considered it as standing apart from the rest of the Constitution, the accepted view now favours an interpretation that treats 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.'[80]

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75 See *Seat of Government Surrender Act 1909* (NSW) and *Seat of Government Acceptance Act 1909* (Cth).

76 See the statements collected by Kirby J in *Fittock v The Queen* (2003) 217 CLR 508, 517 [31] n 39. See also the dissatisfaction with the view that Ch III and s 122 are mutually exclusive sources of authority in *Kruger v Commonwealth* (1997) 190 CLR 1, 80-84 (Toohey J), 108-109 (Gaudron J), 174-176 (Gummow J).

77 Territory courts can exercise federal jurisdiction (*Bradley* (2004) 218 CLR 146; *Emmerson* (2014) 253 CLR 393; *NAAJA v NT* (2015) 256 CLR 569; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Blunden v Commonwealth* (2003) 218 CLR 330); and a law enacted under s 122 can give rise to a matter for the purposes of s 76(ii) of the Constitution, at least where the matter is vested in a federal court established under Ch III (*Northern Territory v GPAO* (1999) 196 CLR 553; *Spinks v Prentice* (reported with *Re Wakim; Ex parte McNally* (1999) 198 CLR 511)).

78 *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 ('*Capital Duplicators*').

79 Ibid 269 (Brennan, Deane and Toohey JJ).

80 *Lamshed v Lake* (1958) 99 CLR 132, 154 (Kitto J), quoted with approval by Brennan, Deane and Toohey JJ in *Capital Duplicators* (1992) 177 CLR 248, 272.

76. The starting point in discerning the nature, scope and content of the relationship between s 122 and other constitutional provisions, is to recognise and acknowledge that there are distinctions between classes of Territories to be found in the text of s 122. In the words of Gaudron J in *Capital Duplicators*,[81] while the power in s 122 is a general one 'it does not follow that the content of that power is the same regardless of the way the particular territory was acquired.'[82]

77. Territories surrendered by States raise different constitutional considerations to other classes of Territories in s 122. Upon federation, the 'people of' the States 'agreed to unite in one indissoluble Federal Commonwealth … under the Constitution …'.[83] They became members 'of the Australian federal body politic'.[84] Surrendered territories remain, it is submitted, 'constituent parts of the Commonwealth of Australia, both geographically and politically',[85] and the people of surrendered territories did not 'lose their membership of the body politic which the Constitution brought into existence as the Commonwealth of Australia.'[86]

78. In some respects, the constitutional text manifests clearly the effects or implications of the surrender of a Territory on a Territorian's membership of the federal body politic. For example, s 122 authorised the Parliament to 'allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.' Thus, the continuing representation of the people of the surrendered Territory in the federal Parliament through ss 7 and 24 of the Constitution would have been incompatible with the express provision in s 122.[87]

79. Other impacts of surrender are less clear. They require a closer analysis of the text and purpose of the provisions in question. In *Capital Duplicators*, a majority of this Court held that s 90 limits the scope of s 122, thereby preventing the conferral on the Assembly of a power to impose a duty of excise. In their joint judgment, Brennan, Deane and Toohey JJ said that '[i]t would be surprising if the surrender of part of a State to the Commonwealth and its acceptance by the Commonwealth pursuant to s 111, whilst leaving the territory as part of the Commonwealth, removed it from the operation of the constitutional provisions designed to create and maintain the free trade area.'[88] If Parliament could authorise an Assembly to impose duties referred to in s 90, 'it would be a Trojan horse available to destroy a central objective of the federal compact.'[89]

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81 *Capital Duplicators* (1992) 177 CLR 248, 285 (Gaudron J).
82 Ibid.
83 Preamble to the *Commonwealth of Australia Constitution Act*.
84 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 [83] (Gummow, Kirby and Crennan JJ). See also the observations of Gageler J in *Love v Commonwealth* [2020] HCA 3, [91] as to the original composition of the body politic of the Commonwealth of Australia.
85 *Capital Duplicators* (1992) 177 CLR 248, 286 (Gaudron J).
86 Ibid 286. See also *Spratt v Hermes* (1965) 114 CLR 226, 269 (Menzies J).
87 *Attorney-General (NSW); ex rel McKellar v Commonwealth* (1977) 139 CLR 527.
88 *Capital Duplicators* (1992) 177 CLR 248, 273.
89 Ibid 279.

80. In *Wurridjal v Commonwealth*,[90] this Court held that s 122 was constrained by the 'just terms' limitation in s 51(xxxi). The 'weight of authority'[91] appears also to be that s 116 constrains the scope of s 122,[92] and the view has been expressed that s 122 is limited also by s 92.[93] By contrast, it was held in *Svikart v Stewart*[94] that s 122 is not constrained by s 52(i).

81. Ultimately, the relationship between ss 80 and 122 should be determined, it is submitted, in a way that 'secures to Territorians the same basic rights that the Constitution confers on other Australians, unless the contrary is clearly indicated.'[95] Adopting the dicta of Gummow J in *Kruger v The Commonwealth*,[96] 'it would be surprising if the surrender of a part of a State to the Commonwealth and its acceptance by the Commonwealth pursuant to s 111 removed it, and the residents from time to time therein, from the protection of those provisions of the Constitution which applied to the people of the Commonwealth as members of the one body politic established by the Constitution.'

82. Section 80, like ss 51(xxxi), 92 and 116, contains a 'fundamental law of the Commonwealth' and a constitutional 'guarantee'.[97] It is not uncommonly characterised as a constitutional 'right'.[98] There is nothing in the text or context of s 80 that required its disapplication from the people of the Australian Capital Territory upon its surrender.[99]

83. That is particularly the case when the operation of s 80 is properly understood. While it resides in the Chapter of the Constitution that creates and defines the *federal* judicature, its operation does not turn on the establishment or operation of the federal judiciary. If federal jurisdiction had never been vested in State courts, s 80 would still require the trial of any offence against any law of the Commonwealth to be by jury.[100] While s 80 constitutes an imperative on the exercise of federal jurisdiction,[101] its operation was not contingent on the creation and exercise of federal jurisdiction. In that sense, Griffith CJ's view that Ch III had no operation in relation to the territories, because it '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*',[102] is simply incorrect when applied to s 80.

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90 (2009) 237 CLR 309, 336 [13], 357 [80] (French CJ), 383-388 [175]-[188] (Gummow and Hayne JJ) and 418-419 [283]-[287] (Kirby J).

91 *Kruger v The Commonwealth* (1997) 190 CLR 1, 166 (Gummow J)

92 *Lamshed v Lake* (1958) 99 CLR 132, 143 (Dixon CJ, with whom Webb and Taylor JJ agreed); *Kruger v The Commonwealth* (1997) 190 CLR 1, 165-166, 179, 185 (Toohey J), 121-123 (Gaudron J), 166-167 (Gummow J); cf 60 (Dawson J), 142 (McHugh J).

93 *Lamshed v Lake* (1958) 99 CLR 132, 143 (Dixon CJ, with whom Webb and Taylor JJ agreed).

94 (1994) 181 CLR 548.

95 *Capital Duplicators* (1992) 177 CLR 248, 288 (Gaudron J).

96 (1997) 190 CLR 1, 165-166.

97 *Cheatle v The Queen* (1993) 177 CLR 541, 549 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

98 *Katsuno v The Queen* (1999) 199 CLR 40, 65 [52] (Gaudron, Gummow and Callinan JJ).

99 For the suggestion that s 80 only applies to surrendered territories, see *Ffrost v Stevenson* (1937) 58 CLR 528, 592 (Evatt J).

100 Covering Clause 5 to the *Commonwealth of Australia Constitution Act* relevantly provides that '… all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth'. Upon Federation, State courts 'immediately acquired new State jurisdiction in respect of classes of matters which had not previously existed', including the enforcement of Commonwealth laws: *Burns v Corbett* [2018] HCA 15; (2018) 92 ALJR 423, 442 [72] (Gageler J). See also *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619-20 [25]-[26] (Gleeson CJ, Gummow and Hayne JJ).

101 *Alqudsi* (2016) 258 CLR 203, 265-266 [168]-[171] (Nettle and Gordon JJ).

102 *Bernasconi* (1915) 19 CLR 629, 635 (emphasis added).

84. Section 80 continues to apply, it is submitted, to the benefit of Territorians following the surrender of the Territory by New South Wales. The text of s 80 contemplates its continuing operation to a surrendered Territory. Where 'the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.' A natural reading of those words extends their application to the case of an offence enacted under s 122 and committed within a surrendered territory.[103]

85. Once that limitation on s 122 is accepted, its corollary is that the Parliament cannot circumvent that constraint by establishing the Assembly to exercise its independent legislative authority so as to achieve the proscribed outcome. If the Parliament cannot *directly* displace the continuing operation of s 80 to criminal norms in a Territory, then it cannot do so *indirectly* through the establishment of a legislative assembly. To conclude otherwise would be to permit 'a Trojan horse' to destroy the constitutional guarantee in s 80.

86. The result is that the authority of s 22 of the *Self-Government Act* does not extend to prescribing that an offence be tried by judge alone if tried on indictment.

PART VII: PROPOSED ORDER

87. The applicant seeks an order that s 68BA of the *Supreme Court Act 1933* (ACT) is invalid, and that the trial of the accused should proceed before a jury pursuant to s 68A of the *Supreme Court Act 1933* (ACT).

PART VIII: TIME FOR ORAL ARGUMENT

88. It is estimated that 2.5 hours will be required for the presentation of the applicant's oral argument.

Dated: 11 May 2020

Theo Kassimatis QC
(03) 9225 6899
theo.kassimatis@vicbar.com.au

James Stellios
(02) 9236 8600
james.stellios@stjames.net.au

Beth Morrisroe
(02) 6230 6912
bmorrisroe@bgchambers.com.au

103 *Ffrost v Stevenson* (1937) 58 CLR 528, 592 (Evatt J).

IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY No C7 of 2020

BETWEEN: **UD**

Applicant

and

The Queen

Respondent

ANNEXURE TO APPLICANT'S SUBMISSIONS

Statute	**Provisions**	**Version**
Constitution	ss 51(xxxi), 52(i), 73, 77, 80, 90 92, 111, 116, 122	
Commonwealth		
ACT Supreme Court (Transfer) Act 1992 (Cth)	s 14	Act No. 49 of 1992
Australian Capital Territory (Self-Government) Act 1988 (Cth)	ss 7, 8, 22, 23, 28, 34	Act No. 106 of 1988
Australian Capital Territory (Self-Government) Act (Cth)	ss 3, 7, 8, 22, 23, 28, 34, 48A	Compilation No. 24, 1 July 2016
Australian Capital Territory Supreme Court Act 1933 (Cth)	s 14	Compilation date 24 November 2009
Judiciary Act 1903 (Cth)	s 35AA	Compilation No. 47, date 25 August 2018
Papua Act 1905 (Cth)	s 6	Act No. 9 of 1905

Seat of Government Acceptance Act 1909 (Cth)	s 6(1), 8	Act No. 23 of 1909
Seat of Government (Administration) Act 1910 (Cth)	s 12	Act No. 13 of 2017
Seat of Government Supreme Court Act 1933 (Cth)	s 6, 11, 12, 14, 55, 56	Act No. 34 of 1933
Australian Capital Territory		
Juries Ordinance 1932	s 2, 16	Act No. 25 of 1932
Juries Ordinance 1967	ss 5, 7	Act No. 47 of 1967
Magna Carta (1927) 25 Edw 1 c 20, s 29		
Supreme Court Practice Direction No. 1 of 2020		Dated 7 April 2020
Supreme Court Practice Direction No. 1 of 2020		Dated 23 March 2020
Supreme Court Act 1933 (ACT)	ss 3, 68B, 68BA.	Republication date: 8 April 2020
New South Wales		
Jury Act 1901 (NSW)	s 28	Act No. 67 of 1901

Dated 11 May 2020

Theo Kassimatis QC

Telephone: 03 9225 6899

Email: Theo.Kassimatis@vicbar.com.au