HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C7 of 2020

BETWEEN:

UD
Applicant

and

The Queen
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY (INTERVENING)

Part I: Certification

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

Part II: Intervention

2. The Attorney-General of the Australian Capital Territory (**Territory**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the validity of s 68BA of the *Supreme Court Act 1933* (ACT) (**SCA**). The Territory also intervened in the ACT Supreme Court,[1] prior to removal to this Court.

Part III: Argument

3. The questions stated for the opinion of the Full Court (Cause Removed
10 Book (**CRB**) 66), and the answers contended for by the Territory, are:

<u>Question 1</u>: Is s 68BA of the SCA invalid by reason of its incompatibility with the constitutional limitation deriving from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***)?

Answer: No. Section 68BA facilitates the exercise of a judicial discretion structured by substantive criteria, which is not directed by legislative or executive policy.

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

20 **Answer:** No. The exercise of discretion in s 68BA, such that the Court may order trial by judge alone in the absence of the accused's consent, does not negate any necessary or defining feature of a Supreme Court.

<u>Question 3</u>: Is s 68BA of the SCA invalid by reason of s 80 of the Constitution?

Answer: No. Section 80 has no application to the trial of offences against laws of the Territory, which are not laws of the Commonwealth.

Factual background and legislative context

4. On 16 March 2020, the ACT Minister for Health declared a public health emergency in response to the public health risk posed by COVID-19, a respiratory illness caused

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[1] Under the *Court Procedures Act 2004* (ACT), s 27, and the *Judiciary Act 1903* (Cth), s 78A.

by the novel coronavirus SARS-CoV-2.[2] As in other jurisdictions, a number of restrictions have been imposed in the Territory to limit the spread of COVID-19.[3]

5. Relevantly to this proceeding, the Applicant is charged on indictment dated 30 March 2020 with four offences arising from events in December 2017.[4] The most serious offence, aggravated burglary, is punishable by up to 20 years' imprisonment.[5] The least serious offence, dishonestly driving a motor vehicle, is punishable by up to 5 years' imprisonment.[6] The trial of those offences was originally scheduled to commence on 6 April 2020 before a judge and jury.[7]

6. On 2 April 2020, the Assembly enacted the *COVID-19 Emergency Response Act 2020* (ACT) (***Emergency Response Act***), with effect from 8 April 2020. Relevantly, the *Emergency Response Act* amended the SCA by broadening the availability of judge alone trials during the "COVID-19 emergency period".[8] Section 68BA enables the Court to order trial by judge alone for an offence against Territory law, even if the accused does not consent, if the conditions in sub-s (3) are satisfied. Those conditions are that 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.

7. Section 68BA was inserted by the Assembly to ensure that the hearing of trials on indictment in the Territory is not seriously delayed.[9] A stated objective of seeking to avoid serious delay is to uphold a criminal defendant's right to a trial without unnecessary and unspecified delay.[10] It is self-evident that the administration of justice more generally is also served by the avoidance of serious delay.[11]

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[2] *Public Health (Emergency) Declaration 2020 (No 1)* [NI2020-153], made pursuant to s 119 of the *Public Health Act 1997* (ACT); further extended by *Public Health (Emergency) Declaration Further Extension 2020 (No 9)* [NI2020-218].

[3] *Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction (No 7)* [NI2020-286]; *Public Health (Residential Aged Care Facilities) Emergency Direction 2020 (No 2)* [NI2020-281]; *Public Health (Returned Travellers) Emergency Direction 2020* [NI2020-164]; *Public Health (Returned Travellers) Emergency Direction 2020 (No 5)* [NI2020-280]; *Public Health (Self-Isolation) Emergency Direction 2020* [NI2020-177]; *Public Health (Non-Essential Gatherings) Emergency Direction 2020 (No 3)* [NI2020-268].

[4] CRB Tab 1.

[5] *Criminal Code 2002* (ACT), s 312; CRB Tab 3 p 12.

[6] *Criminal Code 2002* (ACT), s 318; CRB Tab 3 p 12.

[7] Applicant's Book of Further Materials Tab 3.

[8] Defined in s 68BA(5) of the SCA to mean the period beginning on 16 March 2020 and ending on either 31 December 2020 or another day prescribed by regulation.

[9] Explanatory Statement and Human Rights Compatibility Statement to the COVID-19 Emergency Response Bill 2020 (ACT) (**Explanatory Statement**), 19.

[10] Explanatory Statement, 40; *Human Rights Act 2004* (ACT), s 22(2)(c).

[11] See *Jago v District Court (NSW)* (1989) 168 CLR 23 (***Jago***) at 30 per Mason CJ, 45 per Brennan J.

8. Before making an order under s 68BA, the Court must provide the parties with an opportunity to be heard.[12] Where there is an objection to the making of an order, the matter will be listed for an interlocutory hearing.[13] If either party is dissatisfied with the making of the order, an application for leave to appeal may be made.[14]

9. Section 68BA applies to criminal trials that are to be conducted wholly or partly during the "COVID-19 emergency period" (s 68BA(1)), in relation to a proceeding that begins before, on or after the "commencement day" (s 68BA(2)(a)(i)).[15] It applies whether or not the relevant offence is an "excluded offence" (s 68BA(2)(a)),[16] and whether or not the accused has elected trial by judge alone (s 68BA(2)(b)).
10 Section 68BA expires 12 months after the commencement day (s 68BA(6)).[17]

10. On 7 April 2020, the Supreme Court suspended all jury trials until further notice, by way of Supreme Court Practice Direction 1 of 2020,[18] made at the direction of the Chief Justice and Judges of the Supreme Court.

11. On 9 April 2020, after the *Emergency Response Act* came into effect, the Applicant and the Respondent were provided with written notice of the trial judge's proposal to order that the proceedings be tried by judge alone. The parties filed written submissions on 14 and 15 April 2020, respectively, against the making of such an order. The trial judge heard oral submissions on 16 April 2020, before determining that it would be appropriate to order that the trial proceed before a judge alone (**order**
20 **below**).[19] Due to the challenge to the validity of the provision, the order below has not yet been perfected.[20] At the time of the order below, it was anticipated that the Supreme Court may not resume the conduct of jury trials until December 2020, due to the ongoing public health emergency.[21] Subsequently, on 18 May 2020, the Chief Justice indicated that, commencing 15 June 2020, the Supreme Court would

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[12] SCA, s 68BA(4); Supreme Court of the Australian Capital Territory, 'Practice Direction 1 of 2020: Special Arrangements in Response to COVID-19' (**Practice Direction**), [24].
[13] Practice Direction, [24].
[14] SCA, s 37E(4).
[15] Both terms defined in s 68BA(5).
[16] Excluded offences include murder, manslaughter and certain sexual offences: s 68B(4).
[17] Though the "COVID-19 emergency period" ends on 31 December 2020 (s 68BA(5)).
[18] Practice Direction, [23].
[19] *R v UD (No 2)* [2020] ACTSC 90 (***R v UD (No 2)***) (CRB Tab 5).
[20] *R v UD (No 2)* at [76] per Elkaim J (CRB Tab 5 p 61).
[21] *R v UD (No 2)* at [65] (CRB Tab 5 p 60); *R v IB (No 3)* [2020] ACTSC 103 at [32] per Murrell CJ.

resume some jury trials,[22] but that for a "significant number of cases" it would not be feasible to conduct jury trials in the near future.[23]

12. The Supreme Court can amend the Practice Direction and resume jury trials at any time. The Assembly has taken no action that prevents the resumption of jury trials if the Supreme Court so determines (*cf.* Applicant's Submissions (**AS**) [19]).

The occasion and incidents of trial by jury

13. The conception of trial by jury advanced by the Applicant is divorced from both present and historical reality. The Applicant assumes an immutable right of an accused to elect trial by jury in relation to criminal offences tried on indictment under Territory
10 law. The Territory submits that there is no such right. Though trial by jury may be the general procedure for indictable offences, and serves an important function in the administration of justice, there are many circumstances in which an accused is not entitled to a jury trial, including several in relation to offences tried on indictment.

14. Since its earliest origins, the circumstances in which a matter may be tried by jury have been amenable to amendment by the relevant legislature. In Australia, at both the Commonwealth and State/Territory levels, the conception of trial by jury in both statute and the Constitution has evolved over time.[24] In respect of State offences, this Court has recognised since 1936 that sufficiently clear legislation could alter an accused's "right" to trial by jury.[25]

20 15. Trial by jury did not arrive with the common law upon English settlement in Australia. Instead, it was introduced, after a considerable period, by legislation in the various colonies.[26] For example, until 1839, New South Wales had a system of military juries.[27] Trial by a civilian jury of 12 men first occurred in 1824,[28] was abolished in 1828,[29] and was progressively reintroduced from 1832.[30]

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[22] If Court facilities and resources mean that health safety measures can be achieved for jurors, accused persons, witnesses, legal practitioners and Court staff.
[23] Media Release, "Jury Trials in the Supreme Court", 18 May 2020, https://www.courts.act.gov.au/__data/assets/pdf_file/0007/1548421/Media-Release-ACTSC-Jury-Trials.pdf.
[24] *Brownlee v The Queen* (2001) 207 CLR 278 (***Brownlee***) at [12] per Gleeson CJ and McHugh J, [33]-[34], [59] per Gaudron, Gummow and Hayne JJ; Scott, "Trial by Jury and the Reform of Civil Procedure", *Harvard Law Review*, vol 31 (1918) 669 at 669-670; *Alqudsi v The Queen* (2016) 258 CLR 203 (***Alqudsi***) at [190] per Nettle and Gordon JJ.
[25] *Newell v The King* (1936) 55 CLR 707.
[26] *Brownlee* at [12] per Gleeson CJ and McHugh J, referring to Evatt, "The Jury System in Australia" (1936) 10 (Supp) *Australian Law Journal* 49; *Alqudsi* at [21] per French CJ.
[27] Abolished by the *Jury Trials Act 1839* (NSW).
[28] See the interpretation of s 19 of the *New South Wales Act 1823* (Imp) 4 Geo IV, c 96 adopted in *R v Magistrates of Sydney* [1824] NSWKR 3.
[29] *Australian Courts Act 1828* (Imp) 9 Geo IV, c 83.
[30] *Jury Trials Act 1832* (NSW), *Jury Trials Act 1833* (NSW) and *Jury Trials Act 1839* (NSW).

16. Subject to the guarantee in s 80 of the Constitution in relation to Commonwealth offences tried on indictment, any "right" to trial by jury in Australia has always been sourced in statute.[31] Since it was first introduced, both the occasion and incidents of trial by jury throughout Australia have been modified by statute.

17. **Civil trials:** In England, in civil matters, trial by jury was standard for more than five hundred years.[32] Though briefly interrupted during World War I, substantial change occurred in 1933, when judges were given a general discretion to determine whether the trial was to be "with or without a jury".[33] In Australia, civil trial by jury was the ordinary mode for many years both before and after Federation, before its progressive
10 curtailment.[34]

18. Today, in every Australian jurisdiction, the circumstances in which a person may elect that their civil matter be tried by a jury are very limited, and in some jurisdictions non-existent.[35] Several jurisdictions continue to make provision for civil juries upon application by a party, subject to various tests, such as: the "*court is satisfied that the interests of justice require that the action be tried by a jury*".[36]

19. **Summary offences:** Summary conviction for criminal offences is a creature of statute[37] that pre-dates English colonisation of Australia. It has invariably involved conviction without the involvement of a jury. It was known to Blackstone,[38] and was utilised for minor offences throughout the English colonies.[39] Its existence was well-

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[31] See also the recognition of such statutory basis in *Sutherland v The King* (1934) 52 CLR 356 at 360-361 per Dixon J; *Newell v The King* (1936) 55 CLR 707; *Parsons v The Queen* (1957) 97 CLR 455 at 460 per Dixon CJ, Kitto and Taylor JJ; *R v Di Simoni* (1981) 147 CLR 383 at 406 per Brennan J; *Tassell v Hayes* (1987) 163 CLR 34 at 46 per Brennan J; *Brownlee* at [12] per Gleeson CJ and McHugh J; *Alqudsi* at [21] per French CJ.

[32] Subject to some limited exceptions in Chancery Courts. See *Ford v Blurton* (1922) 38 TLR 801 at 805, per Atkin LJ; *Ward v James* [1966] 1 QB 273 at 290. That default position is similarly reflected in the seventh Amendment to the United States Constitution.

[33] *Administration of Justice (Miscellaneous Provisions) Act 1933* (UK), s 6. This was subject to some exceptions for "reputational" matters such as defamation and promise of marriage.

[34] *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at [36] per Kirby and Callinan JJ.

[35] SCA, s 22; *Supreme Court Act 1970* (NSW), s 85; *District Court Act 1973* (NSW), s 76A; *Juries Act 1962* (NT), ss 6A, 7(1); *Civil Liability Act 2003* (Qld), s 73; *Jury Act 1995* (Qld), s 65A; *Juries Act 1967* (SA), s 5; *Supreme Court Civil Procedure Act 1932* (Tas), s 29(1); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) / *County Court Civil Procedure Rules 2018* (Vic), r 47.02(3); *Supreme Court Act 1935* (WA), s 42.

[36] *Supreme Court Act 1970* (NSW), s 85; *District Court Act 1973* (NSW), s 76A. See also the different tests in *Supreme Court (General Civil Procedure) Rules 2015* (Vic) / *County Court Civil Procedure Rules 2018* (Vic), r 47.02(3); *Jury Act 1995* (Qld), s 65A; *Supreme Court Rules 2000* (Tas), r 558.

[37] "[F]or the common law is a stranger to it, unless in the case of contempts": William Blackstone, *Commentaries on the Laws of England* (1769), Book IV, Ch 20.

[38] William Blackstone, *Commentaries on the Laws of England* (1769), Book IV, Ch 20.

[39] Leonard W Levy, *The Palladium of Justice: Origins of Trial by Jury* (1999), 72; *Alqudsi* at [21] per French CJ. See, eg., the *Justices, summary offences Act 1850* (WA).

understood by the time of Federation,[40] and is implicitly recognised in s 80 of the Constitution (by corollary) in the reference to trials "on indictment".

20. Presently, every jurisdiction in Australia makes provision for summary offences, "simple offences", or "offences which are dealt with in a summary way", to be tried without a jury.[41] The definition of a summary offence is itself a creature of statute that varies across jurisdictions.[42] For example, Commonwealth offences are summary offences if punishable by less than a year in prison,[43] while the relevant period in New South Wales and the Territory is two years.[44] In the Commonwealth context, this Court has repeatedly held that it is a matter for Parliament to determine, when creating
10 an offence, whether or not it is to be prosecuted on indictment.[45]

21. **Indictable offences tried summarily:** The States and Territories have also made provision for more serious offences to be tried summarily in certain circumstances, including without the consent of the accused. Such a procedure was known at the time of Federation and has continued since then.[46]

22. In the Territory today, an indictable offence punishable by imprisonment of up to five years may be tried summarily at the prosecutor's election.[47] With the accused's consent, and subject to conditions, indictable offences punishable by 10 years' imprisonment (or 14 years for money or property offences) may be tried summarily.[48] Generally, including in the Territory, legislation reduces the maximum penalty for an
20 indictable offence tried summarily. In some cases, the limit is the maximum penalty for a summary offence,[49] while in others, an intermediate limit is imposed.[50]

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[40] *Alqudsi* at [101] per Kiefel, Bell and Keane JJ.
[41] *Magistrates Court Act 1930* (ACT), ss 19 and 108A; *Judiciary Act 1903* (Cth), s 68(1)(a); *Criminal Procedure Act 1986* (NSW), ss 6, 170, 194, 202, 245; *Local Court (Criminal Procedure) Act 1928* (NT), s 64; *Justices Act 1886* (Qld), ss 19, 22A; *Criminal Procedure Act 1921* (SA), s 64; *Criminal Code Act 1924* (Tas), s 5(1); *Criminal Procedure Act 2009* (Vic), s 27; *Magistrates Court Act 2004* (WA), s 11.
[42] Eg.: *Legislation Act 2001* (ACT), s 190; *Crimes Act 1914* (Cth), ss 4E, 4H; *Criminal Procedure Act 1986* (NSW), ss 3, 6; *Summary Offences Act 2005* (Qld), s 46; *Criminal Procedure Act 1921* (SA), s 5(1); *Criminal Code Act 1924* (Tas), s 5(1); *Criminal Code Act 1913* (WA), s 1(5).
[43] *Crimes Act 1914* (Cth), s 4H.
[44] *Criminal Procedure Act 1986* (NSW), s 6; *Legislation Act 2001* (ACT), s 190.
[45] *R v Bernasconi* (1915) 19 CLR 629 (***Bernasconi***) at 637 per Isaacs J; *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 136 per Knox CJ, Isaacs, Gavan Duffy and Powers JJ, 139-140 per Higgins J; *Kingswell v The Queen* (1985) 159 CLR 264 at 277 per Gibbs CJ, Wilson and Dawson JJ, 294 per Brennan J; *Alqudsi* at [108] per Kiefel, Bell and Keane JJ, [177] per Nettle and Gordon JJ. See also *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898, pp 1894-1895.
[46] Eg.: *Criminal Justice Act 1855*, 18 & 19 Vict. c. 126, s 1; *Criminal Law and Practice Statute* 1864 (Vic), ss 66-69; *Summary Jurisdiction Act* 1879, 42 & 43 Vict. c 49, ss 11-13; *Criminal Law Amendment Act 1883* (NSW), ss 150-153; former s 12 of the *Crimes Act 1914* (Cth); *Alqudsi* at [102] per Kiefel, Bell and Keane JJ.
[47] *Crimes Act 1900* (ACT), s 374(1)-(2). See similarly *Criminal Code Act 1913* (WA), s 5.
[48] *Crimes Act 1900* (ACT), s 375.
[49] *Crimes Act 1900* (ACT), s 374(7); *Crimes Act 1914* (Cth), s 4J; *Criminal Code Act 1913* (WA), s 3(5).
[50] *Crimes Act 1900* (ACT), s 375(15); *Criminal Code Act 1899* (Qld), s 552BA.

23. **Trial on indictment:** Trial on indictment without a jury, with the consent of the accused, is now provided for in all Australian States and Territories[51] except the Northern Territory[52] and Tasmania.[53] Such trials by judge alone are themselves a creation of statute, having been unknown to the common law.[54]

24. The statutes impose a variety of tests to determine whether to order trial by judge alone, including whether the court "*considers it is in the interests of justice to do so*",[55] whether the complexity or length of the trial "*is likely to be unreasonably burdensome to a jury*",[56] and whether the court "*considers the trial will involve a factual issue that requires the application of objective community standards*".[57]

10 25. In addition, there are a number of circumstances, apart from s 68BA of the SCA, in which even the most serious indictable offences can or must be determined in the absence of a jury, even without the consent of the accused.

26. Section 132(7) of the *Criminal Procedure Act 1986* (NSW) has provided for judge alone trials without the consent of the accused since 14 January 2011. Under that section, the court must order trial by judge alone if it is of the opinion that there is a substantial risk of acts being committed that may constitute an offence under Div 3 of Pt 7 of the *Crimes Act 1900* (NSW) in respect of any jury or juror, and that the risk may not reasonably be mitigated by other means. Division 3 of Pt 7 sets out offences against public justice, including offences of interfering with jurors.[58]

20 27. In South Australia, s 7(3b) of the *Juries Act 1927* (SA) allows the Court, upon application by the prosecution, to order that an accused be tried by judge alone, regardless of the accused's consent, if an accused is charged with a serious and organised crime offence within the meaning of the *Criminal Law Consolidation Act 1935* (SA), and the court "*considers it is in the interests of justice to do so*".

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[51] SCA, s 68B; *Criminal Procedure Act 1986* (NSW), ss 132, 365. Section 365 is a COVID-19 related measure allowing orders for a judge alone trial on the Court's own motion, provided the accused consents; *Criminal Code Act 1899* (Qld), ss 614-615; *Juries Act 1927* (SA), s 7; *Criminal Procedure Act 2009* (Vic), s 420D. Section 420D was enacted on 24 April 2020, as part of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic); *Criminal Procedure Act 2004* (WA), s 118.

[52] *Criminal Code Act 1983* (NT), s 348.

[53] *Criminal Code Act 1924* (Tas), s 361.

[54] William Blackstone, *Commentaries on the Laws of England* (1769), Book IV, Ch 20; *Brown v The Queen* (1986) 160 CLR 171 at 196-197 per Brennan J, 211-212 per Deane J.

[55] *Criminal Code Act 1899* (Qld), s 615; *Criminal Procedure Act 1986* (NSW), s 132(4).

[56] *Criminal Code Act 1899* (Qld), s 615.

[57] *Criminal Procedure Act 2004* (WA), s 118(6).

[58] The existence and effect of s 132(7) was noted in *Alqudsi* at [85]-[86] per Kiefel, Bell and Keane JJ. Compare *Justice and Security (Northern Ireland) Act 2007* (UK) (replacing *Northern Ireland (Emergency Provisions) Act 1973* (UK)), considered in *Hutchings, Re Application for Judicial Review* [2019] UKSC 26.

Section 7(3c) specifies that one matter that may lead the Court to make such an order is a "real possibility" of offences being committed in relation to a juror.

28. In several jurisdictions, provision is made for hearings to occur without a jury in relation to an accused who lacks mental capacity, even if that accused cannot or does not consent to determination without a jury, and even though the accused is liable to a form of detention as a result.[59]

29. Back-up and related offences are offences which are adjunct or alternative to a main offence. Though they are generally less serious than the main offence, they can be indictable offences. In the Territory and New South Wales, following the trial of a main offence (whether or not by jury), any subsequent trial of a back-up or related offence must take place "*if the court considers that it is in the interests of justice*",[60] and must be by judge alone, regardless of the accused's consent.[61]

30. **Manner of trial by jury:** In addition to statutory alteration of the circumstances in which an accused is tried by jury, legislation has also effected significant change in the manner of trial by jury. In the case of Commonwealth offences, this Court has held a number of those changes to be consistent with s 80 of the Constitution.

31. In a departure from the original requirement of unanimity, majority jury verdicts of as few as 9 people are now permitted in most Australian jurisdictions.[62] Procedures for reserve jurors,[63] continuing a trial following the discharge of one or more jurors,[64] and allowing a jury to separate after they retire, are also now common.[65]

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[59] See, eg.: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 101 allows a court to order a special hearing by judge alone if "*the court considers that it is in the interests of justice to make the order*". If convicted, the person becomes liable to supervision under Part 5 (s 105); *Mental Health Act 2016* (Qld), provides for a Mental Health Court constituted by a Supreme Court judge. A person may be detained under s 134; *Mental Health (Forensic Provisions) Act 1990* (NSW), s 21A provides for judge alone trials if an accused does not have capacity to elect otherwise and does not have a legal practitioner make the election for them. The accused is liable to detention following a special hearing under s 23 and related provisions; *Crimes Act 1900* (ACT), s 316(2)(b)(ii) allows the accused's guardian to elect for a special hearing by judge alone. The accused is liable to detention following a special hearing under ss 318 and 319.

[60] SCA, s 68D(2); *Criminal Procedure Act 1986* (NSW), s 167.

[61] SCA, s 68E(1)(a); *Criminal Procedure Act 1986* (NSW), s 168.

[62] See *Jury Act 1977* (NSW), s 55F; *Criminal Code Act 1983* (NT), s 368; *Jury Act 1995* (Qld), s 59A; *Juries Act 1927* (SA), s 57; *Juries Act 2003* (Tas), s 43; *Juries Act 2000* (Vic), s 46; *Criminal Procedure Act 2004* (WA), s 114. Though not for Commonwealth offences: *Cheatle v R* (1993) 177 CLR 541.

[63] See *Juries Act 1967* (ACT), s 31A; *Jury Act 1977* (NSW), s 19; *Juries Act 1962* (NT), s 37A; *Jury Act 1995* (Qld), s 34; *Juries Act 2003* (Tas), s 26; *Juries Act 2000* (Vic), s 23. Reserve juror procedures are not inconsistent with s 80 of the Constitution: *Fittock v The Queen* (2003) 217 CLR 508.

[64] *Jury Act 1977* (NSW), s 53B; *Criminal Code 1983* (NT), s 359; *Jury Act 1995* (Qld), s 57; *Juries Act 1927* (SA), s 56; *Juries Act 2003* (Tas), s 42; *Juries Act 2000* (Vic), s 44; *Criminal Procedure Act 2004* (WA), s 115.

[65] *Juries Act 1967* (ACT), s 42A; *Jury Act 1977* (NSW), s 54; *Criminal Code Act 1983* (NT), s 365; *Jury Act 1995* (Qld), s 53; *Juries Act 1927* (SA), s 55; *Criminal Procedure Act 2004* (WA), s 111; *Juries Act 2003* (Tas), s 47. Procedures for continuing following the discharge of one or more jurors and allowing a jury to separate after they retire are not inconsistent with s 80 of the Constitution: *Brownlee*.

32. Since Federation, there have been significant legislative changes in relation to those qualified to serve on juries. Most notably, women are now able to serve as jurors, which did not occur in the Territory until 1967,[66] and not on equal terms until 1979.[67]

33. It is clear from this brief survey that both the occasion and the incidents of trial by jury have been the subject of continuous legislative alteration in Australia since before Federation, and that indictable offences are not infrequently tried in the absence of a jury, including in some circumstances without the accused's consent.

The overarching guarantee of a fair trial

34. The right of an accused to a fair trial[68] has been recognised by this Court as "fundamental",[69] "comprehensive",[70] "entrenched in our legal system",[71] and the "central prescript"[72] or "hallmark"[73] of our criminal law.[74]

35. In the Territory, that right has been expressed in statute as a right to have criminal charges "*decided by a competent, independent and impartial court or tribunal after a fair and public hearing*".[75] The rights of an accused in criminal proceedings include the right to be tried without unreasonable delay.[76] The *Human Rights Act 2004* (ACT) does not provide for any right to trial by jury.[77]

36. In relation to the proposition that *Magna Carta* enshrines a right to trial by jury due to its continued force in the Territory (AS [63]), leaving aside the substantial differences in the role and qualifications of a juror in the thirteenth century, the clause itself specifies "*by lawful judgment of his peers or by the law of the land*", acknowledging processes alternate to trial by jury even at that time.

37. This is not to deny the public interest in trial by jury,[78] which is recognised in s 68A of the SCA, but to acknowledge that it operates as a tenet and serves the central prescript of a fair trial. The Applicant's case is predicated on an implicit,

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[66] *Juries Ordinance 1967*, ss 9, 12.
[67] *Juries (Amendment) Ordinance 1979*.
[68] Otherwise expressed as the right of an accused not to be tried unfairly: see *Jago* at 57-58 per Deane J.
[69] *Whitehorn v The Queen* (1983) 152 CLR 657 at 664 per Deane J.
[70] *Jago* at 32 per Mason CJ.
[71] *Jago* at 29 per Mason CJ.
[72] *Jago* at 56 per Deane J.
[73] *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 606 per Kirby J.
[74] See also *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 154 per Toohey J (Gaudron J agreeing at 158), 166 per McHugh J; *Barton v The Queen* (1980) 147 CLR 75 at 95-96 per Gibbs ACJ and Mason J, Stephen and Aickin JJ agreeing, 111 per Wilson J; *Jago* at 29 per Mason CJ, 43 per Brennan J; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [37]-[38] per French CJ and Crennan J, [115] per Hayne and Bell JJ.
[75] *Human Rights Act 2004* (ACT), s 21.
[76] *Human Rights Act 2004* (ACT), s 22.
[77] *R v Fearnside* (2009) 3 ACTLR 25 at [99]-[104] per Besanko J, Gray P and Penfold J agreeing.
[78] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 86 per Gaudron J.

constitutionally entrenched, right of a person indicted for an offence to elect trial by jury. That assumption is not borne out by a survey of trial by jury in Australia.

<u>Question 1 – Application of the *Kable* principle</u>

38. The Territory submits that the *Kable* principle[79] is not engaged in this case. Contrary to the submission of the Applicant,[80] the exercise of power under s 68BA of the SCA does not undermine the Supreme Court's independence or impartiality, or otherwise depart from processes which characterise the exercise of judicial power.

39. Importantly, and *contra* the Applicant's assertions to the contrary,[81] nothing in s 68BA prevents a trial by jury from proceeding during the COVID-19 health emergency. There is no basis for saying that by enacting s 68BA the Assembly intended to prevent trial by jury. Section 68BA is a purely facilitative provision, *allowing* the court to order trial by judge alone when the statutory criteria are met.[82] The default position in s 68A, that trial be by jury but for the other provisions of the part, remains. That provision has been subject to s 68B since 1993, which provides for trial by judge alone upon election, and is now also subject to s 68BA, which provides for trial by judge alone in the "interests of justice". In that regard, whether a matter proceeds to trial by judge alone or with a jury remains a question within the discretion of the Supreme Court, the exercise of which is subject to review by way of the process of appeal.[83]

40. In *Hogan v Hinch*,[84] in the context of provisions allowing a court to order a closed hearing or restricting the publication of evidence, French CJ opined that where the statute left the determination to the court's discretion, "*such provisions are unlikely to be characterised as depriving the court of an essential characteristic of a court and thereby rendering it an unfit repository for federal jurisdiction*"[85] The same is true of the discretion afforded to the Court by s 68BA. It is and always has been recognised that it lies within the inherent power of a Supreme Court to control its own process.[86]

41. **Process:** There is nothing atypical or objectionable in the fact that the Court acts on its own motion to notify the parties that a s 68BA order is being considered.[87] The

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[79] As identified at AS [6], with reference to *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [40].
[80] AS [7].
[81] For example AS [14], [19], [32].
[82] See *Kuczborski v Queensland* (2014) 254 CLR 51 (***Kuczborski***) at [209] per Crennan, Kiefel, Gageler and Keane JJ.
[83] SCA, s 37E(4).
[84] (2011) 243 CLR 506.
[85] (2011) 243 CLR 506 at [27].
[86] *Jago* at 74 per Gaudron J; *Tringali v Stewardson Stubbs & Collett Pty Ltd* (1966) 66 SR (NSW) 335 at 344; *Walton v Gardiner* (1993) 177 CLR 378 at 393 per Mason CJ, Deane and Dawson JJ.
[87] AS [26(a)].

notice simply indicates that the Court has determined that a case may be appropriate for trial by judge alone. Even absent express legislative provision, the Court is required to afford procedural fairness to the parties.[88] Section 68BA fulfills that requirement by providing for the Court to give both notice and an opportunity to be heard in relation to the proposed order.[89]

42. Provisions under which courts act on their own motion in criminal proceedings are common, including in the Territory. Following committal, the Supreme Court has jurisdiction in relation to the conduct of a criminal proceeding against a person accused of an indictable offence.[90] At any stage, the Court may, on its own initiative,
10 give any direction about the conduct of the proceeding it considers appropriate.[91] On its own motion, the Court may direct an acquittal.[92] Territory statutes make specific provision for the Supreme Court to correct a defective indictment, and to make orders concerning witnesses, and the use of documents and technology in a trial.[93]

43. The Supreme Court is not obliged to make an order under s 68BA; it is a discretionary matter for the decision of the Court. The only requirement imposed on the Court is to give notice of any proposed order (and to invite parties to make submissions): s 68BA(4). That is not to enlist the Court to give effect to any pre-determined conclusion on the part of the legislature or the executive. The Court acts independently of any instruction, advice or wish of the legislature or the executive.[94]

20 44. In any event, "*[n]ovelty is no objection to the characterisation of a statutory power conferred upon a court as judicial*".[95] The character of the power must be determined by its content and statutory context, and not by any disconformity between its content and that of other powers similarly designated.

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[88] *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J; *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396 per Dixon CJ and Webb J; *Taylor v Taylor* (1979) 143 CLR 1 at 4 per Gibbs J; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [156] per Hayne, Crennan, Kiefel and Bell JJ.
[89] SCA, s 68BA(4). The procedure of a court giving notice to impacted persons of a proposed order that need not have been sought by a party is also not unique. Compare *Uniform Civil Procedure Rules 2005* (NSW), r 12.8(2) and (4); *Supreme Court (General Civil Procedure) Rules 2015* (Vic), rr 55.02 and 55.03; *Family Law Act 1975* (Cth), ss 90XS and 90XZD; Order 52 r 38 of the former *Federal Court Rules 1979* (Cth).
[90] *Court Procedures Act 2004* (ACT), s 76(1).
[91] *Court Procedures Rules 2006* (ACT), r 4738(2).
[92] *Doney v The Queen* (1990) 171 CLR 207 at 214-215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ; *R v LK* (2010) 241 CLR 177 at [29] per French CJ.
[93] *Crimes Act 1900* (ACT), s 264(1); *Evidence Act 2011* (ACT), ss 26, 29(2), 41; *Evidence (Miscellaneous Provisions) Act 2011* (ACT), ss 4AB, 4AJ, 20.
[94] *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at [597] per Crennan and Kiefel JJ in relation to s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[95] *Momcilovic* at [84] per French CJ; see also *Kuczborski* at [206]-[207] per Crennan, Kiefel, Gageler and Keane JJ.

45. It is not evident on what basis the process established by s 68BA can be said to be an "*affront to the precept of equal justice*".[96] The same procedure applies to all parties to the proceeding, and to all accused persons as between proceedings. Further, the relevant question is not the basis upon which the judge gives notice of a proposed order,[97] but the basis upon which the order is proposed to be made. In that regard, the relevant criteria are clearly stated in s 68BA(3).

46. Finally, there is nothing objectionable in the limited retrospective operation of s 68BA.[98] Section 68BA does not interfere with any existing right of the accused so as to engage a presumption against retrospectivity. An accused has a right to fair trial, 10 in accordance with the procedural law at the relevant time.[99] In any case, insofar as the terms of s 68BA(2)(a)(i) are plain, there is no room for the application of a principle of construction against retrospectivity.[100]

47. **Criteria:** There is no basis for the Applicant's submission that the criteria set out in s 68BA(3) are "*without meaningful substance*",[101] "*incapable of judicial application*", and "*impose no meaningful constraints*".[102] The criteria, though stated in broad terms,[103] are capable of judicial application in the individual case. They derive content from the purpose of the *Emergency Response Act* identified at AS [12], and that of the Supreme Court (identified in part in s 7 of the SCA), and regularly fall to be determined by courts in criminal and other proceedings.

20 48. *First*, s 68BA(3)(a) is neither "self-referential", nor "invariably satisfied" in all cases during the emergency period.[104] That submission assumes that expedition is the sole criterion or rationale in s 68BA(3)(a), and discounts the terms of s 68BA(3)(b).[105] The reference to the "orderly" discharge of the business of the Court, and to what is "otherwise" in the interests of justice in s 68BA(3)(b), refutes that assumption.

49. *Secondly,* s 68BA(3)(b) is not "*devoid of meaningful content*" or "subsumed" by paragraph (a). Indeed, the wording of paragraph (b), "***otherwise** in the interests of justice*" expressly directs attention to matters apart from the orderly and expeditious

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[96] Cf. AS [26(b)].
[97] Cf. AS [26(c)].
[98] Cf. AS [26(d)].
[99] *Maxwell v Murphy* (1957) 96 CLR 261 at 285-286 per Fullagar J. Compare *R v MJR* (2002) 54 NSWLR 368 at 59 per Mason P; *Dickson v Whiddett* [2001] FCA 585 at [74]-[75] per Kenny J.
[100] See also *Legislation Act 2001* (ACT), s 75B.
[101] Cf. AS [16].
[102] Cf. AS [27].
[103] *Hogan v Hinch* (2011) 243 CLR 506 at [80] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, with reference to the criterion of satisfaction that the making of a suppression order is "in the public interest".
[104] Cf. AS [17].
[105] Cf. AS [18].

discharge of the business of the Court that is the subject of paragraph (3)(a). Though broad, it represents a common and substantive criterion susceptible of judicial application.[106] In fact, it is difficult to imagine a criterion that is more apposite.

50. The same criterion appears in s 85 of the *Supreme Court Act 1970* (NSW) in relation to whether a civil trial should proceed with a jury; in s 132(4) of the *Criminal Procedure Act 1986* (NSW) in relation to whether a trial by judge alone should be ordered where the prosecutor does not agree to a such a trial; and in s 7(3b) of the *Juries Act 1927* (SA) in relation to whether trial by judge alone should be ordered without the consent of the accused. The circumstances enlivening the latter provision provide just one counterexample to the Applicant's assertion at AS [18] that, in the absence of a health emergency, it would never be in the interests of justice to proceed to trial by judge alone in the absence of consent by the accused.

51. *Thirdly*, s 68BA does not pre-determine, or establish any legislative presumption in relation to, where the interests of justice lie.[107] In some cases, the considerations of the interests of justice may result in no s 68BA order being made. That was acknowledged by the trial judge,[108] and reflected by the invitation to the parties to put evidence that might weigh against the making of an order under s 68BA.[109] The submission that the interests of justice in s 68BA(3)(b) will weigh in all cases in favour of a trial by judge alone[110] presupposes the outcome of the exercise of a broad discretion, and is without foundation. Moreover, the submission that the outcome of the exercise of that discretion is "*predetermined by the judgment made by the Assembly that trials must and will continue*" during the COVID-19 emergency period[111] assumes a non-existent edict from the Assembly.

52. *Fourthly,* to the extent that the Applicant criticises the decision-making of the primary judge in *R v UD (No 2),*[112] that has no bearing on the validity of s 68BA. If his Honour erred in making a s 68BA order in the circumstances of this case, the proper course is to seek leave to appeal. In any case, the Applicant here put forward no substantive

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[106] See also *Thomas v Mowbray* (2007) 233 CLR 307 at [73] per Gummow and Crennan JJ; *R v Commonwealth Industrial Court (Amalgamated Engineering Union Case)* (1960) 103 CLR 368 at 383 per Kitto J (Dixon CJ agreeing). See also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR (***Vella***) at [23]-[24], [89] per Bell, Keane, Nettle and Edelman JJ; cf. [165]-[166], [180] per Gageler J.
[107] In particular, it does not provide that an order should be made unless the trial is *only* suited to determination by a jury, contra AS [24].
[108] *R v UD (No 2)* at [74] (CRB Tab 5 p 61).
[109] *R v UD (No 2)* at [30], [48] (CRB Tab 5 pp 53, 58).
[110] AS [20]. Nothing in s 68BA provides for an "expedited" trial by judge alone: cf. AS [19].
[111] AS [27].
[112] See AS [20]-[24].

reason to think that the interests of justice did not favour trial by judge alone, beyond the assertion of his right to choose trial by jury.[113]

53. **Impact:** The change effected by s 68BA is not such as to engage the *Kable* principle.[114] Section 68BA changes the ability of an accused to elect to be tried by judge alone. As the Applicant acknowledges at AS [28], that is a statutory right (found in s 68B of the SCA). As such, and in the absence of demonstrating that the consent of the accused to the mode of criminal trial is an essential right, it is subject to change.

54. That change is not "unprecedented" in the sense that it is not the only circumstance in which the mode of trial is determined regardless of the consent of the accused. The history traced in [13]-[33] above demonstrates that there are many circumstances in which an accused is not entitled to a jury trial, including several in relation to criminal offences tried on indictment.

55. Furthermore, the Court has not, by way of s 68BA, arrogated to itself a role that is the exclusive preserve of a jury.[115] Trials by judge alone have occurred in the Territory since 1993.[116] In a judge alone trial, a judge adopts the traditional role of a jury as the finder of fact. There is no repugnancy in that, nor is it a denial of the historically important role juries have played in the administration of criminal justice.[117]

56. Nor can it be suggested that the Supreme Court acts at the behest of the Assembly, in order to achieve the Assembly's alleged policy against jury trials during the COVID-19 emergency period.[118] Section 68BA does not "*require judge alone trials*",[119] and it does not prohibit jury trials during the emergency period.

57. Finally, there is no evidence before this Court to suggest that the operation of s 68BA, in the context of the current health emergency, would undermine public confidence in the administration of criminal justice in the Territory. In any event, that is not decisive of validity.[120]

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[113] Further factors relevant to the interests of justice were identified by the Crown (CRB Tab 3 p 13). Other considerations were noted by the trial judge: *R v UD (No 2)* at [47] (CRB Tab 5 p 58).
[114] Cf. AS [28].
[115] Cf. AS [31].
[116] *Supreme Court (Amendment) Act 1993* (ACT), s 6, which inserted s 68B into the SCA.
[117] See also *Cheung v The Queen* (2001) 209 CLR 1 at [4] per Gleeson CJ, Gummow and Hayne JJ, at [80]-[81] per Gaudron J.
[118] Cf. AS [32]. See *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343 at [44] per French CJ, [61]–[73] per Heydon J; *Kuczborski* at [40] per French CJ, [220] per Crennan, Kiefel, Gageler and Keane JJ.
[119] Cf. AS [28].
[120] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [40] per French CJ, Kiefel and Bell JJ, citing *Momcilovic* at 93 per Gummow J; *Vella* at [80] per Bell, Keane, Nettle and Edelman JJ.

Question 2 – Legislative power of the ACT

58. The Applicant's primary and alternative arguments in relation to Question 2 are both predicated on the same "original conception" of a Supreme Court that has a "defining characteristic" of criminal trial by jury for offences tried on indictment, absent statutory warrant for the accused to elect trial by judge alone.[121] It is not evident how something that can be negated by an accused, and otherwise qualified by statute, can be considered an essential characteristic of a Supreme Court. Insofar as the Applicant's conception of a Supreme Court is not embraced by this Court, both the Applicant's primary and alternative arguments fail.

10 59. Furthermore, the Applicant's arguments in relation to Question 2 do not advance his position beyond his arguments in relation to Question 1, other than to posit s 48A of the *Self-Government Act* as a separate basis on which to contend that the Assembly may not destroy the "institutional integrity" of the ACT Supreme Court (or its "other defining characteristics").[122]

60. It may be accepted that ss 28 and 48A of the *Self-Government Act* have the result that the Assembly would not have power to abolish the Supreme Court.[123] That proposition, however, does not advance the case for the invalidity of s 68BA of the SCA. The power of the Assembly to enact s 68BA is found in s 22 of the *Self Government Act*, and the Applicant has not demonstrated how s 68BA is inconsistent
20 with the jurisdiction of the Court provided for in s 48A of the *Self Government Act*.

61. As a repository of federal jurisdiction, the institutional integrity of the Supreme Court is protected by the *Kable* doctrine. It is inapt, however, to classify institutional integrity as a "defining characteristic",[124] as distinct from, for example, independence and impartiality.[125] Such characteristics constitute the "institutional integrity" of a Supreme Court.[126] For the reasons outlined in relation to Question 1, no aspect of the operation of s 68BA engages the *Kable* doctrine.

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[121] AS [53]-[56].
[122] AS [49]-[50].
[123] See *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [78] per Gummow and Hayne JJ; Parliamentary debate on the ACT Supreme Court (Transfer) Bill 1992 (Cth), House of Representatives, 28 May 1992, 3125 at 5 (Mr Duffy, Attorney-General). The Territory does not accept that the same conclusion follows from the matters at AS [46]-[47], but it is unnecessary for the Court to consider.
[124] Cf. AS [49]-[50].
[125] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [81] per Gaudron J.
[126] *Forge v ASIC* (2006) 228 CLR 45 (***Forge***) at [63] per Gummow, Hayne and Crennan JJ; *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 (***Kirk***) at [96] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

62. Contrary to the conceptual leap at AS[50], other characteristics of a Supreme Court, which do not go to institutional integrity for the purposes of *Kable,* do not have some independent protection as "defining characteristics" of a Supreme Court. The Applicant's submissions do not attempt to define generally what those characteristics might be, or by what criteria they could be determined. Any characteristics entrenched by s 48A of the *Self-Government Act* are co-extensive with those required for the institutional integrity of the Court that is protected by the *Kable* doctrine. Such an outcome is consistent with this Court's reasoning in *Forge*[127] and *Kirk.*[128] The "defining characteristics" of a Supreme Court are precisely those to which the

10 reference to "institutional integrity" alludes.[129]

63. Provided that the institutional integrity of the Supreme Court as a potential repository of federal jurisdiction is not "substantially impaired", the Assembly has power to alter the processes and procedures of the Supreme Court, even those subsisting since the establishment of the Court. There is a distinction to be drawn between "historical" and "essential" characteristics, which the Applicant elides.

64. Even if it is accepted that there is implicit in s 48A of the *Self-Government Act* the entrenchment of certain characteristics of a "Supreme Court" that go beyond the protection afforded by *Kable*, those characteristics do not extend to affording the accused the ability to determine the mode of trial in relation to offences against

20 Territory law tried on indictment.[130]

65. The Applicant at AS [53] accepts that the Assembly had power to introduce trial on indictment by judge alone with the consent of the accused. That acceptance is despite the fact that such a procedure was not facilitated by any Supreme Court in Australia at the time the ACT Supreme Court was first established.[131] Nor was such a procedure familiar to either the framers of the Constitution or the colonial judicial systems as they stood at Federation.

66. Indeed, the submissions at AS [58]-[63] would lead to the conclusion that trial on indictment by judge alone is contrary to the essential conception of a Supreme Court

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[127] (2006) 228 CLR 45.
[128] (2010) 239 CLR 531.
[129] *Forge* at [63] per Gummow, Hayne and Crennan JJ; *Kirk* at [96] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[130] Contra AS [53]-[56].
[131] The first judge only trial provision in Australia was s 7(1) of the *Juries Act 1927* (SA), enacted in 1984.

regardless of the accused's consent. The history of trial by jury does not support that proposition.[132]

67. Though repeatedly referring to trial on indictment before a jury as "fundamental", "foundational", "an underlying premise" or a "systemic value", the Applicant has failed to provide any substantive reason for according a special status to the accused's ability to determine the mode of trial of offences against Territory law tried on indictment. Indeed, according such a status to the accused's ability to choose on the assumption that, in the absence of election, trial by judge alone would be a substantial wrong to the accused would be a "startling proposition".[133]

10 68. As noted at AS [64], the enactment of Part VA of the *Self-Government Act* was intended to ensure that laws made in relation to the judicial power of the Territory are made in accordance with certain standards. Section 68BA maintains those standards by facilitating the continuity of criminal proceedings during the emergency period while having the necessary regard to the "interests of justice".[134]

<u>Question 3 – Section 80</u>

69. Question 3 concerns the application of s 80 of the Constitution to trial on indictment of offences against a law of the Territory. The result of the Applicant's submission is that, irrespective of the consent of the accused, trial by judge alone for indictable Territory offences (to the extent that it is ordered under s 68BA of the SCA) would be

20 unconstitutional, also calling into question provisions such as s 68B of the SCA. Such an outcome would overturn 27 years of practice in the Territory.

70. Section 80 is expressed to apply to trials on indictment against "any law of the Commonwealth". The relevant offences under the Criminal Code are not laws of the Commonwealth. The Criminal Code is a law made pursuant to the plenary legislative power of the Territory. The enactment of the Territory's laws does not involve the exercise of the Commonwealth Parliament's legislative power.[135]

71. The Applicant has not asked this Court to overturn the decision in *Bernasconi*,[136] but to distinguish it.[137] The Territory submits that *Bernasconi* is not distinguishable and

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[132] *Fleming v The Queen* (1998) 197 CLR 250 at [4] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ*; AK v Western Australia* (2008) 232 CLR 438; *Alqudsi* at [2] per French CJ, [85]-[86] per Kiefel, Bell and Keane JJ; [190] per Nettle and Gordon JJ.

[133] *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at [11]-[12] per Gaudron, McHugh and Hayne JJ.

[134] Cf. AS [65].

[135] *Capital Duplicators v Australian Capital Territory* (1992) 177 CLR 248 (***Capital Duplicators***) at 282 per Brennan, Deane and Toohey JJ; *Svikart v Stewart* (1994) 181 CLR 548 at 562 per Mason CJ, Deane, Dawson and McHugh JJ; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279 per Wilson J.

[136] *R v Bernasconi* (1915) 19 CLR 629.

[137] AS [71]-[72].

represents an insuperable difficulty for the Applicant. In *Bernasconi*, the Chief Justice found that s 80 has no application to the territories. Instead, it is limited to offences created by the Commonwealth Parliament by statutes passed in the execution of those functions which are aptly described as "laws of the Commonwealth".[138] That phrase, as used in s 80, was held to contraindicate the law of a State, and by extension, the law of a Territory.

72. This Court ought not to accept the Applicant's submission that *Bernasconi* is distinguishable on the basis that the ACT is "*a materially different class of Territory*" from Papua so as to "remove it from the *prima facie* binding scope of authority represented by *Bernasconi*".[139] Contrary to AS [71], the particular character of a territory was not a significant element of the Court's reasoning in *Bernasconi*. Indeed, Justice Isaacs made specific reference to the status of a territory that is not yet "fused with [the Commonwealth]",[140] an expression that his Honour had previously used to describe the Northern Territory.[141]

73. The Applicant also draws upon criticism of Griffith CJ's view in *Bernasconi* of the relationship between s 122 and Ch III[142] to contend that there is "*now considerable overlap between the operation of Ch III and s 122*".[143] Even if that proposition were accepted, it would not support the Applicant's contention that s 80 applies to trial on indictment of an offence against the law of the Territory.

74. As Toohey J made clear in *Kruger v The Commonwealth* (***Kruger***),[144] *Bernasconi* is not authority for the "broad proposition" that the power conferred by s 122 is not restricted by the provisions of Ch III. Instead, the *ratio* is limited to the interoperation of ss 80 and 122.[145] Accordingly, recognition of the decision in *Bernasconi* does not necessarily involve acceptance of the proposition that Ch III as a whole has no application to the territories.[146]

75. While the view may be taken that s 122 is not impervious to Ch III,[147] this case requires the Court to consider the construction only of s 80.[148] As Griffith CJ found in

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[138] *Bernasconi* at 635 per Griffith CJ (Gavan Duffy and Rich JJ agreed with the views expressed by the Chief Justice with respect to the construction of ss 80 and 122 of the Constitution, at 640).
[139] AS [72].
[140] *Bernasconi* at 637 per Issacs J.
[141] *Buchanan's Case* (1913) 16 CLR 315 at 335 per Isaacs J.
[142] AS [76], fn 76.
[143] AS [73], fn 77.
[144] (1997) 190 CLR 1.
[145] (1997) 190 CLR 1 at 80 per Toohey J.
[146] *Spratt v Hermes* (1965) 114 CLR 226 at 275 per Windeyer J; see also Barwick CJ at 245.
[147] Cf. AS [73], fn 77.
[148] *Kruger* at 81 per Toohey J, with reference to Barwick CJ in *Spratt v Hermes* at 242.

Bernasconi, the text and context of s 80 supports the construction of "any law of the Commonwealth" in contradistinction to the laws of the States and Territories.

76. The Applicant's submission that the accepted view "now" favours an interpretation that treats the Constitution as "one coherent instrument",[149] suggests a development in constitutional jurisprudence that is illusory. There is nothing novel in that conception, which in any event does not lead to the conclusion that s 80 of the Constitution applies to offences against laws of the Territory. To utilise the principle in that way would be to override the distinctive operation of this and other provisions of the Constitution, properly construed in light of their text and context.

10 77. The Applicant's case is not advanced by the finding that s 122 is qualified by other provisions of the Constitution.[150] In particular, in ascertaining the operation of s 90, this Court in *Capital Duplicators* recognised the creation of a free trade area embracing the *geographical* territory of the uniting Colonies as one of the objectives of Federation.[151] The Court embraced a construction of s 90 that achieved that "essential objective",[152] concluding that the authorisation of the Assembly to impose duties would "destroy a central objective of the federal compact".[153]

78. The same rationale informed the dicta of Gummow J in *Kruger*, relied upon by the Applicant at AS [81]. That rationale cannot be used presumptively in relation to the operation of s 80. The Applicant cannot demonstrate that limiting the operation of s 80

20 to laws passed by the Commonwealth Parliament (as opposed to laws of the Territory) destroys a central objective of the federal compact. Such a conclusion is contrary to the express terms of s 80, and leads to the logical outcome that it should also bind the States.

79. The Applicant submits at AS [81]-[82] that the relationship between ss 80 and 122 should be determined in a way that secures to Territorians the "basic rights" that the Constitution confers on other Australians, absent contrary indication, and that nothing in the text or context of s 80 required its "disapplication" from the Territory upon its surrender. Properly construed, there is no distinction in how the guarantee in s 80 applies for the benefit of all Australians. It is clear that s 80 continues to apply in the

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[149] AS [75]. Cf. AS [76]-[78], which is proffered in the same guise.
[150] Cf. AS [80]. The "weight of authority" in relation to the application of s 116, to which the Applicant refers, is qualified by Gummow J in *Kruger* (at 166): "albeit none of it determinative of the issue".
[151] (1992) 177 CLR 248 at 274 per Brennan, Deane and Toohey JJ.
[152] (1992) 177 CLR 248 at 278 per Brennan, Deane and Toohey JJ.
[153] (1992) 177 CLR 248 at 279 per Brennan, Deane and Toohey JJ; see also 288-290 per Gaudron J. Cf. AS [79].

Territory, but it does so on its terms.[154] The interpretive principles on which the Applicant relies do not assist him in contending that the term "any law of the Commonwealth" in s 80 encompasses laws of the Territory.

Part IV: Estimate of time for oral argument

80. It is estimated that 1.5 hours will be required for presentation of oral argument.

Dated: 25 May 2020

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154 Cf. AS [84].

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C7 of 2020

BETWEEN: **UD**
Applicant

and

The Queen
Respondent

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ANNEXURE

ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY (INTERVENING) LIST OF LEGISLATIVE PROVISIONS

Statute	Provisions	Version
Constitution	ss 80, 90, 122	
Commonwealth: Statutes		
Australian Capital Territory (Self-Government) Act 1988 (Cth)	ss 22, 28, 48A	Compilation No. 24 (effective 1 July 2016)
Crimes Act 1914 (Cth)	ss 4E, 4H, 4J	Compilation No. 131 (effective 28 April 2020)
Family Law Act 1975 (Cth)	ss 90XS, 90XZD	Compilation No. 89 (effective 25 April 2019)
Federal Court Rules 1979 (Cth)	Order 52 r 58	Compilation No. 36 (effective: 1 January 2011 - 1 August 2011)
Judiciary Act 1903 (Cth)	s 68, 78A	Compilation No. 47 (effective 25 August 2018)

Commonwealth: Statutory Instruments		
Juries Ordinance 1967	ss 9, 12	As made
Juries (Amendment) Ordinance 1979		As made
Australian Capital Territory: Statutes		
Court Procedures Act 2004 (ACT)	ss 27, 76	Republication No. 52 (effective: 14 May 2020)
Court Procedures Rules 2006 (ACT)	r 4738	Republication No. 57 (effective: 21 March 2020)
Crimes Act 1900 (ACT)	ss 264, 316, 318, 319, 374, 375	Republication No. 126 (effective: 14 May 2020)
COVID-19 Emergency Response Act 2020 (ACT)		Act No. 11 of 2020 (effective: 8 April 2020 – 13 May 2020)
Criminal Code 2002 (ACT)	ss 308, 312, 318, 403	Republication No. 41 (effective: 15 August 2017 – 1 March 2018)
Evidence Act 2011 (ACT)	ss 26, 29, 41	Republication No. 10 (effective: 9 March 2020)
Evidence (Miscellaneous Provisions) Act 2011 (ACT)	ss 4AB, 4AJ, 20	Republication No. 44 Effective: 14 May 2020
Human Rights Act 2004 (ACT)	ss 21, 22	Republication No. 13 (effective: 14 May 2020)
Juries Act 1967 (ACT)	ss 31A, 42A	Republication No. 32 (effective: 27 April 2018)
Juries (Amendment) Act 1979 (ACT)		Act No. 39 of 1979 (effective 1 February 1980 – 21 December 2000)
Legislation Act 2001 (ACT)	ss 75B, 190	Republication No. 117 (effective: 30 April 2020)
Magistrates Court Act (ACT)	ss 19, 108A	Republication No. 92 (effective: 14 March 2020)

Magna Carta (1927) 25 Edw 1 c29	s 29	Republication No. 1 (effective: 5 July 2002)
Public Health Act 1997 (ACT)	s 119	Republication No. 32 (effective 8 April 2020)
Supreme Court Act 1933 (ACT)	ss 7, 37E, 68A, 68B, 68BA, 68D, 68E	Republication No. 59 (effective: 8 April 2020)
Supreme Court (Amendment) Act 1993 (ACT)	s 6	Act No. 59 of 1993 (effective: 6 September 1993 – 21 December 2000)
<u>Australian Capital Territory: Statutory Instruments</u>		
Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction (No 7)		Notifiable Instrument No. 286 of 2020 (effective: 15 May 2020 – 6 July 2020)
Public Health (Emergency) Declaration 2020 (No 1)		Notifiable Instrument No. 153 of 2020 (effective: 16 March 2020 – 7 July 2020)
Public Health (Emergency) Declaration Further Extension 2020 (No 9)		Notifiable Instrument No. 218 of 2020 (effective: 8 April 2020)
Public Health (Non-Essential Gatherings) Emergency Direction 2020 (No 3) [NI2020-268]		Notifiable Instrument No. 268 of 2020 (effective: 8 May 2020)
Public Health (Residential Aged Care Facilities) Emergency Direction 2020 (No 2)		Notifiable Instrument No. 281 of 2020 (effective: 14 May 2020)
Public Health (Returned Travellers) Emergency Direction 2020		Notifiable Instrument No. 164 of 2020 (effective: 19 March 2020)
Public Health (Returned Travellers) Emergency Direction 2020 (No 5)		Notifiable Instrument No. 280 of 2020 (effective: 14 May 2020)

Public Health (Self-Isolation) Emergency Direction 2020		Notifiable Instrument No. 177 of 2020 (effective: 25 March 2020
<u>New South Wales</u>		
Crimes Act 1900 (NSW)	Pt 7, div 3	Act No. 40 of 1900 (current version for 1 March 2020)
Criminal Law Amendment Act 1883 (NSW)	ss 150-153	As enacted
Criminal Procedure Act 1986 (NSW)	ss 3, 6, 132, 167, 168, 170, 194, 202, 245, 365	Act No. 209 of 1986 (current version for 14 May 2020)
District Court Act 1973 (NSW)	s 76A	Act No. 9 of 1973 (current version for 1 July 2019)
Jury Trials Act 1832 (NSW)		As enacted
Jury Trials Act 1833 (NSW)		As enacted
Jury Trials Act 1839 (NSW)	s 85	Act No. 11 of 1839
Jury Act 1977 (NSW)	ss 19, 53B, 54, 55F	Act No. 18 of 1977 (current version for 25 March 2020)
Mental Health (Forensic Provisions) Act 1990 (NSW)	s 21A, 23	Act No 10 of 1990 (current version for 4 February 2019)
Supreme Court Act 1970 (NSW)		Act. No 52 of 1970 (current)
Uniform Civil Procedure Rules 2005 (NSW)	r 12.8	Serial No. 418 of 2005 (effective: 9 April 2020)
<u>South Australia</u>		
Criminal Procedure Act 1921 (SA)	ss 5, 64	Version 7.11.2019 (effective 7 November 2019)
Juries Act 1927 (SA)	ss 5, 7, 55, 56	Version 5.3.2018 (effective: 5 March 2018)

Victoria		
County Court Civil Procedure Rules 2018 (Vic)	r 47.02(3)	Statutory Rule No. 170 of 2018 (version 007 effective 28 April 2020)
COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)		Act No. 11 of 2020 (version 001 effective 25 April 2020)
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)	ss 101, 105	Act No. 65 of 1997 (version 074 effective 25 April 2020)
Criminal Law and Practice Statute 1864 (Vic)	ss 66-69	As enacted
Criminal Procedure Act 2009 (Vic)	ss 27, 420D	Act No. 7 of 2009 (version 075 effective 25 April 2020)
Juries Act 2000 (Vic)	ss 23, 44, 46	Act No. 53 of 2000 (version 052 effective 1 March 2020)
Supreme Court (General Civil Procedure) Rules 2015 (Vic)	rr 47.02(3), 55.02, 55.03	Statutory Rule No. 103 of 2015 (version 033 effective 6 May 2020)
Queensland		
Civil Liability Act 2003 (Qld)	s 73	Act No 13. of 2003 (reprint effective: 2 March 2020)
Criminal Code Act 1899 (Qld)	ss 552BA, 614-615	Act No 9. of 1899 (reprint effective: 26 February 2020)
Jury Act 1995 (Qld)	ss 34, 53, 57, 59A, 65A	Act No 42. of 1995 (reprint effective: 30 March 2017)
Justices Act 1886 (Qld)	ss 19, 22A	Act No. 17 of 1886 (reprint effective 13 February 2020)

Mental Health Act 2016 (Qld)	s 288	Act No. 5 of 2016 (reprint effective 1 December 2018)
Summary Offences Act 2005 (Qld)	s 46	Act No. 4 of 2005 (reprint effective 1 March 2020)
<u>Tasmania</u>		
Criminal Code Act 1924 (Tas)	ss 5, 361	Act No. 69 of 1924 (reprint effective 6 April 2020)
Juries Act 2003 (Tas)	ss 26, 42, 43, 47	Act No. 48 of 2003 (reprint effective 30 May 2012)
Supreme Court Civil Procedure Act 1932 (Tas)	s 29	Act No. 58 of 1932 (reprint effective: 9 September 2019)
Supreme Court Rules 2000 (Tas)	r 558	Statutory Rule No. 8 of 2000 (effective 9 September 2019)
<u>Northern Territory</u>		
Criminal Code Act 1983 (NT)	ss 348, 359, 365, 368	Serial No. REPC038 (effective: 7 November 2019)
Juries Act 1962 (NT)	ss 6A, 7, 37A	Serial No. REPJ001 (effective: 14 November 2018)
Local Court (Criminal Procedure) Act 1928 (NT)	s 64	Serial No. REPL068 (effective: 7 November 2019)
<u>Western Australia</u>		
Criminal Code Act Compilation Act 1913 (WA)	ss 1, 3, 5	Act No. 28 of 1913 (effective 4 Apr 2020)
Criminal Procedure Act 2004 (WA)	ss 111, 114, 115, 118	Act No. 71 of 2004 (version 03-e0-02 effective 13 September 2017)

Justices, summary offences (1850)		Act No. 14 Vict. No. 5 of 1850 (effective 2 December 1850)
Magistrates Court Act 2004 (WA)	s 11	Act No. 47 of 2004 (version 03-b0-01 effective 3 November 2018)
Supreme Court Act 1935 (WA)	s 42	Act No. 36 of 1935 (version 09-f0-02 effective 3 November 2018)
<u>United Kingdom</u>		
25 Edw1, c 29 (1297)		As enacted
Administration of Justice (Miscellaneous Provisions) Act 1933 (UK)		As enacted
Australian Courts Act 1828 (Imp) 9 Geo IV, c 83	s 6	As enacted
Criminal Justice Act 1855, 18 & 19 Vict, c 126		As enacted
Justice and Security (Northern Ireland) Act 2007 (UK)	s 1	As enacted
New South Wales Act 1823 (Imp) 4 Geo IV, c 96		As enacted
Northern Ireland (Emergency Provisions) Act 1973 (UK)	s 19	As enacted
Summary Jurisdiction Act 1879, 42 & 43 Vict, c 49	ss 11-13	As enacted