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THE JURY IS OUT: *VUNILAGI V THE QUEEN* (2023) 411 ALR 224

'Then you may trust the Parliament
not to wipe out the right to a jury?'[1]

I Introduction

Trial by jury is a fundamental common law right. It ensures that 12 peers stand between the judiciary and the exercise of its power to remove an individual's liberty at the request of the executive. This right is reflected in s 80 of the *Constitution*. Section 80 requires that all Commonwealth indictable offences be tried by jury. *Vunilagi v The Queen* ('*Vunilagi*') has confirmed that s 80 does not apply to criminal offences enacted by territory legislatures, despite their power being derived from laws of the Commonwealth Parliament.[2] This decision follows a long line of High Court jurisprudence which has limited the application of s 80, and in doing so, undermined the protection of the common law right to trial by jury in Australia.[3]

Vunilagi concerned the prosecution and conviction of Simon Vunilagi for offences under the *Crimes Act 1900* (ACT) by trial by judge alone. In the midst of the COVID-19 emergency, the government of the Australian Capital Territory ('ACT') gave the ACT Supreme Court the power to order a trial by judge alone without the consent of the accused.[4] Vunilagi was denied a trial by jury on this basis. He appealed his conviction, arguing that the enabling law contravened the *Kable*[5]

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1 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 353 (Sir Isaac Isaacs) ('*Australasian Federal Convention Debates* 1898').

2 (2023) 411 ALR 224, 236–7 [54]–[57] (Kiefel CJ, Gleeson and Jagot JJ), 239 [65] (Gageler J), 247 [90] (Gordon and Steward JJ) ('*Vunilagi*').

3 See, eg: *R v Bernasconi* (1915) 19 CLR 629 ('*Bernasconi*'); *R v Archdall* (1928) 41 CLR 128 ('*Archdall*'); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 ('*Federal Court of Bankruptcy*'); *Cheng v The Queen* (2000) 203 CLR 248 ('*Cheng*').

4 *Supreme Court Act 1933* (ACT) s 68BA, as at 8 April 2020.

5 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*'). See Part III(A) below.

principle and s 80 of the *Constitution*. The High Court unanimously dismissed both of these grounds.[6]

This article will focus on the Court's application of s 80 in *Vunilagi*. Parts II and III will outline the factual and legal background to the decision and Part IV will summarise the Court's reasoning. Part V will argue that the Court in *Vunilagi* endorsed a narrow interpretation of s 80, rather than interpreting the provision as a broad, substantive guarantee of the common law right to trial by jury. This interpretation is inconsistent with the typical approach to ch III of the *Constitution*. It is also inconsistent with the framers' intention to maintain the jury system across the Commonwealth, a system which was considered to be a fundamental 'safeguard of liberty'.[7]

II Facts

A *Legislative Background*

The COVID-19 pandemic posed significant problems for the ongoing administration of jury trials in courts throughout Australia. Not only did public health orders restricting activity and imposing social distancing requirements result in the likely delay of many jury trials, but there were also concerns about unnecessarily imperilling the safety of jurors.[8] The response of the ACT Legislative Assembly to these and other pandemic-related issues was to pass the *COVID-19 Emergency Response Act 2020* (ACT), which, inter alia, inserted provisions regarding jury trials into the *Supreme Court Act 1933* (ACT) ('*Supreme Court Act*').

Prior to the passage of these amendments, the *Supreme Court Act* generally required that accused persons in the ACT be tried by jury, unless the accused made a contrary election.[9] Relevantly, the new s 68BA invested the Supreme Court with the power to order that a criminal trial conducted during the COVID-19 emergency period proceed by way of trial by judge alone, rather than trial by jury.

The impugned provision read as follows:

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6 *Vunilagi* (n 2) 231 [22]–[24] (Kiefel CJ, Gleeson and Jagot JJ), 237–8 [60]–[62] (Gageler J), 245 [90]–[92] (Gordon and Steward JJ), 278 [224] (Edelman J).

7 *Australasian Federal Convention Debates* 1898 (n 1) 351 (Bernhard Wise).

8 Explanatory Memorandum, COVID-19 Emergency Response Bill 2020 (ACT) 19.

9 *Supreme Court Act 1933* (ACT) ss 68A–68B, as at 7 April 2020 ('*Supreme Court Act*'). Certain serious offences, listed in sch 2, pt 2.2 of the *Supreme Court Act*, were exempted from the election, such that the accused could not elect to be tried by judge alone.

68BA Trial by judge alone in criminal proceedings — COVID-19 emergency period

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

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

(a) to a criminal proceeding —

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

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

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

(3) The court may order that the proceeding will be tried by judge alone if satisfied the order —

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

(b) is otherwise in the interests of justice.

(4) Before making an order under subsection (3), the court must —

(a) give the parties to the proceeding written notice of the proposed order; and

(b) in the notice, invite the parties to make submissions about the proposed order within 7 days after receiving the notice

(5) In this section:

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

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

(a) 31 December 2020; or

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

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

B *Vunilagi*

Simon Vunilagi, alongside three co-accused, was charged with committing multiple counts of sexual intercourse without consent and an act of indecency without consent, which were offences against ss 54 and 60 of the *Crimes Act 1900* (ACT) respectively. On 13 August 2020, Murrell CJ made an order under s 68BA that the trial proceed before a judge alone.[10] Vunilagi had opposed the making of the order; however, her Honour nonetheless found it to be in the interests of justice to order a trial by judge alone.[11]

The trial proceeded before Murrell CJ. On 9 October 2020, Vunilagi was found guilty of multiple counts of sexual intercourse without consent and one act of indecency without consent.[12] He was sentenced to 6 years, 3 months and 14 days' imprisonment.[13] Vunilagi unsuccessfully appealed to the ACT Court of Appeal, arguing, inter alia, that s 68BA was constitutionally invalid.[14] After this appeal was dismissed, he took the matter to the High Court.

III Relevant Law

Vunilagi concerned the validity of s 68BA under the *Kable* principle and s 80 of the *Constitution*. In determining the application of s 80 to the impugned provision, the legislative history of the *Crimes Act 1900* (ACT) was also highly relevant. This legal background is outlined below.

A Kable *Principle*

The *Kable* principle establishes that State legislation will be constitutionally invalid if it confers upon a state Supreme Court a power or function which substantially impairs the institutional integrity of the Court.[15] Such a law is constitutionally invalid as it is incompatible with the role of state Supreme Courts as repositories of federal jurisdiction under ch III of the Constitution.[16] The *Kable* principle applies to the ACT Supreme Court because it is capable of exercising Commonwealth judicial power.[17]

10 *R v Vunilagi* [2020] ACTSC 225, [42].

11 Ibid [39]–[40].

12 *R v Vunilagi* [2020] ACTSC 274, [526].

13 *R v Vunilagi* [2020] ACTSC 303, [84].

14 *Vunilagi v The Queen* (2021) 17 ACTLR 72, 123 [223], 131 [254].

15 *Kable* (n 5).

16 *Vunilagi* (n 2) 242 [82] (Gordon and Steward JJ).

17 Ibid 229 [12] (Kiefel CJ, Gleeson and Jagot JJ), 242 [82] (Gordon and Steward JJ), citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [28].

B *Section 80 of the* Constitution

Section 80 of the *Constitution* is the final provision of ch III. It relevantly states that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'.

Although s 80 might appear to constitutionally enshrine a right to trial by jury, its substantive guarantee has been severely limited by the prevailing interpretation of the provision. Most notably, s 80 requires a trial by jury only for a 'trial on indictment'. The High Court has repeatedly affirmed that whether an offence is triable on indictment is a matter for Parliament to decide.[18] This effectively means that s 80 only requires a trial by jury where Parliament prescribes that the offence is to be tried by jury. That interpretation has been criticised as leaving s 80 without substantive meaning.[19]

Section 80 also only applies to offences against a 'law of the Commonwealth'. In dispute in *Vunilagi* was whether ss 54 and 60 of the *Crimes Act 1900* (ACT) are laws of the Commonwealth to which s 80 applies.

R v Bernasconi ('*Bernasconi*')[20] is a High Court case which was the subject of much discussion in *Vunilagi*.[21] This case was decided in 1915, on appeal from the Central Court of Papua, and concerned the application of s 80 to laws of a territory. The Commonwealth is able to 'make laws for the government of any territory' under s 122 of the *Constitution*, including laws which establish an independent system of government.[22] In *Bernasconi*, Griffith CJ, with whom Duffy and Rich JJ agreed, considered that ch III of the *Constitution* — and therefore, s 80 — did not apply to laws made under s 122 of the *Constitution*, whether or not those laws are made by the Commonwealth Parliament 'directly or through a subordinate legislature' of a territory.[23] As will be discussed below, the Court in *Vunilagi* refused to overturn *Bernasconi* but made clear that it is largely no longer good law.[24]

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18 See, eg: *Archdall* (n 3) 136 (Knox CJ, Isaacs, Gavan Duffy and Powers JJ), 139–40 (Higgins J); *Kingswell v The Queen* (1985) 159 CLR 264, 276–7 (Gibbs CJ, Wilson and Dawson JJ, Mason J agreeing at 282) ('*Kingswell*'); *Cheng* (n 3) 295 [141]–[143] (McHugh J).

19 See, eg: *Federal Court of Bankruptcy* (n 3) 584 (Dixon and Evatt JJ); *Kingswell* (n 18) 310 (Deane J); *Cheng* (n 5) 307 (Kirby J). See generally Anthony Gray, 'Mockery and the Right to Trial by Jury' (2006) 6(1) *Queensland University of Technology Law and Justice Journal* 66.

20 *Bernasconi* (n 3).

21 See below Part IV.

22 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 265–6 (Mason CJ, Dawson and McHugh JJ), 272 (Brennan, Deane and Toohey JJ), 284 (Gaudron J) ('*Capital Duplicators*'). See also *Berwick Ltd v Gray* (1976) 133 CLR 603, 607 (Mason J).

23 *Vunilagi* (n 2) 236 [54], citing *Bernasconi* (n 3) 635.

24 Ibid 236 [54] (Kiefel CJ, Gleeson and Jagot JJ), 238 [62] (Gageler J), 264–7 [170]–[178] (Edelman J).

C *Legislative History of the* Crimes Act 1900 *(ACT)*

The legislative history of the *Crimes Act 1900* (ACT) is relevant to whether ss 54 and 60 are 'laws of the Commonwealth' under s 80 of the *Constitution*. This history was discussed at great length by the Court in *Vunilagi*.[25]

In 1909, the ACT was surrendered by New South Wales and accepted as a territory of the Commonwealth under s 111 of the *Constitution*. Between 1909 and 1989, the *Crimes Act 1900* (NSW) applied in the ACT pursuant to Commonwealth law.[26]

In 1989, under s 122 of the *Constitution*, the Commonwealth passed the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ('*Self-Government Act*'), which created the ACT Legislative Assembly and granted this body the power to 'make laws for the peace, order and good government' of the ACT.[27] Under s 34(4) of the *Self-Government Act*, a law which was in force in the ACT before the commencement of that Act and was 'an Act of the Parliament of New South Wales' was taken to be an enactment of the ACT Legislative Assembly and could be amended or repealed accordingly.[28] Initially, s 34(4) did not apply to the *Crimes Act 1900* (NSW);[29] however, this was later altered and from 1 July 1990, the *Crimes Act 1900* (NSW) was taken to be an enactment of the ACT Legislative Assembly.[30]

In 1992, the Legislative Assembly also enacted the *Crimes Legislation (Status and Citation) Act 1992* (ACT) ('*Status and Citation Act*') which specifically provided that the *Crimes Act 1900* (NSW) 'shall be taken to be, for all purposes, a law made by the Legislative Assembly as if the provisions of the [Act] had been re-enacted in an Act passed by the Assembly and taking effect on the commencement of [the *Status and Citation Act*]'.[31] The *Status and Citation Act* was repealed in 1999[32] but it has continued in its effect.[33]

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25 See ibid 231–3 [26]–[36] (Kiefel CJ, Gleeson and Jagot JJ), 239–40 [66]–[73] (Gageler J), 248–52 [105]–[123] (Gordon and Steward JJ), 275–7 [209]–[219] (Edelman J).

26 Ibid 231–2 [28] (Kiefel CJ, Gleeson J, Jagot J), citing *Seat of Government Acceptance Act 1909* (Cth) s 6(1); *Seat of Government (Administration) Act 1910* (Cth) s 4.

27 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22(1).

28 Ibid s 34(4).

29 Ibid s 34(5), sch 3 pt 2 (as made).

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

31 *Crimes Legislation (Status and Citation) Act 1992* (Cth) s 3(1).

32 *Vunilagi* (n 2) 233 [35] (Kiefel CJ, Gleeson and Jagot JJ), citing *Law Reform (Miscellaneous Provisions) Act 1999* (ACT) s 5(1), sch 2.

33 *Vunilagi* (n 2) 233 [35], citing *Law Reform (Miscellaneous Provisions) Act 1999* (ACT) s 5(2); *Interpretation Act 1967* (ACT) s 42; *Legislation Act 2001* (ACT) ss 88, 301(2).

IV Decision

On appeal to the High Court, Vunilagi contended that s 68BA was invalid by reason of being contrary to: (1) the implied limitation on legislative power recognised in *Kable*;[34] and (2) s 80 of the *Constitution*. In respect of the second ground, Vunilagi argued that the *Crimes Act 1900* (ACT) is a 'law of the Commonwealth' because it is given force by the Commonwealth's *Self-Government Act*, or alternatively that s 80 applies to all laws made pursuant to s 122 of the *Constitution*, including laws made by a territory legislature.[35] The High Court unanimously rejected both grounds and dismissed the appeal. Their Honours' reasoning is set out below.

A *Chief Justice Kiefel, Gleeson and Jagot JJ*

Chief Justice Kiefel, Gleeson and Jagot JJ rejected the appellant's contention that s 68BA was constitutionally invalid under the *Kable* principle. The appellant had argued that s 68BA(4) operated as a 'gatekeeping function' whereby the ACT Supreme Court could arbitrarily provide an accused person with a notice under s 68BA(4)(a), without any 'criteria' or 'discernible test' for whether the notice should be provided.[36] However, the plurality found that the appellant's argument rested on an incorrect construction of s 68BA.

Their Honours considered that, on the proper construction of s 68BA, the provision granted the trial judge a discretionary power which involved 'the usual incidents of the judicial process, including an open and public enquiry, procedural fairness and the giving of reasons'.[37] As such, in their Honours' view, s 68BA did not impair the institutional integrity of the Court and was not in breach of the *Kable* principle.

In relation to the appellant's second ground of appeal, Kiefel CJ, Gleeson and Jagot JJ did not consider ss 54 and 60 of the *Crimes Act 1900* (ACT) to be laws of the Commonwealth to which s 80 of the *Constitution* applies. Therefore, there was no constitutional requirement for Vunilagi to be tried by jury.

Their Honours considered the *Crimes Act 1900* (NSW) to have been a law of the Commonwealth until 1 July 1990, when s 34(4) of the *Self-Government Act* applied to the *Crimes Act 1900* (NSW) and it became a law of the ACT.[38] Their Honours considered the ACT Legislative Assembly to be an independent body politic which enacted laws which were 'distinct from the laws of the Commonwealth Parliament'.[39] As such, at the time of the appellant's trial, ss 54 and 60 of the *Crimes*

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34 See above Part III(A).

35 See above Part III(B). See also Simon Vunilagi, 'Appellant's Submissions', Submission in *Vunilagi v The Queen & Anor*, C13/2022, 5 August 2022, 7 [17], 14 [32], 16 [37].

36 *Vunilagi* (n 2) 229–30 [15]–[16] (Kiefel CJ, Gleeson and Jagot JJ).

37 Ibid 229 [14].

38 See *ACT Self–Government (Consequential Provisions) Act 1988* (Cth) s 12(2).

39 *Vunilagi* (n 2) 236–7 [55].

Act 1900 (ACT) were not laws of the Commonwealth to which s 80 applies and therefore, Vunilagi was not required to be tried by jury for these offences.

Their Honours also rejected the appellant's secondary and broader contention that s 80 applies both to laws made by the Commonwealth under s 122, and laws made by the Legislative Assembly, which derives its power from laws made under s 122. This finding would be contrary to the decision in *Bernasconi*.[40] Their Honours made clear that the contention in *Bernasconi* that ch III does not apply to territories is now 'considered to be incorrect'.[41] However, in relation to s 80, their Honours considered it unnecessary to revisit *Bernasconi* as they had already determined the narrower question of whether ss 54 and 60 were 'laws of the Commonwealth' under s 80.[42]

B *Justice Gageler*

Justice Gageler concurred with the plurality's reasoning on the *Kable* ground.[43] His Honour also agreed with the plurality's conclusion in respect of the s 80 ground, but expressed his own reasons on this point.

Justice Gageler found that the reasoning in *Bernasconi*, that the legislative power in s 122 of the *Constitution* is not subject to the requirements of ch III, 'no longer accords with the doctrine of the Court'.[44] However, his Honour considered it unnecessary to decide whether the conclusion in *Bernasconi* was nevertheless correct on the basis that laws made under s 122 are not subject to s 80.[45] This was because, in his Honour's view, the appeal could be resolved by deciding whether legislation made by a territory parliament that is constituted under the authority of Commonwealth legislation is a 'law of the Commonwealth' — a question left unanswered by the majority in *Bernasconi*.[46]

According to Gageler J, the answer to that question was no. The reference in s 80 to a 'law of the Commonwealth', his Honour wrote, was a reference to legislation enacted by the Commonwealth Parliament and delegated legislation enacted pursuant to such legislation, but was not a reference 'to the ultimate source of power to enact that legislation'.[47] The legislative power vested in the ACT Legislative Assembly was considered 'distinct' from the legislative power of the Commonwealth

40 *Bernasconi* (n 3).

41 *Vunilagi* (n 2) 236 [54].

42 Ibid 236–7 [55].

43 Ibid 237–8 [60].

44 Ibid 238 [62].

45 Ibid.

46 Ibid 238 [63], quoting *Bernasconi* (n 3) 634 (Griffith CJ, Gavan Duffy and Rich JJ agreeing at 640).

47 *Vunilagi* (n 2) 239 [65].

Parliament itself,[48] and thus, laws enacted by the Legislative Assembly were not laws of the Commonwealth.[49]

On the facts of *Vunilagi*, Gageler J found that the *Status and Citation Act* had the substantive legal effect of re-enacting the text of the *Crimes Act 1900* (NSW), giving that legislation 'the status of a law enacted by the Legislative Assembly'.[50] The thereby-created *Crimes Act 1900* (ACT) was therefore not deemed a law of the Commonwealth to which s 80 applies.[51]

C *Justices Gordon and Steward*

Justices Gordon and Steward dismissed the *Kable* argument through similar reasoning as that of the plurality. Their Honours took the view that 'once s 68BA … is properly construed, the appellant's argument falls away'.[52]

Further, Gordon and Steward JJ found that ss 54 and 60 of the *Crimes Act 1900* (ACT) were not laws of the Commonwealth under s 80 of the *Constitution*.[53]

Their reasoning differed from the other Justices in some respects. Their Honours stated that s 34(4) of the *Self-Government Act* could not conclusively deem laws to not be laws of the Commonwealth.[54] In their view, this would amount to the 'stream ris[ing] higher than its source', contrary to the decision in *Australian Communist Party v Commonwealth*.[55]

However, their Honours considered s 34(4) to reflect an intention on the part of the Commonwealth to 'hand over the lawful authority' of the existing laws in the ACT to the ACT Legislative Assembly.[56] Therefore, such existing laws could validly become laws of the ACT if the Legislative Assembly 'sufficiently adopted the laws' through an 'amendment or a repeal and re-enactment of the law'.[57] By enacting the *Status and Citation Act*, the Legislative Assembly had sufficiently adopted the *Crimes Act 1900* (NSW) as a law of the ACT.[58] Therefore, in their Honours' view, ss 54 and 60 were not laws of the Commonwealth to which s 80 applies.

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48 See *Capital Duplicators* (n 22).

49 *Vunilagi* (n 2) 239 [66].

50 Ibid 240 [71].

51 Ibid 238 [61], 240 [73].

52 Ibid 243 [85].

53 Ibid 253 [126].

54 Ibid 250 [113].

55 (1951) 83 CLR 1, 258 (Fullagar J).

56 *Vunilagi* (n 2) 250 [115].

57 Ibid.

58 Ibid 251 [118].

Justices Gordon and Steward also rejected Vunilagi's alternative contention that laws made by the ACT Legislative Assembly were nevertheless 'laws of the Commonwealth' under s 80. Their Honours considered the ACT Legislative Assembly to exercise its own 'separate and distinct legislative power … not a power under delegation or agency from the Commonwealth Parliament'.[59] Therefore, ss 54 and 60 were 'laws of the Territory' not 'laws of the Commonwealth' to which s 80 applies.

D *Justice Edelman*

Justice Edelman dismissed Vunilagi's *Kable* argument, holding that the approach required by s 68BA(4) was 'wholly compatible with the institutional integrity of the Supreme Court'.[60]

With regard to the s 80 argument, Edelman J argued that the question of whether ch III of the *Constitution*, or specifically s 80, did not apply to territory laws made under s 122 of the *Constitution* had to be answered before the Court could decide whether a law made by a territory parliament could be a law of the Commonwealth.[61] In contrast, the rest of the bench had found it unnecessary to consider this first issue.[62]

Justice Edelman found that the reasoning in *Bernasconi*, that s 122 was unconstrained by the requirements of ch III of the *Constitution*, was 'manifestly wrong'.[63] His Honour would therefore have granted leave to re-open *Bernasconi*.[64] Furthermore, his Honour considered that *Bernasconi* could neither be re-explained on the basis that s 122 is immunised against s 80 specifically, nor on the basis that the decision was limited to a particular type of territory.[65] However, in his Honour's view, the reference in s 80 to a 'law of the Commonwealth' could be interpreted as excluding the laws of a self-governing territory. Since *Vunilagi* could be resolved on that basis, there was no need to consider whether *Bernasconi* could be re-explained as such.[66]

In particular, Edelman J noted the 'formal approach' that had been taken by the High Court to the interpretation of the phrase 'trial on indictment' in s 80. Justice Edelman argued that in the interests of consistency, a formal interpretative approach

59 Ibid 253 [126], citing *Capital Duplicators* (n 22) 265, 281–4.

60 *Vunilagi* (n 2) 257 [142], 257–8 [145].

61 Ibid 259 [150]–[151].

62 See ibid 236–7 [55] (Kiefel CJ, Gleeson and Jagot JJ), 238 [62] (Gageler J), 247 [98] (Gordon and Steward JJ).

63 Ibid 254 [132], 267 [178].

64 Ibid.

65 Ibid 267 [179], 268 [183], 271 [193].

66 Ibid 267 [179].

should similarly be adopted for construing the phrase 'law of the Commonwealth'.[67] His Honour accepted that, had the purpose of s 80 been 'to provide a strong guarantee of trial by jury', s 80 might constrain both laws passed by the Commonwealth Parliament and laws passed by self-governing territories that derive their authority from Commonwealth law.[68] However, the formal approach previously applied to the interpretation of s 80 'instead reflect[ed] a more flexible approach to trial by jury'.[69] In light of this formal approach, his Honour considered that 'law of the Commonwealth' means an enactment of the Commonwealth Parliament or delegated legislation created pursuant to such an enactment, but does not extend to legislation passed by self-governing territories with their own legislative power.[70]

In his Honour's view, the ACT Legislative Assembly had adopted the *Crimes Act 1900* (NSW) through the *Status and Citation Act*.[71] The relevant offences for which Vunilagi was convicted were therefore not offences against a law of the Commonwealth, and thus s 80 did not apply.[72]

E *Conclusion*

Overall, the Court in *Vunilagi* found that a law of a self-governing territory such as the ACT is not a 'law of the Commonwealth', and is therefore not constrained by s 80. Thus, *Vunilagi* establishes that the *Constitution* does not require offences against criminal laws enacted by the ACT Legislative Assembly to be tried by way of jury. The Court also agreed that the broad reasoning in *Bernasconi*, to the effect that laws made under s 122 of the *Constitution* are not constrained by ch III, is no longer persuasive.[73] However, only Edelman J rejected the narrower reasoning in *Bernasconi*, that s 80 does not apply to laws made under s 122.[74] The majority considered it unnecessary to address this question.

V Comment

This comment proceeds in two parts. First, we discuss the balancing act performed by the framers when drafting s 80 of the *Constitution*. The framers sought to maintain the common law right to trial by jury, while ensuring that the Commonwealth could formulate a flexible and effective system of criminal procedure. This

67 Ibid 273–4 [202].

68 Ibid 273 [201].

69 Ibid 273–4 [202].

70 Ibid 275–6 [204]–[205].

71 Ibid 277 [217]–[218].

72 Ibid 277 [219].

73 Ibid 236 [54] (Kiefel CJ, Gleeson and Jagot JJ), 238 [62] (Gageler J), 264–7 [170]–[178] (Edelman J).

74 Ibid 270 [189] (Edelman J).

has left s 80 vulnerable to judicial attack, and has seen its protection of the right to trial by jury continually undermined.

Second, we argue that the Court in *Vunilagi* implicitly rejected the view that s 80 provides a substantive guarantee of this common law right, and instead opted for a restrictive and formal interpretation of the constitutional provision. We argue that although this interpretive approach might be consistent with case law on s 80, it stands at odds with ch III jurisprudence more generally.

A *Section 80: A Balancing Act*

Trial by jury remains the cornerstone of Australia's criminal justice system at common law. This system was inherited from Britain[75] where it is 'ingrained … in the British idea of justice'.[76] It is a fundamental check on government power and a safeguard for criminal defendants, whose liberty is threatened by two arms of government — the executive prosecutor and the judiciary. In this context, Deane J in *Kingswell v The Queen*[77] described the jury trial as a 'bulwark against the tyranny of arbitrary punishment'.[78]

At the time of the 1890s Federal Conventions, trial by jury was 'firmly established in each of the federating colonies as the universal method of trial of serious crime'.[79] This system was considered an important aspect of the transition in Australia from 'military control to civilian self-government'.[80]

Section 80 was drafted into the *Constitution* in order to maintain the jury system across the Commonwealth.[81] Bernhard Wise considered it 'a necessary safeguard to the individual liberty of the subject in every state'.[82] However, the framers also appreciated the need for pragmatism in this area. There was concern amongst a number of the framers that 'making trial by jury a fixture'[83] under s 80 would limit the Federal Parliament's autonomy and prevent the formulation of a flexible and effective criminal justice system. There was also concern that it would render the

75 Herbert Vere Evatt, 'The Jury System in Australia' (1936) 10 (Supplement) *The Australian Law Journal* 49, 52–3.

76 United Kingdom, *Parliamentary Debates*, House of Lords, 25 May 1933, vol 87, col 1054 (Lord Atkin). In 1215, the Magna Carta declared that 'no Freeman shall be taken or imprisoned … but by lawful judgment of his Peers, or by the Law of the Land': *Magna Carta 1297*, 25 Edw 1, c 9, s 29.

77 *Kingswell* (n 18).

78 Ibid 298.

79 *Brownlee v The Queen* (2001) 207 CLR 278, 297 [52].

80 *Kingswell* (n 18) 299 (Deane J).

81 *Australasian Federal Convention Debates* 1898 (n 1) 351 (Henry Higgins).

82 Ibid 350 (Bernhard Wise).

83 Ibid 350 (Patrick Glynn).

Commonwealth's 'power less great than the power … possessed by the states' which maintain an unfettered ability to alter or remove the right to trial by jury.[84]

Ultimately, a balance was sought between protecting the right to trial by jury, and ensuring the Federal Parliament was able to effectively prosecute offences against Commonwealth laws. Section 80 was drafted to only apply to indictable offences, a category of offences created by the Federal Parliament itself.[85] This ensured that the flexibility and convenience of the summary jurisdiction was maintained. However, the framers recognised that this significantly weakened the application of s 80, which could be limited by the Federal Parliament by simply expanding the summary jurisdiction.[86]

This weakness has been evident in the High Court's construction of s 80 since federation. The High Court has interpreted s 80 narrowly and significantly limited its protection of the common law right to trial by jury.[87] By finding that offences against laws of territory legislatures do not have to be tried by jury, *Vunilagi* represents another narrow reading of s 80 — this time in relation to the scope of its application. This construction appears to be contrary to the intentions of the framers in seeking to enshrine the right to trial by jury across the Commonwealth. As will be discussed below, the Court's approach in *Vunilagi* is also inconsistent with the substantive approach generally adopted by the High Court in relation to ch III of the *Constitution*.

B *Section 80: A Toothless Tiger*

The interpretation of s 80 adopted by the Court in *Vunilagi* endorses a formal interpretive approach to s 80, instead of reading the provision as a guarantee of the common law right to trial by jury. We argue that this is inconsistent with the substantive interpretive approach generally applied to ch III of the *Constitution* (which contains s 80).

1 *A Formal Interpretive Approach to s 80*

The Court's conclusion in *Vunilagi* — that s 80 does not apply to the laws of self-governing territories — implicitly rejects the view that s 80 provides a substantive constitutional guarantee of the common law right to a trial by jury. Justice Edelman was most clear: his Honour expressly observed that had the purpose of s 80 been to provide this guarantee, then 'there might be a strong argument' that s 80 *would* extend to the laws of self-governing territories.[88]

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84 Ibid.

85 See *Kingswell* (n 18) 276–7 (Gibbs CJ, Wilson and Dawson JJ, Mason J agreeing at 282).

86 *Australasian Federal Convention Debates* 1898 (n 1) 352–3 (Richard O'Connor): 'You may trust the Parliament not to increase the list of offences to be dealt with by summary jurisdiction'.

87 See above Part III(B).

88 *Vunilagi* (n 2) 273 [201].

This hypothetical outcome seems logical. If a substantive view of s 80 was adopted, then the more formal question of whether the law was enacted by the Commonwealth Parliament or the legislature of a self-governing territory would seem less relevant. Instead, the focus would be on construing s 80 as a constitutional guarantee of the common law right to trial by jury. To that end, the phrase 'law of the Commonwealth' could be interpreted liberally, such that it would encompass the laws of self-governing territories on the basis that the power to pass such laws was granted by legislation enacted by the Commonwealth Parliament. This would extend the protection in s 80 to a wider array of offences throughout Australia, better enshrining the fundamental common law right.

Instead, the Court in *Vunilagi* decided the constitutional question on the basis that the offences in question were against laws enacted by the ACT Legislative Assembly. This represents a far more 'formal' and restrictive approach to the operation of s 80.[89]

2 *A Substantive Interpretive Approach to Ch III*

This 'formal' approach to interpretation might be consistent with much of the jurisprudence on s 80, as Edelman J argued. As explained in Part III(B), the interpretation of the phrase 'trial on indictment' has received a reading that has significantly narrowed the substantive meaning of the provision. And in *Alqudsi v The Queen*, the High Court found that when s 80 applies to a criminal trial, an accused cannot elect to be tried by judge alone, rejecting the view that s 80 confers a personal right that can be waived.[90]

However, although this formal and restrictive view may be consistent with the approach that the Court has previously taken to the construction of s 80, it sits uncomfortably with the Court's avowed approach to the interpretation of ch III of the *Constitution* — the chapter in which s 80 appears. In particular, the Court has repeatedly endorsed and applied the view that 'the concern of the Court in construing ch III of the *Constitution* is with substance, not merely form'.[91] As McHugh J said in *Re Woolley; Ex parte M276/2003*, 'Chapter III looks to the substance of the matter and cannot be evaded by formal cloaks'.[92]

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89 See ibid 273–4 [202] (Edelman J).

90 (2016) 258 CLR 203, 250–1 [115] (Kiefel CJ, Bell and Keane JJ), 259 [141] (Gageler J), 277 [213] (Nettle and Gordon JJ). See also *Brown v The Queen* (1986) 160 CLR 171.

91 *Nicholas v The Queen* (1998) 193 CLR 173, 233 [148] (Gummow J). See also judgments of Kirby J: at 257 [201]; Hayne J: at 278 [250]. See also: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('*Lim*'); *SDCV v Director-General of Security* (2022) 405 ALR 209, 253 [175] (Gordon J).

92 (2004) 225 CLR 1, 35 [82].

Thus, in both *Alexander v Minister for Home Affairs* ('*Alexander*')[93] and *Benbrika v Minister for Home Affairs* ('*Benbrika*'),[94] the High Court invalidated Commonwealth laws purporting to invest the Minister with power to involuntarily deprive a citizen of their citizenship. In doing so, the Court in *Alexander* concluded that the impugned laws were punitive in their 'substantive effect' and so breached the *Lim* principle, which stipulates a separation of powers implied by ch III.[95] Further, the *Lim* principle had previously only been raised in the context of executive detention, but the Court in *Alexander* applied a substantive approach in finding that the principle could be extended to restricting involuntary citizenship deprivation.[96]

And the majority in the later decision of *Benbrika*, finding that the *Lim* principle prohibits laws authorising the Commonwealth Executive to punish criminal guilt, even where such guilt has been found by a ch III court, reaffirmed that 'the concern of the Constitution in "exclusively entrusting to the courts designated by ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth … is with substance and not mere form"'.[97]

3 *A Conflict of Interpretation*

Clearly, the Court has consistently applied and endorsed a substantive rather than formalistic approach to the interpretation of ch III of the *Constitution*. With respect, it is contradictory to apply a formal and restrictive approach to the interpretation of s 80 in the interests of consistency, when such an approach is, itself, inconsistent with the approach to ch III interpretation more generally.

Further, it is not clear why a substantive approach should be taken to the interpretation of principles that have been found to be implied in the *Constitution*, but a formal and restrictive approach should be taken to an express provision such as s 80 that the framers chose to write into the *Constitution* in keeping with centuries of common law thinking. This inconsistency was neither recognised nor explained in *Vunilagi*, and, with respect, appears to lack a principled basis.

Ultimately, by applying a formal and narrow interpretive approach to s 80, *Vunilagi* forsakes an interpretation that would render s 80 a substantive constitutional guarantee of the common law right to trial by jury. This is not justified by the High Court's general approach to the interpretation of ch III, and it is certainly not justified by the framers' intentions in drafting s 80 against the background of a strong common law right to trial by jury.

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93 (2022) 401 ALR 438 ('*Alexander*').

94 (2023) 97 ALJR 899 ('*Benbrika*').

95 *Alexander* (n 93) 456 [79] (Kiefel, Keane and Gleeson JJ). See also *Lim* (n 91) 27 (Brennan, Deane and Dawson JJ).

96 *Alexander* (n 93) 456 [79] (Kiefel, Keane and Gleeson JJ), 476 [158] (Gordon J).

97 *Benbrika* (n 94) [34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), quoting *Lim* (n 91) 27 (Brennan, Deane and Dawson JJ).

VI Conclusion

The ratio of *Vunilagi* is straightforward. A law of a self-governing territory is not a 'law of the Commonwealth', and so an offence against such a law is not subject to the jury requirement in s 80 of the *Constitution*.

However, the implications of that conclusion are significant. It means that there is no constitutionally enshrined guarantee of a right to trial by jury for offences committed against the laws of self-governing territories. *Vunilagi* thus adds its name to the list of High Court decisions that, by adopting a formal interpretive approach, narrows the application of s 80 and thereby weakens the protection of the right to trial by jury throughout the Australian federation.

That is no trifling matter. The jury trial has been described as 'an essential feature of real democracy',[98] and is a historical and constituent aspect of criminal trials under the common law. And although the right to trial by jury remains relatively untrammelled in Australia in practice, national emergencies such as the COVID-19 pandemic reveal the ease with which legislatures can remove it, in the absence of a guarantee of the right. Without a substantive interpretation of s 80, the right to trial by jury in Australia is frail and feeble. Whether that would have surprised many of our *Constitution*'s framers is one question.[99] Perhaps the more significant question is whether it should worry us.

98 Evatt (n 75) 67.

99 See Gray (n 19) 77.