



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S78/2022  
File Title: Attorney-General (Cth) v. Huynh & Ors  
Registry: Sydney  
Document filed: Form 27D - Respondent's submissions  
Filing party: Respondents  
Date filed: 02 Aug 2022

#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

S78/2022

BETWEEN:

**ATTORNEY-GENERAL (Cth)**

Appellant

and

**HUY HUYNH**

First Respondent

**ATTORNEY-GENERAL (NSW)**

Second Respondent

**SUPREME COURT OF NSW**

Third Respondent

### **FIRST RESPONDENT'S SUBMISSIONS**

Part I: **CERTIFICATION**

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

Part II: **STATEMENT OF ISSUES ON APPEAL**

2. The respondent submits that the specific issue which requires a ruling by this court is whether s 79 of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and Review Act**) applies to a conviction or sentence for an offence against a law of the Commonwealth (**federal offence**) which has been dealt with in a NSW court.
3. The respondent submits that this issue should be resolved by answering the questions posed by the appellant as follows:

- a. is the function conferred by Div 3 of Part 7 of the Appeal and Review Act an administrative function that is conferred on judges of the Supreme Court *persona designata*? (**Question 1**)

**Answer:** 'yes'

- b. if the answer to Question 1 is 'yes', then does Div 3 of Part 7 apply of its own force to federal offenders who are convicted and sentenced in New South Wales courts? (**Question 2**)

**Answer:** 'yes'

- c. Does s 68(1) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) pick up and apply Div 3 of Part 7 as federal law? (**Question 3**)

**Answer:** 'yes'

**Part III: NOTICE UNDER SECTION 78B OF THE JUDICIARY ACT**

4. The respondent agrees that notice to the Attorneys-General of the States and Territories is required pursuant to s 78B of the Judiciary Act and that the appellant has issued all such necessary notices. (CAB 162)

**Part IV: STATEMENT OF CONTESTED MATERIAL FACTS**

5. The respondent does not contest any of the material facts set out in the appellant's chronology or submissions.

**Part V: STATEMENT OF RESPONDENT'S ARGUMENT**

6. The respondent agrees with the appellant's submissions.

**Question 1: Is the function conferred by Div 3 of Part 7 of the Appeal and Review Act an administrative function that is conferred on Supreme Court judges *persona designata*?**

7. For the reasons set out in the appellant's submissions,<sup>1</sup> the respondent agrees that the answer should be 'yes'. The respondent notes that this is a compound question involving two concepts.
8. Specifically, the respondent agrees that the determinations that can be made in s 79 of the Appeal and Review Act are purely administrative in nature, namely whether to:
- a. refuse to consider or otherwise deal with the application (s 79(3));
  - b. order an inquiry (s 79(1)(a)); or
  - c. refer the case to the Court of Criminal Appeal (s 79(1)(b)).
9. The respondent agrees that the power to perform these functions is conferred on the Chief Justice of NSW, or another Justice authorised by the Chief Justice, as *persona designata*.

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<sup>1</sup> At AWS [18] – [22]

**Question 2: If the answer to Question 1 is ‘yes’, then does Div 3 of Part 7 apply of its own force to federal offenders who are convicted and sentenced in New South Wales courts?**

10. The respondent agrees with the appellant’s submissions.<sup>2</sup>
11. Further to the appellant’s submissions concerning the references to the ‘Minister’ in Div 3, subsection 79(5) of the Appeal and Review Act, the respondent says:
  - a. the report required by the section is to be made to the minister administering the Appeal and Review Act (s15(2)(a) *Interpretation Act 1987* (NSW)).
  - b. whilst at the time of writing, responsibility for the Act happens to be with the NSW Attorney-General (See *Allocation of the Administration of Acts*), there is no requirement for it to be administered by the Attorney-General rather than any other minister.
12. No provision of Div 3 confers any power or function on the Attorney-General as such or at all. No provision of Div 3 confers any power on the minister to do anything in relation to an application, inquiry or referral under the division. Consistent with the appellant’s submissions, the provision of a report under s 79(5) appears to be solely for the information of the minister for the purposes of administering the Act.

**Question 3: Does s 68(1) of the Judiciary Act 1903 (Cth) pick up and apply Div 3 of Part 7 as federal law?**

13. The respondent agrees with the appellant’s submissions that the whole of Div 3, along with Div 5, of Part 7 is picked up by s 68(1) of the Judiciary Act.<sup>3</sup>
14. If s 68(1) was limited to judicial powers and functions, the provision would add little or nothing to s 79. However, from its text and context, it has extra work to do, namely, to apply certain State laws which apply before and after judicial proceedings, including conferring powers which are purely administrative.
15. This is consistent with cases in the Federal Court and Queensland Court of Appeal which have held, or proceeded on the basis, that the power to refer a case to an appeal court on a petition for mercy is an administrative one which, in the case of federal offences dealt with in a State court, is picked up by s 68(1) of the Judiciary Act: *R v Martens* (2009) 235 FLR 371; [2009] QCA 351; *Martens v Commonwealth and Another* (2009) 174 FCR 114; [2009] FCA 207; *Yasmin v Attorney-General*

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<sup>2</sup> At AWS [23] – [31]

<sup>3</sup> At AWS [32] – [49]

(Cth) (2015) 236 FCR 169; [2015] FCAFC 145; *Attorney-General (Cth) v Ogawa* (2020) 281 FCR 1; [2020] FCAFC 180.

16. If the answer to Question 1 is 'yes' then s 68(1) of the Judiciary Act, in picking up Div 3 of the Appeal and Review Act, has the effect of conferring non-judicial functions on a State judicial officer as *persona designata*.
17. Additionally, the respondent submits that, if Div 3 applies only by being picked up by s 68(1) and not of its own force, then s 4AAA of the *Crimes Act 1914* (Cth) would supply the necessary basis for the conferral of the function onto a State judge as *persona designata*. (see *Hilton v Wells* (1985) 157 CLR 57; and *Grollo v Palmer* (1995) 184 CLR 348).
18. Section 68(1) of the Judiciary Act readily fits the description of 'a law of the Commonwealth relating to criminal matters' under which functions and powers are conferred. Additionally, or alternatively, the state provisions picked up by s 68(1) as federal laws fit that description. There is no reason to read down s 4AAA to exclude functions or powers which are conferred by the operation of s 68(1): cf Basten JA at [118] – [120] (CAB 86-87).

Part VI: **NOT APPLICABLE**

Part VII: **ESTIMATE OF TIME FOR ORAL ARGUMENT**

19. It is estimated that the presentation of the respondent's oral argument will require approximately half an hour.

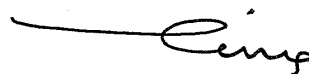
**Annexure Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019***

20. The respondent, having agreed with the appellant's submissions, adopts the appellant's list of constitutional provisions and statutes.

Dated 29 July 2022



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