



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY
 BETWEEN:

ATTORNEY-GENERAL (CTH)
 Appellant
 and
HUY HUYNH & Ors
 Respondents

10 **OUTLINE OF ORAL SUBMISSIONS OF THE AMICI CURIAE**

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE

2. **Summary:** The questions posed in AS [3] turn on the following matters.

(a) **Q2: s 79(1)(b) NSW Act does not apply of its own force to federal offences**

- Section 79 operates by reference to convictions for NSW offences, not convictions by NSW courts.
- “Conviction” and “sentence” have a consistent meaning throughout Pt 7, so s 79(1)(b) is not divisible from s 79(1)(a): contra J [158] (Leeming JA).

(b) **Q3: s 79(1)(b) NSW Act is not applied by s 68(1) Judiciary Act**

- An “appeal” in s 68(1) Judiciary Act is limited to a judicial proceeding. The s 79(1) procedure is not “respecting” such a judicial proceeding within s 68(1).
- Section 79(1)(a) NSW Act is not “applicable” in respect of convictions for federal offences. And s 79(1)(b) cannot be picked up separately.

3. **Q(2): *s 79 NSW Act operates by reference to NSW offences*:** The required connection between NSW and the subject-matter of NSW Act goes beyond geographic connection, and in a federation includes consideration of the responsibilities of different governments.

- *Jacobsen v Rogers* (1995) 182 CLR 572 at 590 (*19); *Interpretation Act 1987* (NSW) s 12(1)(b) (*12); *R v Lowe* (2003) 57 NSWLR 102 [42], [45]

4. There is a general rule of construction that a reference in a NSW Act to offences and convictions means offences and convictions for breaches of NSW law. Since 1903, State courts hear and determine federal offences pursuant to jurisdiction granted by federal law.
- *Solomons* (2002) 211 CLR 119 [9], [37] (*32); *Seaegg* (1932) 48 CLR 251 at 255 (*31); AmS [10]-[17]
 - Common law presumptions lead to same result: *Impiombato* [2022] HCA 33 [23]-[31] (*36); *DRJ (No 2)* (2020) 103 NSWLR 692 [122], [138] (*37)
5. Part 7 NSW Act operates after conviction. There is no intersection between these powers and the original exercise of judicial power. Part 7 gives effect to the executive power of dispensation (clemency and overcoming miscarriages of justice): J[17]. Dispensation is a matter for the executive of the polity which created the offence; here, the Commonwealth.
- *Knight* (2017) 261 CLR 306 [29] (*20); *Cadia* (2010) 242 CLR 195 [86]-[87]
 - Contrast juries which are an institution created under State law: cf *Lodhi* (*41)
6. “Conviction” and “sentence” have a consistent meaning in Pt 7: A Commonwealth offence does not give rise to a “conviction” or “sentence” for Div 4 inquiries, nor for Div 2 petitions to the Governor. Would expect these terms to have same meaning throughout – there is nothing capricious in the NSW Act being confined to NSW offences.
- cf J [217] (Leeming JA); *Impiombato* [2022] HCA 33 [72] (*36)
7. Query whether s 79 NSW Act could validly apply to federal offences of its own force.
- AmS [19]-[25]; *Rizeq* (2017) 262 CLR 1 [22], [103] re s 79(1)(b) (*29)
8. **Q(3):** “appeal” in s 68(1) Judiciary Act is limited to judicial proceedings: The facts that s 68(1) is ambulatory, and applies to some non-curial laws, does not mean it extends to Pt 7 NSW Act (which operates after the exercise of jurisdiction has ended). And the general objective of s 68 is concerned with the administration of criminal justice in courts.
- cf *Gee* (2003) 212 CLR 230 at [3], [7] (*26); *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 [26], [98]
9. The definition of “appeal” (from 1903) means judicial proceedings. As made, appeal was from judicial proceedings (at least judicial orders): see Judiciary Act, ss 21, 34-35 (*9). The 1932 amendments added s 68(1)(d) – that mischief only dealt with appeals in courts. And s 68(1) confers powers ancillary to the exercise of jurisdiction conferred by s 68(2).

10. Section 79(1) procedure is not “respecting” a judicial proceeding: A s 79 procedure is not a judicial proceeding (s 79(4)), nor is it “respecting” a judicial proceeding: AmS [37].
11. Section 79(1)(a) is not “applicable” in respect of federal convictions: Generally s 68(1) picks up State laws with their meaning unchanged.
- *Putland* (2004) 218 CLR 174 [36]; *Edensor Nominees* (2004) 204 CLR 559 [68], [72]-[75] (*13)
12. Proceeding “by analogy” under s 68(2) allows the corresponding Commonwealth official to exercise a power to engage the jurisdiction of a State court. But applying s 79(1)(a) and Div 4 to federal offences would require a wholesale re-write: AmS [41]-[44].
- 10 13. Section 79(1)(b) cannot be picked up separately from s 79(1)(a): Section 68(1) Judiciary Act will not pick up only part of a State law if to do so would give an altered meaning to the severed part. Here, the particular issue is whether s 79(1)(b) would operate in the same way on federal convictions, if picked up without s 79(1)(a).
- *Solomons* (2002) 211 CLR 119 [24]; *Putland* (2004) 218 CLR 174 [38] (*25)
14. This is a question of construction of the NSW Act, comparable to the extent of inconsistency when a State law is inconsistent with a Commonwealth Act. Severance/reading down under s 31 NSW Interpretation Act is not applicable.
- *Wenn v A-G (Vic)* (1948) 77 CLR 84 at 122 (Dixon J); *Bell Group v WA* (2016) 260 CLR 500 [71]; contra Cth reply [12]
- 20 15. Properly construed, s 79(1) contains a single power, exercised on the grounds in s 79(2)-(3), rather than two distinct powers. NSW courts have had the power to order an executive inquiry since 1883. Since 1912, NSW Ministers have had the power to refer a matter to a court to be treated as an appeal. Courts have only been given that power since 1996.
- See J [18]-[19], [28]-[29]; *Crimes Amendment (Review of Convictions and Sentences) Act 1996* (NSW), Sch 1 item 7
16. Other States and the NT have provisions similar to former s 26 *Criminal Appeal Act 1912* (NSW): see attached table. Different questions of divisibility would arise there: J [108].

Dated: 8 November 2022


Graeme Hill


James Stellios

ATTACHMENT: TABLE OF LEGISLATION FOR REVIEW OF CONVICTIONS (OTHER THAN NSW)

State	Act	Provisions
Vic	<i>Criminal Procedure Act 2009</i> (Vic) s 327(1)	'If a person convicted on indictment or found unfit to stand trial or found not guilty because of mental impairment petitions for the exercise of Her Majesty's mercy in relation to the conviction or finding, or the sentence imposed on the person, the Attorney-General — (a) may refer the whole case to the Court of Appeal; or (b) may refer any point arising in the case to the judges of the Trial Division of the Supreme Court for their opinion.'
Qld	Pt 6.4 (added 2019) <i>Criminal Code Act 1899</i> (Q), sch 1 Criminal Code s 672A	<i>Person can apply to Court for leave to bring second appeal from conviction for indictable offence (or related summary offence)</i> '... the Crown Law Officer , on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may— (a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or (b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly.'
SA	<i>Criminal Procedure Act 1921</i> (SA) s 173(1)	'... the Attorney-General , on the consideration of any petition for the exercise of Her Majesty's mercy having reference to the conviction of a person on information or to the sentence passed on a person so convicted, may, if the Attorney-General thinks fit, at any time, either— (a) refer the whole case to the Court of Appeal, and the case must then be heard and determined by that Court as in the case of an appeal by a person convicted; or (b) refer any point arising in the case to those judges for their opinion and those judges, or any 3 of them, must consider the point so referred and furnish the Attorney-General with their opinion accordingly.'
WA	s 159 (1 st enacted 2013) <i>Sentencing Act 1995</i> (WA) s 140(1)	<i>A Person convicted on information can apply to Court for permission to bring a second appeal.</i> 'A petition for the exercise of the Royal Prerogative of Mercy in relation to an offender convicted on indictment, or to the sentence imposed on such an offender, may be referred by the Attorney General to the Court of Appeal either — (a) for the whole case to be heard and determined as if it were an appeal by the offender against the conviction or against the sentence (as the case may be); or (b) for an opinion on any specific matter relevant to determining the petition.'
Tas	<i>Criminal Code Act 1924</i> (Tas), sch 1, Criminal Code s 419	'The Attorney-General , on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of any person or to any sentence passed on a convicted person, may — (a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Attorney-General with its opinion thereon accordingly.'
NT	s 402A (added 2015) <i>Criminal Code Act 1983</i> (NT), sch 1 Criminal Code s 431	<i>A person convicted of serious crime can apply to Court for leave to bring a second appeal.</i> '... a Crown Law Officer , on the consideration of any petition for the exercise of the prerogative of mercy having reference to the finding of guilt of any person or to any sentence passed on a person found guilty of an offence, may: (a) refer the whole case to the Court whereupon the case shall be heard and determined by the Court as in the case of an appeal by a person found guilty of an offence; or (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon whereupon the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon.'
ACT	<i>Crimes Act 1900</i> (ACT) Pt 20	<ul style="list-style-type: none"> • An inquiry may be ordered by the Executive (s 423) or the Supreme Court (s 424) • Inquiry through board of inquiry (s 427) and report to registrar of Supreme Court (s 428) • Supreme Court to consider report and make orders (s 430)