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

First Respondent

ATTORNEY GENERAL (NSW)

Second Respondent

SUPREME COURT OF NSW

Third Respondent

APPELLANT'S SUBMISSIONS

PART I CERTIFICATION

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

PART II ISSUES ON APPEAL

2. The New South Wales Court of Appeal held that s 79(1)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and Review Act**) does not apply with respect to a conviction or sentence for an offence against a law of the Commonwealth.

3. The following questions arise for consideration (all of which the Appellant contends should be answered 'yes'):

   (a) 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*? (**Question 1**)

   (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**)

   (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**)

PART III NOTICE UNDER SECTION 78B OF THE JUDICIARY ACT

4. The Appellant has given notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) to the Attorneys-General of the States and Territories (CAB 162).

PART IV DECISIONS BELOW

5. The decision at first instance is *Application of Huy Huynh under Part 7 of the Crimes (Appeal and Review) Act 2001 for an Inquiry* [2020] NSWSC 1356 (CAB 5). The decision of the New South Wales Court of Appeal is *Huynh v Attorney General (NSW)* [2021] NSWCA 297; 396 ALR 422 (CAB 28).

PART V RELEVANT FACTS

6. On 9 June 2015, Mr Huynh was convicted in the District Court of New South Wales of certain offences against laws of the Commonwealth. An appeal to the Court of Criminal Appeal[1] and an application for special leave to appeal to this Court failed.[2]

7. On 18 March 2020, having exhausted all available avenues of appeal, Mr Huynh applied to the Supreme Court, under Part 7 of the Appeal and Review Act, for a review of his conviction and sentence. He was self-represented.

8. On 13 October 2020, Garling J, having received submissions from the Attorney General of NSW, dismissed the application. His Honour noted that it was open to him, under s 79(3), to 'refuse to consider' the application (at PJ [54]-[55], CAB 19-20), but said

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1 *Cranney v R; Huynh v R* (2017) 325 FLR 173.

2 *Huynh v The Queen* [2019] HCASL 6.

that he had examined the material and had no sense of unease or doubt as to the applicant's guilt (that being a precondition to the exercise of the powers in s 79(1)).

9. On 18 January 2021, Mr Huynh filed a summons in the New South Wales Court of Appeal, seeking an order in that Court's supervisory jurisdiction quashing Garling J's decision on the ground that his Honour had erred in law. At that point, questions were raised about the significance of the fact that Mr Huynh had been convicted of Commonwealth rather than State offences.

10. Three issues (preliminary to the substance of Mr Huynh's grounds of review) called for consideration in order to determine whether Garling J had jurisdiction to hear and determine Mr Huynh's application. They were:

(a) whether the power exercised by a judge under s 79 of the Appeal and Review Act was judicial or administrative in nature;

(b) whether ss 78-79 of the Appeal and Review Act applied of their own force in relation to a conviction for a Commonwealth offence; and

(c) if not, whether those provisions applied as federal law, pursuant to s 68(1) of the Judiciary Act, in relation to Mr Huynh's conviction.

11. The leading judgment was given by Basten JA, with whom Bathurst CJ, Gleeson JA and Payne JA agreed at [1], [128] and [251] respectively (CAB 40, 89, 131). Payne JA added short additional reasons, with which Bathurst CJ and Gleeson JA also agreed. Leeming JA wrote separately, and to materially different effect.

12. As to issue (a), the Court held that the power exercised by a judge under s 79 of the Appeal and Review Act was administrative in nature and the judge exercising it did so *persona designata*: Basten JA at [39], [44]-[46], [53]-[54] (CAB 53, 55, 58). Leeming JA held that the function was administrative, but did not state in terms that it was conferred *persona designata*: at [147], [149] (CAB 97-99).

13. As to issue (b), the majority held that the relevant provisions did <u>not</u> apply of their own force: Basten JA at [13(1)], [75] (CAB 43, 67); Payne JA at [262] (CAB 136). In dissent on this point, Leeming JA held that the relevant provisions applied of their own force with respect to federal offenders convicted in a New South Wales court: at [188]-[224] (CAB 111-123).

14. As to issue (c), all members of the Court held that s 68(1) did not pick up the relevant provisions: Basten JA at [77], [93] (CAB 68, 76); Leeming JA at [219] (CAB 121); Payne JA at [264] (CAB 137-138).

PART VI ARGUMENT

Part 7 of the Appeal and Review Act

15. Div 3 of Part 7 of the Appeal and Review Act creates a procedure for an application to be made to an authorised judge of the Supreme Court for an inquiry into a conviction or sentence (s 78(1)). After considering such an application, an authorised judge may direct that an inquiry be conducted by a 'judicial officer'[3] into the conviction or sentence (s 79(1)(a)), or may refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal under the *Criminal Appeal Act 1912* (NSW) (s 79(1)(b)). The authorised judge may also refuse to consider or otherwise deal with the application (s 79(3)). Action under s 79(1) may only be taken if it appears that there is doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case (s 79(2)). Proceedings under the section are not judicial proceedings (s 79(4)).

16. If any inquiry is directed to be conducted under s 79(1)(a), that enlivens Div 4 of Part 7, which picks up parts of the *Royal Commissions Act 1923* (NSW) (s 81). On completing such an inquiry, the judicial officer must cause a report on the results of the inquiry to be sent to the Chief Justice (s 82(1)(b)). After considering that report, the Supreme Court must cause its own report on the matter (together with a copy of the judicial officer's report) to be sent to the Governor (s 82(3)), who may then dispose of the matter in such a manner as to the Governor appears just (s 82(4)). The judicial officer who conducted the inquiry may also refer the matter to the Court of Criminal Appeal for consideration of whether the conviction should be quashed, or for review of the sentence imposed on the convicted person (s 82(2)).

17. On receiving a reference under s 79(1)(b), which enlivens Div 5 of Part 7, the Court of Appeal is to deal with the case so referred in the same way as if the convicted person

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[3] Defined in s 74 of the Appeal and Review Act to mean a judicial officer (or former judicial officer) within the meaning of the *Judicial Officers Act 1986* (NSW).

had appealed against the conviction or sentence under the *Criminal Appeal Act 1912* (NSW) (s 86).

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

18. It is appropriate to consider this question at the outset, because it affects the source of power by which Div 3 of Part 7 is capable of applying to federal offenders (ie as a State law of its own force (Question 2) or as picked up and applied by s 68(1) of the Judiciary Act (Question 3)). That follows because, if Div 3 of Part 7 were to be held to confer judicial power on a court, then as a State law it could not apply of its own force with respect to Commonwealth offences, meaning that Question 2 would not arise.

19. As already noted, the Court of Appeal held that the function conferred by Div 3 of Part 7 of the Appeal and Review Act was an administrative function that is conferred on Supreme Court judges *persona designata*:[4] Basten JA at [39], [44]-[46], [53]-[54] (CAB 53, 55, 58); see also Leeming JA at [147], [149] (CAB 97-99). That conclusion is consistent with the way in which the Court of Appeal had previously characterised the functions conferred by Div 3 of Part 7 and its predecessors.[5] It is correct, as is demonstrated in particular by:

(a) Section 75 of the Appeal and Review Act, which provides that the jurisdiction of the Supreme Court is exercisable by the Chief Justice or an authorised judge, and that references in Part 7 to the 'Supreme Court' are to be construed accordingly: see Basten JA at [37]-[38] (CAB 52-53).

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4 The *persona designata* doctrine permits non-judicial functions to be conferred on federal judges as individuals, even though Ch III would prevent the conferral of such functons on federal courts unless those functions were incidental to the exercise of judicial power: see *Hilton v Wells* (1985) 157 CLR 57 at 72 (Gibbs CJ, Wilson and Dawson JJ); *Grollo v Palmer* (1995) 184 CLR 348 at 362 (Brennan CJ, Deane, Dawson and Toohey JJ). It has no direct application to the conferral of non-judicial functions by a State Parliament on State judges, given the absence of a strict separation of judicial power at the State level.

5 *Sinkovich v Attorney General (NSW)* (2013) 85 NSWLR 783 at [12] (Basten JA, Bathurst CJ, Beazley P, Price and Beech-Jones JJ agreeing); *Patsalis v Attorney General (NSW)* (2013) 85 NSWLR 463 at [22] (Basten JA, Bathurst CJ and Beazley P agreeing); *Varley v Attorney-General (NSW)* (1987) 8 NSWLR 30 at 49 (Hope JA, with whom Samuels JA agreed, Kirby P dissenting); *Lodhi v Attorney General (NSW)* (2013) 241 A Crim R 477 at [22] (Basten JA, Bathurst CJ and Beazley P agreeing).

(b) Subsection 79(4), which expressly states that proceedings under s 79 are not 'judicial proceedings': see Basten JA at [45] (CAB 55); Leeming JA at [147(1)] (CAB 97).

20. Other features of Div 3 of Part 7 support the same conclusion. For example, it is inconsistent with the function involving judicial power that:[6]

(a) the judge to whom an application is made has no obligation to consider it on the merits (as s 79(3) provides);

(b) there is no obligation to hear and determine the application in open court; and

(c) there is no obligation to give reasons.

10 Further, the express power in s 79(4) to consider 'written submissions made by the Crown' implicitly confirms that an application under s 79(1) does not create a justiciable dispute (or *lis*) between the prosecutor and the offender, for if it did there would be no need for such a provision: Basten JA at [45] (CAB 55).

21. The conclusion that Div 3 of Part 7 confers administrative power is consistent with decisions respecting comparable procedures in other States. For example, when considering the Queensland equivalent of s 79(1)(b) in *Holzinger v Attorney-General (Qld)*,[7] the Queensland Court of Appeal (Sofronoff P, Morrison and Mullins JJA) pointed out that the considerations that inform the exercise of that power may encompass 'legal arguments, wider questions of justice and public policy …, including
20 possible law reform, and compassionate grounds personal to the petitioner arising from the circumstances of a particular case'. That a discretion of that kind can be exercised having regard to 'legitimate political factors'[8] points against a characterisation of the power as judicial rather than administrative.

22. For the above reasons, the New South Wales Court of Appeal was correct to hold that the function conferred by Div 3 of Part 7 is an administrative function conferred on judges *persona designata.* That being so, it is unnecessary to address the alternative submission advanced in the Court of Appeal[9] (which will, if the above aspect of the

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6 See Basten JA at [46] (CAB 55); Leeming JA at [147(2)] (CAB 97-98).

7 (2020) 5 QR 314 at [61].

8 (2020) 5 QR 314 at [61].

9 See Basten JA at [13(3)], [72], [83] (CAB 43-44, 65-66, 71).

Court of Appeal's reasoning is challenged, likewise be advanced in the alternative in this Court) that the power conferred by Div 3 of Part 7 is incidental to the exercise of judicial power under Div 5 of Part 7.

Question 2: If the answer to Question 1 is 'yes', does Div 3 of Part 7 apply of its own force to federal offenders?

23. As a matter of State legislative power, Div 3 of Part 7 is *capable of applying* of its own force to convictions and sentences in NSW courts, whether those convictions and sentences concern Commonwealth or State offences.[10] A State law conferring an administrative function *persona designata* on State judges will not transgress upon the exclusively federal power to regulate the exercise of federal jurisdiction by a court (and therefore will not be invalid on that account),[11] whether or not that function pertains in part to federal offences (although it is, of course, subject to any inconsistent Commonwealth law by reason of s 109 of the Constitution). As Leeming JA explained at [199] (CAB 114-115), Div 3 is more readily characterised as a substantive law 'determinative of the rights and duties of persons', than as a law regulating the manner in which federal jurisdiction must be exercised.[12] For that reason, while some aspects of Part 7 of the Appeal and Review Act could apply with respect to convictions and sentences for federal offences only if they are applied as federal law (such as any aspect that confers power to set aside a conviction or sentence for a federal offence: Basten JA at [8], [122] (CAB 42, 87); Leeming JA at [186] (CAB 111)), that is not the case for Div 3 of Part 7 because nothing done under Div 3 has any impact on the conviction or sentence for any offence (including for any federal offence): Leeming JA at [189], [199]-[200] (CAB 112, 114-115).

24. As a matter of statutory construction, Div 3 of Part 7 *does apply* to persons convicted and sentenced with respect to federal offences. Textually, Div 3 provides for an inquiry into a 'conviction' or a 'sentence'. The words 'conviction' and 'sentence' are both

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10 While the Attorney-General's special leave application accommodates this construction, it is acknowledged that the Attorney-General took a different position in the court below.

11 *Masson v Parsons* (2019) 266 CLR 554 at [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***) at [105] (Bell, Gageler, Keane, Nettle and Gordon JJ); see also Leeming JA at [199]-[201].

12 Applying the distinction applied in *Masson v Parsons* (2019) 266 CLR 554 at [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), by reference to *Rizeq* (2017) 262 CLR 1 at [105] (Bell, Gageler, Keane, Nettle and Gordon JJ).

defined in s 74(1), but those definitions are inclusive, and therefore operate only to enlarge the ordinary meaning of the words.[13] On its ordinary meaning, the word 'conviction' means 'the act of finding somebody guilty of a crime in court; the fact of having been found guilty'.[14] That ordinary meaning accommodates both (i) a State conviction (ie a conviction imposed by a New South Wales court for an offence against the laws of New South Wales) and (ii) a federal conviction (ie a conviction imposed by a New South Wales court for an offence against the laws of the Commonwealth). The inclusive definition of 'conviction' in s 74(1) extends that ordinary meaning to include a verdict of the kind referred to in ss 59(1)(c) or (d) of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), or a special verdict of act proven but not criminally responsible entered at a trial, or following a special hearing under that Act, if the defence of mental health impairment or cognitive impairment was not set up as a defence by the person for whom the verdict was entered.[15] Contrary to Payne JA's reasoning at [255] (CAB 132-133), there is no reason why the *inclusion* of those verdicts under State law equates to the *exclusion* of verdicts 'of a like kind' entered under federal law, let alone normal convictions under federal law (that being the relevant issue in this appeal).[16]

25. The word 'sentence' is defined inclusively to include 'a sentence or order imposed or made by any court following a conviction'.[17] That language is apt to include both a sentence imposed by a New South Wales court following conviction for a Commonwealth offence and a sentence imposed following conviction for a State offence.

26. Section 12(1)(b) of the *Interpretation Act 1987* (NSW) (**Interpretation Act**) does not alter this position. That paragraph provides that, in any Act or instrument, 'a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality,

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13 See, eg, *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 589 (Barwick CJ); *Douglas v Tickner* (1994) 49 FCR 507 at 519G (Carr J), citing *Sherrit Gordon Mines Ltd v Commissioner of Taxation* [1977] VR 342 at 353 (McInerney J).

14 Oxford English Dictionary, online edition.

15 The definition appeared in largely identical terms in the former s 474A of the *Crimes Act 1900* (NSW). It was one of the provisions that was 'transferred' from Part 13A of the *Crimes Act 1900* (NSW) to the new Part 7 of the Appeal and Review Act in 2006 by the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* (NSW).

16 Namely, Part IB Divs 7-9 of the *Crimes Act 1914* (Cth).

17 This definition being different from that appearing in s 3 of the Appeal and Review Act.

jurisdiction or other matter or thing in and of New South Wales'. As such, s 12(1)(b) is a particular expression of the general rule of construction that, absent a contrary intention, State legislation is to be construed as confined to matters that have a connection with the State.[18] Where a provision has a number of different elements, each of which is capable of bearing some connection to matters outside the State, s 12(1) does not supply a ready answer to the question of which of those elements operates extraterritorially.[19] Thus, in applying s 12(1), '[o]ne does not read every reference to every locality, every jurisdiction, every matter and every thing in a provision as a reference to that locality, jurisdiction, matter and thing in and of New South Wales'.[20] Ultimately, the way that s 12(1) interacts with a particular State Act to provide a sufficient connection with NSW is a matter of construction.

27. For the reasons given by Leeming JA at [209]-[211] and [216]-[217] (CAB 118-119, 120-121), the better view is that Div 3 is properly interpreted in conformity with s 12(1) by treating it as directed to convictions imposed in State *courts*, rather than convictions for State *offences*.[21] Division 3 makes no mention of the laws under which offenders were convicted. Conversely, the term 'sentence' is defined by reference to an order by 'any court'. There is no reason, textual or contextual, why the 'localising principle' in s 12(1) should operate to confine the scope of offences for which a conviction was entered, or sentence imposed, to offences against New South Wales *laws*: Leeming JA at [217] (CAB 120-121); cf Basten JA at [68] (CAB 63). The relevant connection with New South Wales would already have been supplied by the fact that Div 3 is concerned

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18 *Seaegg v The King* (1932) 48 CLR 251 at 255 (the Court); *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [9] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

19 *Insight Vacations Pty Ltd (t/as Insight Vacations) v Young* (2011) 243 CLR 149 at [28]-[29] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

20 *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692 (***DRJ***) at [116] (Leeming JA, Bell P agreeing at [1] and [41], Meagher JA agreeing at [42]); *Law Society of New South Wales v Glenorcy Pty Ltd* (2006) 67 NSWLR 169 at [37]-[38] (Mason P), quoting *O'Connor v Healey* (1967) 69 SR (NSW) 111 at 114 (Jacobs JA); *Goliath Portland Cement Co Ltd v Bengtell* (1994) 33 NSWLR 414 at 428 (Kirby P). See also *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 422 (Dixon J).

21 See also *Lodhi v Attorney General (NSW)* [2013] NSWCA 433; (2013) 241 A Crim R 477 at [23], [53], [61]-[63] (Basten JA, Bathurst CJ and Beazley P agreeing). Nothing in the legislative history of Part 7 or its predecessor legislation, Part 13A of the *Crimes Act 1900* (NSW) suggests otherwise. The legislative history is traversed by Basten JA at [16]-[30]. See also *Patsalis v Attorney General (NSW)* (2013) 85 NSWLR 463; *Sinkovich v Attorney General (NSW)* (2013) 85 NSWLR 783.

only with convictions or sentences imposed by *courts* within the geographical area of New South Wales.[22]

28. *Solomons v District Court (NSW)* (2002) 211 CLR 119 does not stand in the way of that conclusion: cf Basten JA at [69], [89] (CAB 63-64, 74). The operation of s 12(1) of the Interpretation Act upon the relevant statutory scheme in issue in that case was uncontested before the High Court.[23] In any event, the provision there in question – which empowered a court to grant a costs certificate to a person acquitted of a criminal offence – was more readily construed as limited in its operation to New South Wales offences, a costs certificate being a precondition to the payment by the executive government of New South Wales out of the State's consolidated revenue fund.[24]

29. There is no tension between the conclusion that Div 3 can apply of its own force to convictions or sentences for federal offences and the requirements imposed by ss 78(2) and 79(5) of the Appeal and Review Act for copies of an application and report of any action to be given to the 'Minister': cf Basten JA at [72]-[74] (CAB 65-67) and Payne JA at [260] (CAB 135-136). It may be accepted that, when Div 3 applies of its own force, the reference to the 'Minister' is to a State Minister (as opposed to when s 79 of the Appeal and Review Act is picked up by s 68(1) of the Judiciary Act, which has the effect that references to the Minister are to be read by analogy as references to the responsible Commonwealth Minister).[25] But that does not provide any reason to conclude that Div 3 does not apply of its own force to federal offences. To the contrary, the responsible State Minister has an interest in the correctness of all convictions and sentences imposed by New South Wales *courts*, whether they relate to State or Commonwealth offences: see Leeming JA at [237] (CAB 127-128). To exclude convictions and sentences for federal offences from the operation of Part 7 would deny the State Minister information concerning what is occurring with respect to a significant part of the jurisdiction of State courts.

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22 See *DRJ* (2020) 103 NSWLR 692 at [100] (Leeming JA).

23 If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue: *Coleman v Power* (2004) 220 CLR 1 at [79] (McHugh J).

24 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [25]-[26] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), [62] (McHugh J).

25 *Williams v The King (No 2)* (1934) 50 CLR 551 at 560-562 (Dixon J); *Peel v The Queen* (1971) 125 CLR 447 at 457 (Menzies J), 458-459 (Owen J) and 468-469 (Gibbs J); *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 124-125 (Gibbs CJ, Mason and Wilson JJ).

30. Reading Div 3 of Part 7 as applying to federal offenders of its own force does not lead to any inconsistency with Div 2: cf Basten JA at [75] (CAB 67). There is no obstacle to reading 'conviction' and 'sentence' as applying to *both* federal and State offences wherever those terms appear in Part 7. Division 2 regulates the *process* by which the Governor considers (or may refuse to consider) petitions. It does not confer a *power* to pardon offences. Such a power is instead sourced in the prerogative, and its existence is preserved by s 114 of the Appeal and Review Act.[26] The fact that the Governor's power does not extend to pardoning federal offenders does not mean that the words 'conviction' and 'sentence' cannot be given the same meaning in Div 2 that those terms bear in Div 3. It simply means that, with respect to Div 2, it is only if the Division is picked up by s 68(1) of the Judiciary Act that it will have meaningful operation with respect to convictions and sentences of federal offenders, for only then could it result in an exercise of power by the Governor-General to pardon such offenders.

31. Alternatively, if reading down the terms 'conviction' and 'sentence' for the purposes of Div 2 so that they apply only with respect to State offences is necessary to give Div 2 coherent operation, that provides ample reason for displacing the presumption that words in a statute are to be given the same meaning wherever they appear,[27] for no such reading down is necessary for Div 3 to operate coherently.

Question 3: Section 68 of the Judiciary Act picks up Div 3 of Part 7 of the Appeal and Review Act and applies it as federal law

32. Irrespective of whether Div 3 of Part 7 applies of its own force to federal offenders, s 68(1) of the Judiciary Act picks it up and applies it as a federal law.[28] That is the consequence of the following four propositions, each of which is developed below:

(a) *First*, the purpose of s 68(1) of the Judiciary Act is to promote uniformity of treatment of State and federal offenders within the boundaries of a particular

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26 See *Folbigg v Attorney General of New South Wales* (2021) 391 ALR 294 at [35] (Basten, Leeming and Brereton JJA).

27 See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270 at [25] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ).

28 Section 68(1) would only exclude the direct application of Div 3 of Part 7 to the extent of any inconsistency between the directly applied State law and the State law as picked up by s 68(1). In that event, the law as picked up by s 68(1) would prevail to the extent of any inconsistency by reason of s 109 of the Constitution. However, in practice such inconsistency is unlikely, for the content of the laws will be identical (except to the extent that references to State officers will be read in the picked up law as references to the equivalent federal officers).

State (absent provision to the contrary being made in Commonwealth law). In order to achieve that purpose, the subject matter of s 68(1) is not confined to laws that confer or regulate the functions or powers of State courts, for not all laws pertaining to alleged offenders who are to be tried in State courts are of that character and s 68(1) must pick up all relevant laws in order to achieve its purpose. The purpose of s 68(1) differing substantially from that of s 79(1) of the Judiciary Act, it is erroneous to equate the operation of those provisions.

(b) *Second*, while s 68(1) is supported by s 51(xxxix) read with s 77(iii) of the Constitution in many of its operations, in its application to non-judicial, non-incidental functions it is supported not by those provisions, but by the heads of power that support the underlying federal criminal offences in respect of which jurisdiction has relevantly been conferred by s 68(2) of the Judiciary Act (again, in conjunction with s 51(xxxix)).

(c) *Third*, s 68(1) is textually capable of picking up laws concerning functions of the kind conferred by s 79(1) of the Appeal and Review Act.

(d) *Fourth*, s 68(1) is not prevented from picking up Div 3 of Part 7 on the ground that to pick it up would give Div 3 an altered meaning.

(i) Section 68(1) of the Judiciary Act serves a purpose distinct from that of s 79(1)

33. Section 79(1) of the Judiciary Act, unlike s 68(1), is directed to courts. It makes the procedural laws of a State or Territory 'binding on all Courts exercising federal jurisdiction'. Its purpose in doing so is to fill the gap left by the inability of State Parliaments to regulate the exercise of federal jurisdiction.[29]

34. Section 68(1) is very different. Its terms make clear that its operation is <u>not</u> confined to laws that are binding on courts, or to State laws that regulate the exercise of judicial power. That follows because among the laws expressly identified as capable of being picked up by s 68(1) are State laws 'respecting the arrest and custody of offenders or persons charged with offences'. Such powers are directed at securing the availability of a person for trial, but they are not themselves judicial powers.[30] The power of arrest,

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29 *Rizeq* (2017) 262 CLR 1 at [17], [20] (Kiefel CJ) and [63] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Masson v Parsons* (2019) 266 CLR 554 at [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

30 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [24] (French CJ, Kiefel and Bell JJ), citing *Williams v The Queen* (1986) 161 CLR 278 at 306 (Wilson and Dawson

for example, obviously is not properly characterised as judicial power, or even as power that is incidental thereto.[31] The inclusion of non-judicial powers within s 68(1) demonstrates that its purpose is not to fill the gap left by the fact that State law cannot regulate the exercise of federal jurisdiction, for the simple reason that non-judicial powers of that kind (eg powers of arrest) would not fall within any such gap.

35. Furthermore, while textually s 79(1) is directed to *courts*, s 68(1) is directed to the *persons* charged with federal offences in respect of whom courts in each State have jurisdiction. It is true that the laws picked up and applied by s 68(1) are identified by reference to the courts that have been invested with jurisdiction by s 68(2), but the grant of jurisdiction is not co-extensive with the laws that are picked up by s 68(1). Instead, s 68(1) picks up and applies all State laws that are applicable '*to persons who are charged* with offences against the laws of the Commonwealth *in respect of whom* jurisdiction is conferred' by s 68(2) (emphasis added). The word 'whom' emphasises that the focus of s 68(1) is upon the State laws applicable to a *person charged* in respect of whom State courts have jurisdiction under s 68(2). The District Court of New South Wales that convicted and sentenced Mr Huynh clearly had such jurisdiction: see Leeming JA at [138]-[139] (CAB 94).

36. Once a State court has been invested with jurisdiction by s 68(2) over a person charged with a federal offence then, unless Commonwealth law otherwise provides, s 68(1) picks up and applies *all* State laws respecting the arrest, custody, bail, trial and conviction of such persons, as well as any laws respecting appeals. The operation of s 68(1) is not limited to State laws concerning the power of *courts*, as the reference to 'arrest' illustrates: cf Leeming JA's assumption at [169] (CAB 106). Thus, the fact that a person must fall within the jurisdiction of a State court under s 68(2) in order for s 68(1) to be engaged does *not* mean that s 68(1) can only pick up laws that regulate the exercise of jurisdiction *by courts* over such persons. Sections 68(1) and (2) are

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JJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

[31] At common law, a constable was empowered to arrest without warrant any person whom he or she suspected on reasonable grounds of having committed a felony: *Halliday v Nevill* (1984) 155 CLR 1 at 12 (Brennan J). The judicial process begins only when the arrested person is brought before a court: *Williams v The Queen* (1986) 161 CLR 278 at 292-293 (Mason and Brennan JJ), 306 (Wilson and Dawson JJ). See also *R v Orcher* (1999) 48 NSWLR 273 at [43] (Spigelman CJ, Grove and Sully JJ agreeing); *Robinson v New South Wales* (2018) 100 NSWLR 782 at [46] (McColl JA, Basten JA and Emmett AJA agreeing).

'complementary', but they are not co-extensive: cf Leeming JA at [220] (CAB 121-122); Basten JA at [42] (CAB 54).

37. The fact that s 68(1) picks up State laws that go beyond those regulating the exercise of judicial power is explicable by reference to the fact that that subsection recognises that 'the administration of the criminal law of the Commonwealth is organised upon a State by State basis'.[32] From that starting point, s 68(1) seeks 'to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice'.[33] It does this by picking up as federal law *all* the State laws that would apply *prior to, during, and after a trial* for an offence against State law, thereby ensuring that the same laws apply with respect to federal offenders within each State as apply to all other offenders within the State. In that way, it provides for uniformity of treatment of State and federal offenders within the boundaries of a particular State.[34] As Gleeson CJ put it in *R v Gee*, '*[w]hen State courts hear criminal cases in federal jurisdiction*, the general purpose of s 68 of the Judiciary Act is to bring about the result that, in the exercise of such jurisdiction, State courts apply the same procedure as when they exercise State jurisdiction'.[35] That coheres with a constitutional scheme under which federal offenders may be tried in State courts and pursuant to which, under s 120 of the Constitution, States exercise responsibility for detaining Commonwealth offenders.

38. For the above reasons, the operation of s 68(1) is not confined to picking up laws that regulate the exercise of jurisdiction by State courts, notwithstanding that its operation is enlivened by the fact that a State court has jurisdiction under s 68(2) with respect to the trial of the relevant federal offence. In particular, there is no reason why s 68(1) cannot pick up and apply State laws that apply prior to, or after, trial in a State court, even if those laws are concerned solely with administrative powers. Indeed, if s 68(1) did not pick up laws of those kinds, it would fail to achieve the purpose identified above.

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32 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467 (Mason CJ, Dawson and McHugh JJ).

33 *Williams v The King (No 2)* (1934) 50 CLR 551 at 560 (Dixon J), cited in *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467 (Mason CJ, Dawson and McHugh JJ) and *Putland v The Queen* (2004) 218 CLR 174 at [4] (Gleeson CJ).

34 See, further, *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345 (Mason J).

35 (2003) 212 CLR 230 at [3] (emphasis added).

39. It follows that the Court of Appeal was wrong at [91]-[94] (CAB 75-77) to reason that s 68(1) is a more specific version of s 79(1) of the Judiciary Act, and so lends itself to the same analysis. In particular, it was wrong to rely on *Rizeq*[36] for the proposition that s 68(1) cannot pick up Div 3 of Part 7 because Div 3 does not engage the jurisdiction of a court: cf Basten JA at [117], [123] (CAB 85-86, 87-88); Leeming JA at [200], [222] (CAB 115, 122). To apply that reasoning to s 68(1) is to overlook the different areas of operation, and the different purposes, of ss 68(1) and 79(1) of the Judiciary Act.

(ii) Support for s 68(1) not confined to ss 51(xxxix) and 77(iii) of the Constitution

40. To the extent that it concerns laws that are binding upon courts, s 68(1) of the Judiciary Act is clearly supported by s 51(xxxix) read with s 77(iii) of the Constitution.[37] However, once it is appreciated that s 68(1) is not confined to picking up laws that confer functions on courts or that regulate the exercise of federal jurisdiction, it is apparent that those provisions cannot be the sole source of power to support s 68(1).

41. In so far as it picks up State laws that do *not* confer functions or powers on a court, the power to enact s 68(1) of the Judiciary Act derives from whatever head of power supports the Commonwealth criminal offence to which the relevant operation of s 68(1) relates (read, if necessary, with s 51(xxxix)).[38] Here, Mr Huynh was convicted of offences against s 307.11 of the *Criminal Code* (Cth). That provision is supported by s 51(xxix), which confers on the Commonwealth Parliament power to make laws with respect to external affairs.[39] Section 300.1(1) expressly states that the purpose of Part 9.1 (in which s 307.11 appears) 'is to create offences relating to drug trafficking and to give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances'.[40] There can be little doubt that procedures to facilitate the enforcement of such offences – including by facilitating the review of convictions and sentences imposed under those laws – are reasonably capable of being considered

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36 (2017) 262 CLR 1 at [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

37 *Rizeq* (2017) 262 CLR 1 at [46], [58]-[59], [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

38 See, by analogy, *R v Hughes* (2000) 202 CLR 535.

39 *Momcilovic v The Queen* (2011) 245 CLR 1 at [616], [650] (Crennan and Kiefel JJ); see also at [287] (Hayne J).

40 [1993] ATS 4 (done at 20 December 1988; entered into force generally on 11 November 1990 and for Australia on 14 February 1993). Article 3 of that Convention obliges states to establish certain drug-related offences under domestic law.

appropriate and adapted to fulfilling Australia's obligations under the Convention.[41] In those circumstances, the head of power that supports s 68(1) of the Judiciary Act, in so far as it operates to pick up Div 3 of Part 7 in its application to Mr Huynh, is s 51(xxix) of the Constitution (read, if necessary, with s 51(xxxix)). For that reason, it is not to the point that s 68(1), in that operation, cannot be characterised as (or as incidental to) a law '[i]nvesting any court of a State with federal jurisdiction': cf Basten JA at [80]-[83] (CAB 69-71).

(iii) Section 68(1) is textually capable of picking up the functions conferred by Div 3

42. Section 68(1)(d) of the Judiciary Act picks up State laws 'respecting … the procedure for … the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith'. Section 2 of the same Act defines an 'appeal' to include 'any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge'. As Gleeson CJ has explained, there is no reason why the term 'appeal' in that context 'should not be applied with full generality'.[42]

43. Taking that approach, the reference to 'appeals' in s 68(1) readily accommodates the process provided for by Div 3 of Part 7, which in terms creates a procedure to call in question the decision of the court that imposed the conviction or sentence to which the application under s 78(1) of the Appeal and Review Act relates. Justice Leeming concluded otherwise only because he considered a 'proceeding' to be confined in this context to a *judicial* proceeding: at [222] (CAB 122). For the reasons outlined above, that is incorrect.

44. In any event, whether or not the procedure provided for by Div 3 of Part 7 is itself a 'proceeding' to call in question a conviction or sentence, s 68(1)(d) extends to laws 'respecting' the procedure for hearing and determining appeals (and also to 'proceedings connected therewith'). While the word 'respecting' takes its meaning

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41 *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 259 (Deane J); *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 487-488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

42 *R v Gee* (2003) 212 CLR 230 at [13] (Gleeson CJ).

from its particular statutory context,[43] the term – like its cognate, 'in respect of' – is capable of accommodating a broad range of relational connections.[44] As the Court of Appeal implicitly accepted (Basten JA at [78] (CAB 69), Leeming JA at [224] (CAB 123)), the exercise of jurisdiction by the Court of Criminal Appeal under s 86 of the Appeal and Review Act to deal with a case referred to it as though it were an appeal is clearly a 'proceeding'. It follows that Div 3 of Part 7 – in providing in ss 78 and 79 for an application to be made to a judge to decide whether to take action that includes deciding whether to refer the application to the Court of Criminal Appeal – is a law 'respecting' a 'procedure for … hearing … appeals' (as defined), which can therefore be picked up by s 68(1)(d) of the Judiciary Act: see also Basten JA at [72] (CAB 65-66).

(iv) Section 68(1) does not give an altered meaning to s 79(1) of the Appeal and Review Act

45. Once it is understood that s 68(1) may pick up and apply laws conferring administrative functions, the Court of Appeal's concern about giving s 79 of the Appeal and Review Act an altered meaning falls away. Insofar as s 68(1) operates upon Div 3 of Part 7, it picks up and applies the whole of the Division, rather than s 79(1)(b) alone. That follows because, for the reason addressed immediately above, the whole of the power exercisable under s 79(1) is (at least) a law 'respecting' the procedure for hearing and determining an 'appeal' (as defined in s 2 of the Judiciary Act), because one of the possible outcomes of the consideration of the application is a referral to the Court of Criminal Appeal.

46. That being so, for s 68(1) to pick up and apply Div 3 of Part 7 does not 'change the nature of the power conferred under Part 7, Div 3, and thus give the State law an altered meaning': cf Basten JA at [94] (CAB 76-77). As the whole of Div 3 is picked up, the concern about the fractured application of Div 3, derived from the principles discussed in *Solomons v District Court (NSW)*[45] and *Commonwealth v Mewett*,[46] does not arise.

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43 *State Government Insurance Office v Rees* (1979) 144 CLR 549 at 561 (Mason J); *R v Khazaal* (2012) 246 CLR 601 at [31] (French CJ); *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at [24] (French CJ).

44 *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412 at 416 (Taylor J), citing *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111 (Mann CJ); *Club Motor Insurance Agency Pty Ltd v Sargent* (1969) 118 CLR 658 at 661 (Taylor J); *State Government Insurance Office v Rees* (1979) 144 CLR 549 at 553 (Stephen J).

45 (2002) 211 CLR 119 at [24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

46 (1997) 191 CLR 471 at 556 (Gummow and Kirby JJ).

47. Of course, if s 68(1) did not also pick up at least one of Divs 4 or 5 of Part 7, it would be pointless for it to pick up Div 3. However, for the reasons given by Leeming JA at [158] and [224] (CAB 102-103, 123), s 68(1) operates at least to pick up and apply Div 5 of Part 7. Unlike Div 3 of Part 7 (which can apply *both* of its own force and by reason of being picked up by s 68(1), subject to any inconsistency that would be resolved pursuant to s 109 of the Constitution), Div 5 cannot apply of its own force to convictions for federal offences. That follows because State law cannot, of its own force, empower a court to set aside a conviction for an offence against federal law, or alter the sentence imposed for such an offence:[47] Leeming JA at [158] (CAB 102-103). To do so would interfere with the past exercise of federal jurisdiction, that being beyond the legislative power of the States.[48] However, once Div 5 is picked up by s 68(1), it operates as a federal law with respect to convictions and sentences for federal offences, in the same way as it operates directly with respect to convictions and sentences for State offences (save that the reference to State officers must be read as references to Commonwealth officers[49]).

48. It is sufficient to resolve this appeal to conclude that there is no obstacle to s 68(1) operating to pick up and apply Divs 3 and 5 of Part 7, whether or not it also picks up the other Divisions of Part 7: cf Basten JA at [75] (CAB 67) and Payne JA at [259] (CAB 133-135). As explained by Leeming JA at [158] and [223] (CAB 102-103, 123), the separate divisions of Part 7 'lend themselves readily to a divisible approach'. For that reason, irrespective of whether Div 3 of Part 7 applies of its own force, it operates as a federal law by operation of s 68(1) of the Judiciary Act with respect to convictions and sentences in New South Wales courts with respect to federal offenders.

49. For the sake of completeness, while the point does not need to be decided to resolve this appeal, it may well be that s 68(1) is also capable of picking up Divs 2 and 4 of Part 7 (with the references to the Govenor and the Attorney General of NSW then being read as references to the Governor-General and Commonwealth Attorney-General,

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47 *Burns v Corbett* (2018) 265 CLR 304 at [80]-[81] (Gageler J); *MZXOT v Minister for Immigation and Citizenship* (2008) 233 CLR 601 at [24]-[25] (Gleeson CJ, Gummow and Hayne JJ).

48 *Rizeq* (2017) 262 CLR 1 at [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

49 See, eg, *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 124-125 (Gibbs CJ, Mason and Wilson JJ); *R v Martens (No 2)* [2011] 1 Qd R 575 at [10] (Muir JA), [92] (Chesterman JA); *Jasmin v The Queen* (2017) 51 WAR 505 at [69]-[72] (Buss P), [228] (Mazza and Mitchell JJA).

respectively).[50] Thus, where the outcome of a judge's administrative deliberation under s 79(1) is to direct an inquiry by a judicial officer under s 79(1)(a), Div 4 is picked up and applied by s 68(1) of the Judiciary Act as a federal law which confers non-judicial functions on a judicial officer, appointed under s 81(1)(b) of the Appeal and Review Act and empowered to refer the matter to the Court of Criminal Appeal under s 82(2). That picked-up law would then be the 'law of the Commonwealth relating to criminal matters' that enlivens s 4AAA(3) of the *Crimes Act 1914* (Cth),[51] thereby ensuring that the function conferred on the judicial officer is conferred conformably with the *persona designata* requirements.[52]

PART VII ORDERS SOUGHT

50. The Appellant seeks the orders set out in the Notice of Appeal (CAB 158).

PART VIII ESTIMATE OF TIME

51. The Appellant estimates that approximately 2.5 hours will be required for the presentation of oral argument.

Dated: 30 June 2022

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50 *Williams v The King (No 2)* (1934) 50 CLR 551 at 560-562 (Dixon J); *Peel v The Queen* (1971) 125 CLR 447 at 457 (Menzies J), 458-459 (Owen J), 468-469 (Gibbs J); *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 124-125 (Gibbs CJ, Mason and Wilson JJ). The authority referred to by Leeming JA in the first sentence of [217] does not stand in the way of that conclusion. That line of authority traces back to the reasoning of Wood CJ at CL in *Application of Pearson; Re* (1999) 46 NSWLR 148 at [70], where it had been conceded that s 68(1) of the Judiciary Act was not capable of picking up and applying a predecessor to s 79(1)(a), on the premise that s 68 can only pick up and apply laws that confer a judicial function or a function incidental to a judicial function: Wood CJ at CL at [64], [68]. That premise is incorrect, for the reasons given above.

51 *Crimes Act 1914* (Cth) s 4AAA(6); *O'Donoghue v Ireland* (2008) 234 CLR 599 at [61] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

52 *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **ATTORNEY-GENERAL (CTH)**

Appellant

and

HUY HUYNH

First Respondent

ATTORNEY GENERAL (NSW)

Second Respondent

SUPREME COURT OF NSW

Third Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the particular constitutional provisions and statutes referred to in his submissions.

Commonwealth		Provision(s)	Version
1.	Commonwealth Constitution	ss 51(xxix), 77(iii), 109, 120	Current
2.	*Crimes Act 1914* (Cth)	s 4AAA, Part IB Divs 7-9	Current (Compilation No. 142, 2 April 2022 – present)
3.	*Criminal Code Act 1995* (Cth)	ss 300.1(1), 307.11	Compilation No. 97, 25 March 2015 – 17 June 2015

4.	*Judiciary Act 1903* (Cth)	ss 2, 68, 78B, 79	Compilation No. 47, 25 August 2018 – 31 August 2021
State			
5.	*Crimes (Appeal and Review) Act 2001* (NSW)	Pt 7, s 114	No. 120 of 2001, 28 September 2020 – 26 March 2021
6.	*Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* (NSW)		No. 70 of 2006
7.	*Crimes Act 1900* (NSW)	Pt 13A	No. 40 of 1900, 1 February 2007 to 22 February 2007
8.	*Criminal Appeal Act 1912* (NSW)		Current (No. 16 of 1912, 1 July 2021 – present)
9.	*Interpretation Act 1987* (NSW)	s 12(1)	Current (No. 15 of 1987, 28 June 2022 – present)
10.	*Judicial Officers Act 1986* (NSW)		Current (No. 100 of 1986, 28 September 2020 – present)
11.	*Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW)	s 59(1)	Current (No. 12 of 2020, 24 March 2022 – present)
12.	*Royal Commission Act 1923* (NSW)		Current (No. 29 of 1923, 12 September 2013 – present)