



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

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 OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

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

Part II: OUTLINE OF FIRST RESPONDENT'S PROPOSITIONS

2. **Question 1:** The powers conferred on NSW Supreme Court judges under Div 3 of Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) (**CARA**) are:
 - a. administrative and not judicial (see CARA s 79(4), and the lack of any obligation to hear an application, to give reasons, or to hold hearings in open court); and
 - b. conferred on any such judge as *persona designata* (see CARA s 75).
3. **Question 2:** Div 3 of Part 7 applies of its own force to a conviction, such as the First Respondent's conviction, for a federal offence in a NSW State court.
4. The hinge required by the localising principle, at common law and under s 15 of the *Interpretation Act 1987* (NSW), is that the “conviction or sentence” be imposed by a *court* “in and of New South Wales”, rather than being imposed in respect of an offence contrary to a *law* “in and of New South Wales”. Division 3 does not concern itself with sources of law. It concerns itself with convictions or sentences, the latter of which is expressly defined to mean “a sentence or order imposed or made by any **court** following a conviction.” The long title to the Act likewise suggests a general focus on all convictions or sentences imposed by the courts of New South Wales.

5. It is within the competence of NSW Parliament to confer the powers in Div 3 of Part 7 on a NSW Supreme Court judge as *persona designata* whether the conviction was for a State or a Federal offence. Section 31 of the *Interpretation Act 1987* (NSW) provides that an Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament.
6. Div 5 of Part 7, by contrast, is not within the competence of NSW Parliament in relation to a conviction for a federal offence nor for a State offence in the diversity jurisdiction. It appears to be common ground that Div 5, at least, could be picked by s 68 of the *Judiciary Act 1903* (Cth) (**JA**). Therefore, to that extent, CARA relies upon the JA (which forms part of the legislative backdrop known to the NSW Parliament when Part 7 was enacted) to effectuate its purpose of creating a review mechanism for all offences in NSW courts. In the ultimate analysis, the evident intent is for CARA *to apply directly where it can, and to be picked up where it must*.
7. **Question 3:** Whether or not Div 3 applies of its own force, it is picked up and applied by JA, s 68(1). While s 68(1) is in some respects similar to s 79 of that Act, there are significant differences. Section 68(1) picks up and applies certain State criminal laws and procedures to “persons” (federal offenders), rather than to “courts”. Further, as the reference to “arrest” shows, it can pick up laws conferring executive functions.
8. Section 68(1) extends to laws respecting the procedure for the hearing and determination of appeals, which include “any proceeding to review or call in question … the … decision … of any Court”. Such a proceeding need not be a judicial proceeding. On this basis, an administrative inquiry conducted by a NSW Supreme Court judge under Div 3 into whether there appears to be “a doubt or question as to the convicted person’s guilt” (s 79(2)) amounts to an “appeal” and the whole division is picked up. Alternatively, if “proceeding” in the definition of appeal is confined to *judicial* proceedings, all but s79(1)(a) of Div 3 is picked up as a law “respecting” an appeal under Div 5.
9. Because such a law is picked up and applied as federal law, this is subject, as Victoria notes, to the limits on the powers of the Commonwealth Parliament to confer a function on a State judge. Relevantly, the limits include that a function may only be conferred on a judge as *persona designata* with that individual judge’s consent, and that a function with a *duty* to perform it cannot be conferred without the State’s authorisation.
10. As to the individual consent limit, CARA s 79(3) permits a judge to decline to perform the function conferred. Consent need not be given in a formal or written form: it can be

manifested from the conduct of embarking on considering the application (see *O'Donoghue v Ireland* at [64]).

11. As to the State authorisation limit, the provisions of Div 3 and, in particular, CARA s 79(3) are consistent with the conferral of functions and not duties.
12. On one view, CARA s 79(3) provides a complete answer to the issues raised by Victoria. However, even if it does not, s 4AAA of the *Crimes Act 1914* (Cth) does so. The “temporal problem” identified does not arise. That is because s 4AAA operates directly on s 68(1) to enlarge the categories of laws that are “applicable” (meaning “able to be applied”) and thus picked up by that section. The purpose of s 4AAA is to ensure that laws conferring non-judicial functions on State judges do not exceed power. The use of the present tense “is conferred” indicates that s 4AAA applies, and is considered, simultaneously with the law conferring the function, modifying its effect. There is no reason to read s 68(1) first and in isolation from all other laws including s 4AAA.

Div 3 of Part 7 of CARA can be picked up without s79(1)(a)

13. As explained above, on a narrow view of the meaning of “appeal” in s 68 JA, s 79(1)(a) of CARA might not be picked up. *However, the power in s 79(1)(b), along with the rest of Div 3 and the relevant provisions of Div 5, can be picked up with or without s 79(1)(a).*
14. If this proposition is correct then, in order to decide this case, there is no need to consider whether the whole of Part 7 is picked up, whether the whole of Div 3 Part 7 of CARA is picked up, nor whether that division applies of its own force.
15. There is no difficulty with s 79(1)(b) being picked up without s 79(1)(a). Contrary to the reasoning of Basten JA in the court below, under s 79 the judge is not given a single, indivisible power, but a suite of powers. This is clear from the parallel suite of powers which is divided between two different decision-makers, the Governor and the Attorney-General, in Div 2 (s 77(1)) (albeit the Attorney has one additional power). The powers in s 79(1) are not interdependent, and the existence (or otherwise) of one does not alter the meaning of the other (cf. ss 2 and 4 of the Costs Act in *Solomons*).

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