HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA S78/2022

SYDNEY REGISTRY

BETWEEN:

ATTORNEY-GENERAL (Cth)
Appellant

and

HUY HUYNH
First Respondent

ATTORNEY-GENERAL (NSW)
Second Respondent

SUPREME COURT OF NSW
Third Respondent

FIRST RESPONDENT'S REPLY TO THE INTERVENOR'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: FIRST RESPONDENT'S ARGUMENT

2. There is now no dispute that the answer to the Appellant's Question 1 should be "*yes*".

3. It is also now common ground that s 68(1) of the *Judiciary Act 1903* (Cth) (***Judiciary Act***) is not limited to laws that confer powers on "*courts*" (as with s 68(2)), but rather is directed to laws that apply to "*persons*" (Intervenor's Submissions (**IS**) [31]). That conclusion should be accepted in any event because (a) s 68(1) deals with "*arrest*" (which is a function conferred on executive officers, not courts), and (b) prior to the *Statute Law (Miscellaneous Provisions) Act (No 1) 1983* (Cth), s 68(1) defined the class of persons to whom it applied as "*persons who are charged with offences against the laws of the Commonwealth committed within that State*". The amendment in 1983 was only for the purpose of "*tidying up, correcting or up-dating*" this language,[1] not reducing its ambit.

4. The Appellant's Questions 2 and 3 remain at issue and are dealt with in turn.

Question 2: Div 3 of Part 7 applies of its own force

5. There are three points to make in reply. ***First***, the common law "*localising principle*", embodied in s 12 of the *Interpretation Act* (***IA***), is a principle that, in its application to a given provision, is frequently open to be applied in more than one way. That difficulty arises where, as here, the provision under interpretation contains "*several possible elements*" that are candidates for localisation.[2] The exercise of identifying the "*element*" or "*hinge*"[3] that is to be read in the localised way is to be undertaken in a way that promotes the purposes or objects of the Act under interpretation,[4] as s 33 of the IA itself requires. It is not sufficient to point to the statute construed in *Solomons* and to assert that because "*offence*" was the term properly to be localised in that statute, that the same must be true of s 79, where that term does not even appear (cf. IS [12]).

6. The best choice of a "*matter*" or "*thing*" to receive the localising treatment in s 79 is "*a conviction or sentence*", each of which is a type of court order. The expression should be understood to refer to a conviction or sentence imposed by a court in and of New South Wales. That coheres with the purpose of the *Crimes (Appeal and Review) Act 2001* (NSW) (***CAR Act***), the subject matter of which is appeals and reviews arising in

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[1] Explanatory Memorandum to the Statute Law (Miscellaneous Provisions) Bill (No 1) 1983, pp 1, 74–76.
[2] *Insight Vacations Pty Ltd (t/as Insight Vacations) v Young* (2011) 243 CLR 149 at 159 [28] (the Court).
[3] *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692.
[4] *DRJ*; *Insight Vacations* at 160 [30]

connection with criminal proceedings in New South Wales. There is nothing in the legislative history of the Act to suggest any purpose of confining the Act to a subset of such proceedings; and indeed, the long title suggests the broader focus: "An Act to restate the law with respect to appeals and other forms of review ***in relation to criminal proceedings***; and for other purposes" (emphasis added). There is every reason to infer that the legislative intent was to make provision for the whole topic of criminal proceedings in the State. The State has a legitimate interest in whether injustices are occurring in its courts, and the availability of a transparent and apolitical inquiry process to identify and redress such injustices is a legitimate end in itself.

7. ***Secondly***, contrary to IS [11], there is no "*presumption that State Parliaments, in enacting procedures for the determination of criminal offences, intend only to address State offences*", save to the extent that such a presumption may find expression in the localising principle, discussed above. In any event, Div 3 is not a procedure "*for the determination of criminal offences*". It is a procedure for an administrative inquiry. There is no reason why state officers cannot be empowered administratively to inquire into and form opinions about matters related to federal legislation.

8. ***Thirdly***, and contrary to IS [23], there is no constitutional impediment recognised in *Rizeq* or any other case on a State parliament empowering an executive officer or body to take steps that lead to the commencement of a proceeding in federal jurisdiction. Were that so, any State provision empowering a statutory corporation to commence proceedings in its own name (see, eg, IA s 50(1)(c)) would to that extent be invalid. The relevant impediment is on a State Parliament purporting "*to command a* ***court*** *as to the manner of* ***exercise*** *of federal jurisdiction*" (*Rizeq* at 26 [61]) (emphasis added). It does not preclude laws empowering ***individuals*** to take administrative action ***before*** any proceeding has been commenced and any occasion to exercise federal jurisdiction has arisen.

Question 3: Div 3 of Part 7 is picked up by s 68(1) in any event

9. In any event, the whole of Div 3 of Part 7 of the *CAR Act* – including both subparagraphs of s 79(1) – is picked up by s 68(1) of the *Judiciary Act*. There does not appear to be any dispute that, if s 79(1)(b) is picked up, then so too will Div 5 be. The area of contention is s 79(1)(a) and Div 4. The First Respondent contends that these, too, are picked up by s 68 – and it must be ***both*** s 79(1)(a) and Div 4, or otherwise ***neither*** of them, for it would

be futile to direct an inquiry which could not be held[5] – with the result that Divs 3, 4 and 5 are all picked up by s 68.

The meaning of "appeal" in s 68(1)

10. The Intervenor notes that the definition of "*appeal*" in s 2 of the *Judiciary Act* has remained unchanged since the enactment of that Act in 1903 (IS [33]). But that is true also of the definitions of "*matter*" and "*plaintiff*" (and "*defendant*", which is defined by reference to "*matter*"). Each of those defined terms uses the expression "*proceeding* ***in a Court***" (emphasis added). If "*proceeding*" in the Act meant only *judicial* proceedings, those qualifying words would be redundant. The use of those qualifying words suggests that wherever "*proceeding*" appears without them, it has its usual, broader meaning.

11. There is no question that, in 1903, the words "*proceeding*" and "*proceedings*" were capable in the ordinary meaning of extending beyond judicial proceedings. The wording of ss 50, 51(xxv), 78 and 118 of the Constitution make that clear. As early as 1908 in *Newcastle Coal Company Ltd & Ors v The Firemen's Union (Industrial Union of Employees) & Ors* (1908) 6 CLR 466, in refusing special leave to appeal, Griffith CJ at 468, with whom Barton, Isaacs and Higgins JJ agreed, relevantly stated:

> We are all of the opinion that ***the proceeding*** sought to be restrained, which is merely a recommendation by the Industrial Court to the Governor, cannot be regarded as a ***judicial*** proceeding (emphasis added).

12. Moreover, more recent additions to the *Judiciary Act* have maintained this same wider understanding of the term "*proceeding*". This can be seen in the contrast between the defined term "*proceeding*" in s 77RA and the same defined term in s 77RL. Those two definitions show that the Act is deliberate in confining "*proceeding*" to a "*proceeding in a court*" when that is the intention (as in s 77RA), and otherwise in recognising that "*proceeding*" can extend to both judicial and administrative proceedings – and making provision for each connotation – when that is the intention (as in s 77RL).

13. In any event, even if "*proceeding*" were exclusively judicial, s 68(1) would still apply at least to s 79(1)(b), as that provision creates a power to cause a judicial proceeding to be commenced, and so is a provision "*respecting*" such a proceeding. The term "*respecting*" is of broad import and should not be given any narrow meaning. Nor can it simply be equated to "*incidental to*" (cf. IS [37]), which is a constitutional test with the different purpose of defining the limits of a federal legislative conferral of power on a court.

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[5] Analogously to the futility of issuing a costs certificate which could not be used to obtain payment from State coffers: *Solomons v District Court of New South Wales & Ors* (2002) 211 CLR 119.

Are s 79(1)(a) and Div 4 of the CAR Act "applicable"?

14. For s 79(1)(a) to be "*applicable*" within the meaning of s 68(1), Div 4 would also have to be applicable. This would involve translating the references to the "*Governor*" in s 82, when picked up and applied as federal law under s 68(1), as referring to the Governor-General. Such an approach is consistent with decisions of this Court on the application of s 68(2) to appeals: *Peel v The Queen* (1971) 125 CLR 447; *Rohde v The Director of Public Prosecutions* (1986) 161 CLR 119. The other functions – namely the functions of the Chief Justice and any judicial officer as *personae designatae* – do not require any translation in order to apply, but simply operate according to their terms.

15. Contrary to the implication in the Intervenor's submissions (IS [43]), the Governor-General would not on this approach be required impermissibly to "*act on the advice of*" any State official. The reports provided under Div 4 are not advice, but merely information relevant for the Governor-General's consideration of whether to exercise the prerogative of mercy. The Governor-General would still act upon the advice of the Federal Executive Council, albeit advice informed by a State officer's report.

16. For these additional reasons, the first respondent submits that s 79(1)(a) and Div 4 are picked up by s 68(1). However, it is submitted that, even if they are not, this does not prevent the picking up of s 79(1)(b) and Div 5 on their own.

Can s 79(1)(b) be picked up without s79(1)(a)?

17. The question of whether s 79 of the *Judiciary Act* may validly pick up part, but not all, of a State legislative scheme has been considered in a number of cases in this Court.[6] Assuming that the same reasoning applies to s 68, it is submitted that to pick up s 79(1)(b) of the *CAR Act* without s 79(1)(a) would not "*give an altered meaning to the severed part of the State legislation*".[7] The "*severed part*" whose meaning is to be considered is s 79(1)(b), the other subsections of s 79 and Div 5.

18. The meaning of a provision to be picked up may be altered by the failure to pick up another provision which affects it in some way. It is in that sense that the provision which is not picked up may be considered an "*integral part of a State legislative scheme*"[8] without which the meaning of the provision to be picked up would be altered. Thus, severance has been considered impermissible in the following circumstances:

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[6] *Commonwealth of Australia v Mewett* (1997) 191 CLR 471; *British American Tobacco Australia Ltd v State of Western Australia* (2003) 217 CLR 30; *Solomons v District Court (NSW)* (2002) 211 CLR 119.
[7] *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 135 [24] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ
[8] *Mewett* at 556; *Solomons* at 135, [24].

a. picking up a limitation period without the provisions for extension of time;[9]

b. picking up a provision granting a right to sue the Crown in right of a State without the preconditions for the grant of the right;[10] and

c. picking up a provision for issuing a costs certificate without provision for it to be used to obtain payment from the State.[11]

19. It is accepted that s 79(1)(b) and Div 5 of Part 7 of the *CAR Act* are part of a broader legislative scheme. That scheme is contained in Part 7 of the Act and provides for a number of different avenues of possible relief for a convicted offender who has exhausted all rights of appeal. It does not follow that the application of Part 7 is on an all-or-nothing basis. On the contrary, Part 7 lends itself to a divisible approach, providing for distinct and discrete procedures for the re-consideration of both conviction and sentence.

20. Contrary to IS [53], the severance of one of the options available to a judicial officer exercising functions considering an application under s 78 would not materially alter the nature of that judicial officer's consideration. All it would mean is that instead of being faced with a choice between refusing the application and progressing it in one of two ways, the judicial officer will be faced with a choice between refusing the application and progressing it in one way. The fundamental nature of the question to be considered would remain unchanged: namely, is there a doubt or question that warrants further inquiry?

21. The First Respondent respectfully submits that the analysis of Wood CJ at CL in *Application of Pearson* (1999) 46 NSWLR 148 was correct on the question of severability, with his Honour then considering the application to Commonwealth offenders of provisions that were relevantly identical to s 79(1)(a) and (b) of the *CAR Act*. His Honour considered that the unavailability of one of the two mutually exclusive methods of review did not alter the meaning of the other: *Pearson* at [81].

Dated: 26 September 2022

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[9] *Commonwealth of Australia v Mewett* (1997) 191 CLR 471
[10] *British American Tobacco Australia Ltd v State of Western Australia* (2003) 217 CLR 30
[11] *Solomons v District Court (NSW)* (2002) 211 CLR 119; see also *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168.

ANNEXURE – ADDITIONAL STATUTORY PROVISIONS REFERRED TO IN REPLY SUBMISSIONS

Judiciary Act 1903 (Cth) (as at 13 October 2020), ss 77RA and 77RL

Judiciary Act 1903 (Cth) (as at 31 December 1982), s 68