



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 NEW SOUTH WALES
Third Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF VICTORIA (INTERVENING)**

PART I: CERTIFICATION

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

10 **PART II: OUTLINE**

Section 68(1) of the *Judiciary Act* and constitutional limits

2. The words “so far as they are applicable” in s 68(1) of the *Judiciary Act 1903* (Cth) operate to confine the operation of the provision, such that it does not operate to pick up and apply as a Commonwealth law any State law that would, if picked up and applied, infringe a constitutional limit on Commonwealth legislative power (**VS [14]**): *Putland v The Queen* (2004) 218 CLR 174 at [7] (Gleeson CJ); see also [41] (Gummow and Heydon JJ), [121] (Callinan J) (**JBA v 4, Tab 25**).
 3. To determine whether a State law is not “applicable” within the meaning of s 68(1) of the *Judiciary Act* because of a constitutional limit on Commonwealth legislative power, it is necessary to take the text of the State law and analyse whether that text would, if applied as Commonwealth law, infringe a limit on Commonwealth legislative power: *Rizeq v Western Australia* (2017) 262 CLR 1 at [81] (Bell, Gageler, Keane, Nettle and Gordon JJ) (**JBA v 4, Tab 29**).
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4. In this appeal, the two most relevant limits are (VS [17]-[18]):
- 4.1 the individual consent requirement, relating to the conferral of non-judicial functions on Ch III judges in their personal capacity (VS [19]-[22]; CAB 86 [117], 87 [120]); and
- 4.2 the State authorisation requirement, relating to the conferral by the Commonwealth of administrative duties upon State officers (VS [27]-[30]; CAB 76 [93]).
5. If the text of Div 3 of Pt 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) would, if applied as a Commonwealth law, infringe either of those limits, then Div 3 of Pt 7 will not be “applicable” within the meaning of s 68(1) of the *Judiciary Act* and therefore will not be picked up.

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Section 4AAA of the *Crimes Act*

6. That outcome could not be avoided by s 4AAA(3) of the *Crimes Act 1914* (Cth) (JBA v 2, Tab 7): VS [23]-[26], [31]; CAB 86-87 [118]-[119].
7. For s 4AAA(3) to operate, there must relevantly be “a law of the Commonwealth relating to criminal matters” that confers a non-judicial function on a State or Territory judge.
- 7.1 The relevant function in Div 3 of Pt 7 will never be conferred under Commonwealth law, unless Div 3 of Pt 7 is “applicable” within the meaning of s 68(1) of the *Judiciary Act*.
- 7.2 Whether Div 3 of Pt 7 is “applicable” will depend upon the analysis of its text described at paragraph 3 above, which must necessarily occur before any operation of s 4AAA of the *Crimes Act*.
8. The analysis is the same (VS [24] n 28) regardless of whether the relevant “law of the Commonwealth relating to criminal matters” is s 68(1) of the *Judiciary Act* itself (Cth Reply [14]; Huynh [18]) or Div 3 of Pt 7 as applied by s 68(1) (Cth [49]).

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Dated: 8 November 2022



Rowena Orr
Solicitor-General for Victoria



Thomas Wood