HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

ATTORNEY-GENERAL (CTH)
Appellant
and
HUY HUYNH
First Respondent
and
ATTORNEY GENERAL (NSW)
Second Respondent
and
SUPREME COURT OF NSW
Third Respondent

SUBMISSIONS OF THE PROPOSED AMICUS CURIAE

Part I: Certification

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

Part II: Basis of proposed appearance

2. Leave is sought to appear as an amicus curiae, to support the orders made by the Court below.

Part III: Reasons for granting leave to be heard as amicus curiae

3. Leave should be granted to appear as an amicus, so that there is a contradictor to the Appellant's arguments.[1]

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[1] See *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at [68] (Hayne J, with Gleeson CJ agreeing), [149] (Crennan and Kiefel JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595 at [56] (Kiefel CJ, Bell and Keane JJ), with Gordon J agreeing on this point at [122].

Part IV: Issues presented by the appeal

4. In response to the issues identified in the Appellant's submissions (**AS**) [3], the amicus submits:

   4.1. First, s 79(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**NSW Act**) confers an administrative power on the Chief Justice of the Supreme Court or an authorised Judge that is exercised in their capacity as designated persons. It follows that s 79(1) could only be picked up by s 68(1) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), not s 68(2) (which deals with jurisdiction of courts): ***see Pt A below***

   4.2. Second, s 79(1) of the NSW Act does not purport to apply to convictions and sentences for Commonwealth offences and, indeed, would be beyond State legislative power if it sought to do so: ***see Pt B below***

   4.3. Third, s 79(1) of the NSW Act is not picked up by s 68(1) of the Judiciary Act. Section 68(1) does and could not pick up s 79(1)(a) of the NSW Act, and s 79(1)(b) cannot be picked up divorced from s 79(1)(a): ***see Pt C below***

5. These conclusions broadly support the conclusions of the majority justices in the Court below: *Huynh v Attorney-General (NSW)* [2021] NSWCA 297 (**J**) [CAB 28].

A. Section 79(1) of the NSW Act confers an administrative power, which is exercised as persona designata

6. The first issue is the nature of the function conferred by Pt 7, Div 3 of the NSW Act. This issue is particularly important to the potential application of s 68 of the Judiciary Act, considered in Pt C below.

7. The operative provision in Pt 7, Div 3 is s 79, which provides for functions to be exercised by "the Supreme Court". The Appellant accepts the conclusion of the Court below that Div 3 confers administrative powers, which are exercised by Supreme Court judges acting as persona designata: AS [19]-[22]. That conclusion is correct, for the reasons given by the Court below.

8. In particular, it is important to note the bifurcated nature of s 79.

8.1. A decision under s 79(1)(a) opens the gateway to an inquiry by a "judicial officer" under Div 4, and leads ultimately to an exercise of non-judicial power by the Governor under s 82(4). None of those acts involves an exercise of judicial power: **J [57]** (Basten JA) [CAB 60].[2] And the making of an order under s 79(1)(a) is not incidental to the previous conviction for an offence, or any other exercise of judicial power.

8.2. While s 79(1)(b), if it stood alone, might have been characterised as incidental to a subsequent exercise of judicial power under the *Criminal Appeal Act 1912* (NSW) (**NSW Appeal Act**), s 79(1)(a) colours the character that s 79(1)(b) otherwise might have had. The bifurcated process in s 79(1) sits uncomfortably with a characterisation of the power as judicial in nature, or even incidental to an exercise of judicial power: **J [72], [83]** (Basten JA) [CAB 66, 71]; see also **[172]** (Leeming JA), **[268]** (Payne JA) [CAB 107, 139]. Rather, s 79 of the NSW Act prescribes a procedure to be followed which might, if the power is exercised under s 79(1)(b), open the gateway for the later exercise of federal jurisdiction by a court under the NSW Appeal Act.[3]

B. Section 79(1) of the NSW Act does not apply to Commonwealth offences

9. The second issue is whether s 79(1) of the NSW Act purports to apply in its terms to a Commonwealth offence, such that it can apply of its own force without the need to be picked up by a Commonwealth provision. For the following reasons, s 79(1) does not purport to apply of its own force to federal offences: contra AS [24]-[30].

10. **"Conviction" and "sentence" are for State offences:** Sections 78 and 79 operate by reference to a "conviction" or "sentence". The NSW Act does not expressly state whether these terms are limited to convictions and sentences for State offences, or whether they extend to convictions or sentences for any offences heard in NSW courts.

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2 See also **J [147]** (Leeming JA) [CAB 97], **[265]** (Payne JA) [CAB 138]. The precursor to s 79(1)(a) did not involve any judicial function either: **J [21]-[22]** (Basten JA) [CAB 47]; **[147](4)** (Leeming JA) [CAB 98].

3 Such a proceeding would arise under a law made by the Commonwealth Parliament (s 76(ii) of the Constitution) because "the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement": see eg *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 (***PT Bayan***) at [54] (French CJ, Kiefel, Bell, Gageler and Gordon JJ). In the case of an appeal under the NSW Appeal Act, that federal jurisdiction is conferred by s 68(2) of the Judiciary Act.

11. However, once the Commonwealth Parliament conferred federal jurisdiction on State courts to hear Commonwealth offences (now by s 68(1) and (2) of the Judiciary Act),[4] there is a presumption that State Parliaments, in enacting procedures for the determination of criminal offences, intend only to address State offences. The majority justices in the Court below were therefore correct, with respect, to hold that s 79 did not apply to Commonwealth offences: **J [69], [89]** (Basten JA), **[254], [262]** (Payne JA) [CAB 64, 74, 136-7].

12. ***Solomons:*** In *Solomons v District Court (NSW),*[5] five members of this Court stated that there is a "general rule of construction" which confines a State enactment to State proceedings and officers, deriving from s 12(1) of the *Interpretation Act 1987* (NSW) (**Interpretation Act**). Accordingly, s 2 of the *Costs in Criminal Cases Act 1967* (NSW) (**Costs Act**) was not picked up by either s 68 or s 79 of the Judiciary Act for proceedings for Commonwealth offences. The effect of s 12(1) of the Interpretation Act was that the "Court[,] Judge [and] Justices" identified in s 2 of the Costs Act, and the phrase "any proceedings relating to any offence", did not extend to federal courts created by the Parliament under Ch III of the Constitution or the High Court or to federal judicial officers, and the offences in question did not include offences under a law of the Commonwealth.[6] Provisions such as s 12 (and reference to matters "in and of" a jurisdiction) are not only concerned with geographical connection, but also reflect the division of responsibility within a federation: contra AS [27].

13. This statement in *Solomons* was the considered conclusion of five judges of this Court: a conclusion that was a necessary step to be taken by the Court before considering whether s 68 or s 79(1) of the Judiciary Act could pick up s 2 of the Costs Act. While the wider scheme in the Costs Act affected the operation of s 79(1) of the Judiciary Act to pick up the relevant provision, that wider scheme had no impact on the reasoning supporting the conclusion that the Costs Act provisions applied to State offences only (cf AS [28]).

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4 This presumption arises because s 68 of the Judiciary Act vests federal jurisdiction on State courts to hear and determine trials for Commonwealth criminal offences, to the exclusion of State jurisdiction. If not for the vesting of federal jurisdiction, Commonwealth offences could have been heard by State courts in *State* jurisdiction by virtue of covering cl 5 to the Constitution: see eg *MZXOT v Minister for Immigration* (2008) 233 CLR 601 at [25]-[26] (Gleeson CJ, Gummow and Hayne JJ).

5 *Solomons* (2002) 211 CLR 119 at [9] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

6 Ibid.

14. This "general rule of construction" should be applied here, to produce the result that s 79(1) of the NSW Act purports to apply only to convictions and sentences for State offences. Although s 79(1) refers to the review of a "conviction" or "sentence", those terms are defined by reference to an "offence".

    14.1. "Conviction" is defined in s 74(1) to include "a verdict that the accused person committed the offence charged or an offence available as an alternative to the offence charged" within s 59(1)(c) or (d) of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (para (a) of the definition).

    14.2. "Sentence" is defined in s 74(1) to include "a sentence or order imposed or made by any court following a conviction" (necessarily for an offence). "Sentence" is also defined in s 3 as including an order made "as a consequence of its having convicted the person of an offence", or an order "on finding the person guilty of an offence" (see paras (a) and (b) of the definition). The related concept of "acquittal" is defined in s 3 to include "an acquittal in appeal proceedings in respect of an offence" (para (a)).

15. ***Seaegg:*** This conclusion is also supported by *Seaegg v The King*,[7] which considered the operation of s 5(1) of the NSW Appeal Act, which provided that "a person convicted on indictment may appeal" to the Court of Criminal Appeal "against his conviction" or "against the sentence passed on his conviction". The term "indictment" was defined to "include any information presented or filed as provided by law for the prosecution of offenders". This Court held that these general words did not refer to prosecutions on indictment preferred by Commonwealth law officers for Commonwealth offences.[8]

16. It would be highly anomalous if s 79(1) of the NSW Act were found to be directed to any conviction or sentence by a State court, when s 5(1) of the NSW Appeal was held in *Seaegg* to be directed only to State offences. The proper construction of a State provision cannot depend on whether there is express mention of an "offence" (as distinct from a conviction or sentence): contra AS [28]. To the contrary, in a context where s 68(1) of the Judiciary Act picks up State laws when a State court is hearing a Commonwealth offence, the proper

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7 (1932) 48 CLR 251 (***Seaegg***).

8 (1932) 48 CLR 251 at 255 (Rich, Dixon, Evatt and McTiernan JJ).

approach is that State criminal procedures are presumed to be confined to State offences, unless the particular procedure is unconnected with the character of the offence.

17. ***Lodhi* is distinguishable:** That last point explains why *R v Lodhi*[9] is distinguishable: see **J [70]-[71]** (Basten JA), **[270]-[271]** (Payne JA) [CAB 64-65, 139-40]. The provision considered in *Lodhi* (which authorised the Supreme Court or District Court to request the Sheriff to investigate the eligibility of a juror to have served on a jury) was held to apply in relation to a trial conducted in federal jurisdiction. However, such a request involved the exercise of an administrative function that had no immediate impact on the conviction for a federal offence, and the relevant NSW Act was intended to operate regardless of any possible distant federal effect: **J [71]** (Basten JA); **[271]** (Payne JA) [CAB 65, 140]. In other words, unlike s 79 of the NSW Act, that provision was concerned with the institutional function of the jury, not the character of the offence being tried.

18. **Statutory scheme Pt 7:** Three features of the scheme in Pt 7 of the NSW Act support interpreting s 79(1) of the NSW Act as applying to only State offences.

    18.1. Petitions can be made to the Governor for review (Pt 7, Div 2). This review mechanism can only relate to State offences, and it would be inconsistent to treat Divs 2 and 3 of Pt 7 as having a differential operation on convictions and sentences: **J [75]** (Basten JA); **[258]-[259]** (Payne JA) [CAB 67, 133]. Contrary to AS [30], it would be futile to read the provisions in Div 2 to include convictions and sentences for Commonwealth offences, because in that case there would be a process which would lead to no exercise of power. If s 68(1) of the Judiciary Act is required to give that process meaning (cf AS [30]), then the logical conclusion is that Div 2 applies in its terms only to convictions and sentences for State offences. The solution is not to displace the presumption that words are to be given a consistent meaning (AS [30]), but to apply the presumption consistently to Divs 2 and 3.

    18.2. By s 79(5), the Registrar of the Common Law Division of the Supreme Court is to provide a copy of a s 78 application and report to the Minister as to any action taken by the Supreme Court under s 79(1). The reference to the Minister must be understood

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[9] (2013) 241 A Crim R 477 (***Lodhi***).

as a reference to the State Minister administering the NSW Act: Interpretation Act, s 15(2). The State Minister administering the NSW Act can have no interest in, or responsibility for, a conviction for a federal offence: **J [74]** (Basten JA), **[260]** (Payne JA) [CAB 67, 136] (contra AS [29]).

18.3. The outcome of an inquiry under Pt 7, Div 4 (whether the direction for an inquiry is made under s 77 or s 79) is to be reported to the Governor (ss 82(1)(a), 82(3)). The State Governor has no pardoning power with respect to federal offenders: **J [75]** (Basten JA) [CAB 67]. That reinforces the conclusion that s 79(1) forms part of a review scheme intended to apply only to convictions and sentences for State offences.

19. **Limits on State legislative power:** Finally, for the following reasons, it would be beyond State legislative power to purport to apply s 79(1) of the NSW Act to Commonwealth offences: contra AS [23]. The provision should not be given a construction which would take it beyond power[10] and, thus, s 79(1) should not be construed as purporting to apply to Commonwealth offences of its own force.

20. As a preliminary matter, it is common ground that a State law could not validly alter the charter created by a conviction and sentence in federal jurisdiction (as Leeming JA acknowledged): **J [158], [186]** [CAB 102-3, 186]. Such a State law would either transgress on the Commonwealth's exclusive legislative power with respect to federal judicial power,[11] or it would be inconsistent with s 68 of the Judiciary Act.[12]

21. Instead, s 79 of the NSW Act provides a process to relieve a convicted person of the burden of a conviction or sentence. There are two ways for achieving that outcome under Pt 7 of the NSW Act, both of which (insofar as they apply to Commonwealth offences) fall within the exclusive power of the Commonwealth.

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10 Interpretation Act 1987 (NSW), s 31.

11 See *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***) at [59]-[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). Even a Commonwealth law cannot "purport to set aside the decision of a court exercising federal jurisdiction": *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117 at [53] (French CJ, Crennan and Kiefel JJ).

12 See **J [122]** (Basten JA) [CAB 87].

22. *Referral to Court of Appeal:* The first pathway is a referral to the Court of Criminal Appeal, to be dealt with as an appeal under the NSW Appeal Act. In exercising that jurisdiction with respect to a Commonwealth offence, the Court of Criminal Appeal would be exercising federal judicial power. And as noted, the Commonwealth has exclusive legislative power with respect to the exercise of federal judicial power.

23. This Court held in *Rizeq* that a State law cannot determine "the powers that a court has in the exercise of federal jurisdiction nor how or in what circumstances those powers are to be exercised".[13] To the extent that s 79(1)(b) provides the gateway to a prospective exercise of jurisdiction by the Court of Criminal Appeal, it cannot validly operate as the enlivening condition for the exercise of federal jurisdiction. The fact that an exercise of power under s 79(1)(b) does not, without more, have "any direct impact upon the federal offence" (cf **J [189]** (Leeming JA)) does not deny its prospective operation as the enlivening condition for the exercise of jurisdiction by the Court of Criminal Appeal. Further, although the right to such an exercise of federal jurisdiction might be "contingent" (cf **J [191]** (Leeming JA)), the procedure for making the order under s 79(1)(b) nonetheless regulates when that jurisdiction will be enlivened (contra **J [199]-[200]** (Leeming JA)).

24. *Report to Governor:* The second pathway for reviewing a conviction or sentence is the conduct of an inquiry which ultimately leads to a report to the Governor who "may then dispose of the matter in such manner as to the Governor appears just" (s 82(4)). It may be accepted that relieving a person of the burden of a conviction or sentence comes within the scope of executive power;[14] however, the authority in relation to a Commonwealth offence is necessarily found in Commonwealth executive power, not State executive power: **J [75]** (Basten JA); **[261]** (Payne JA) [CAB 67, 136].

25. For the above reasons, s 79 of the NSW Act does not apply of its own force in respect of Commonwealth offences. It is only if these conclusions were not accepted that it would be possible to say that s 79(1) creates rights and duties that are capable of applying of their own

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13 *Rizeq* (2017) 262 CLR 1 at [103] (Bell, Gageler, Keane, Nettle and Gordon JJ) (emphasis added). See also at [22] (Kiefel CJ).

14 *Elliot v The Queen* (2007) 234 CLR 38 at [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Baker v The Queen* (2004) 223 CLR 513 at [29] (McHugh, Gummow, Hayne and Heydon JJ); *Crump v New South Wales* (2012) 247 CLR 1 at [58]-[59] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

force following *Rizeq* (cf **J [199]-[201]** (**Leeming JA**). However, the better view, as explained, is that the power to create such rights and duties falls within the exclusive power of the Commonwealth Parliament.

C. Section 79(1)(a) of the NSW Act is not picked up by s 68(1) of the Judiciary Act

26. The third and decisive issue is whether s 79(1) of the NSW Act can be picked up by s 68(1) of the Judiciary Act. For the following reasons, s 79 cannot be picked up. In summary:

26.1. Section 79(1)(a) of the NSW Act cannot be picked up by s 68(1) of the Judiciary Act, because an inquiry held under Div 4 for report to the Governor is not a "proceeding" within s 68(1), and neither the inquiry nor the initial direction is "respecting" such a proceeding. Further, s 79(1)(a) is not "applicable" within s 68(1) of the Judiciary Act.

26.2. Section 79(1)(b) of the NSW Act cannot be picked up divorced from s 79(1)(a).

27. **Judiciary Act, s 68(1) – textual requirements:** Section 68(1) of the Judiciary Act relevantly provides:

> (1) The laws of a State … respecting … the procedure for:
>
> (a) [the] summary conviction [of offenders and persons charged with offences];
>
> …
>
> (c) their trial and conviction on indictment; and
>
> (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith
>
> shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

28. The statutory question therefore is whether the process under ss 78 and 79 of the NSW Act is a "procedure for … the hearing and determination of" an "appeal arising out" of a "trial or conviction". "Appeal" is defined in s 2 of the Judiciary Act to include "an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge".

29. It can be accepted that the process to be undertaken under ss 78 and 79, by the Chief Justice or authorised Judge in their capacity as designated persons, is a "procedure". It also can be

accepted that the Court of Criminal Appeal, when dealing with a referral made under s 79(1)(b), is doing so in a "proceeding to review or call into question" the proceedings or decision of a court (ie the conviction or sentence).

30. **"Proceeding" means judicial proceeding:** However, those points do not answer whether an inquiry undertaken under Pt 7, Div 4 of the NSW Act, pursuant to a direction given under s 79(1)(a), is a "proceeding to review or call in question the proceedings [or] decision" for the purposes of the Judiciary Act.

30.1. By s 81(1) of the NSW Act, this review is undertaken by a "judicial officer", which is defined in s 74(1) to mean "a judicial officer (or former judicial officer) within the meaning of the *Judicial Officers Act 1986* [NSW] [**NSW Judicial Officers Act**]". The facts that (a) the inquiry function is invested in an officer, rather than a court, and (b) this function may be invested in a former judicial officer, indicate that the inquiry function is not undertaken through a judicial proceeding: **J [53], [54]** (Basten JA) [CAB 58].

30.2. Accordingly, if the term "proceeding" in the definition of "appeal" in the Judiciary Act is confined to a judicial proceeding, then the Pt 7, Div 4 inquiry function would not fall within the scope of s 68(1) of the Judiciary Act.

31. *Section 68(1) not confined to laws applied by courts:* It can be accepted that s 68(1) is not limited to picking up laws that confer powers on courts: see AS [33]-[37]. In this respect, s 68(1) has a broader field of operation than s 68(2), which applies only to the jurisdiction of courts.

31.1. Section 68(1) was intended to pick up "the machinery of punishment" in State law,[15] and it expressly applies to "laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences" and "for holding accused persons to bail". Further, where s 68(1) is enlivened, the State laws are to "apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth". (That language contrasts with s 79(1), which

[15] Second Reading Speech to the Punishment of Offences Bill (Cth), Commonwealth, *Parliamentary Debates,* House of Representatives, 13 December 1901, 8731 (Mr Deakin, Attorney-General) 8731. Section 68(1) and (2) of the Judiciary Act are based on ss 2-3 of the *Punishment of Offences Act 1901* (Cth).

provides that State laws shall be binding on all courts exercising federal jurisdiction in that State.)

31.2. Further, it can be accepted that the legislative power to support s 68 of the Judiciary Act (which applies to Commonwealth criminal offences) is not confined to s 77(iii) of the Constitution (read with s 51(xxxix)), but extends to the Commonwealth heads of legislative power relied on to enact the relevant federal criminal offence or, indeed, s 120 of the Constitution which authorises Commonwealth laws for the custody of offenders against the laws of the Commonwealth: see AS [40]-[41].

32. However, the analysis cannot end there: contra AS [43]. Whether s 79(1) of the NSW Act can be picked up by s 68(1) of the Judiciary Act depends on the narrower question of whether it prescribes a "procedure for … the hearing and determination of appeals". It may be accepted that "[t]here is no reason why the reference to appeals in s 68(2) should not be applied with full generality":[16] cf AS [42]. However, it is still necessary to construe the meaning of the word "appeal" against the text, context and purpose of s 68.

33. *Legislative history – "appeal":* The current definition of "appeal" was included in the Judiciary Act on its enactment. At that time, every usage of the term "appeal" in the Judiciary Act was in the context of an appeal to a court or the King in Council.[17] In other words, the definition of "appeal" in s 2 on enactment applied only to a judicial proceeding. Section 68 of the Judiciary Act was amended in 1932, to respond to the Court's decision in *Seaegg*[18] to extend the provision to criminal appeals. However, the amendment in 1932 did not change the meaning of the term "appeal". Nor is there anything in its legislative history to suggest that a wider understanding of the term was intended to be incorporated into s 68(1). To the contrary, the amendment to s 68(1) must be viewed alongside the amendment to s 68(2) which, in response to *Seaegg*, expanded the federal jurisdiction of State courts to hear and determine federal criminal appeals. That is, the 1932 amendment to s 68(1) was

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

17 *Judiciary Act 1903* (Cth) (No 6 of 1903, as made): ss 21, 22 (application for leave to appeal to the High Court), 23 (decision in case of difference of opinion), 27 (no appeal as to costs), 34, 35, 37 (appellate jurisdiction of the High Court), s 39 (federal jurisdiction of State courts), 40 (removal to the High Court), 77 (no other appeals to the High Court).

18 (1932) 48 CLR 251.

tethered to the amendment to s 68(2). It is plain from the second reading speech and parliamentary debate that the amendments were directed to the decision in *Seaegg*.[19]

34. Further, the term "proceeding" is used twice in the definition of "appeal". The second usage clearly relates to a judicial proceeding, and it is to be assumed that expressions are used consistently within the same provision.[20] Accordingly, in its operation in relation to procedures for "the hearing and determination of appeals", "s 68(1) operates in tandem with s 68(2)": **J [220]** [CAB 121] (Leeming JA). That is, the respective fields of operation of s 68(1) and (2) in this respect are complementary and co-extensive, and are both confined to judicial proceedings: **J [222]** (Leeming JA) [CAB 122] (contra AS [43]).

35. *Conclusions – s 79(1)(a) not picked up:* In summary, s 79(1)(a) of the NSW Act could only be picked up by s 68(1) of the Judiciary Act if it were a procedure for the hearing and determination of an "appeal", which is defined in turn to include "any proceeding to review or call in question the proceedings [or] decision". However, as explained, a "proceeding" here means a judicial proceeding. Section 79(1)(a), which authorises a Pt 7, Div 4 inquiry by a judicial officer in a designated capacity, does not fall within the scope of s 68(1). (The position of s 79(1)(b) is considered separately below.)

36. Further, as the term "appeal" is confined to those involving judicial proceedings, the process under ss 78 and 79 of the NSW Act is not itself a "proceeding to review or call in question the proceedings decision" either: see [30.1] above (contra AS [43]).

37. The fact that s 68(1) of the Judiciary Act picks up State laws "respecting" the specified matters in (a)-(d) does not overcome this difficulty: contra AS [44]. When viewed as a whole, s 79(1) of the NSW Act cannot be accurately characterised as a law "respecting … the procedure for … the hearing and determination of appeals". The level of connection required involves "questions of degree",[21] and the inquiry will be affected by the extent to which the provision as a whole does not relate to the hearing and determination of appeals.

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19 Second Reading Speech to the Judiciary Bill 1932, *Parliamentary Debates,* House of Representatives, 22 November 1932, 2607-9; *Parliamentary Debates,* Senate, 1 December 1932, 3318-19.

20 See eg *Minister for Immigration v Moorcroft* (2021) 95 ALJR 557 at [25] (Kiefel CJ, Keane, Gordon, Stewart and Gleeson CJ); *Museums Victoria v Susnjara* [2021] VSCA 166 at [76] (Beach, Kaye and Osborn JJA). See also Dennis Pearce, *Statutory Interpretation in Australia* (9th ed, 2019) at [4.7].

21 See, by analogy, *Spence v Queensland* (2019) 268 CLR 355 at [59] (Kiefel CJ, Bell, Gageler and Keane JJ).

The considerable under-inclusiveness of s 79(1) cannot be ignored in ascertaining the requisite degree of connection between the provision as a whole and the appeal that follows any action taken under s 79(1)(b). As Payne JA held in the Court below: **J [268]** [CAB 139]:

> … the non-judicial power conferred by s 79(1) cannot be a power incidental to the exercise of judicial power … At best, one element of the various powers conferred on a judge by s 79 may so qualify. In most cases an application under s 79 will lead to no outcome or to an administrative process. I do not accept that, simply because one possible outcome of the gateway function – referral to the Court of Criminal Appeal – will involve the ultimate exercise of judicial power by that Court, therefore the result is that the entire gateway decision in all its aspects – including of course no outcome … – is therefore incidental to the exercise of judicial power.[22]

38. It follows, it is submitted, that s 79(1) cannot be a law "respecting" a referral to the Court of Criminal Appeal. Once that position is rejected, there is no statutory pathway in s 68(1) of the Judiciary Act for Pt 7, Div 3 to apply as a whole (contra AS [45]), and the appellant's arguments are "not sufficient to resolve this appeal" (cf AS [48]). The question of whether s 79(1)(b) can be picked up by s 68(1) on its own is addressed in Pt C below.

39. **Section 79(1)(a) of the NSW Act is not "applicable":** Even if, contrary to these conclusions, s 79(1)(a) of the NSW Act were considered to be a procedure for the hearing and determination of an appeal within the terms of s 68(1) of the Judiciary Act, s 79(1)(a) still could not be picked up by s 68(1). Section 68(1) only picks up State laws "so far as they are applicable". It has been accepted, in the context of the equivalent expression in s 79(1) of the Judiciary Act, that these words mean that State provisions are picked up with their meaning unchanged.[23] The same position applies to s 68(1).[24]

40. For the following reasons, Pt 7, Div 4 of the NSW Act is not "applicable" within s 68(1). It would require too much re-writing to apply this Division to Commonwealth offences.

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22 See also J [172] (Leeming JA) [CAB 107].

23 *Rizeq* (2017) 262 CLR 1 at [81], [91] (Bell, Gageler, Keane, Nettle and Gordon JJ), [200] (Edelman J); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [67] (McHugh, Gummow and Hayne JJ), [157] (Kirby J), [171] (Callinan J); *Austral Pacific Group Limited (in liq) v Airservices Australia* (2000) 203 CLR 136 at [13] (Gleeson CJ, Gummow and Hayne JJ), [52] (McHugh J); *Pedersen v Young* (1964) 110 CLR 162 at 165-6 (Kitto J).

24 *Putland v The Queen* (2004) 218 CLR 174 (***Putland***) at [36]-[38] (Gummow and Hayne JJ), with Callinan J agreeing at [121].

41. *Application of Pt 7, Div 4 would require wholesale re-write:* A direction under s 79(1)(a) of the NSW Act is the first step in a multi-stage scheme, involving a range of different State decision-makers.

41.1. Action taken under s 79(1)(a) must be reported to "the Minister" (s 79(5)).

41.2. An order made under s 79(1)(a) results in an inquiry under Pt 7, Div 4. This inquiry is conducted by a "judicial officer" or former judicial officer appointed by "the Chief Justice" (s 81(1)(b)).[25]

41.2.1. As noted, "judicial officer" is defined in s 74(1) to mean a judicial officer within the NSW Judicial Officers Act; that is, a NSW judicial officer.[26]

41.2.2. The judicial officer has the powers, authorities, protections and immunities conferred on a commissioner by Div 1 of Pt 2 of the *Royal Commissions Act 1923* (NSW) (**NSW Royal Commissions Act**).

41.3. The end result of an inquiry is that a report is to be sent to "the Governor" (s 82(3)) who disposes of the matter in such manner as to the Governor appears just (s 82(4)).

42. A State Governor could not dispose of a matter relating to a Commonwealth offence – this is a matter for Commonwealth executive power, not State executive power: see [24] above. It would only be possible to take substantive action on receiving a report in respect of a federal offence if references to the "Governor" in s 82 could be read as "the Governor-General".

43. The Governor-General acts on advice of Commonwealth officials, not State officials, pursuant to the system of responsible government provided for by the Constitution. But "judicial officer" is defined as a NSW judicial officer, or former NSW judicial officer. Further, the judicial officer is appointed by the "Chief Justice", which would mean the Chief Justice of the NSW Supreme Court: see NSW Act, s 75(1). And the judicial officer who

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25 In the case of a referral under s 77 of the NSW Act, the judicial officer is appointed by the Governor: s 81(1)(a).

26 "Judicial officer" is defined in s 3 of the NSW Judicial Officers Act to mean: (a) a Judge or associate Judge of the Supreme Court, (b) a member of the Industrial Relations Commission, (c) a Judge of the Land and Environment Court, (d) a Judge of the District Court, (e) the President of the Children's Court, (f) a Magistrate, or (h) the President of the Civil and Administrative Tribunal.

conducts an inquiry has the powers etc of a commissioner under the NSW Royal Commissions Act.

44. These anomalies cannot be reconciled. On the one hand, it would run counter to the federal system for the Governor-General to receive a report from a State judge who was appointed to that role by a State Chief Justice and who was acting under State royal commissions legislation. On the other hand, it would be highly anomalous and ultimately futile if a report were made to a State Governor about a conviction for a federal offence over which the Governor could not exercise any powers. And it would require considerable re-writing and uncertainties to convert each of these references to Commonwealth officials. For example, there is even a question whether the initial referral would need to be undertaken by Commonwealth officials, rather than a State Chief Justice.

45. *Position different from Judiciary Act s 79(1) or s 68(2):* It is true that some level of translation is permitted under both s 79(1) and s 68(2) of the Judiciary Act in applying State laws as Commonwealth laws. However, as explained below, neither of those provisions would support the wholesale transposition exercise that would be required to apply Pt 7, Div 4 to Commonwealth offences.

46. In the context of s 79(1) of the Judiciary Act, references in a State provision to a State court can readily be translated to include a federal court when the provision is applied by that federal court. In that situation, State laws are applied on "the hypothesis that federal courts do not necessarily lie outside their field of application". However, the very purpose of s 79 "would fail partly in its objective if State laws on these topics are to be given a literal application".[27] If that were not so, "the operation of federal jurisdiction might readily be stultified".[28] That reasoning does not support attempting to apply Pt 7, Div 4 of the NSW Act to Commonwealth offences.

47. In the context of s 68(2), this provision expressly confers "like [federal] jurisdiction" on State courts. It has been accepted that "the adoption of State law must proceed by analogy"[29]

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27 *John Robertson & Co (in liq) v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 (***John Robertson***) at 95 (Mason J).

28 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [68] (Gleeson CJ, Gaudron and Gummow JJ) endorsing *John Robertson* (1973) 129 CLR 65 at 88 (Gibbs J).

29 *Williams v The King [No 2]* (1934) 50 CLR 551 at 561 (Dixon J).

and, applying this approach, provisions conferring powers on designated State officials to institute appeals have been translated through s 68(2) into the conferral of power on equivalent Commonwealth officials.[30] But that situation is very different from seeking to pick up Pt 7, Div 4 of the NSW Act by s 68(1) of the Judiciary Act.

47.1. Section 68(2) of the Judiciary Act gives effect to the policy choice made by Parliament when implementing the constitutional scheme in Ch III for the vesting of federal jurisdiction in State courts;[31] namely, "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".[32] However, that policy is directed to the administration of justice by courts, where the exercise of federal jurisdiction by State courts could only be made effective by the adoption of an approach that "proceed[ed] by analogy".

47.2. Further, s 68(2) expressly authorises a degree of translation (by conferring "like jurisdiction"), and the extent of translation of State laws required is confined as a practical matter by the fact that s 68(2) is dealing with the jurisdiction of courts. The usual example is s 68(2) applies a State provision conferring a single power (such as bringing an appeal), which is exercised by an established Commonwealth official so as to engage the jurisdiction of a State court exercising federal jurisdiction.

48. When one turns to the translation potential of s 68(1), it must be recognised that it seeks to do more than pick up laws that regulate jurisdiction. However, the flexibility allowed within the translation exercise must also recognise the underlying constitutional framework and the limits of judicial power. As the authorities on ss 79(1) and 68(2) of the Judiciary Act

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30 *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 (***Rohde***) at 124-5 (Gibbs CJ, Mason and Wilson JJ), 126-7 (Brennan J), 130, 133-4 (Deane J); *Peel v The Queen* (1971) 125 CLR 447 at 457 (Menzies J), 457 (Windeyer J), 460 (Owen J), 468-9 (Gibbs J). The Court was divided in *Williams v The King [No 2]* (1934) 50 CLR 551, with Rich J (at 557-8), Starke J (at 558) and Dixon J (at 561) concluding that a NSW provision conferring a right of appeal on the NSW Attorney-General could be translated through s 68(2) to a power conferred on the Attorney-General of the Commonwealth.

31 *Williams [No 2]* (1934) 50 CLR 551 at 558-60 (Dixon J). It is Dixon J's approach that has been accepted in subsequent cases: see *Peel v The Queen* (1971) 125 CLR 447 at 457 (Menzies J), 457 (Windeyer J), 460 (Owen J), 468-9 (Gibbs J); *Rohde* (1986) 161 CLR 119 at 124-5 (Gibbs CJ, Mason and Wilson JJ), 126-7 (Brennan J), 130, 133-4 (Deane J).

32 *Williams [No 2]* (1934) 50 CLR 551 at 560 (Dixon J). See also *Leeth v Commonwealth* (1992) 174 CLR 455 at 467 (Mason CJ, Dawson and McHugh JJ); *Putland* (2004) 218 CLR 174 at [4] (Gleeson CJ).

suggest, there is considerable need for flexibility in translation when giving effect to the constitutional imperative in s 77(iii) for State courts to exercise Commonwealth judicial power. Otherwise, the exercise of federal jurisdiction would be stultified. However, no such imperative arises from Ch II of the Constitution which contemplates the exercise of executive power by a broad range of executive decision-makers. Here, the "translation" of Pt 7, Div 4 would require a wholesale creation of a multi-stage executive scheme involving officials at the highest level of government, including the Governor-General.

49. As Gaudron J said in *Kruger v The Commonwealth*,[33] "[t]here may be statutory provisions couched in terms which make it impossible for them to be 'picked up'". The translation of State laws in those circumstances would result in a court exceeding its judicial function. Analogously to the application of severance provisions of a kind found in s 15A of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**), the application of s 68(1) to translate State provisions into federal provisions must occur "strictly within the limits of judicial power".[34] Such sections do not authorise a court to "redraft a statute".[35]

50. **Not possible to pick up s 79(1)(b) alone:** The final question is whether it would be possible to pick up s 79(1)(b) of the NSW Act alone by s 68(1) of the Judiciary Act. It may be accepted that, if s 79(1)(b) were enacted on its own, it might be capable of being picked up as a federal law by s 68(1) as a procedure for the hearing and determination of an appeal.

50.1. The conferral of the function under s 79(1)(b) of the NSW Act, by force of s 68(1) of the Judiciary Act, on the Chief Justice or authorised Judge would not be beyond Commonwealth legislative power at least where the function is not imposed as a matter of duty.[36]

50.2. In determining whether s 68(1) imposes that function as a matter of duty, it would be permissible to have regard to s 4AAA(3) of the *Crimes Act 1914* (Cth) which provides that a State Judge "need not accept the function or power conferred". In translating State

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33 (1997) 190 CLR 1, 140. See also *Edensor Nominees Pty Limited* (2001) 204 CLR 559, 593 (Gleeson CJ, Gaudron and Gummow JJ), 612 (McHugh J), 639 (Hayne and Callinan JJ).

34 *Spence v Queensland* (2019) 268 CLR 355 (***Spence***) at [87] (Kiefel CJ, Bell, Gageler and Keane JJ).

35 *Spence* (2019) 268 CLR 355 at [87] (Kiefel CJ, Bell, Gageler and Keane JJ), quoting *Pidoto v Victoria* (1943) 68 CLR 87 at 111 (Latham CJ).

36 *O'Donoghue v Ireland* (2008) 234 CLR 599 at [14] (Gleeson CJ), [57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

provisions into federal provisions through s 68(1) of the Judiciary Act, the State provisions can be read alongside applicable federal provisions.[37] Thus, arguably,[38] if s 79(1)(b) were enacted on its own, it would be possible for s 68(1) to pick it up alongside s 4AAA(3) of the *Crimes Act*: cf **J [119]** (Basten JA) [CAB 86-7]. When read with s 4AAA(3) of the *Crimes Act 1914* (Cth), no duty would be imposed upon the Chief Justice or authorised Judge to accept or exercise the function in s 79(1)(b).

51. However, s 79(1)(b) of the NSW Act forms part of a wider legislative scheme for the review of convictions and sentences. For the reasons that follow, s 79(1)(a) and (b) are interrelated to such an extent that one cannot be picked up without the other.

52. In *Re Application of Pearson*,[39] Wood CJ at CL accepted that s 68(1) of the Judiciary Act could pick up the precursor to s 79(1)(b) in s 474E(1)(b) of the *Crimes Act 1900* (NSW), without the precursor to s 79(1(a) in s 474E(1)(a). However, the conclusion of Wood CJ at CL is "unpersuasive": **J [97]** (Basten JA) [CBA 78].

53. As already explained, the legislative scheme in Part 7, Div 3 of the NSW Appeal Act confers a power on the Chief Justice or authorised Judge to make an order under s 79(1) following an application to the Court under s 78 or on their own motion. Subsection 79(1) does not contain two discrete powers. There is a single power, which may be exercised by the Chief Justice or authorised Judge in one of two ways. Action may only be taken under s 79(1) upon satisfaction of the single condition set out in s 79(2) – that is, "if it appears that there is a 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". The particular circumstance enlivening the power might favour taking one action rather than the other under s 79(1). For example, a mitigating circumstance in the case might incline the decision-maker towards

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37 *Putland* (2004) 218 CLR 174 at [23] (Gleeson CJ), [44], [50] (Gummow and Heydon JJ, with Callinan J agreeing at [121]).

38 The application of s 4AAA would likely turn on whether the power under s 79(1)(b), when picked up alone by s 68(1), is "incidental to a judicial function or power" within the terms of s 4AAA(1). If it is, s 4AAA(1) would be inapplicable. It is possible that, as a gateway function designed to enliven the jurisdiction of the Court of Criminal Appeal, the power under s 79(1)(b) should be characterised as incidental to the future exercise of judicial power by the Court of Criminal Appeal: see *Palmer v Ayres* (2017) 259 CLR 478 at [36] (Kiefel, Keane, Nettle and Gordon JJ); *PT Bayan* (2015) 258 CLR 1 at [47] (French CJ, Kiefel, Bell, Gageler and Gordon JJ). Cf **J [172]** (Leeming JA) [CAB 107].

39 (1999) 46 NSWLR 148 at [75].

choosing action under the executive pathway in s 79(1)(a), rather than the judicial pathway in s 79(1)(b), in order for the matter to be brought to the attention of the Governor for an exercise of the pardoning power. It cannot be supposed that Parliament included alternative pathways, based on a single condition, without the decision-maker having a true choice between those pathways.

54. Further, s 79 provides that the Chief Justice or authorised Judge may refuse to consider or otherwise deal with an application where (relevantly) the matter "has previously been dealt with under this Part" (s 79(3)(a)(ii)). An application under Pt 7, Div 3 may have been dealt with previously under either s 79(1)(a) or (b). The option of dealing with it under one paragraph may be precluded by it having been dealt with under the other, thus reinforcing the singularity of the power and the interconnected operation of the two paragraphs within the wider scheme for review in Pt 7.

55. The interrelation of s 79(1)(a) and (b) is such that the picking up of the latter without the former would "give an altered meaning to the severed part of the State legislation".[40] It would collapse the options for dealing with an application under s 78. The option under s 79(1)(a), which might be warranted in certain circumstances, would not be available. Furthermore, it would also require the redrafting of s 79(3)(a)(ii) to qualify the expression "has previously been dealt with under this Part",[41] because action could not be taken under s 79(1)(a) in relation to a federal offence.

56. To pick up s 79(1)(b), without also picking up s 79(1)(b), "is to divide the function into two separate parts and, in effect, into two separate discretionary powers": **J [98]** (Basten JA). To adopt the words of Gummow and Heydon JJ in *Putland*,[42] if s 68(1) picked up s 79(1)(b) alone, then s 79(1)(b) would not "bea[r] upon the Commonwealth … offences in the same way as it applies to" State offences. The Court below was, with respect, correct to conclude

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40 *Solomons* (2002) 211 CLR 119 at [24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) referring to *Commonwealth v Mewett* (1997) 191 CLR 471 at 556. See also *British American Tobacco* (2003) 217 CLR 30, 47-8 [22] (Gleeson CJ), 60 [67] (McHugh, Gummow and Hayne JJ), 87 [157], 90 [171] (Callinan J).

41 See *Spence* (2019) 268 CLR 355 at [89] (Kiefel CJ, Bell, Gageler and Keane JJ), discussing the impermissibility of redrafting provisions in the context of applying s 15A of the Acts Interpretation Act.

42 (2004) 218 CLR 174 at [38] (Gummow and Heydon JJ), Callinan J agreeing at [121].

that s 68(1) of the Judiciary Act is not capable of picking up s 79(1)(b) of the NSW Act divorced from s 79(1)(a): **J [93]-[98]** (Basten JA), **[269]** (Payne JA) [CBA 76-9, 139].

Part V: Time estimate

57. The amicus curiae would seek no more than 2 hours for the presentation of oral argument.

Dated: 9 September 2022

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

ATTORNEY-GENERAL (CTH)
Appellant
and
HUY HUYNH
First Respondent
and
ATTORNEY GENERAL (NSW)
Second Respondent
and
SUPREME COURT OF NSW
Third Respondent

ANNEXURE TO THE SUBMISSIONS OF THE PROPOSED AMICUS CURIAE

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the amicus supplements the appellant's list of the constitutional provisions and statutes with the following:

Commonwealth

	Legislation	**Provision(s)**	**Version**
1	*Judiciary Act 1903* (Cth)	ss 21, 22, 23, 27, 34, 35, 37, 39, 40 and 77	No 6 of 1903, as made

New South Wales

	Legislation	**Provision(s)**	**Version**

2	*Costs in Criminal Cases Act 1967* (NSW)	s 2	No 13 of 1967, 23 March 1967 – 2 December 1999
3	*Interpretation Act 1987* (NSW)	ss 15(2) and 31	Current (No 15 of 1987, 28 June 2022 – present)