HIGH COURT OF AUSTRALIA

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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 REPLY

PART I: CERTIFICATION

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

PART II: REPLY

Question 2 – application of Div 3 of Part 7 of its own force to federal offenders

2. The 'presumption' relied upon in [11] of the proposed amicus curiae's submissions (**ACS**) does not resolve the question of whether s 79(1) of the Appeal and Review Act is limited to offences against a State *law*, as distinct from offences tried by State *courts*. For the reasons advanced at AS [26]-[28], s 12(1) of the Interpretation Act does not answer the question of which of those connections to NSW was intended. However, while the text of Pt 7, Div 3 makes no reference to the *laws* under which offenders were convicted, it does refer to the acts of *courts* (ie convictions and sentences). On that basis, Leeming JA was correct to conclude that Div 3 'applies to convictions or sentences of *New South Wales courts*, rather than convictions or sentences for *offences contrary to New South Wales statutes*' (original emphasis) (CAB 121 [217]).

3. *Lodhi v Attorney General (NSW)* (2013) 241 A Crim R 477 (***Lodhi***) supports that conclusion. ACS [17] seeks to distinguish that case on the ground that it 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'. But that is equally true of Pt 7, Div 3. Indeed, a possible result of the investigatory function that was held in *Lodhi* to be picked up by s 68 was in fact an application under Pt 7, Div 3 (as Basten JA acknowledged: CAB 64-65 [70]).

4. As an aid to construction, the effect of s 12(1) of the Interpretation Act varies with the statutory context. *Solomons v District Court (NSW)* (2002) 211 CLR 119 (***Solomons***) applied s 12(1) in the context of a statutory scheme that involved an imposition upon NSW consolidated revenue, which supported confining 'offences' to NSW offences. By contrast, there is no reason why the NSW Parliament would have intended that erroneous convictions imposed by NSW courts be incapable of review simply because those convictions concerned Commonwealth offences.

5. The appellant's construction of s 68(1) does not produce any anomaly with *Seaegg v The King* (1932) 48 CLR 251 (***Seaegg***): cf ACS [16]. In *Seaegg*, this Court's construction of s 5 of the *Criminal Appeal Act 1912* (NSW) (***Criminal Appeal Act***) was grounded in its understanding that federal offences were 'governed by the special provisions' of the Judiciary Act which, at

the time, did not permit appeals to State courts for convictions against federal offences.[1] Further, s 5 plainly could not *itself* validly have conferred a right of appeal against federal convictions, which was why 'recourse to some law of the Commonwealth which extends the operation of the State enactment and applies it to the conviction of offenders against the Federal law' was necessary.[2] There is nothing 'anomalous' (cf ACS [16]) about concluding that State law does not as a matter of construction purport to confer a right of appeal against a federal conviction (being something that it could not validly do), but that it does confer an administrative power that might ultimately lead to such an 'appeal' (which it can validly do). In any event, for the reasons given by McHugh and Gummow JJ in *R v Gee* (2003) 212 CLR 230 at [61]-[64], 'in construing the provisions of the *Judiciary Act* as it now stands', effect should no longer be given to *Seaegg*.

6. Contrary to ACS [19]-[23], Pt 7, Div 3 – applying of its own force as State law – does not transgress upon the Commonwealth's exclusive power to regulate the exercise of federal jurisdiction. The fact that Pt 7, Div 3 is a 'gateway' to a 'prospective exercise' of jurisdiction by a court does not mean it enters the area of the Commonwealth's exclusive power. Of course, if a State judge, acting *persona designata*, exercises the power in s 79(1)(b) to refer the whole case to be dealt with as an appeal under the *Criminal Appeal Act*, any further step under Pt 7, Div 5 could occur only to the extent that Division is picked up by s 68 of the Judiciary Act. But that does not mean that the prior *administrative* function conferred by Pt 7, Div 3 cannot apply unless it, too, is picked up by s 68. To the contrary, where Pt 7, Div 3 does not purport to 'regulate the exercise'[3] of federal jurisdiction, it can validly apply as a State law in accordance with its terms (which, for the reasons above, include convictions and sentences for both State and Commonwealth offences).

Question 3: Section 68 of the Judiciary Act picks up and applies Div 3 of Part 7

7. ***Purpose of s 68***: The amicus curiae apparently accepts the appellant's identification in AS [37] of the purpose of s 68(1), being that it seeks to place the administration of the criminal law of the Commonwealth in each State upon the same footing as the criminal law of the State, so as to avoid the establishment of two independent systems of criminal justice (ACS [47.1]). Nevertheless, the amicus curiae invites the Court to adopt an interpretation of s 68(1) that, if accepted, would require the Commonwealth to create its own independent system for

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

2 *Seaegg* (1932) 48 CLR 251 at 255 (Rich, Dixon, Evatt and McTiernan JJ). See, further, *Seaegg* at 257 and *R v Williams; R v Somme* (1934) 34 SR (NSW) 143 at 149 (Jordan CJ).

3 Eg *Masson v Parsons* (2019) 266 CLR 554 at [30]-[31], [40]-[41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

the review of convictions and sentences for Commonwealth offences, that being a system that would have to operate side by side with (and, in the case of joint trials of Commonwealth and State offences, which may need to duplicate) the State system found in Pt 7. There is no warrant for interpreting s 68(1) in that way.

8. ***'Proceedings' need not be 'judicial proceedings'***: The amicus curiae invites the Court to read into the definition of 'appeal' in s 2 of the Judiciary Act the qualification that a 'proceeding' must be judicial: cf ACS [30]-[36]. The proper construction of the word 'proceeding' depends on its statutory context.[4] In its ordinary meaning, it is capable of including any proceedings of a legal nature, even if it does not take place in a court.[5] That being so, and it being uncontroversial that s 68(1) is not confined to laws that confer powers on courts (ACS [31]), it would be anomalous to confine the word 'proceeding' to judicial proceedings. That is particularly true given that the word is used in the phrase 'any proceeding to review or call in question', which is evidently of broad compass. As Gleeson CJ put it, '[t]here is no reason why the reference to appeals in s 68(2) should not be applied with full generality'.[6] Yet, despite purporting to accept that proposition (ACS [32]), the amicus does the opposite.

9. The fact that 'appeals' were, upon the enactment of the Judiciary Act, limited to appeals to a court or the King in Council, does not of itself confine the term 'proceedings' to judicial proceedings: cf ACS [33]. That would be relevant only if the meaning of the word were fixed at the date of its enactment, but plainly it should be given an ambulatory operation.[7] Further, contrary to ACS [34], the fact that the second usage of 'proceeding[s]' in the definition of 'appeal' in s 2 of the Judiciary Act is qualified by the words 'of any Court' in fact supports the conclusion that the first usage of the term is not so qualified. Furthermore, even if the procedure provided for in Pt 7, Div 3 is not itself a 'proceeding', it has a sufficient connection with Pt 7, Div 5 (which plainly involves a judicial proceeding) that it falls within s 68(1)(d) as a law 'respecting … the procedure for … the hearing and determination of appeals'. The contrary argument in ACS [37] adopts an unjustifiably narrow interpretation of the word

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4 *Blake v Norris* (1990) 20 NSWLR 300 at 306 (Smart J).

5 See, eg, *Extradition Act 1988* (Cth), s 19; *Bankruptcy Act 1966* (Cth), s 5; *Service and Execution of Process Act 1901* (Cth), s 16. See, further, *R v Westminster (City) London Borough Council Rent Officer, Ex parte Rendall* [1973] QB 959 at 974 (Lord Denning MR, Orr and Lawton LJJ agreeing); *Nilant v Macchia* (2000) 104 FCR 238 at [9] (Hill J) and [46] (Weinberg J); *McCallum v Commissioner of Taxation (Cth)* (1997) 75 FCR 458 at 472-473 (Lehane J, Whitlam J agreeing); *S Kidman & Co v Lowndes CM* (2016) 314 FLR 358 at [39] (Grant CJ, Kelly and Hiley JJ); *Alliance Petroleum Australia NL v Australian Gas Light Co* (1983) 70 FLR 404 at 423 (King CJ, Wells J agreeing); *R v Deemal* (2009) 195 A Crim R 391 at [21] (Holmes JA, Daubney J agreeing).

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

7 *R v Gee* (2003) 212 CLR 230 at [6]-[7] (Gleeson CJ), [24], [63] (McHugh and Gummow JJ). See also *Aubrey v The Queen* (2017) 260 CLR 305 at [39]-[40] (Kiefel CJ, Keane, Nettle and Edelman JJ), referred to in *The Queen v A2* (2019) 269 CLR 507 at [169]-[170] (Edelman J).

'respecting' (appearing to equate the meaning of that word with whether Pt 7, Div 3 is 'incidental to the exercise of judicial power'). S78/2022

10. ***Section 68(1) can pick up s 79(1)(b) alone***: It is sufficient to decide this appeal for the Court to find that s 68(1) picks up s 79(1)(b). It is unnecessary to decide whether it also picks up s 79(1)(a) (and Pt 7, Div 4), because even if it does *not* pick up those provisions that would not mean that s 79(1)(b) was 'inapplicable' (cf ACS [39]).

11. As the amicus curiae accepts, 'some level of translation is permitted' in applying State laws as Commonwealth laws under s 68(1) (ACS [45], [48]). The real question concerns the *extent* to which s 68(1) can apply the text of a State statute with a changed meaning.[8] The amicus curiae accepts that there 'is considerable need for flexibility in translation' in the context of s 68(2), because otherwise 'the exercise of federal jurisdiction would be stultified' (ACS [48]). In fact, however, a stricter approach would mean only that the Commonwealth would need to enact more of its own laws to regulate the exercise of federal jurisdiction, in much the same way that the Commonwealth would need to enact more of its own laws (and thereby create independent systems of justice) if a strict approach were to be adopted to the circumstances in which State laws can be applied as Commonwealth laws under s 68(1). Thus, in both s 68(1) and (2), a strict approach to the 'translation' that is permitted would tend to defeat the purpose of s 68 of the Judiciary Act.

12. There is no necessary impediment to s 68(1) picking up only part of a State or Territory law.[9] An analysis of the case law cited at ACS [55], fn 40 reveals that s 68(1) does not eschew modification *per se*, but rather, that it is incapable of picking up, in isolation, provisions that cannot operate in the absence of other provisions that do not apply as federal law.[10] That consideration is not relevant to s 79(1)(b). Nor is it to the point that in enacting s 79(1) the Parliament intended a decision-maker to have a choice between alternative pathways (cf ACS [53]). As a matter of State law, s 31(2) of the *Interpretation Act* creates a strong presumption that s 79(1)(a) and (b) are divisible. There is nothing to rebut that presumption, there being no basis to infer that the NSW Parliament intended s 79 'to operate fully and completely according to its terms, or not at all'.[11] To the contrary, it is most unlikely that

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8 Cf *Rizeq v Western Australia* (2017) 262 CLR 1 at [200] (Edelman J), concerning s 79(1) of the Judiciary Act.

9 *Putland v The Queen* (2004) 218 CLR 174 at [37]-[38] (Gummow and Heydon JJ).

10 *Solomons* (2002) 211 CLR 119 at [15], [25], [28] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ). See also *British American Tobacco Limited v Western Australia* (2003) 217 CLR 30 (***BAT***) at [16], [19] (Gleeson CJ), [50], [60], [67] (McHugh, Gummow and Hayne JJ).

11 *Knight v Victoria* (2017) 261 CLR 306 at [35] (the Court); *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

the NSW Parliament intended it to be impossible to refer cases to the Court of Appeal to be dealt with as an appeal *unless* it was also possible to direct that an inquiry be conducted that may result in a pardon by the Governor.

13. Sections 79(1)(a) and (b) being divisible as a matter of State law, the same must be true for the purposes of determining whether they are divisible in their possible operations as Commonwealth laws applying by reason of s 68(1). There is no impediment to s 68(1) picking up and applying Div 3 of Part 7 only insofar as it permits either: (a) a decision to take no further action; or (b) a decision to refer the case to the Court of Appeal under s 79(1)(b). That is confirmed by the fact that, when s 79(1)(b) is picked up by s 68(1), its operation (together with that of Pt 7, Div 5) would be exactly the same *whether or not* s 79(1)(a) was also picked up (cf ACS [56]). The different pathways available under s 79(1) are 'discrete' and 'mutually exclusive': Leeming JA at [158] (CAB 103).

14. Contrary to the submissions of Victoria (**VS**) at [25], there is no temporal problem with the operation of s 4AAA of the *Crimes Act 1914* (Cth). The obvious purpose of s 4AAA is to secure constitutional validity by ensuring that a function or power conferred on a State or Territory judge by a Commonwealth law is conferred in a personal and voluntary capacity.[12] That purpose would be defeated if the qualifications in s 4AAA could take effect only *after* the provisions upon which they are designed to operate had (validly) come into force. The problem hypothesised by Victoria is inconsistent with the result in *O'Donoghue v Ireland*.[13] There is no reason why s 68 should operate differently to any other Commonwealth law.[14]

15. The issues raised at VS [27]-[31] do not arise in circumstances where s 79 clearly confers a power rather than imposing a duty: see Appeal and Review Act, s 79(3).[15]

Dated: 13 October 2022

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12 Explanatory Memorandum to the *Crimes Amendment (Forensic Procedures) Bill 2000* (Cth), [21].

13 (2008) 234 CLR 599.

14 Victoria in fact eschews any analytical distinction, in this context, between s 68(1) on the one hand and, on the other, Div 3 of Pt 7 as picked up and applied as a Commonwealth law: VS, fn 28.

15 So much appears to be uncontroversial: see ACS [50.1].