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 NSW
Third Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Construction of Part 7 of the Act

2. Part 7 contains two discrete and mutually exclusive pathways for the review of convictions and sentences, one involving administrative power (Div 4) and the other judicial power (Div 5): CA (Leeming JA) at [158] (**CAB 102-103**). Those pathways each have two entry points (Div 2 and Div 3). The entry point under Div 3 (s 79) involves a decision by a Supreme Court judge performing an administrative function *persona designata*.

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Section 68(1) of the Judiciary Act picks up at least s 79(1)(b) of the Act

The purpose of s 68(1) is to apply the State system for the administration of the criminal law to federal offenders

3. The purpose of s 68(1) of the Judiciary Act is to "place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and avoid the establishment of two independent systems of criminal justice": *R v Gee* (2003) 212 CLR 230 at [6]-[7], [13], [63], [115], [180] (**JBA 4, Tab 26**). That purpose requires the system for post-conviction review to be applied to Commonwealth offences in order to avoid the need to establish a separate system (**AS [34], [37]; AR [7]**).

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4. Section 68(1) applies State laws to persons who are charged with offences against the laws of the Commonwealth. Not all of the laws picked up by s 68(1) regulate or control the exercise of jurisdiction. Section 68(1) therefore serves a purpose distinct from s 79 of the Judiciary Act: **AS [33]-[39]**; **ACS [31], [48]; FRS [13]; VS [8]**; cf CA (Basten JA) [91]-[93], [117], [123] (**CAB 75-76, 85-88**).

At least s 79(1)(b) and Div 5 can be picked up by s 68(1)

5. **Threshold question**: The amici concede that s 79(1)(b) involves a procedure respecting an "appeal" within s 68(1) of the Judiciary Act and that, if it was enacted alone, it might be capable of being picked up by that provision: **ACS [29], [50]**. Their argument that s 79(1)(b) cannot be picked up by s 68(1) depends entirely on the proposition that s 79(1)(a) and Div 4 cannot be picked up and that s 79(1) is not severable: **ACS [26],**

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[30]. The correctness of the latter part of that proposition should be decided as a threshold issue**.**

6. Section 68(1) can pick up part of a State law provided that to do so does not change the meaning of the part of the law that is picked up: *Solomons* (2002) 211 CLR 119 at [24] (**JBA 4, Tab 32**). It would not change the meaning of s 79(1)(b) if it were to be picked up without s 79(1)(a): *Re Application of Pearson* (1999) 46 NSWLR 148 at [76], [79], [81] (**JBA 5, Tab 35**); **AR [10]-[13]**; cf CA (Basten JA) [94], [97] (**CAB 76-79**); **ACS [54]**; **AS [47]-[48]**. That is true even if Parliament intended s 79(1) to confer a choice: *Knight v Victoria* (2017) 261 CLR 306 at [35] (**JBA 3, Tab 20**); cf **ACS [53]**. For that reason, even if the Court were to find that s 79(1)(a) and Div 4 cannot be picked up by s 68(1), the appeal should be allowed because Garling J had power to make the decision that he made under s 79(1) of the Act, as picked up by s 68(1).

If necessary, s 79(1)(a) and Div 4 can also be picked up by s 68(1)

7. If the Court finds it necessary to decide the point, s 79(1)(a) and Div 4 can also be picked up by s 68(1) of the Judiciary Act. Section 68(1) picks up and applies laws respecting "appeals", a term defined inclusively in s 2 of the Judiciary Act to include "any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or judge". The word "proceeding" in the inclusive definition of "appeal" is not limited to judicial proceedings, and in any case does not limit the meaning of the word "appeal": **AS [42]-[43]**; **AR [8]-[9]; FRS [11]**. Construed broadly, an "appeal" is capable of including any procedure that may result in a person being relieved of the consequences of a conviction or sentence.

8. The amici's submissions substantially overstate the amount of translation that is required by s 68(1) to apply s 79(1)(a) and Div 4 to convictions for federal offences: **AS [49]**. The only translation required is that the references in Div 4 to the "Governor" would need to be read as a reference to the "Governor-General". That is supported by s 68(1), which proceeds "by analogy": *Rohde v DPP* (1986) 161 CLR 119 at 124-125 **(JBA 4, Tab 30).** That would not require the Governor-General to impermissibly "act on the advice of" the State judicial officers, for the Governor-General would continue to act on the advice of the Federal Executive Council: cf **ACS [43]**; **FR R [15]**.

Section 79(1)(b) does not impose a duty on State officers without their consent

9. Section 68(1) is a "law of the Commonwealth relating to criminal matters" which confers a function or power on "a State or Territory Judge" within s 4AAA(1) of the *Crimes Act 1914* (Cth) and therefore enlivens s 4AAA(3) (**JBA 2, Tab 7**). Section 4AAA and 68(1) operate simultaneously, as otherwise s 4AAA would fail to achieve its purpose: cf *O'Donoghue v Ireland* (2008) 234 CLR 599 (**JBA 4, Tab 23**). Accordingly, s 79(1) of the Act, as picked up by s 68(1), does not impose a duty on a State judge to perform any function under that picked-up provision, and no question of the limits of Commonwealth constitutional power to impose duties on State officials arises: **AR [14]**.

Section 79(1) of the Appeal and Review Act applies of its own force

10 10. Section 79(1) should be construed, as a matter of State law, as applying to convictions entered by, and sentences imposed by, New South Wales courts: CA (Leeming JA) [209]-[211] (**CAB 118-119**); **AS [24]-[25]**. It does not apply only to New South Wales offences. If it did so, Pt 7 would not extend to convictions for common law offences.

11. Section 12(1)(b) of the *Interpretation Act 1987* (NSW) does not require a different result: *BHP Group Ltd v Impiombato* [2022] HCA 33 at [21], [36], [39], [43], [59], [62]-[63] (**JBA 5, Tab 36**); CA (Leeming JA) [216]-[217] (**CAB 120**); cf CA (Basten JA) [68]-[69] (**CAB 63**); *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [1], [8], [9], [12], [15], [25]-[26] (**JBA 4, Tab 32**); **AS [26]-[28]; AR [2]-[4]**.

20 12. State Parliaments have legislative power to authorise administrative review of convictions for Commonwealth offences (**AS [23]; AR [6]**). The application of s 79 to convictions for federal offences does not transgress the Commonwealth's exclusive power to regulate the exercise of federal jurisdiction: *Rizeq v Western Australia* (2017) 262 CLR 1 at [103] (**JBA 4, Tab 29**); *Masson v Parsons* (2019) 266 CLR 554 at [30] (**JBA 3, Tab 22**); CA (Leeming JA) [199], [200], [203], [205] (**CAB 114-117**); *Lodhi v Attorney General (NSW)* (2013) 241 A Crim R 477 at [19], [32], [41], [44], [45], [52]-[53], [55], [61]-[63] (**JBA 5, Tab 41**); cf CA (Basten JA) [70]-[71] (**CAB 64-65**); **AR [6]**.

Dated: 8 November 2022

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Stephen Donaghue	Trent Glover	Christine Ernst