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

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ATTORNEY-GENERAL (NSW)
Second Respondent

SUPREME COURT OF NEW SOUTH WALES
Third Respondent

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

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PARTS I, II & III: CERTIFICATION AND INTERVENTION

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

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART IV: ARGUMENT

A. INTRODUCTION

3. This appeal raises a series of complex issues concerning the proper construction of both Div 3 of Pt 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) (***Appeal and Review Act***) and s 68(1) of the *Judiciary Act*.

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4. The Commonwealth has approached those issues by reference to three questions: **Cth [3]**. Victoria makes submissions only in response to Question 3. It does so on the assumption that:

(1) the function conferred by Div 3 of Pt 7 is an administrative function conferred *persona designata*, consistent with the submissions of the Commonwealth, Mr Huynh and the proposed Amicus in relation to Question 1 (**Cth [22]**; **Huynh [7]**; **Huynh Reply [2]**; **Amicus [7]**); and

(2) it will be necessary or appropriate for the Court to answer Question 3, either because Div 3 of Pt 7 does not apply of its own force to federal offenders convicted and sentenced in New South Wales' courts (meaning that Question 2 has been answered "no": see **Amicus [9]-[25]**), or because Question 3 should be considered in any event (see **Cth [32]**).

10 5. Question 3 concerns the operation of s 68(1) of the *Judiciary Act*. Victoria's submissions are directed to the intersection between the operation of that provision and limits on Commonwealth legislative power.

6. In summary, Victoria submits:

(1) Because the terms of s 68(1) of the *Judiciary Act* operate to apply certain State laws "so far as they are applicable" to persons charged with federal offences in respect of whom jurisdiction is conferred on State courts, s 68(1) does not "pick up" State laws that would, if picked up, contravene a limit on Commonwealth legislative power.

(2) In the context of Div 3 of Pt 7, the most relevant of those limits is that a
20 non-judicial function cannot be conferred on a judge of a Ch III court, in their personal capacity, without the judge's consent.[1] Another potentially relevant limit is that an administrative duty cannot be conferred on a State official without State authorisation.[2]

(3) If the qualifying expression "so far as they are applicable" in s 68(1) prevents Div 3 of Pt 7 from being picked up, that outcome cannot be avoided by s 4AAA of the *Crimes Act 1914* (Cth).

7. Each of those propositions is elaborated upon below.

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1 *Grollo v Palmer* (1995) 184 CLR 348 at 364-365 (Brennan CJ, Deane, Dawson and Toohey JJ).

2 See *O'Donoghue v Ireland* (2008) 234 CLR 599 at [15], [17] (Gleeson CJ), [52]-[58] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

B. SECTION 68(1)

8. Victoria agrees with the Commonwealth and Mr Huynh that, properly construed, the operation of s 68(1) of the *Judiciary Act* is not confined to picking up laws that regulate the exercise of jurisdiction by State courts. Rather, it can pick up and apply State laws that apply prior to, or after, trial in a State court, even if those laws are concerned solely with administrative functions: **Cth [38]**; **Huynh [13]**.

9. Victoria also agrees with the submission that s 68(1) is not a more specific manifestation of s 79(1) of the *Judiciary Act* and that, therefore, the Court of Appeal was wrong to rely on *Rizeq v Western Australia*[3] to confine the operation of s 68(1): **Cth [39]**; **Huynh [13]**. The proposed Amicus appears to have accepted as much: see **Amicus [31]**.

10. Victoria emphasises, however, that the text of s 68(1) of the *Judiciary Act* makes clear that it operates to pick up and apply relevant State laws to persons charged with federal offences only "so far as they are applicable".

11. One consequence of the use of that expression is addressed by the proposed Amicus. It relates to the capacity of s 68(1) to pick up a State law, if the application of that law as a Commonwealth law would require the meaning of the State law to be altered: see **Amicus [39]**; cf **Cth [46]**.[4] Whether Div 3 of Pt 7 can be picked up by s 68(1), having regard to that limitation, depends on the proper construction of those provisions (as to which Victoria makes no submission).

12. Victoria's submissions on Question 3 focus on a different consequence of the expression "so far as they are applicable". It was identified by Gleeson CJ in *Putland v The Queen* in the following way:[5]

> The laws of a State or Territory to which s 68(1) refers apply "so far as they are applicable". Although there is not in s 68, as there is in s 79 of the *Judiciary Act*, an express qualification to the operation of the provision by the use of the words "except as otherwise provided by the Constitution or the laws of the Commonwealth", in the context of a problem such as

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3 (2017) 262 CLR 1.

4 See *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136 at [13] (Gleeson CJ, Gummow and Hayne JJ), concerning the words "cases to which they are applicable" in s 79(1) of the *Judiciary Act*.

5 (2004) 218 CLR 174 at [7]; see also at [41] (Gummow and Heydon JJ), [96] (Kirby J), [121] (Callinan J); *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [119] (Kirby J); *Bui v DPP (Cth)* (2012) 244 CLR 638 at [11] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

the present there is little, if any, functional difference between the two forms of qualification.

13. The express qualification to the operation of s 79(1) of the *Judiciary Act*, referred to by Gleeson CJ, has two aspects.[6] The *first* is conveyed by the expression "except as otherwise provided by the Constitution".[7] The *second* is conveyed by the expression "except as otherwise provided by … the laws of the Commonwealth".[8] Consistent with the observation of Gleeson CJ, the qualifying expression "so far as they are applicable" in s 68(1) incorporates the same two aspects into s 68(1).[9]

14. This appeal raises for consideration the first aspect of the qualification, which "anticipates" the existence of State laws which, if picked up and applied as a Commonwealth law, would contravene a constitutional limit on Commonwealth legislative power.[10] Provisions of State law that would have that effect, if they were to be picked up, are simply "beyond the reach" of s 68(1).[11] In other words, the effect of the qualification is that those State laws are not "picked up and applied as a law having its source in Commonwealth legislative power".[12]

15. In that way, the qualification ensures that s 68(1) does not "exceed the legislative power of the Commonwealth".[13] Thus, Gleeson CJ's explanation can be understood as a "reading down" of s 68(1), in the sense that his Honour selected a "reasonably open" construction to avoid invalidity.[14] But, in any event, if no such construction were

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6 See *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [67] (McHugh, Gummow and Hayne JJ).

7 See generally Hill and Beech, "'Picking up' State and Territory laws under s 79 of the Judiciary Act — three questions" (2005) 27 *Australian Bar Review* 25 at 42-44.

8 That expression was equated in *Masson v Parsons* with the concept of inconsistency in s 109 of the *Constitution*: see (2019) 266 CLR 554 at [43] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

9 See also *Wong v The Queen* (2001) 207 CLR 584 at [48] (Gaudron, Gummow and Hayne JJ); *Hili v The Queen* (2010) 242 CLR 520 at [21] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *R v Pham* (2015) 256 CLR 550 at [22] (French CJ, Keane and Nettle JJ).

10 See *Masson* (2019) 266 CLR 554 at [42] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

11 See *Kruger v Commonwealth* (1997) 190 CLR 1 at 140 (Gaudron J), quoted in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2004) 204 CLR 559 at [72] (Gleeson CJ, Gaudron and Gummow JJ); see also at [137] (McHugh J).

12 See *Masson* (2019) 266 CLR 554 at [42] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Solomons* (2002) 211 CLR 119 at [23]-[24], [28] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), [119]-[120], [139] (Kirby J); *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [228] (Edelman J).

13 See *Acts Interpretation Act 1901* (Cth), s 15A.

14 See *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

"reasonably open", the same result would follow by a process of "severance" (in the sense of "partial disapplication").[15]

16. Either way, s 68(1) of the *Judiciary Act* cannot operate to pick up a State law that would, if picked up and applied as a Commonwealth law, contravene a limit on Commonwealth legislative power.

C. RELEVANT LIMITS ON COMMONWEALTH LEGISLATIVE POWER

17. The qualification in s 68(1) that prevents it from operating to pick up a State law that would contravene a limit on Commonwealth legislative power may be engaged by any limit on Commonwealth legislative power. However, as a general proposition, given the area in which s 68(1) operates, the following four limits are most likely to be relevant:

(1) *First*, the Commonwealth Parliament cannot confer upon a State court a non-judicial function.[16] This limit is unlikely to be relevant in this appeal because, as noted above, the parties, and the proposed Amicus, contend that Div 3 of Pt 7 does not confer a function upon a Ch III court, but rather confers a function upon a judge of a Ch III court, in their personal capacity.[17]

(2) *Second*, the Commonwealth Parliament cannot confer upon a judge of a Ch III court, in their personal capacity, a function that is incompatible either with the judge's performance of judicial functions, or with the proper discharge by the court of its responsibilities as an institution exercising judicial power.[18] While Basten JA acknowledged the existence of this limit (**CAB 83 [110]**), no party, nor the proposed Amicus, has submitted that it is relevant to the disposition of this appeal.

(3) *Third*, the Commonwealth Parliament cannot confer upon a judge of a Ch III court, in their personal capacity, a non-judicial function — unless the individual

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15 See, eg, *Thoms v Commonwealth* (2022) 96 ALJR 635 at [74]-[77] (Gordon and Edelman JJ).

16 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152 (the Court).

17 The first limit may need to be revisited if Question 1 were to be answered differently: see **CAB 103 [159]-[160]** (Leeming JA).

18 *Grollo* (1995) 184 CLR 348 at 364-365 (Brennan CJ, Deane, Dawson and Toohey JJ). See also *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 14-15 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 21 (Gaudron J).

judge has consented to that conferral.[19] The potential relevance of this limit was acknowledged by both Basten JA and Leeming JA (**CAB 86 [117], 87 [120], 103 [159], 104 [161]-[162]**), and is acknowledged by both the Commonwealth and Mr Huynh in this Court: **Cth [49]**; **Huynh [17]**.

(4) *Fourth*, the Commonwealth Parliament cannot confer upon a State official (including a judge acting in their personal capacity) an administrative duty — unless the State has authorised that conferral.[20] The existence and scope of this limit is unresolved. But its potential relevance was acknowledged by Basten JA (**CAB 76 [93]**),[21] and is acknowledged by the proposed Amicus in this Court (**Amicus [50.1]-[50.2]**).

18. The third and fourth limits, and their potential relevance to the disposition of this appeal, are addressed further below. If the effect of picking up Div 3 of Pt 7 would be to produce a Commonwealth law that purported to infringe one (or both) of those limits, the qualification to the operation of s 68(1) discussed above would be engaged, such that it would not operate to pick up Div 3 of Pt 7.

C.1 Third limit: Individual consent requirement

19. There are a number of ways a legislative scheme may ensure that the third limit is not infringed. Without being exhaustive:

(1) One drafting technique is that contained in the scheme considered in *Grollo*: by its express terms, the statute does not confer the function upon the judge unless the judge has provided prior written consent.[22]

(2) Another technique is for the statute to expressly provide that the judge "need not accept" the function that the statue has otherwise conferred on the judge.[23] That

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19 *Grollo* (1995) 184 CLR 348 at 364-365 (Brennan CJ, Deane, Dawson and Toohey JJ). See also *Wilson* (1996) 189 CLR 1 at 13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

20 See *O'Donoghue* (2008) 234 CLR 599 at [14]-[18] (Gleeson CJ), [52]-[57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

21 However, it is not clear whether his Honour thought it potentially relevant to the area in which s 68(1) of the *Judiciary Act* operates; whether it is a limit that might be engaged in a particular instance; or whether it was a limit on the scope of the "incidental power in relation to federal jurisdiction".

22 (1995) 184 CLR 348 at 357 (Brennan CJ, Deane, Dawson and Toohey JJ). The same mechanism appears in s 45A of the *Extradition Act 1988* (Cth). See also the scheme considered in *Wainohu v New South Wales* (2011) 243 CLR 181 at [80] (Gummow, Hayne, Crennan and Bell JJ).

23 See, eg, *Extradition Act*, s 45B.

is the form used in s 4AAA(3) of the *Crimes Act*,[24] which we discuss further below.

(3) In some legislative schemes, neither technique is adopted, but the scheme impliedly allows for the judge to refuse to accept the conferral of the function.[25]

20. Division 3 of Pt 7 does not contain any express mechanism for the provision of consent. As Basten JA observed, "there is nothing in s 79 of the Appeal and Review Act which provides for voluntary acceptance of federal power": **CAB 86 [117]**. The question is thus whether the legislative scheme impliedly allows for the relevant judges of the Supreme Court — being the Chief Justice and any Justices authorised by the Chief Justice[26] — to refuse to accept the conferral of the relevant function.

21. That depends upon the proper construction of the legislative scheme (as to which Victoria makes no submission). However, if the scheme lacks a mechanism for the provision of consent (express or implied), then the qualification to the operation of s 68(1) of the *Judiciary Act* will preclude it from picking up Div 3 of Pt 7. That is because, if s 68(1) were to pick up Div 3 of Pt 7, the resulting Commonwealth law would infringe the individual consent requirement.

22. That possible outcome was alluded to by Basten JA in the Court of Appeal. His Honour said that to the extent that the provisions of Div 3 of Pt 7 might be picked up by s 68(1) of the *Judiciary Act*, "they are not in a form which would comply with the constitutional constraints on Commonwealth power": **CAB 87 [120]**. That observation provided an alternative basis for Basten JA's ultimate conclusion that Div 3 of Pt 7 is not picked up by s 68(1) of the *Judiciary Act*. If that is right, the answer to Question 3 is "no".

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24 See *CXXXVIII v White* (2020) 274 FCR 170 at [92]-[105] (Wigney, Bromwich and Abraham JJ), concerning the application of s 4AAA(3) of the *Crimes Act* to s 31 of the *Australian Crime Commission Act 2002* (Cth).

25 See, eg, *Wilson* (1996) 189 CLR 1, where the statute simply contained a power to nominate a person to make a report, and there was nothing to suggest that the person was required to accept the nomination: at 7 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See further *CXXXVIII* (2020) 274 FCR 170 at [106] (Wigney, Bromwich and Abraham JJ).

26 See *Appeal and Review Act*, s 75.

Section 4AAA of the *Crimes Act*

23. If s 68(1) cannot pick up Div 3 of Pt 7 by reason of the individual consent requirement, that problem cannot be solved by recourse to s 4AAA of the *Crimes Act*. Basten JA anticipated that result, although not the precise reason for it: see **CAB 86-87 [119]**.

24. Section 4AAA identifies a series of "rules" of construction. Those rules apply only in the circumstances detailed in s 4AAA(1).[27] In short, they apply only where a function which is neither judicial nor incidental to a judicial function is conferred upon a judge "under a law of the Commonwealth relating to criminal matters".[28] The relevant rule is contained in s 4AAA(3). If it applies, "[t]he person need not accept the function or power conferred" (being one of the drafting techniques identified above).

25. The problem is a temporal one. Specifically, if Div 3 of Pt 7 (if picked up) would infringe a constitutional limitation, the qualification in s 68(1) of the *Judiciary Act* will be engaged and, as a result, Div 3 of Pt 7 will not be picked up. The translation of the State law into Commonwealth law simply will not occur.

26. Thus, contrary to the position of both the Commonwealth and Mr Huynh (**Cth [49]**; **Huynh [18]**), there will be no conferral of a function "under a law of the Commonwealth relating to criminal matters". Accordingly, the precondition specified in s 4AAA(1) will not be satisfied and s 4AAA(3) will not apply.

C.2 Fourth limit: State authorisation requirement

27. The fourth limit is that the Commonwealth Parliament cannot confer upon a State official an administrative duty — unless the State has authorised that conferral.[29] Framed in that way, the limit is the converse of the established proposition that "a State by its laws cannot unilaterally invest functions under that law in officers of the

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27 *O'Donoghue* (2008) 234 CLR 599 at [61] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

28 See also *Crimes Act*, s 4AAA(7). For present purposes, nothing turns on whether the relevant Commonwealth law is better identified as the State law as picked up by s 68(1) of the *Judiciary Act*, or as s 68(1) of the *Judiciary Act* itself. Both Div 3 of Pt 7 (if picked up) and s 68(1) of the *Judiciary Act* satisfy the description of "a law of the Commonwealth relating to criminal matters": see **Huynh [18]**; cf **CAB 105 [164]** (Leeming JA).

29 The limit may not apply if there is something in the subject matter, content or context of a particular head of Commonwealth legislative power to indicate that it should not (as with, for example, ss 51(vi) and 77(iii) of the *Constitution*): *O'Donoghue* (2008) 234 CLR 599 at [15]-[16] (Gleeson CJ), [44]-[45] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); cf at [174]-[176] (Kirby J).

Commonwealth".[30] It can be understood as arising from the federal nature of the *Constitution* and, in particular, as a specific application of the *Melbourne Corporation* principle.[31]

28. However, as noted above, the existence and scope of this limit is unresolved. Current authority establishes that the Commonwealth Parliament may confer upon a State officer a mere power (rather than a duty). Such a conferral involves "no interference with the functions of the executive government of the State".[32] In light of that authority, it was unnecessary to resolve the existence and boundary of the fourth limit in *O'Donoghue v Ireland*. The Commonwealth law impugned in that case[33] was construed as conferring a power, not a duty, upon State magistrates.[34]

29. Whether the same is true in this appeal will depend upon how Div 3 of Pt 7 is construed. The proposed Amicus has recognised as much: see **Amicus [50.1]-[50.2]**. In contrast, the Commonwealth has not addressed the issue, but appears to proceed on the basis that Div 3 of Pt 7 confers a power rather than a duty: see **Cth [20]**.

30. If, contrary to the Commonwealth's apparent position, Div 3 of Pt 7 were held to confer a duty on judges of the Supreme Court in their personal capacity, it may be necessary for the Court to consider the existence and scope of the fourth limit (including whether the State must authorise the conferral by legislation, or whether it can do so by executive agreement).[35]

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30 *R v Hughes* (2000) 202 CLR 535 at [31] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *O'Donoghue* (2008) 234 CLR 599 at [32] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

31 See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 507-509 (Kirby J); *Hughes* (2000) 202 CLR 535 at [31] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), [75] (Kirby J); *O'Donoghue* (2008) 234 CLR 599 at [160]-[163] (Kirby J); *Spence v Queensland* (2019) 268 CLR 355 at [99]-[108] (Kiefel CJ, Bell, Gageler and Keane JJ), [307]-[316] (Edelman J).

32 *Aston v Irvine* (1955) 92 CLR 353 at 364 (the Court), as discussed in *O'Donoghue* (2008) 234 CLR 599 at [22] (Gleeson CJ), [48]-[51] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

33 *Extradition Act*, s 19, read together with s 4AAA(3) of the *Crimes Act*.

34 See *O'Donoghue* (2008) 234 CLR 599 at [20] (Gleeson CJ), [47], [57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

35 In Victoria's submission, authorisation by executive agreement is sufficient, unless there is a legislative impediment that prevents the making of such an agreement: see *O'Donoghue* (2008) 234 CLR 599 at [19] (Gleeson CJ). See, eg, *Commonwealth Places (Application of Laws) Act 1970* (Cth), s 6(2) (read with Commonwealth, *Gazette*, No 91, 30 September 1971 at 6160); *Extradition Act*, s 46 (read with Commonwealth, *Gazette: Special*, No S366, 30 November 1988 at 3). See also *Commonwealth Arrangements Act 1958* (Vic), s 4.

31. If the fourth limit operated to prevent s 68(1) of the *Judiciary Act* from picking up Div 3 of Pt 7, that outcome could not be avoided by s 4AAA of the *Crimes Act* for the reasons explained at paragraphs 23 to 26 above (cf **Amicus [50.2]**).[36] Question 3 would then be answered "no".

PART V: ESTIMATE OF TIME

32. The Attorney-General for Victoria estimates that she will require up to 20 minutes for the presentation of her oral submissions.

Dated: 7 October 2022

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[36] Nor is there any suggestion that any arrangement has been made between the Governor-General and the Governor of New South Wales pursuant to s 4AAB(1) of the *Crimes Act*.

IN THE HIGH COURT OF AUSTRALIA
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SUPREME COURT OF NEW SOUTH WALES
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ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR VICTORIA (INTERVENING)

20 Pursuant to Practice Direction No 1 of 2019, Victoria sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	Ch III
	Statutory provisions		
2.	*Acts Interpretation Act 1901* (Cth)	Compilation No 36	s 15A
3.	*Crimes Act 1914* (Cth)	Compilation No 142	s 4AAA
4.	*Crimes (Appeal and Review) Act 2001* (NSW)	28 September 2020 – 26 March 2021	Pt 7
5.	*Commonwealth Arrangements Act 1958* (Vic)	Authorised Version No 26	s 4

6.	*Commonwealth Places (Application of Laws) Act 1970* (Cth)	Compilation No 16	s 6(2)
7.	*Extradition Act 1988* (Cth)	Compilation No 15	ss 19, 45A, 45B, 46
8.	*Judiciary Act 1903* (Cth)	Compilation No 47	ss 68, 79