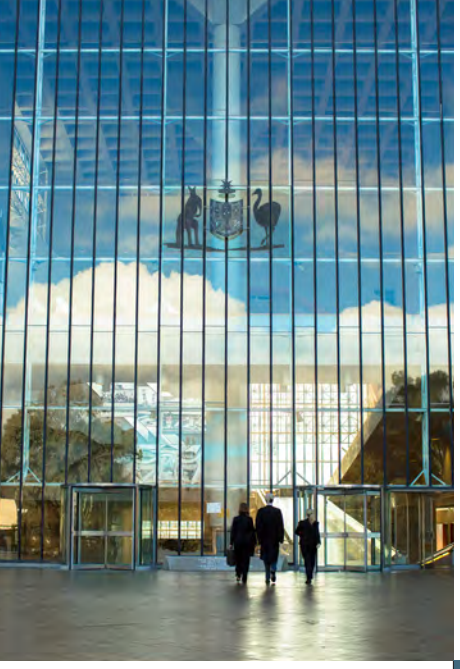

31 October 2023

New South Wales law providing for inquiry into a conviction or sentence applies as federal law for Commonwealth offences

In this issue

By a 4:3 majority, the High Court held that provisions of the *Crimes (Appeal and Review) Act 2001* (NSW) (CAR Act) providing for applications to the Supreme Court of New South Wales for inquiry into a conviction or sentence, and subsequent referral to the Court of Criminal Appeal of New South Wales, can be picked up and applied as federal laws under s 68(1) of the *Judiciary Act 1903* (Cth) (Judiciary Act).

Chief Justice Kiefel, Gageler and Gleeson JJ, together with Jagot J, who wrote separately, allowed the Attorney-General's appeal from a decision of the New South Wales Court of Appeal. In that decision (*Huynh v Attorney General* (NSW) (2021) 107 NSWLR 75) a majority held that a person convicted of offences under Commonwealth laws could not use the CAR Act procedures for post-conviction review. Justices Gordon and Steward, and Edelman J writing separately, dissented.

Attorney-General (Cth) v Huynh
High Court of Australia, 10 May 2023
[2023] HCA 13

Constitutional cases

Background

In 2015, in the District Court of New South Wales, the first respondent (Mr Huynh) was convicted of *Criminal Code* (Cth) offences concerning importation of a border-controlled precursor. Mr Huynh appealed to the Court of Criminal Appeal and also applied for special leave to appeal to the High Court, both unsuccessfully (*Cranney v The Queen* (2017) 325 FLR 173; *Huynh v The Queen* [2019] HCASL 6).

Supreme Court of New South Wales

Having exhausted all available avenues of appeal, Mr Huynh applied to the Supreme Court under s 78(1) of the CAR Act for an inquiry into his conviction. Under s 79 of the CAR Act, the Supreme Court may:

- decline to deal with the application (s 79(3)), or
- either:
  - direct that a judicial officer conduct an inquiry into the conviction or sentence (under s 79(1)(a))
  - refer the whole case to the Court of Criminal Appeal (s 79(1)(b)). The case will then be dealt with as an appeal under the *Criminal Appeal Act 1912* (NSW).

On 13 October 2020, Garling J dismissed Mr Huynh's application on its merits (*Re Huynh* [2020] NSWSC 1356).

Court of Appeal

On 18 January 2021, Mr Huynh filed a summons in the Court of Appeal seeking an order quashing Garling J's decision on the ground that his Honour had erred in law. At that point, jurisdictional questions were raised because Mr Huynh had been convicted of Commonwealth rather than State offences.

An amended summons was filed seeking to join the Attorney-General of the Commonwealth as a party to the proceedings. The Attorney-General consented.

Before the Court of Appeal could examine Mr Huynh's judicial review application, there were 3 issues for the Court to consider:

1) In dealing with an application under s 78(1), is a judge exercising judicial or administrative power under s 79 of the CAR Act?
2) Do ss 78 and 79 of the CAR Act apply of their own force in relation to a conviction for a Commonwealth offence; and
3) If they do not apply of their own force in relation to that conviction, do those sections apply as federal laws under s 68(1) of the Judiciary Act?

The Court of Appeal held that s 79 of the CAR Act conferred an administrative function, exercised *persona designata*. A majority of the court (Bathurst CJ and Basten, Gleeson and Payne JJA) held that ss 78 and 79 of the CAR Act did not apply to convictions for Commonwealth offences, either of their own force or under s 68(1) of the *Judiciary Act 1903* (Cth). Justice Leeming, in sole dissent, took the view that the provisions applied of their own force in federal jurisdiction. The Court of Appeal therefore declared that Garling J's decision purporting to determine Mr Huynh's application under s 78 of the CAR Act had been void and of no effect.

High Court

The Attorney-General applied for special leave to appeal from the whole Court of Appeal judgment. On 12 May 2022, the High Court granted special leave to appeal without the need for oral argument.

On appeal to the High Court, the Attorney-General argued that ss 78 and 79 of the CAR Act can be applied for Commonwealth offences *both* of their own force and as federal laws under s 68(1) of the Judiciary Act. Mr Huynh filed submissions agreeing with the Attorney-General. The second respondent, the NSW Attorney General, filed a submitting appearance, as did the third respondent, the Supreme Court. The Victorian Attorney-General intervened to make submissions on constitutional issues, without supporting the position of any particular party.

Given there was no party to contradict the Attorney-General's appeal, the Court requested that an *amicus curiae* act as contradictor in the appeal. Graeme Hill SC and James Stellios were briefed to appear in that capacity.

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The High Court's decision

The High Court delivered 4 separate judgments:

- a plurality judgment by Kiefel CJ and Gageler and Gleeson JJ
- a separate concurring judgment by Jagot J
- a dissenting judgment by Gordon and Steward JJ
- a separate dissent by Edelman J.

No party to or intervener in the appeal sought to argue against the Court of Appeal's conclusion that the power under s 79 of the CAR Act was an administrative function exercised by an authorised judge *persona designata*. Therefore, the court did not hear argument on that point ([17], [132], [194]). The Victorian Attorney-General made submissions on operation of the *persona designata* doctrine.

Sections 78(1) and 79(1) do not apply of their own force for Commonwealth offences

The High Court was unanimously of the view that ss 78(1) and 79(1) of the CAR Act cannot apply of their own force as state laws in relation to a conviction or sentence for an offence under a law of the Commonwealth ([8], [133], [226]–[227], [265]).

> … as a matter of construction, the provisions did not purport to apply directly to Commonwealth offences.

The majority and minority justices rejected this argument for substantially similar reasons. They found that, as a matter of construction, the provisions did not purport to apply directly to Commonwealth offences. In particular, their Honours held that the central subject matter or 'hinge' upon which Div 3 of Pt 7 operates is a 'conviction' or 'sentence'. The New South Wales Parliament intended these terms to mean convictions or sentences against laws of New South Wales ([34]–[35], [134], [227]–[229], [265]).

The High Court also held that the New South Wales Parliament should be assumed to have used the terms 'conviction' and 'sentence' consistently, and found that construing those terms to include convictions and sentences for offences against Commonwealth laws would produce 'an exercise of constitutional futility', at least in relation to Div 2 of Pt 7 ('Petitions to the Governor') ([35]–[36], [134]–[137], [229], [265]).

Finally, the court held that provisions of the CAR Act, if applied of their own force in respect of Commonwealth offences, would exceed state legislative power because it would be either a purported conferral, or a regulation of the manner of exercise of, federal jurisdiction, contrary to Ch III of the Constitution ([37], [138]–[139], [231]–[232], [265]).

Application of ss 78(1) and s 79(1)(b) as federal laws for Commonwealth offences

The appeal was allowed. The majority held that ss 78(1) and 79(1)(b) of the CAR Act (but not s 79(1)(a)) apply to persons convicted by NSW courts of Commonwealth offences as surrogate federal laws through s 68(1) of the Judiciary Act ([8], [266]). The minority judges reasoned that Div 3 of Pt 7 of the CAR Act should not be read in isolation from the rest of Pt 7. They further held that ss 79(1)(a) and 79(1)(b) were mutually inseverable ([125], [168], [206], [250]).

The first respondent's application for judicial review of the decision of Garling J dismissing his application under s 78 of the CAR Act for an inquiry into his conviction for offences under the *Criminal Code* (Cth) was remitted to the Court of Appeal for determination.

Majority judges (Kiefel CJ and Gageler and Gleeson JJ; and Jagot J)

For Kiefel CJ and Gageler and Gleeson JJ, s 68(1) of the Judiciary Act was similar to, but relevantly distinguishable from, s 79(1) of that Act. Their Honours recognised a 'substantial degree of overlap in the purposes and operations of the two provisions', but they identified 3 'important differences', generally consistent with the Attorney-General's submissions ([41]–[42]):

1) 'Focus': Section 79(1) of the Judiciary Act is concerned with laws that are binding on *courts*. However, s 68(1) is concerned with laws that apply to *persons* charged with offences against laws of the Commonwealth.
2) 'Role': Section 79(1) is confined to filling a gap left by the inability of state parliaments to regulate the exercise of federal jurisdiction. However, s 68(1) provides for the uniformity of treatment of state and federal offenders by picking up identified aspects of state and territory criminal procedure.
3) 'Translation': Application of state and territory laws 'so far as they are applicable' to persons charged with Commonwealth offences requires

that particular references to state and territory bodies and officers be treated as references to federal equivalents. Where this gives rise to inconsistency with the operation of s 79(1), s 68(1) must prevail ([59], [64]).

Justice Jagot did not refer to s 79(1) of the Judiciary Act but embraced a similar conception of the function and purpose of s 68(1) to the plurality ([268], [286]).

The plurality held that 'the key to understanding the scope and operation of s 68(1)' lies in s 68(2). That subsection uses equivalent language to confer 'like jurisdiction', for federal offenders, upon courts exercising jurisdiction with respect to state and territory offenders ([43]–[44]). Section 68(1) operates to apply state and territory laws 'respecting' one or more of the 'six designated categories of criminal procedure' identified in s 68(1) to people charged with Commonwealth offences in respect of whom jurisdiction is conferred on state and territory courts under s 68(2) ([48]). Justice Jagot agreed that the laws specified in s 68(1) must be construed in the context of s 68(2)'s vesting of federal jurisdiction 'with respect to the identified topics' ([268]).

The majority rejected the argument that the reference to 'appeals' in s 68(1)(d) of the Judiciary Act includes the procedure under Div 3 of Pt 7 of the CAR Act as a proceeding to call in question the conviction or sentence the subject of an application. In particular, their Honours found that the term 'appeal' in s 68(1)(d) could not be extended to proceedings heard and determined otherwise than in the exercise of judicial power ([50], [265]). The plurality judges reasoned that this would be inconsistent with s 68(2)'s conferral of jurisdiction in equivalent terms ([54]).

Instead, the majority held that a state or territory law providing for a non-judicial process to call into question a conviction or sentence may be a law 'respecting' one or more of the categories of criminal procedure within s 68(1) ([55], [265]). Whether such a state or territory law meets that description is a question of characterisation. To determine that issue one must identify the state jurisdiction by reference to which 'like jurisdiction' is vested under s 68(2) ([68], [265]).

The plurality rejected the 'broadest form' of argument on this point: that the application of ss 78(1) and 79(1) of the CAR Act as federal laws under s 68(1) of the Judiciary Act draws support from the federal jurisdiction that was exercised by the District Court in convicting and sentencing Mr Huynh for offences under the *Criminal Code* (Cth). This approach was rejected because ss 78(1) and 79(1) cannot be characterised as laws respecting 'the procedure for ... trial and conviction on indictment' within s 68(1)(c) ([69]–[70]).

The majority preferred the view that ss 78(1) and 79(1) of the CAR Act draw support as surrogate federal laws from the jurisdiction that *might* be exercised by the Court of Criminal Appeal by reference to the state jurisdiction conferred under Div 5 of Part 7 of the CAR Act. As vested by s 68(2) in respect of federal offenders, jurisdiction under ss 86 and 88 of the CAR Act (relevantly enlivened by the particular power exercised under s 79(1)) was held to be capable of characterisation as jurisdiction 'with respect to the hearing and determination of appeals' ([71]–[72], [265]).

> ... the plurality judges identified 'insurmountable difficulties' in relation to s 79(1)(a).

However, the plurality judges identified 'insurmountable difficulties' in relation to s 79(1)(a). Their Honours held the relationship between a direction under s 79(1)(a) and a potential exercise of jurisdiction under s 88 to be 'no more than contingent and remote', in circumstances where an 'appeal' would result only following a referral by a judicial officer upon the completion of an inquiry under Div 4 of Pt 7. Further, that power of referral to the Court of Criminal Appeal could not be disentangled from the 'totality of procedures' under Div 4, some of which plainly do not fall within s 68(1)(d) of the Judiciary Act ([73]).

These difficulties did not arise for the procedure under ss 78(1) and 79(1)(b). These sections enliven the jurisdiction of the Court of Criminal Appeal under s 86 of the CAR Act with no intervening non-judicial procedure ([74]). Their Honours found no textual difficulty with severing s 79(1)(b) from s 79(1)(a). Also,

they found there was no effect on the substantive legal operation of the former provision without the latter ([75]).

Without departing from the plurality's approach, Jagot J's separate reasons for judgment dealt at length with the issue of severance. Her Honour explained why the selective application in federal jurisdiction of particular provisions of Div 3 of Pt 7 of the CAR Act did not give an 'altered meaning' to the statutory scheme or otherwise render it inapplicable ([269]–[297]). In particular, her Honour explained why ss 79(1)(a) and 79(1)(b) could and should be given a distributive operation ([287]–[297]).

The majority judges therefore concluded that ss 78(1) and 79(1)(b) (but not s 78(1)(a)) can apply as federal laws by force of s 68(1) of the Judiciary Act. They are laws 'respecting ... the procedure for ... the hearing and determination of appeals'. These 'appeals' are heard and determined in the exercise of federal jurisdiction vested in the Court of Criminal Appeal under s 68(2) of the Judiciary Act by reference to s 86 of the CAR Act ([75]–[77], [265]). Their Honours left for determination on remittal the question of whether the requirement of notice to 'the Minister' under s 78(2) is also applicable as a federal law, including whether that provision would be translated so as to require notice to the Attorney-General of the Commonwealth ([79], [298]).

In reaching this conclusion, the plurality judges defined the scope of s 68(1) by reference to the federal jurisdiction vested by s 68(2). They found that s 79(1)(b) of the CAR Act was a law 'respecting' appeals heard in the exercise of that federal jurisdiction. However, their Honours did not appear to explain the basis on which the s 79(1)(b) power could be conferred upon a judge by operation of s 68(1). They did not expressly rely upon the common assumption of the parties and interveners that s 79 of the CAR Act conferred an administrative function exercised *persona designata*. Also, the plurality did not expressly characterise the relevant powers as being incidental to the exercise of judicial power. Despite this lack of clarity, Jagot J agreed with the plurality that, for the reasons they give, 'ss 78 and 79 of the CAR Act are incidental to the exercise of a judicial function by the Court of Criminal Appeal' ([265]).

The plurality judgment concluded with some brief observations on the submissions of the Victorian Attorney-General. Jagot J agreed with these observations. Their Honours rejected arguments that constitutional limitations on Commonwealth legislative power had been infringed either by the conferral upon a judge of a non-judicial function without the judge's consent or by conferral of an administrative duty upon a state officer without state legislative approval. Their Honours noted that in the circumstances Garling J had not been under any enforceable obligation to entertain Mr Huynh's application. However, they left open the question of whether the Chief Justice of the Supreme Court might come under an enforceable obligation to deal with an application under s 78(1) ([81]–[83], [298]).

Their Honours rejected arguments that constitutional limitations on Commonwealth legislative power had been infringed either by the conferral upon a judge of a non-judicial function without the judge's consent or by conferral of an administrative duty upon a state officer without state legislative approval.

Gordon and Steward JJ

Justices Gordon and Steward jointly dissented on whether ss 78(1) and s 79(1)(b) apply as federal laws. Their Honours gave a detailed description of the history and scheme of Pt 7 of the CAR Act. Reasoning with close reference to the interrelation between the CAR Act and the prerogative of mercy, their Honours characterised Pt 7 as reflecting a 'politically controlled' process of inquiries and referrals which mandates a dialogue between the judicial and executive branches ([92]–[105], [124]).

This analysis of Pt 7 of the CAR Act informed their Honours' views that s 79 of the CAR Act is not to be construed in isolation from the legislative scheme of which it forms part and that the 2 'pathways' comprising s 79 are themselves mutually inseverable

([125], [168]). These conclusions foreclosed the distributive operation of the provisions of Pt 7 and their selective application to persons convicted of Commonwealth offences.

Justices Gordon and Steward also found that the s 79(1)(a) 'pathway' could not be picked up and applied by s 68(1) of the Judiciary Act because it does not provide a procedure for the hearing and determination of an 'appeal' and because it cannot be made 'applicable' in federal jurisdiction without rewriting the provision ([158], [161]). Section 79(1)(b) could not be picked up independently of s 79(1)(a) without giving the legislative scheme a different legal operation. Their Honours reasoned that s 79 contemplates 'a choice to be made about the appropriate way to address an application' ([168]–[169]). In any event, Gordon and Steward JJ held that s 79(1)(b) could also not be made 'applicable' to Commonwealth offences without impermissible interference with its intended meaning and undermining of its purpose ([171]–[174]).

Justices Gordon and Steward therefore found the constitutional issues that the Victorian Attorney-General raised were unnecessary to decide. However, they considered that those issues reinforced the need for the Commonwealth Parliament to enact its own procedure for inquiry into convictions and sentences ([176]).

Edelman J

Justice Edelman dissented separately on the operation of s 68(1) of the Judiciary Act. His Honour identified 3 'assumptions' at the foundation of the appeal that were said to reduce the authority of the court's decision. The majority's conclusion as to the operation of s 68(1) of the Judiciary Act could not be correct if any of these assumptions were false:

- CAR Act s 79(1) confers an administrative function exercised *persona designata*.
- Section 68(1) picks up all relevant laws conferring powers upon state and territory officials.
- Section 68(2) is capable of picking up the conferral of jurisdiction upon the Court of Criminal Appeal to hear and determine a case referred under s 79(1)(b) ([191]–[192], [195], [198]).

His Honour expressed varying degrees of scepticism about each of these assumptions without finally deciding the correctness of any.

Justice Edelman referred to a further assumption upon which the appeal was conducted – that the relevant laws to be picked up and applied by s 68(1) were ss 78 and 79 of the CAR Act ([205]). His Honour considered it 'artificial' to treat those provisions in isolation, embracing '[t]he careful analysis by Gordon and Steward JJ of the interrelationship' of the provisions of Pt 7 which supported a 'broader view of the law' that weighed against a distributive operation ([206]).

Justice Edelman distinguished authorities for severing 'independent and discrete' parts of laws under s 68(1) from the present case. His Honour considered these 'would go further than any decision of this Court has ever gone' in respect of that technique, amounting to 'a legislative, not a judicial, act' ([184], [186], [245]). His Honour departed from the other minority judges in finding that s 79(1)(b) could be picked up by 68(1) if it were severable. However, he reasoned that to sever that provision would defeat the purpose the legislative scheme, which was to ensure that the Supreme Court has the same powers as the executive to refer a case the subject of an application to the Court of Criminal Appeal ([248], [252]–[256]).

> His Honour expressed the view that the preferable solution to any 'gap for miscarriages of justice' would be for the Commonwealth Parliament to legislate its own scheme, instead of relying upon the 'creativity of the judiciary' ([257]–[258]).

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The Commonwealth's legal team

Simon Daley PSM and Brooke Griffin from AGS Dispute Resolution and Simon Thornton and Chris Skoglund from the Constitutional Litigation Unit acted for the Attorney-General, with the Solicitor-General, Dr Stephen Donaghue KC, Trent Glover and Christine Ernst as counsel.

The text of the decision is available at: https://eresources.hcourt.gov.au/showCase/2023/HCA/13

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