

HIGH COURT OF AUSTRALIA

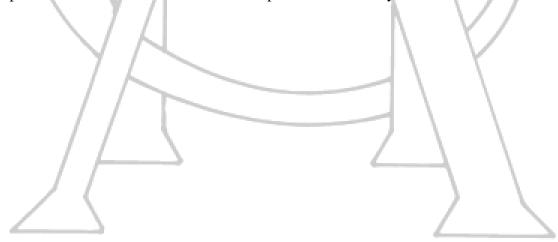
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	Details of Filing	
File Number: File Title:	S78/2022 Attorney-General (Cth) v. Huynh & Ors	
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Important Information

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S78/2022

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 NEW SOUTH WALES

Third Respondent

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

PART I: CERTIFICATION

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

10 PART II: OUTLINE

Section 68(1) of the Judiciary Act and constitutional limits

- 2. The words "so far as they are applicable" in s 68(1) of the *Judiciary Act 1903* (Cth) operate to confine the operation of the provision, such that it does <u>not</u> operate to pick up and apply as a Commonwealth law any State law that would, if picked up and applied, infringe a constitutional limit on Commonwealth legislative power (VS [14]): *Putland v The Queen* (2004) 218 CLR 174 at [7] (Gleeson CJ); see also [41] (Gummow and Heydon JJ), [121] (Callinan J) (JBA v 4, Tab 25).
- 3. To determine whether a State law is not "applicable" within the meaning of s 68(1) of the *Judiciary Act* because of a constitutional limit on Commonwealth legislative power, it is necessary to take the <u>text</u> of the State law and analyse whether that text would, if
- applied as Commonwealth law, infringe a limit on Commonwealth legislative power: *Rizeq v Western Australia* (2017) 262 CLR 1 at [81] (Bell, Gageler, Keane, Nettle and Gordon JJ) (**JBA v 4, Tab 29**).

- 4. In this appeal, the two most relevant limits are (VS [17]-[18]):
 - 4.1 the individual consent requirement, relating to the conferral of non-judicial functions on Ch III judges in their personal capacity (VS [19]-[22]; CAB 86 [117], 87 [120]); and
 - 4.2 the State authorisation requirement, relating to the conferral by the Commonwealth of administrative duties upon State officers (VS [27]-[30]; CAB 76 [93]).
- 5. If the text of Div 3 of Pt 7 of the Crimes (Appeal and Review) Act 2001 (NSW) would, if applied as a Commonwealth law, infringe either of those limits, then Div 3 of Pt 7 will not be "applicable" within the meaning of s 68(1) of the Judiciary Act and therefore will not be picked up.
- Section 4AAA of the Crimes Act
- 6. That outcome could not be avoided by s 4AAA(3) of the Crimes Act 1914 (Cth) (JBA v 2, Tab 7): VS [23]-[26], [31]; CAB 86-87 [118]-[119].
- For s 4AAA(3) to operate, there must relevantly be "a law of the Commonwealth relating 7. to criminal matters" that confers a non-judicial function on a State or Territory judge.
 - The relevant function in Div 3 of Pt 7 will never be conferred under 7.1 Commonwealth law, unless Div 3 of Pt 7 is "applicable" within the meaning of s 68(1) of the Judiciary Act.
 - Whether Div 3 of Pt 7 is "applicable" will depend upon the analysis of its text 7.2 described at paragraph 3 above, which must necessarily occur before any operation of s 4AAA of the Crimes Act.
- 8. The analysis is the same (VS [24] n 28) regardless of whether the relevant "law of the Commonwealth relating to criminal matters" is s 68(1) of the Judiciary Act itself (Cth Reply [14]; Huynh [18]) or Div 3 of Pt 7 as applied by s 68(1) (Cth [49]).

Dated: 8 November 2022

Romano ors Mamoilloo

Rowena Orr Solicitor-General for Victoria

Thomas Wood

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