ATTORNEY-GENERAL (CTH) v HUYNH and Others

HIGH COURT OF AUSTRALIA

KIEFEL CJ, GAGELER, GORDON, EDELMAN, STEWARD, GLEESON and JAGOT JJ

8, 9 November 2022, 10 May 2023 — Canberra

[2023] HCA 13

Constitutional law — Judicial power — Federal jurisdiction — Where person convicted of offence against law of Commonwealth in state court — Where person sought order for inquiry into conviction — Where person sought to have matter referred to New South Wales Court of Criminal Appeal — Where application unsuccessful — Where person sought judicial review — Whether provisions of Crimes (Appeal and Review) Act 2001 (NSW) (CAR Act) applied by their own force to conviction by New South Wales court for offence under law of Commonwealth — Whether provisions of CAR Act picked up by s 68(1) of Judiciary Act 1903 (Cth) — (CTH) Criminal Code Act 1995 ss 11.5, 307.11 — (NSW) Crimes (Appeal and Review) Act 2001 ss 76, 77, 78, 79, 86 — (NSW) Criminal Appeal Act 1912 s 5.

Huy Huynh (Mr Huynh) was convicted in the District Court of New South Wales of drug offences under the Criminal Code Act 1995 (Cth). He appealed unsuccessfully against his conviction to the New South Wales Court of Criminal Appeal. Mr Huynh then applied to the Supreme Court of New South Wales, pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 (NSW) (the CAR Act), for an inquiry into his conviction. In his application, he sought an order under s 79(1)(b) of the CAR Act referring the whole of the matter to be referred to the New South Wales Court of Criminal Appeal to be dealt with as an appeal under the Criminal Appeal Act 1912 (NSW). Garling J dismissed the application: see *Huynh v Attorney-General (NSW)* [2020] NSWSC 1356. Mr Huynh sought judicial review of the decision in the New South Wales Court of Appeal, pursuant to s 69 of the Supreme Court Act 1970 (NSW). One of the respondents to the application for judicial review was the Attorney-General (Cth). At the outset of the hearing, the court raised the issue of whether ss 78(1) and 79(1) of the CAR Act applied to a conviction by a New South Wales court for an offence under the law of a Commonwealth, either of their own force or by force of s 68(1) of the Judiciary Act 1903 (Cth) (Judiciary Act). By majority, the New South Wales Court of Appeal (Bathurst CJ, Basten, Gleeson and Payne JJA (Leeming JA, dissenting)) held that they do not: see *Huynh v Attorney-General (NSW)* (2021) 107 NSWLR 75; 396 ALR 422; [2021] NSWCA 297. The Attorney-General (Cth) obtained special leave to appeal to the High Court of Australia. On appeal, Mr Huynh supported the Attorney-General's argument that the majority of the New South Wales Court of Appeal had erred in holding that ss 78(1) and 79(1) of the CAR Act do not apply to a conviction by a New South Wales court for an offence under a law of the Commonwealth. In the absence of a contradictor, amici curiae were appointed.

Held, per Kiefel CJ, Gageler, Gleeson and Jagot JJ (Gordon, Edelman and Steward JJ, dissenting), allowing the appeal:

Per Kiefel CJ, Gageler and Gleeson JJ

(i) Sections 78(1) and 79(1) of the CAR Act do not apply by their own force to a conviction by a New South Wales court for an offence under a law of the Commonwealth. However, ss 78(1) and 79(1)(b) of the CAR Act apply to such a conviction by force of s 68(1) of the Judiciary Act: at [8], [38], [77].

(ii) Section 68(1) of the Judiciary Act applies the text of a state or territory law so far as they are applicable to persons charged with offences against Commonwealth laws

without change to its meaning. This is subject to three qualifications. First, the text of a state or territory law does not apply as a Commonwealth law to the extent that it would be inconsistent with the Commonwealth Constitution or another Commonwealth law. Second, s 68(1) of the Judiciary Act proceeds by way of analogy. It must displace s 79(1) of the Judiciary Act to the extent of any inconsistency in the translation of state laws. Third, where a particular provision of state law is an integral part of a state legislative scheme, s 68(1) of the Judiciary Act could not operate to pick up some but not all of the scheme if to do so would give an altered meaning to the severed part of the state legislation: at [57]–[59], [64], [65].

(iii) Although there are insurmountable difficulties with characterising ss 78(1) and 79(1)(a) of the CAR Act as laws respecting the procedure for the jurisdiction conferred by s 88 of the CAR Act so as to be applied as Commonwealth laws by force of s 68(1) of the Judiciary Act, the same difficulties do not arise in regarding ss 78(1) and 79(1)(b) of the CAR Act thus. The sole legal consequence of a referral under s 79(1)(b) of the CAR Act is to enliven the jurisdiction under s 86 of the CAR Act, without a non-judicial procedure intervening. Section 79(1)(a) of the CAR Act can operate independently of s 79(1)(b), such that ss 78(1) and 79(1)(b), operating as Commonwealth laws by force of s 68(1) of the Judiciary Act, would not give the provision a substantively different legal operation. There are separate courses of action: at [73]–[76].

Per Jagot J

(iv) Sections 78 and 79 of the CAR Act do not apply of their own force to a conviction or sentence for an offence against the law of the Commonwealth: at [265].

(v) Section 68(1) of the Judiciary Act operates to apply ss 78(1), 79(1)(b) and 86 of the CAR Act to a person convicted by a New South Wales court in respect of an offence against a law of the Commonwealth. They are not given an altered meaning and the unavailability of one option to the Supreme Court of New South Wales on the making of an application for an inquiry by a person charged with an offence against a law of the Commonwealth does not alter the state law. These provisions are not integrated into a legislative scheme in a manner rendering them altered in their application to a person charged with an offence against a law of the Commonwealth merely because one option, being a direction for an inquiry, is inapplicable to such a person: at [266], [284]–[287], [297].

Per Gordon and Steward JJ, dissenting

(vi) The function conferred by Div 3 of Pt 7 of the CAR Act was an administrative function which is conference on Supreme Court judges persona designate: at [90], [132].

(vii) Division 3 of Pt 7 of the CAR Act does not apply of its own force to federal offenders who are convicted and sentenced in New South Wales courts: at [90], [133]–[141].

(viii) Section 68(1) of the Judiciary Act does not pick up and apply Div 3 of Pt 7 of the CAR Act as federal law. Section 79(1)(b) of the CAR Act is not applicable, as required by s 68(1) of the Judiciary Act, because the meaning of the state provision and therefore its legal operation would be changed. In addition, it could not be picked up without s 79(1)(a) of the CAR Act because it would be picking up an integral part of a state legislative scheme, thereby giving a different legal operation to the scheme: at [90], [157], [167]–[171], [173]–[175].

Per Edelman J, dissenting

(ix) Although s 68(2) of the Judiciary Act confers federal jurisdiction on the Supreme Court of New South Wales when dealing with a Commonwealth offence, s 79 of the CAR Act cannot operate of its own force in federal jurisdiction: at [182], [227]–[232].

(x) Section 68(1) of the Judiciary Act cannot pick up and apply s 79(1)(a) of the CAR Act, which empowers the Supreme Court of New South Wales to direct an inquiry be conducted into a conviction upon application by the convicted person: at [183], [246], [247].

(xi) Section 68(1) of the Judiciary Act cannot pick up and apply only part of the text of ss 78 and 79 of the CAR Act as Commonwealth law. This would effectively rewrite the

legislative scheme of which this provisions form a part. Section 79(1)(a) of the CAR Act cannot be severed from s 79(1)(b): at [183]–[186], [250], [252], [256].

Appeal

This was an appeal against a decision of the New South Wales Court of Appeal (*Huynh v Attorney-General (NSW)* (2021) 107 NSWLR 75; 396 ALR 422; [2021] NSWCA 297) as to whether ss 78 and 79 of the Crimes (Appeal and Review) Act 2001 (NSW) applied, by their own force or by being picked up by s 68(1) of the Judiciary Act 1903 (Cth), to a conviction by a New South Wales court of a person for an offence against a law of the Commonwealth.

S P Donaghue KC, Solicitor-General (Cth), *T M Glover* and *C Ernst* instructed by *Australian Government Solicitor* for the appellant (Attorney-General (Cth)).

R J Wilson SC and *D J Reynolds* instructed by *Legal Aid (NSW)* for the first respondent (Huy Huynh).

G A Hill SC and *J S Stellios* instructed by *Australian Government Solicitor* appearing as amici curiae.

R J Orr KC, Solicitor-General (Vic) and *T M Wood* instructed by the *Victorian Government Solicitor* for the Attorney-General (Vic), intervening.

Submitting appearances for the second and third respondents (Attorney-General (NSW) and Supreme Court of New South Wales).

[1] Kiefel CJ, Gageler and Gleeson JJ. Mr Huynh was convicted and sentenced to a term of imprisonment following a trial on indictment in the District Court of New South Wales for an offence under ss 11.5(1) and 307.11(1) of the Criminal Code (Cth). He appealed against the conviction to the Court of Criminal Appeal of the Supreme Court of New South Wales pursuant to s 5 of the Criminal Appeal Act 1912 (NSW) as applied by force of s 68(1) and (2) of the Judiciary Act 1903 (Cth). The Court of Criminal Appeal dismissed the appeal.[1]

[2] Mr Huynh subsequently applied to the Supreme Court of New South Wales pursuant to s 78(1) of the Crimes (Appeal and Review) Act 2001 (NSW) (the CAR Act) for an inquiry into the conviction. By that application, he sought to obtain an order under s 79(1)(b) of the CAR Act referring the whole of his case to the Court of Criminal Appeal to be dealt with as an appeal under the Criminal Appeal Act. The application was considered and dismissed on its merits by Garling J.[2]

[3] Mr Huynh then applied by originating summons in the Court of Appeal of the Supreme Court of New South Wales for judicial review of the decision of Garling J pursuant to s 69 of the Supreme Court Act 1970 (NSW). The respondents to the application for judicial review were the Attorneys-General of New South Wales and the Commonwealth and the Supreme Court of New South Wales.

[4] On the hearing of the application for judicial review, the Court of Appeal itself raised a preliminary issue. The issue was whether ss 78(1) and 79(1) of the CAR Act apply to a conviction by a New South Wales court for an offence under

1. *Cranney v R* (2017) 325 FLR 173; [2017] NSWCCA 234.
2. *Huynh v Attorney-General (NSW)* [2020] NSWSC 1356.

a law of the Commonwealth, either of their own force or by force of s 68(1) of the Judiciary Act. In a considered judgment,[3] the Court of Appeal held by majority (Bathurst CJ, Basten, Gleeson and Payne JJA) that they do not. The dissentient (Leeming JA) took the view that they apply of their own force.

[5] The holding of the majority resulted in the Court of Appeal making orders declaring the decision of Garling J to be void for want of jurisdiction and dismissing the originating summons for judicial review without the majority reaching the grounds of review sought to be raised by Mr Huynh.

[6] On appeal by special leave to this Court, the Attorney-General of the Commonwealth argues with the support of Mr Huynh that the majority in the Court of Appeal was wrong to hold that ss 78(1) and 79(1) of the CAR Act do not apply to a conviction by a New South Wales court for an offence under a law of the Commonwealth.

[7] The Attorney-General of New South Wales, although a party to the appeal, has chosen not to participate in its hearing. The Attorney-General of Victoria has intervened under s 78A of the Judiciary Act to raise a narrow and discrete constitutional issue consideration of which can be deferred until the end of these reasons. In the absence of any other contradictor,[4] Mr Hill SC and Mr Stellios have been appointed amici curiae. In that capacity, they have presented argument responding to that of the Attorney-General of the Commonwealth and of Mr Huynh.

[8] For the reasons which follow, ss 78(1) and 79(1) of the CAR Act do not apply of their own force to a conviction by a New South Wales court for an offence under a law of the Commonwealth, but ss 78(1) and 79(1)(b) are applied to such a conviction by force of s 68(1) of the Judiciary Act.

[9] The outcome of the appeal by the Attorney-General of the Commonwealth is therefore that the appeal will be allowed, that the orders made by the Court of Appeal will be set aside, and that the matter will be remitted to the Court of Appeal for the hearing and determination of Mr Huynh's application for judicial review of the decision of Garling J.

The CAR Act

[10] Part 7 of the CAR Act is framed against the background that a conviction and sentence following a trial on indictment constitute the conclusive determination of criminal liability, subject only to an appeal under s 5 of the Criminal Appeal Act,[5] and that the Court of Criminal Appeal has no jurisdiction to reopen an appeal under s 5 of the Criminal Appeal Act which it has heard and finally determined.[6]

[11] Part 7 is headed "Review of convictions and sentences". Division 2 of that Part is headed "Petitions to Governor". Although Div 2 does not arise directly for consideration in the appeal, its provisions have contextual relevance. Section 76 allows for a petition for review of a conviction or sentence or the exercise of the Governor's pardoning power to be made to the Governor by or on behalf of the convicted person. Under s 77(1)(b), after the consideration of a petition, the

3. *Huynh v Attorney-General (NSW)* (2021) 107 NSWLR 75; 396 ALR 422; [2021] NSWCA 297 (*Huynh (NSWCA)*).
4. See *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542; 242 ALR 1; 64 ACSR 507; [2008] HCA 2 at [1], [68], [149].
5. *Elliott v R* (2007) 234 CLR 38; 239 ALR 651; [2007] HCA 51 at [5].
6. *Grierson v R* (1938) 60 CLR 431; [1938] ALR 460.

Attorney-General is empowered to refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal under the Criminal Appeal Act. The consequence of a reference under s 77(1)(b) is to enliven jurisdiction separately conferred on the Court of Criminal Appeal by s 86, which is within Div 5 of Pt 7 of the CAR Act.

[12] Sections 78 and 79 are in Div 3, which is headed "Applications to Supreme Court".

[13] Section 78 provides:

> (1) An application for an inquiry into a conviction or sentence may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person.
>
> (2) The registrar of the Criminal Division of the Supreme Court must cause a copy of any application made under this section to be given to the Minister.

[14] Section 79 provides:

> (1) After considering an application under section 78 or on its own motion —
>
> (a) the Supreme Court may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or
>
> (b) the Supreme Court may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912.
>
> (2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.
>
> (3) The Supreme Court may refuse to consider or otherwise deal with an application. Without limiting the foregoing, the Supreme Court may refuse to consider or otherwise deal with an application if —
>
> (a) it appears that the matter —
>
> (i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or
>
> (ii) has previously been dealt with under this Part or under the previous review provisions, or
>
> (iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or
>
> (iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and
>
> (b) the Supreme Court is not satisfied that there are special facts or special circumstances that justify the taking of further action.
>
> …
>
> (4) Proceedings under this section are not judicial proceedings. However, the Supreme Court may consider any written submissions made by the Crown with respect to an application.
>
> (5) The registrar of the Criminal Division of the Supreme Court must report to the Minister as to any action taken by the Supreme Court under this section (including a refusal to consider or otherwise deal with an application).

[15] The expression "convicted person" is not defined in the CAR Act. The term "conviction" is defined for the purposes of Pt 7, but in a manner which has no bearing on any issue in the appeal.[7] The term "sentence" is defined for the purposes of Pt 7 to include "a sentence or order imposed or made by any court following a conviction".[8]

[16] The references in ss 78(1) and 79(1), (3) and (4) to "the Supreme Court" must be read in light of s 75 of the CAR Act. Section 75 provides that the "jurisdiction of the Supreme Court" under Pt 7 "is to be exercised by the Chief Justice or by a Judge of the Supreme Court who is authorised by the Chief Justice to exercise that jurisdiction" and that references to "the Supreme Court" in Pt 7 "are to be construed accordingly".

[17] Having regard to the declaration in s 79(4) that a proceeding under s 79 is not judicial, the majority in the Court of Appeal took the view that the effect of s 75 is that the references in ss 78 and 79 to "the Supreme Court" are not to the Supreme Court constituted by the Chief Justice or an authorised judge,[9] but rather to the Chief Justice or an authorised judge acting persona designata.[10] That view has been accepted by all parties and by the amici curiae in this Court.

[18] The references in ss 78(2) and 79(5) to "the Minister" must be read in light of s 15 of the Interpretation Act 1987 (NSW) as references to the Minister or a Minister of the Crown in right of the State of New South Wales for the time being administering Pt 7 of the CAR Act. Unsurprisingly, the Minister has at all material times been or included the Attorney-General of New South Wales.[11]

[19] Read with s 79(2) and (3), s 79(1) can be seen to be enlivened where the Chief Justice or an authorised judge, having chosen to consider an application made by or on behalf of a convicted person under s 78(1), entertains a doubt or thinks there to be a question as to the convicted person's guilt or as to mitigating circumstances in the case or evidence in the case. Where s 79(1) is so enlivened, two distinct and alternative courses of action are open to the Chief Justice or the authorised judge under the terms of that provision. In choosing whether or not to pursue either course of action, the Chief Justice or authorised judge performs what Basten JA aptly described in the Court of Appeal as a "gateway function".[12]

[20] One course of action open to the Chief Justice or the authorised judge upon considering an application made under s 78(1) and entertaining a doubt or thinking there to be a question as to the convicted person's guilt or as to mitigating circumstances or the evidence is to exercise the power conferred by s 79(1)(a) to direct that an inquiry be conducted into the conviction or sentence by a judicial officer. The consequence of a direction under s 79(1)(a) is to trigger an inquiry under Div 4 of Pt 7 of the CAR Act.

[21] Where directed under s 79(1)(a), an inquiry under Div 4 of Pt 7 is to be conducted by a present or former judicial officer[13] (relevantly defined to include a judge of the New South Wales Supreme Court) to be appointed by the Chief

7. Section 74(1) of the CAR Act (definition of "conviction").
8. Section 74(1) of the CAR Act (definition of "sentence").
9. Compare *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 318–23; 90 ALR 322 at 327–31.
10. *Huynh (NSWCA)* at [1], [37]–[39], [44]–[47], [53]–[54], [128], [265].
11. See cl 20(1) of the Allocation of the Administration of Acts 2001 (NSW).
12. *Huynh (NSWCA)* at [83].
13. Section 3(1) of the Judicial Officers Act 1986 (NSW) (definition of "judicial officer").

Justice[14] and is to result in that judicial officer reporting to the Chief Justice.[15] The Chief Justice or an authorised judge is then to prepare a report of his or her own, which is to be sent to the Governor together with a copy of the judicial officer's report.[16] The Governor is then at liberty to "dispose of the matter in such manner as to the Governor appears just".[17] The inquiry and reporting, in that way, facilitate consideration by the Governor of the exercise of the prerogative of mercy, which remains unaffected by anything in the CAR Act.[18]

[22] To the certainty of an inquiry under Div 4 of Pt 7 resulting in reports being sent to the Governor is added the potential for the inquiry also to result in the judicial officer referring the subject-matter of the inquiry to the Court of Criminal Appeal together with a copy of the judicial officer's report. Such a referral could be either "for consideration of the question of whether the conviction should be quashed" (were the judicial officer to form the opinion that there was a reasonable doubt as to the guilt of the convicted person)[19] or "for review of the sentence imposed on the convicted person" (were the judicial officer to form the opinion that there was a reasonable doubt as to a matter that may have affected the nature or severity of the sentence).[20] The referral would enliven jurisdiction conferred on the Court of Criminal Appeal under Div 5 of Pt 7 of the CAR Act by s 88(1) or s 88(2), exercise of which would involve the Court of Criminal Appeal considering the reports in a proceeding to which the Crown in right of New South Wales and the convicted person would be given the opportunity to make submissions.[21]

[23] The other course of action open to the Chief Justice or authorised judge upon considering an application made under s 78(1) and entertaining a doubt or thinking there to be a question as to the convicted person's guilt or as to mitigating circumstances or the evidence is to exercise the power conferred by s 79(1)(b) to refer the whole of the case to the Court of Criminal Appeal to be dealt with as an appeal under the Criminal Appeal Act. The consequence of a reference by the Chief Justice or authorised judge under s 79(1)(b) is to enliven the jurisdiction separately conferred on the Court of Criminal Appeal by s 86, which is the same jurisdiction which would be enlivened as a consequence of a reference by the Attorney-General under s 77(1)(b).

[24] Section 86 of the CAR Act provides that the Court of Criminal Appeal, on receiving a reference under s 77(1)(b) or s 79(1)(b), "is to deal with the case so referred in the same way as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act 1912, and that Act applies accordingly". Dealing with the case in that way would involve the Court of Criminal Appeal hearing it as if it were an appeal under s 5 of the Criminal Appeal Act and determining it ordinarily by making an order under s 6 of the Criminal Appeal Act.

14. Section 81(1)(b) of the CAR Act.
15. Section 82(1)(b) of the CAR Act.
16. Section 82(3) of the CAR Act.
17. Section 82(4) of the CAR Act.
18. Section 114 of the CAR Act. See *Folbigg v Attorney-General (NSW)* (2021) 391 ALR 294; [2021] NSWCA 44 at [35].
19. Section 82(2)(a) of the CAR Act.
20. Section 82(2)(b) of the CAR Act.
21. Section 85 of the CAR Act.

[25] The parties to the appeal under s 86 of the CAR Act read with s 5 of the Criminal Appeal Act would mirror those in an appeal under s 5 of the Criminal Appeal Act (which is commenced by a convicted person filing a notice of appeal which the Registrar of the Court of Criminal Appeal is required to serve on the Attorney-General of New South Wales[22]). The convicted person would be the appellant. The respondent would be either the Attorney-General of New South Wales or the Director of Public Prosecutions of New South Wales "in the character of the person responsible for the indictment"[23] on behalf of the Crown in right of New South Wales.[24]

[26] Those two distinct and alternative courses of action available to the Chief Justice or an authorised judge under s 79(1)(a) and (b) of the CAR Act have different historical roots.

[27] The course of action available under s 79(1)(a) originated in legislation first introduced in New South Wales in 1883.[25] The 1883 legislation was re-enacted as s 475 of the Crimes Act 1900 (NSW). As last amended in 1992,[26] s 475(1) was expressed to apply "[w]henever, after the conviction in any court of any person, any doubt or question arises as to his guilt, or any mitigating circumstances in the case, or any portion of the evidence therein", and relevantly to empower "the Supreme Court on application by or on behalf of" the convicted person to direct a Justice or a judicial officer to conduct an inquiry "on the matter suggested". The inquiry was to result in a report to the Governor under s 475(4).

[28] The course of action available under s 79(1)(b) of the CAR Act derives from s 26(a) the Criminal Appeal Act. As enacted in 1912, s 26 the Criminal Appeal Act was modelled on s 19 of the Criminal Appeal Act 1907 (UK). The chapeau to s 26 made clear that nothing in the Criminal Appeal Act was to affect the pardoning power of the Governor. Section 26(a) provided that the Minister of Justice, on considering a petition for the exercise of the pardoning power, may "refer the whole case to the court, and the case shall be heard and determined by the court as in the case of an appeal by a person convicted".

[29] Section 475 of the Crimes Act and s 26 of the Criminal Appeal Act were repealed upon the enactment of Pt 13A of the Crimes Act in 1993.[27] Part 13A was amended in 1996[28] and again in 2003.[29] The provisions of Pt 13A of the Crimes Act were then transferred to, and renumbered in, Pt 7 of the CAR Act[30] in 2006.[31]

[30] Reflecting s 475 of the Crimes Act prior to its repeal, the course of action now available to the Chief Justice or an authorised judge under s 79(1)(a) of the CAR Act, on an application under s 78(1), was available to the Chief Justice or an authorised judge under Pt 13A of the Crimes Act from the time of its

22. Sections 10 and 16 of the Criminal Appeal Act.
23. *R v Williams* (1934) 34 SR (NSW) 143 at 152 (*R v Williams*).
24. Sections 8 and 9 of the Criminal Procedure Act 1986 (NSW).
25. Sections 383 and 384 of the Criminal Law Amendment Act of 1883 (NSW) (46 Vic No 17).
26. Schedule 1 to the Criminal Legislation (Amendment) Act 1992 (NSW), enacted after *Varley v Attorney-General (NSW)* (1987) 8 NSWLR 30.
27. Schedules 1 and 2 to the Crimes Legislation (Review of Convictions) Amendment Act 1993 (NSW).
28. Schedule 1 to the Crimes Amendment (Review of Convictions and Sentences) Act 1996 (NSW).
29. Schedule 3 to the Crimes Legislation Amendment Act 2003 (NSW).
30. Enacted as the Crimes (Local Courts Appeal and Review) Act 2001 (NSW).
31. Schedule 2 to the Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006 (NSW).

enactment in 1993.[32] Reflecting s 26(a) the Criminal Appeal Act as enacted, the course of action now available to the Attorney-General under s 77(1)(b) of the CAR Act, after a petition to the Governor, was available to the Attorney-General under Pt 13A of the Crimes Act from the time of its enactment in 1993.[33]

[31] The course of action now available to the Chief Justice or an authorised judge under s 79(1)(b) of the CAR Act, on an application under s 78(1), was not available to the Chief Justice or an authorised judge under Pt 13A of the Crimes Act at the time of its enactment in 1993 but was added by amendment in 1996.[34] The purpose of its addition, as explained in the second reading speech for the amending legislation, was to "give the Supreme Court the same power as the Governor has to refer a case to the Court of Criminal Appeal to be dealt with as an appeal under the Criminal Appeal Act". "Given that a petitioner may choose between an application to the Governor and an application to the Supreme Court", the second reading speech explained, "it is considered desirable that the same outcomes be available for the disposition of the application regardless of the preferred venue".[35]

Sections 78 and 79 of the CAR Act do not apply of their own force to Commonwealth offences

[32] The difference between the majority and the dissentient in the Court of Appeal as to whether ss 78 and 79 of the CAR Act apply of their own force to a conviction by a New South Wales court for an offence under a law of the Commonwealth turned on a difference as to the construction of the terms "conviction" and "sentence" and of the expression "convicted person".

[33] The "localising principle"[36] expressed in s 12(1)(b) of the Interpretation Act 1987 (NSW) — that "a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales" — leaves the precise nature of the connection between the "conviction" and "sentence" of the "convicted person" and the State of New South Wales to be determined as a matter of construction.[37] The constructions judicially accorded to cognate expressions in other New South Wales statutes[38] are of limited utility in making the necessary constructional choice.

[34] The Court of Appeal was unanimous in concluding that the requisite connection with the State of New South Wales involves the conviction and sentence having been by a New South Wales court. What differentiated the majority from the minority was that the majority concluded that the requisite connection also involves the conviction and sentence having been for an offence punishable under New South Wales law.

32. See ss 474D(1) and 474E(1) of the Crimes Act.
33. See s 474C(1)(b) of the Crimes Act.
34. Items 7 and 11 of Sch 1 to the Crimes Amendment (Review of Convictions and Sentences) Act 1996 (NSW).
35. New South Wales, Legislative Council, *Parliamentary Debates*, Hansard, 12 September 1996, p 4096. See also New South Wales, Legislative Assembly, *Parliamentary Debates*, Hansard, 12 June 1996, p 2897.
36. *Huynh (NSWCA)* at [68].
37. See *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956; 405 ALR 402; [2022] HCA 33 at [36], [63].
38. Compare *Seaegg v R* (1932) 48 CLR 251 at 255 (*Seaegg v R*); *Solomons v District Court of New South Wales* (2002) 211 CLR 119; 192 ALR 217; [2002] HCA 47 (*Solomons*) at [9].

[35] The context of ss 78 and 79 within the scheme of Pt 7 of the CAR Act makes the conclusion of the majority compelling. In enacting Pt 7, the Parliament of New South Wales can be assumed to have used terminology consistently[39] and to have avoided the absurdity of authorising the Chief Justice or a judge of the Supreme Court to engage in an exercise of constitutional futility.

[36] The report to the Governor, which is the necessary outcome of the Chief Justice or an authorised judge of the Supreme Court exercising the power conferred by s 79(1)(a) after considering an application made under s 78(1), is constitutionally utile in respect of a person convicted and sentenced for an offence punishable under New South Wales law in so far as it facilitates consideration by the Governor of the exercise of the prerogative of mercy. Such a report would be constitutionally futile in respect of a person convicted and sentenced for an offence punishable under a law of the Commonwealth. Axiomatically, within the federal system of government established by the Constitution, the prerogative of mercy in respect of a person convicted and sentenced for an offence under a law of the Commonwealth is an aspect of the executive power of the Commonwealth vested by s 61 of the Constitution exclusively in the Governor-General.[40]

[37] The conferral by s 86 of the CAR Act of State jurisdiction on the Court of Criminal Appeal to deal with the case of a convicted person as if on an appeal under the Criminal Appeal Act, which is the necessary outcome of the Chief Justice or an authorised judge exercising the power conferred by s 79(1)(b) after considering an application made under s 78(1), is effective in respect of a person convicted and sentenced for an offence punishable under New South Wales law in that it can result in the Court of Criminal Appeal making an order setting aside the conviction or varying the sentence. A conferral of State jurisdiction in those terms would be beyond the legislative power of the State in respect of a person convicted and sentenced in federal jurisdiction for an offence under a law of the Commonwealth.[41]

[38] Having no application of their own force to a person convicted and sentenced by a New South Wales court for an offence under a law of the Commonwealth, ss 78 and 79 of the CAR Act can have such an application only to the extent they are given it by force of a Commonwealth law — relevantly, s 68(1) of the Judiciary Act.

Section 68(1) of the Judiciary Act

[39] The Judiciary Act is described by its long title as an Act "to make provision for the Exercise of the Judicial Power of the Commonwealth". Part X is headed "Criminal jurisdiction". Division 1 of that Part is headed "Application of laws". Within that Division, s 68 is headed "Jurisdiction of State and Territory courts in criminal cases".

[40] Section 68(1) and (2) provide:

> (1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
>
> (a) their summary conviction; and
>
> (b) their examination and commitment for trial on indictment; and

39. *Registrar of Titles v Franzon* (1975) 132 CLR 611 at 618; 7 ALR 383 at 386–7.
40. See *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; 269 ALR 204; [2010] HCA 27 at [86]–[87].
41. *Rizeq v Western Australia* (2017) 262 CLR 1; 344 ALR 421; 57 Fam LR 294; [2017] HCA 23 (*Rizeq v Western Australia*) at [60].

(c) their trial and conviction on indictment; and
(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

(2) The several Courts of a State or Territory exercising jurisdiction with respect to:
(a) the summary conviction; or
(b) the examination and commitment for trial on indictment; or
(c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

[41] Section 68(1)'s application of certain State and Territory laws "so far as they are applicable" to persons charged with offences against Commonwealth laws in respect of whom jurisdiction is invested in State and Territory courts under s 68(2) has features in common with the prescription in s 79(1) of the Judiciary Act that certain State and Territory laws are binding on courts exercising federal jurisdiction "except as otherwise provided by the Constitution or the laws of the Commonwealth … in all cases to which they are applicable". There is a substantial degree of overlap in the purposes and operations of the two provisions in so far as both "enable State [and Territory] courts in the exercise of federal jurisdiction to apply federal laws according to a common procedure in one judicial system".[42]

[42] There are, however, important differences. There is a difference of focus, s 68(1) being concerned with laws applying to persons (in the sense that those persons are the subject or object of the applicable laws whether or not those persons are immediately bound by them) and s 79(1) being concerned with laws binding on courts. Underlying that difference in focus is a difference in the roles of the two provisions, s 68(1) being concerned to pick up identified aspects of State and Territory criminal procedure — so as to ensure that "federal criminal law is administered in each State [and Territory] upon the same footing as State [and Territory] law and [to avoid] the establishment of two independent systems of justice"[43] — rather than being narrowly confined to the jurisdictional gap-filling role identified for s 79(1) in *Rizeq v Western Australia*.[44] There is also a difference in the nature and degree of translation that is required in picking up and applying State and Territory laws. That difference will need to be explored in some detail.

42. *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345; 4 ALR 293 at 299. See also *Putland v R* (2004) 218 CLR 174; 204 ALR 455; [2004] HCA 8 (*Putland v R*) at [7], [36], [41], [121].
43. *R v Murphy* (1985) 158 CLR 596 at 617; 61 ALR 139 at 149 (*R v Murphy*).
44. At [32], [90]–[92], [103].

[43] The key to understanding the scope and operation of s 68(1) lies in an appreciation of the scope and operation of s 68(2). In its application to the "several Courts of a State", s 68(2) is an exercise of the legislative power conferred on the Commonwealth Parliament by s 77(iii) of the Constitution.[45] Section 68(2) in that application invests State courts with federal jurisdiction with respect to a class of matters within those mentioned in s 76(ii) of the Constitution. The class comprises matters arising under Commonwealth laws which create offences. The federal jurisdiction so invested is inherently limited to authority to exercise the judicial power of the Commonwealth or to perform functions incidental to the exercise of that judicial power.[46]

[44] Section 68(2) defines the federal jurisdiction which it invests in the several courts of a State by reference to the State jurisdiction from time to time exercised by each State court with respect to "the summary conviction", "the examination and commitment for trial on indictment", "the trial and conviction on indictment" and "the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith" of persons charged with offences against the laws of the State.

[45] In investing each State court which exercises one or more of those four categories of State jurisdiction with "the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth", s 68(2) "recognizes that the adoption of State law must proceed by analogy".[47] The federal jurisdiction it invests is "a jurisdiction analogous, similar or corresponding to that of the State Court in respect of offences against the laws of the State".[48]

[46] To the extent that the federal jurisdiction invested in a State court through s 68(2)'s adoption of State law by analogy might be inconsistent with the federal jurisdiction invested in that State court by s 39(2) of the Judiciary Act, the better view (at least since the insertion of s 39A(1) of the Judiciary Act) is that the specific investiture by s 68(2) displaces the general investiture by s 39(2).[49]

[47] Section 68(1) is an exercise of the legislative power conferred on the Commonwealth Parliament by s 51(xxxix) of the Constitution and of such other conferrals of legislative power as might be exercised by the Commonwealth Parliament to create the offences charged.[50]

[48] Section 68(1) operates to apply to persons charged with offences against the laws of the Commonwealth, in respect of whom jurisdiction is invested in State or Territory courts under s 68(2), State or Territory laws from time to time applying to persons charged with State or Territory offences which answer the description of laws "respecting" one or more of six designated categories of criminal procedure: those "respecting … the procedure for" each of the four categories of State jurisdiction designated in s 68(2), those "respecting the arrest

45. *R v Murphy* at CLR 613–14; ALR 146–7.
46. *R v Murphy* at CLR 614–18; ALR 147–50.
47. *Williams v R (No 2)* (1934) 50 CLR 551 at 561; [1934] ALR 314 (*Williams v R (No 2)*).
48. *Williams v R (No 1)* (1933) 50 CLR 536 at 543; [1934] ALR 1 (*Williams v R (No 1)*).
49. *Brown v R* (1986) 160 CLR 171 at 197; 64 ALR 161 at 178 (*Brown v R*); *R v Gee* (2003) 212 CLR 230; 196 ALR 282; [2003] HCA 12 (*Gee*) at [66]–[67]. See Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed, 2016, pp 302–3.
50. Compare *R v Hughes* (2000) 202 CLR 535; 171 ALR 155; 34 ACSR 92; [2000] HCA 22 at [40].

and custody of offenders or persons charged with offences", and those "respecting … the procedure … for holding accused persons to bail".

[49] Much attention has been focused in argument on the reference in s 68(1)(d) to "the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith". Section 68(1)(d) and the corresponding language in s 68(2) were inserted in 1932[51] in response to the holding in *Seaegg v R*[52] that s 68(2) in its original form did not operate to invest federal jurisdiction with respect to criminal appeals as defined by reference to s 5 of the Criminal Appeal Act.

[50] The term "appeal" was in 1932, and remains, defined in s 2 of the Judiciary Act to include "an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge". Neither the object of the Judiciary Act encapsulated in its long title, nor the extensive usage of the term "appeal" throughout the Judiciary Act, nor the evident purpose of the words inserted into s 68 in 1932 to overcome the holding in *Seaegg v R*,[53] provides any support for the notion advanced by the Attorney-General of the Commonwealth and Mr Huynh that the term so defined extends s 68(1)(d) to a proceeding that is not a proceeding to be heard and determined by a court in the exercise of judicial power.

[51] Of the words inserted in 1932, Dixon J said in *Williams v R (No 2)*[54] that "they necessarily extend to all remedies given by State law which fall within the description 'appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith'". His Honour explained that "[t]his accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice".

[52] Construed and applied in the manner indicated by Dixon J in *Williams v R (No 2)*, the words inserted into s 68 in 1932 were accepted in *Peel v R*[55] and *Rohde v Director of Public Prosecutions*[56] to encompass prosecution appeals against sentence. They were accepted in *LK*[57] to encompass a prosecution appeal against a directed verdict of acquittal. One effect of the inserted words so construed and applied is that the prior and continuing reference in each of s 68(1) and (2) to "persons who are charged with offences against the laws of the Commonwealth" must be read without temporal restriction so as to extend to persons who, having been charged, have gone on to be tried and convicted of offences against laws of the Commonwealth.

[53] The same words were accepted in *Gee*[58] to extend to a procedure for the reservation by a District Court, and determination by a Supreme Court, of a question of law antecedent to trial. Elaborating on the explanation of the general policy of s 68 by Dixon J in *Williams v R (No 2)*, Gleeson CJ said in *Gee*:[59]

51. Judiciary Act 1932 (Cth).
52. (1932) 48 CLR 251.
53. See *R v LK* (2010) 241 CLR 177; 266 ALR 399; [2010] HCA 17 (*LK*) at [14]–[16].
54. At CLR 560.
55. (1971) 125 CLR 447 at 457, 460, 467–8; [1972] ALR 231 (*Peel*).
56. (1986) 161 CLR 119 at 124–5; 66 ALR 593 at 595–6 (*Rohde*).
57. At [12]–[20], [86].
58. (2003) 212 CLR 230; 196 ALR 282; [2003] HCA 12.
59. At [7].

> "That general policy reflects a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter. The federal legislation enacted to give effect to that choice, therefore, had to accommodate not only differences between State procedures at any given time, but also future changes to procedures in some States that might not be adopted in others. That explains the use of general and ambulatory language, and the desirability of giving that language a construction that enables it to pick up procedural changes and developments as they occur in particular States from time to time."

[54] The general policy explained by Dixon J as elaborated by Gleeson CJ is implemented through the language of s 68(1) purposively construed within the structure of s 68 as a whole. Even on the most purposive of constructions, however, the language and structure of s 68(1) and (2) make it impossible to read the reference to "appeals" in s 68(1)(d) as broader than the federal jurisdiction invested in State courts by the equivalent language in s 68(2). In referring to the procedure for the hearing and determination of appeals arising out of a trial or conviction, s 68(1)(d) refers only to the procedure for the hearing and determination of a proceeding in a court in the exercise of judicial power. The reference does not extend to non-judicial procedures engaged in by persons or institutions who do not, for the purposes of engaging in those procedures, constitute State courts.

[55] If State or Territory laws providing for the review or questioning of convictions or sentences through non-judicial procedures engaged in by persons or institutions other than State or Territory courts are to fall within the purview of s 68(1), it can only be, as the amici curiae submit, because those laws answer the description of laws "respecting" one or more of the six categories of criminal procedure designated in s 68(1). The word "respecting", like the cognate expression "in respect of", takes its meaning from its context[60] and accommodates a range of potential relational connections.[61]

[56] Whether and to what extent State or Territory laws answer the description of laws "respecting" one or more of those categories of criminal procedure is a question of characterisation. The answer to that question necessarily turns on considerations of substance and degree.

[57] To the extent that State or Territory laws are properly characterised as answering the requisite description, s 68(1)'s application of the text of those laws "so far as they are applicable" to persons charged with offences against Commonwealth laws in respect of whom federal jurisdiction is invested under s 68(2) requires a degree of translation. Not unlike s 79(1),[62] s 68(1) applies the text of a State or Territory law without change to its meaning. However, there are three important qualifications to that general proposition.

[58] The first qualification, recognised in *Putland v R*,[63] is that s 68(1) does not apply the text of a State or Territory law to the extent that in so applying as a Commonwealth law it would be inconsistent with the Constitution or another Commonwealth law.

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60. *State Government Insurance Office (Qld) v Rees (liquidators of K D Morris & Sons Pty Ltd)* (1979) 144 CLR 549 at 561; 26 ALR 341 at 351; 4 ACLR 559 at 567–8.
61. *R v Khazaal* (2012) 246 CLR 601; 289 ALR 586; [2012] HCA 26 at [31].
62. *Rizeq v Western Australia* at [81], [91].
63. At [7], [41], [121].

[59] The second qualification is as follows. In the same way as s 79 of the Judiciary Act necessarily proceeds on the hypothesis that a State or Territory law which binds courts exercising State or Territory jurisdiction is capable of binding courts exercising federal jurisdiction,[64] s 68(1) necessarily proceeds on the hypothesis that a State or Territory law applicable to a person charged with an offence against a State or Territory law in State or Territory jurisdiction is capable of application to a person charged with an offence against a Commonwealth law in respect of whom like federal jurisdiction is invested under s 68(2). To the extent that s 68(2) recognises that the adoption of State or Territory law must proceed by analogy, so too must s 68(1).

[60] *Williams v R (No 1)*[65] is an illustration. Section 5D of the Criminal Appeal Act, which is expressed to confer a right of appeal against sentence on the Attorney-General of New South Wales, was there held not to confer that right on the Attorney-General of New South Wales in the analogous federal jurisdiction invested by s 68(2) of the Judiciary Act. Starke J posed and answered the determinative question:[66]

> "By whom, then, can the right of appeal granted in respect of sentences pronounced regarding offences against the Federal law be exercised? In my opinion, that right is exercisable by the Crown, and the proper officer to assert it is the legal adviser and representative of the Crown in the Commonwealth; in other words, the Attorney-General of the Commonwealth."

To similar effect, Dixon J expressed the opinion that it was "clear that the appeal is not given by the legislation to the Attorney-General of the State", adding:[67]

> "It is true that sub-sec (1)(d) of sec 68 of the Judiciary Act … applies the laws of the State with respect to the procedure for the hearing and determination of appeals arising out of the trial or conviction on indictment, or out of any proceeding connected therewith, of offenders against the laws of the States. But the qualification contained in the words occurring in the sub-section, 'so far as they are applicable,' excludes the application of so much of the State law as gives the appeal to the State Attorney-General."

[61] *Peel* and *Rohde* are further illustrations. In *Peel*, which was also concerned with federal jurisdiction invested by s 68(2) of the Judiciary Act by reference to s 5D of the Criminal Appeal Act, Gibbs J identified one of the questions to be "whether the right of appeal which s 68(2) confers is given to the Attorney-General of the Commonwealth". Answering that question with reference to what had been said by Jordan CJ in *R v Williams*,[68] Gibbs J said:[69]

> "As Jordan CJ pointed out … if s 68(2) '… is read as meaning that the jurisdiction is to be restricted to hearing appeals by persons designated by the State Act, it becomes nugatory, because neither persons convicted on New South Wales indictments nor the Attorney-General of New South Wales could have any concern with appeals arising out

64. *John Robertson & Co Ltd (in liq) v Philips Industries Pty Ltd (the fourth defendant)* (1973) 129 CLR 65 at 95; 1 ALR 21 at 43–4; *Maguire v Simpson* (1977) 139 CLR 362 at 376; 18 ALR 469 at 478.
65. (1933) 50 CLR 536; [1934] ALR 1.
66. At CLR 543.
67. At CLR 545.
68. At 151–2.
69. *Peel* at CLR 468–9.

> of trials or convictions for offences against the laws of the Commonwealth.' This provides a sound reason for concluding that in the application of s 68(2) 'the adoption of State law must proceed by analogy'."

Proceeding by analogy, Gibbs J continued:

> "Section 5 of the Criminal Appeal Act … gives a right of appeal to a person convicted upon indictment under State law and s 68(2) in its operation on s 5 gives a right of appeal to persons convicted upon indictment under the law of the Commonwealth. Section 5D of the Criminal Appeal Act gives the Attorney-General of the State a right of appeal because he is the proper officer to represent the State; s 68(2) in its operation on s 5D gives a right of appeal to the Attorney-General of the Commonwealth as the proper officer to represent the Commonwealth. The functions exercised by the Attorney-General of the Commonwealth are like functions to those of the Attorney-General of the State and the jurisdiction exercised by the Court of Criminal Appeal in hearing and determining an appeal by the Attorney-General of the Commonwealth against a sentence imposed for an offence against Commonwealth law is a like jurisdiction to that exercised by the Court of Criminal Appeal in hearing an appeal by the Attorney-General of the State against a sentence imposed for an offence against the law of the State."

[62] Although Gibbs J did not specifically address the operation of s 68(1), it is obvious that, for the federal jurisdiction so invested by s 68(2) of the Judiciary Act to be efficacious, the text not only of ss 5 and 5D but also of Pt 4 of the Criminal Appeal Act (governing the procedure for the hearing and determination of appeals under those sections) must be applied as Commonwealth laws by s 68(1)(d) of the Judiciary Act. As so applied, the text of those provisions needs to be translated to the extent of treating references to the Crown in right of the State of New South Wales as references to the Crown in right of the Commonwealth and of treating references to the Attorney-General of the State as references to the Attorney-General of the Commonwealth.

[63] In *Rohde*, the operation of s 68(2) of the Judiciary Act to confer federal jurisdiction defined by reference to s 567A of the Crimes Act 1958 (Vic) (which was expressed to confer a right to appeal against a sentence for an offence against a Victorian law on the Victorian Director of Public Prosecutions) was held to confer a right of appeal against a sentence for an offence against a Commonwealth law on the Attorney-General of the Commonwealth. The right of appeal so conferred was held to be exercisable by the Commonwealth Director of Public Prosecutions by operation of s 9(7) of the Director of Public Prosecutions Act 1983 (Cth).

[64] Just as s 68(2) of the Judiciary Act must displace s 39(2) to the extent of any inconsistency, so s 68(1) must displace s 79(1) to the extent of any inconsistency in the translation of State laws. Section 68(1) is the more specific of the two provisions, and giving priority to s 68(1) is harmonious with the purposes of both provisions.

[65] The third qualification to the general proposition that s 68(1) of the Judiciary Act applies the text of a State or Territory law without change to its meaning is that expressed in *Solomons*[70] and repeated in *Putland v R*[71] in relation to s 79. The qualification is that "where a particular provision of State law is an integral part of a State legislative scheme, [the section] could not operate to pick up some but not all of it, if to do so would be to give an altered meaning to the

70. At [24].
71. At [36]–[37]. See also *Gee* at [62].

severed part of the State legislation". The qualification was applied in *Solomons* to hold that neither s 68 nor s 79 of the Judiciary Act empowered the District Court of New South Wales to grant a costs certificate under s 2 of the Costs in Criminal Cases Act 1967 (NSW)[72] in proceedings involving federal offences, given that the certificate would have lacked utility as no Commonwealth law effected a "corresponding transmutation" upon s 4 of that Act, which allowed a certificate granted under s 2 to be used to make an application to an executive officer of the State of New South Wales for payment of the certified costs from the Consolidated Revenue Fund of New South Wales.[73]

[66] The third qualification does not mean that the operation of s 68(1) is limited to the application of State or Territory laws which stand alone or which are components of State or Territory legislative schemes capable of application as Commonwealth laws in their entirety. That is not how s 68(1) works, as *Brown v R*[74] and *Cheatle v R*[75] (each recognising the partial application of State jury provisions by s 68(1)) well enough illustrate. What the third qualification means is that s 68(1) does not apply the text of a State or Territory law where to apply the text divorced from its State or Territory context would give that text a substantively different legal operation.

[67] Those being the principles which inform the answer to the determinative question of whether and to what extent s 68(1) of the Judiciary Act applies ss 78 and 79 of the CAR Act to a conviction by a New South Wales court for an offence under a law of the Commonwealth, it is appropriate now to turn to that question.

The extent to which s 68(1) of the Judiciary Act applies ss 78 and 79 of the CAR Act

[68] For reasons which have been explained, determination of whether and to what extent s 68(1) of the Judiciary Act applies the text of ss 78 and 79 of the CAR Act as Commonwealth laws necessarily begins with identification of the State jurisdiction by reference to which "like jurisdiction" is invested by s 68(2) of the Judiciary Act.

[69] The argument of the Attorney-General of the Commonwealth and of Mr Huynh in its broadest form is that support for the application of the text of ss 78(1) and 79(1) of the CAR Act as Commonwealth laws by force of s 68(1) of the Judiciary Act can be found in the "like jurisdiction" which was exercised under s 68(2) of the Judiciary Act by the District Court of New South Wales when convicting and sentencing Mr Huynh for an offence under ss 11.5(1) and 307.11(1) of the Criminal Code.

[70] That broadest form of the argument fails at the level of characterisation of ss 78(1) and 79(1) of the CAR Act for the purpose of s 68(1) of the Judiciary Act. Those provisions cannot be characterised as laws respecting the procedure for the trial and conviction on indictment of a convicted person. The provisions speak only when jurisdiction to hear and determine the matter concerning the criminal

72. *Solomons* at [1], [19], [29].
73. *Solomons* at [25]–[27].
74. (1986) 160 CLR 171; 64 ALR 161.
75. (1993) 177 CLR 541; 116 ALR 1.

liability to which the trial and conviction related has been spent and when the criminal liability which had been in issue in that matter has merged in the conviction and sentence.[76]

[71] A narrower form of the argument of the Attorney-General of the Commonwealth and of Mr Huynh is that support for the application of the text of ss 78(1) and 79(1) of the CAR Act as Commonwealth laws by force of s 68(1) of the Judiciary Act can be found in the "like jurisdiction" which might be invested by s 68(2) of the Judiciary Act by reference to the State jurisdiction conferred on the Court of Criminal Appeal under s 88 of the CAR Act, in the event of a direction under s 79(1)(a) giving rise to a referral by a judicial officer conducting an inquiry under Div 4, and that is invested under s 86 of the CAR Act, in the event of a referral under s 79(1)(b).

[72] Adopting the approach of Dixon J in *Williams v R (No 2)* as applied in *Peel*, *Rohde*, *Gee* and *LK*, there is no difficulty in principle in characterising the jurisdiction conferred by each of ss 86 and 88 of the CAR Act as jurisdiction with respect to the hearing and determination of an appeal arising out of the trial or conviction of a convicted person. Neither s 86 nor s 88 of the CAR Act confers jurisdiction of a kind inherently incapable of defining "like jurisdiction" invested by s 68(2) of the Judiciary Act.

[73] There are, however, insurmountable difficulties in characterising ss 78(1) and 79(1)(a) of the CAR Act as laws respecting the procedure for the jurisdiction conferred by s 88 of the CAR Act so as to be applied as Commonwealth laws by force of s 68(1) of the Judiciary Act. The relationship between a direction under s 79(1)(a) and a referral by a judicial officer conducting an inquiry under Div 4 enlivening the jurisdiction conferred by s 88 is no more than contingent and remote. Moreover, a direction under s 79(1)(a) cannot have the potential to result in a referral by a judicial officer, so as to enliven the jurisdiction conferred by s 88, without also having the certainty of invoking the totality of the procedures for inquiry and reporting under Div 4. To attempt to disentangle one from the other would be to give the text of s 79(1)(a) a radically different legal operation. And on no basis could the provisions of Div 4 which provide for inquiry and reporting be characterised as laws respecting the procedure for the hearing of appeals in the jurisdiction conferred by s 88 of the CAR Act. The tail cannot wag the dog.

[74] The same difficulties do not arise in characterising ss 78(1) and 79(1)(b) of the CAR Act as laws respecting the procedure for the hearing of appeals in the jurisdiction conferred by s 86 of the CAR Act. The sole legal consequence of a referral under s 79(1)(b) is directly and immediately to enliven the jurisdiction conferred by s 86. No non-judicial procedure intervenes.

[75] The question is then as to whether ss 78(1) and 79(1)(b) of the CAR Act can be applied as Commonwealth laws by force of s 68(1) of the Judiciary Act independently of s 79(1)(a) of the CAR Act. There is no textual difficulty applying the text of ss 78(1) and 79(1)(b) without applying the text of s 79(1)(a). The critical question is whether the absence of s 79(1)(a) would give that text a substantively different legal operation. The answer is that it would not.

76. *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 106; [1932] ALR 22.

[76] The structure and history of Pt 7 of the CAR Act (to which reference has already been made) indicate that, despite both being available upon the making of a common form of application under s 78(1) and both being regulated by s 79(2) and (3), the two courses of action available to the Chief Justice or an authorised judge of the Supreme Court by s 79(1)(a) and (b) are distinct and separate. The unavailability of one course of action does not alter or detract from the availability or incidents of the other course of action. Taking away s 79(1)(a) has no effect on the form or method of application set out in s 78(1), on the circumstances in which the Chief Justice or an authorised judge of the Supreme Court might refuse to consider or otherwise deal with that application in accordance with s 79(3), on the precondition to the taking of action under s 79(1)(b) set out in s 79(2), or on the range of other considerations available to be taken into account by the Chief Justice or an authorised judge in deciding whether or not to take action under s 79(1)(b).

[77] The conclusion to which that leads is that the texts of ss 78(1) and 79(1)(b) of the CAR Act are applied as Commonwealth laws by force of s 68(1) of the Judiciary Act on the basis that they are laws respecting the procedure for the hearing of appeals in the "like jurisdiction" to that conferred under s 86 of the CAR Act (read with the Criminal Appeal Act) invested in the Court of Criminal Appeal by s 68(2) of the Judiciary Act upon its receipt of a reference under s 79(1)(b) of the CAR Act. The matter to be heard and determined in the exercise of the judicial power of the Commonwealth in that like federal jurisdiction is a controversy, between a person convicted of and sentenced for an offence against a law of the Commonwealth and the Attorney-General of the Commonwealth representing the Crown in right of the Commonwealth, as to whether the conviction or sentence should be quashed or otherwise dealt with on any ground for which provision is made in the Criminal Appeal Act.

[78] The conclusion accords with that reached by Wood CJ at CL with respect to the forerunners of ss 78(1) and 79(1)(b) of the CAR Act, namely ss 474D(1) and 474E(1)(b) of the Crimes Act, in *Re Application of Pearson*.[77]

[79] Whether s 68(1) of the Judiciary Act operates to apply the text of the notice provisions in ss 78(2) and 79(5) of the CAR Act, and if so whether that text is to be translated to require notice to the Attorney-General of the Commonwealth as distinct from notice to the Attorney-General of New South Wales, has not been the subject of argument and need not be determined in order to resolve the appeal. Those are questions which, at least in relation to s 78(2) of the CAR Act, are within the scope of the issues raised by Mr Huynh in his application for judicial review. The merits of that application, as has already been noted, were not addressed by the majority in the Court of Appeal and will remain to be addressed on remittal to the Court of Appeal. Enough for present purposes is to record that the resolution of those questions about the notice provisions, one way or the other, has no bearing on the conclusion that the texts of ss 78(1) and 79(1)(b) of the CAR Act are applied as Commonwealth laws by force of s 68(1) of the Judiciary Act.

Victoria's discrete constitutional argument

[80] There remains to consider the discrete constitutional argument put on behalf of the Attorney-General of Victoria. The argument is that the text of ss 78(1) and 79(1)(b) of the CAR Act applying as a Commonwealth law by force of s 68(1) of the Judiciary Act would infringe one or perhaps two limitations on Commonwealth legislative power.

77. (1999) 46 NSWLR 148; 162 ALR 248; [1999] NSWSC 143.

[81] The limitation on Commonwealth legislative power which it is said would be infringed is that recognised in *Grollo v Commissioner of Australian Federal Police*:[78] that the Commonwealth Parliament cannot confer on a judge of a court in their personal capacity a non-judicial function unless the individual judge has consented to that conferral. The limitation which it is said would perhaps be infringed is that considered but left unresolved in *O'Donoghue v Ireland*:[79] that the Commonwealth Parliament cannot impose an administrative duty on the holder of a State statutory office without State legislative approval.

[82] The argument is answered sufficiently for the purposes of the present case, in which Mr Huynh's application under s 78(1) of the CAR Act was considered and dismissed by Garling J as a judge of the Supreme Court authorised by the Chief Justice under s 75 of the CAR Act, by noting that Garling J did not come under any enforceable obligation to entertain Mr Huynh's application by virtue of the authorisation under s 75 or by virtue of the application being allocated to him.[80]

[83] Garling J made a choice to entertain Mr Huynh's application, as is evidenced by his conduct in considering and dismissing it. Neither s 78(1) nor s 79(1)(b) of the CAR Act applying as a Commonwealth law by force of s 68(1) of the Judiciary Act imposed any duty on him to entertain the application at all. Any question concerning whether the Chief Justice might come under an enforceable obligation to entertain an application which would infringe either of the constitutional limitations to which the Attorney-General of Victoria draws attention can be addressed if and when it arises.[81]

Orders

[84] The appeal is to be allowed. The orders made by the Court of Appeal are to be set aside. The matter is to be remitted to the Court of Appeal for the hearing and determination of the further amended summons in accordance with the judgment of this Court. There is to be no order as to costs.

[85] Gordon and Steward JJ. On 9 June 2015, Mr Huynh was convicted in the District Court of New South Wales of an offence against a law of the Commonwealth, being one count of conspiracy to import a commercial quantity of a border-controlled precursor (pseudoephedrine) in breach of ss 11.5(1) and 307.11(1) of the Criminal Code (Cth). He was sentenced to imprisonment for 12 years, with an eight-year non-parole period.

[86] In March 2020, having exhausted all available avenues of appeal, Mr Huynh applied to the Supreme Court of New South Wales for an inquiry into his conviction under s 78 in Div 3 of Pt 7 of the Crimes (Appeal and Review) Act 2001 (NSW) (the CAR Act). Mr Huynh's application was dismissed by Garling J in October 2020. His Honour held that having examined Mr Huynh's submissions and all of the relevant material, and having considered the issues substantively, he had "no sense of unease or doubt as to [Mr Huynh's] guilt".

[87] In January 2021, Mr Huynh commenced proceedings against the Attorney-General of New South Wales in the Court of Appeal of the Supreme Court of New South Wales under s 69 of the Supreme Court Act 1970 (NSW)

78. (1995) 184 CLR 348 at 364–5; 131 ALR 225 at 234–5. See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 13; 138 ALR 220 at 227–8.
79. (2008) 234 CLR 599; 244 ALR 404; [2008] HCA 14 (*O'Donoghue v Ireland*).
80. Compare *O'Donoghue v Ireland* at [24].
81. See *Knight v Victoria* (2017) 261 CLR 306; 345 ALR 560; [2017] HCA 29 at [32], [37].

seeking an order quashing the decision of Garling J, and a declaration that "there was an error of jurisdiction and law on the part of Garling J". Mr Huynh subsequently joined the Attorney-General of the Commonwealth ("the A-G (Cth)") and the Supreme Court of New South Wales.

[88] Before the Court of Appeal, a preliminary question was raised as to whether the procedure under Div 3 of Pt 7 of the CAR Act was available to a person convicted in a New South Wales court of an offence against a law of the Commonwealth. The Court of Appeal made the following orders and declarations, from which the A-G (Cth) now appeals:

> (1) Declare that the power conferred by s 79 of the [CAR Act]:
>
> (a) is to be exercised by the Chief Justice or a judge of the Court authorised by the Chief Justice as a persona designata;
>
> (b) is *not available* with respect to a conviction or sentence for an offence against a law of the Commonwealth heard and determined in a New South Wales court.
>
> (2) Declare that the decision of Garling J purporting to determine an application lodged with the Supreme Court by Huy Huynh under s 78 of the [CAR Act] with respect to his conviction for a contravention of the Criminal Code 1995 (Cth) is void and of no effect.
>
> (3) Otherwise dismiss the summons. (emphasis added)

[89] Given that the interests of Mr Huynh aligned with those of the A-G (Cth) and there was no contradictor,[82] the Court appointed Mr Graeme Hill SC and Mr James Stellios as amici curiae to support the orders made by the Court of Appeal. The Attorney-General of Victoria intervened.

[90] The A-G (Cth) submitted that three questions arose on the appeal, all of which should be answered "Yes":

> (a) Is the function conferred by Div 3 of Part 7 of the [CAR Act] an administrative function that is conferred on Supreme Court judges *persona designata*? (**Question 1**)
>
> (b) If the answer to Question 1 is 'yes', then does Div 3 of Part 7 apply of its own force to federal offenders who are convicted and sentenced in New South Wales courts? (**Question 2**)
>
> (c) Does s 68(1) of the Judiciary Act 1903 (Cth) (Judiciary Act) pick up and apply Div 3 of Part 7 as federal law? (**Question 3**)

For the following reasons, we would answer Question 1 "Yes" but Questions 2 and 3 "No". We would therefore dismiss the appeal.

[91] To assess these questions (especially Questions 2 and 3) it is first necessary to consider the royal prerogative of mercy in New South Wales. Because Mr Huynh and the A-G (Cth) argue that only one part of one of the mechanisms in the CAR Act relating to the prerogative of mercy (Div 3 of Pt 7 of the CAR Act) applies to Commonwealth offenders, it is then necessary to pay close attention to the whole of Pt 7 of the CAR Act and the role it plays in the exercise of the prerogative of mercy, which remains unaffected by Pt 7[83].

82. On appeal to this court, each of the Supreme Court of New South Wales (the third respondent) and the Attorney-General (NSW) (the second respondent) filed submitting appearances.
83. Section 114 of the CAR Act.

The prerogative of mercy and the early review and referral provisions

[92] Prerogative powers were "accorded to the Crown by the common law".[84] The royal prerogative of mercy is an "ancient right of the Crown to pardon, partially or fully, those who have been convicted of a public offence".[85] There is no need, in this case, to explore how large that power is. At common law, the pardon was not equivalent to an acquittal; its effect was merely "to remove from the subject of the pardon, 'all pains penalties and punishments whatsoever'" that may ensue from the conviction, but it did not eliminate the conviction itself.[86]

[93] At the Commonwealth level, the power to grant a pardon is sourced in s 61 of the Constitution.[87] In New South Wales, the power to grant a pardon under the prerogative of mercy was originally conferred by the Governor's Commission, and then by permanent Letters Patent as supplemented by Royal Instructions.[88] Those Letters Patent were revoked following the passing of the Constitution (Amendment) Act 1987 (NSW),[89] and the Governor's power is now generally to be found in s 7(2) of the Australia Act 1986 (Cth), which provides that "all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State".

[94] The prerogative of mercy is a broad discretionary power exercisable by the Governor of New South Wales acting on the advice of the Executive Council and the Attorney-General.[90] Its purpose remains "to temper the rigidity of the law by dispensing clemency in appropriate circumstances".[91]

[95] Over time, there came to be two distinct and alternative statutory pathways in New South Wales, now reflected in Pt 7 of the CAR Act, aimed at assisting in the exercise of the granting of a pardon under the prerogative of mercy, and providing for the quashing of convictions. Those two pathways "have different historical roots"[92]: one in s 475 of the Crimes Act 1900 (NSW) and the other in s 26(a) of the Criminal Appeal Act 1912 (NSW).

[96] Section 475 of the Crimes Act, before its absorption into what became Pt 7 of the CAR Act, provided in substance that the Governor (on the petition of a convicted person or someone on their behalf) or the Supreme Court (on an application by or on behalf of the person or on its own motion) could, if a doubt

84. *Barton v Commonwealth* (1974) 131 CLR 477 at 498; 3 ALR 70 at 86.
85. Milne, "The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review" (2015) 36 *Adelaide Law Review* 211 at 216–17, citing Smith, "The Prerogative of Mercy, the Power of Pardon and Criminal Justice" [1983] *Public Law* 398.
86. *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; 198 ALR 1; [2003] HCA 28 (*Eastman*) at [98], quoting *R v Cosgrove* [1948] Tas SR 99 at 106 and *R v Foster* [1985] QB 115 at 130; [1984] 2 All ER 679.
87. See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514; 316 ALR 1; 143 ALD 443; [2015] HCA 1 at [42] and the cases there cited.
88. Twomey, *The Constitution of New South Wales*, 2004, pp 624 and 662. See *Smith v Corrective Services Commission (NSW)* [1980] 2 NSWLR 171 at 180.
89. Section 2, Sch 1 item 3 of the Constitution (Amendment) Act 1987 (NSW), inserting s 9F into the Constitution Act 1902 (NSW).
90. *Mallard v R* (2005) 224 CLR 125; 222 ALR 236; [2005] HCA 68 (*Mallard*) at [6]; s 14 of the Interpretation Act 1987 (NSW). See also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 364–5; 41 ALR 1 at 16–17 (*FAI Insurances*).
91. New South Wales Department of Communities and Justice, "Royal Prerogative of Mercy: Fact Sheet" (2022) at 1. See also *Holzinger v Attorney-General (Qld)* (2020) 5 QR 314; 385 ALR 158; [2020] QCA 165 at [17], citing *R v Bentley* [2001] 1 Cr App R 21.
92. Reasons of Kiefel CJ, Gageler and Gleeson JJ, at [26].

or question arose as to the convicted person's guilt, mitigating circumstances, or any part of the evidence, direct a judicial officer to conduct a review by summoning and examining on oath all persons likely to give material information on the matter.[93] That evidence, along with the judicial officer's conclusions on the review, were then to be provided to the Governor "and the matter shall thereafter be disposed of, as to the Governor … shall appear to be just".[94]

[97] The background to the enactment of what became s 475 of the Crimes Act reveals that at the time of its commencement in 1883,[95] and for some time after, there was no general right of appeal in criminal cases.[96] The legislative history of s 475 reflected a desire on the part of the colonial legislature to provide "solid ground on which the Executive may proceed when they [had] to deal with capital cases where doubts [were] thrown on the character of persons connected with them".[97] As the Minister explained in his second reading speech in 1883, that solid ground would assist in circumstances where representations were frequently made to the Government after a person was convicted in relation to the character of the victim or certain witnesses, and the Government did not have the power to institute inquiries on oath to determine the foundation of such complaints.[98] In other words, the s 475 inquiry was enacted to provide the Executive with assistance in its consideration of petitions for mercy.

[98] Section 26(a) of the Criminal Appeal Act, before its absorption into what became Pt 7 of the CAR Act, provided a different pathway for post-conviction review. Section 26 provided as follows:

> "Nothing in this Act shall affect the pardoning power of the Governor, but the Minister administering the Justices Act 1902, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may:
>
> (a) refer the whole case to the court, and the case shall be heard and determined by the court as in the case of an appeal by a person convicted;
>
> (b) if he desires the assistance of the court on any point arising in the case with a view to the determination of the petition, refer that point to the court for their opinion thereon, and the court shall consider the point so referred and furnish the Minister with their opinion thereon accordingly."

[99] As was observed in *Mallard*,[99] provision for such referrals to the Court as found in s 26(a) owed its origin to public adverse reactions to the excessive imposition of capital punishment, and a judicial reluctance, even once Courts of Criminal Appeal were established and rights of appeal became more prevalent, to allow appeals in criminal cases.[100] Referrals to the Court of Criminal Appeal were, and are, "effectively both a substitute for, and an alternative to, the invocation, and the exercise of the Crown prerogative, *an exercise in practice*

93. Section 475(1) of the Crimes Act.
94. Section 475(4) of the Crimes Act.
95. Sections 383 and 384 of the Criminal Law Amendment Act 1883 (NSW).
96. *Eastman* at [74].
97. New South Wales, Legislative Assembly, *Parliamentary Debates*, Hansard, 22 February 1883, p 618, quoted in *Eastman* at [68].
98. New South Wales, Legislative Assembly, *Parliamentary Debates*, Hansard, 22 February 1883, p 618, quoted in *Eastman* at [68].
99. (2005) 224 CLR 125; 222 ALR 236; [2005] HCA 68.
100. At [4].

necessarily undertaken by officials and members of the Executive, unconfined by any rules or laws of evidence, procedure, and appellate conventions and restrictions".[101]

[100] Those two pathways were made available, as options, in a single scheme for the first time by the Crimes Legislation (Review of Convictions) Amendment Act 1993 (NSW). The changes included inserting into the Crimes Act a new Pt 13A, titled "Review of Convictions",[102] which relevantly adopted the structure which now exists in Pt 7 of the CAR Act, containing both a form of the s 475 inquiry pathway and a form of the s 26 referral and opinion pathway.

[101] The new Pt 13A incorporated a number of important reforms identified in a review undertaken a year earlier by the Criminal Law Review Division of the New South Wales Attorney-General's Department into s 475 of the Crimes Act.[103] In that review, the abolition of the s 475 pathway was not endorsed and its continued existence was said to have advantages, among other grounds, because the judicial officer has a broad discretion to determine the procedure at such an inquiry[104] and because of the limits on the scope of the s 26(a) pathway.[105] An Issues Paper published as part of that review, referred to by the Minister in his second reading speech on the Bill to introduce Pt 13A,[106] stated that "the procedure under section 475 offers advantages which section 26 does not and vice versa. The availability of the section 26 procedure may not therefore on its own justify abolishing the section 475 procedure".[107] The Issues Paper also addressed what the Minister indicated was a "present incompatibility between section 475 and section 26",[108] namely that there appeared "to be no requirement that an election be made between pursuing a section 475 inquiry and seeking a review of a conviction by any of the other means available", including by way of a s 26(a) referral.[109] As the Issues Paper noted, "[i]t will not always be a simple matter to determine which of the variety of mechanisms available for the review or scrutiny of criminal convictions is the most appropriate in a particular case".[110]

101. At [6] (emphasis added).
102. Section 3, Sch 1 item 3 of the Crimes Legislation (Review of Convictions) Amendment Act 1993 (NSW).
103. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, pp 18–20, especially p 19.
104. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, p 17.
105. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, pp 18–19.
106. New South Wales, Legislative Assembly, *Parliamentary Debates*, Hansard, 27 October 1993, p 4575.
107. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, p 19.
108. New South Wales, Legislative Assembly, *Parliamentary Debates*, Hansard, 27 October 1993, p 4575.
109. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, pp 8–9.
110. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, p 11.

[102] The solution was the combination of the s 475 pathway and the s 26 pathway in the new Pt 13A. Critically, the referral power, now found in s 79(1)(b) of the CAR Act, was subsequently added in 1996,[111] so that the Supreme Court had the same power to refer a case to the Court of Criminal Appeal (to be dealt with as an appeal) when an application was made to it as the Governor had following a petition. The Attorney-General explained in his second reading speech the symmetry of operation that was intended by that addition:[112]

> "There is no reason in principle why a corresponding power should not reside in the Supreme Court upon consideration of an application for an inquiry. It may be that the court considers that the matter warrants collective expertise of three judges sitting as the Court of Criminal Appeal rather than a judge sitting alone. This will remain a choice solely within the discretion of the Supreme Court. Given that a petitioner may choose between an application to the Governor and an application to the Supreme Court, it is considered desirable that the same outcomes be available for the disposition of the application regardless of the preferred venue."

Since 2006,[113] the dual pathways and their symmetrical operation have been found in Pt 7 of the CAR Act.

[103] Four interrelated aspects of the prerogative and the CAR Act should be noted. First, it is critical to recognise that by s 114 of the CAR Act nothing in that Act "limits or affects in any manner the prerogative of mercy". That is, despite the existence of Pt 7, the Governor of New South Wales retains the ability to and can grant a pardon, at any time. Second, the pardoning power, being one exercisable by the Governor of New South Wales, is in practice one which is exercised on the advice of the Executive Council and the Attorney-General. So much is made plain by convention,[114] and expressly by s 14 of the Interpretation Act 1987 (NSW).[115] Third, s 114 indicates that the dual pathways brought together in Pt 7 of the CAR Act retain their character as avenues to both assist the Executive in its exercise of the pardoning power, and provide a substitute and alternative pathway to the invocation and exercise of that power.[116]

[104] Fourth, the exercise of the prerogative at all times remains politically controlled. The process of inquiries and referrals under Pt 7 reflects that essential fact. Under Pt 7, in respect of applications made to the Supreme Court, at each point in the process — when an application is made,[117] when the Court decides which pathway to take,[118] and on the completion of an inquiry[119]— the Supreme Court reports to the Executive. The reporting to the Executive, at each step,

111. Section 3, Sch 1 item 7 of the Crimes Amendment (Review of Convictions and Sentences) Act 1996 (NSW).
112. New South Wales, Legislative Council, *Parliamentary Debates*, Hansard, 12 September 1996, p 4096. See also New South Wales, Legislative Assembly, *Parliamentary Debates*, Hansard, 12 June 1996, p 2897.
113. Section 4, Sch 2.1 item 1 of the Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006 (NSW). At that time, the CAR Act was named the Crimes (Local Courts Appeal and Review) Act 2001 (NSW).
114. See *FAI Insurances* at CLR 364–5; ALR 16–17; *Mallard* at [6].
115. Section 14 of the Interpretation Act 1987 (NSW) provides that "[i]n any Act or instrument, a reference to the Governor is a reference to the Governor with the advice of the Executive Council, and includes a reference to any person for the time being lawfully administering the Government".
116. *Mallard* at [6].
117. Section 78(2) of the CAR Act.
118. Section 79(5) of the CAR Act.
119. Section 82(3) of the CAR Act.

reflects that they are steps to assist in what is quintessentially a political decision whether to afford mercy to a person who will, apart from exceptional cases, have exhausted judicial remedies to challenge the conviction and sentence that constitute the final disposition of the judicial process. And it is a process during which the Executive Council and the Attorney-General retain the ability to *at any point* advise the Governor of New South Wales to grant a pardon. Put in different terms, Pt 7 of the CAR Act is a process designed to assist in the exercise of the prerogative and to provide an alternative pathway to the invocation and exercise of that power and, for that reason, prescribes a necessary dialogue between the Executive of New South Wales and the Supreme Court of New South Wales.

[105] It is therefore necessary to look, in some detail, at Pt 7 of the CAR Act to understand how it requires selecting one of two available mechanisms as the most appropriate mechanism to review a sentence or criminal conviction in a particular case.

Part 7 of the CAR Act

[106] Part 7, headed "Review of convictions and sentences", contains six Divisions. Division 2 deals with petitions to the Governor; Div 3 deals with applications to the Supreme Court of New South Wales; Div 4 deals with one of the mechanisms — an inquiry — and Div 5 deals in part with the second of the mechanisms — a referral to the Court of Criminal Appeal.

[107] The words in the phrase "conviction or sentence", which is the hinge on which the Part operates, are defined in s 74 as follows:

> "*conviction* includes —
>
> (a) a verdict of the kind referred to in section 22(1)(c) or (d) of the Mental Health (Forensic Provisions) Act 1990, being a verdict that the accused person committed the offence charged or an offence available as an alternative to the offence charged, or
>
> (b) an acquittal on the ground of mental illness, where the mental illness was not set up as a defence by the person acquitted.
>
> …
>
> *sentence* includes a sentence or order imposed or made by any court following a conviction.

Division 2 — Petitions to Governor

[108] Division 2 of Pt 7 concerns "Petitions to Governor". Section 76 provides that "[a] petition for a review of *a conviction or sentence* or the exercise of the Governor's pardoning power may be made to the Governor by the convicted person or by another person on behalf of the convicted person" (emphasis added). The "Governor" is, of course, the Governor of New South Wales.

[109] Section 77 sets out the procedure for the Governor's consideration of a petition under s 76. Relevantly, after considering a petition, the Governor may direct that an inquiry be conducted by a judicial officer into the conviction or sentence[120]; the Attorney-General may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act[121]; or the Attorney-General may request the Court of Criminal Appeal to give an opinion on any point arising in the case.[122] The precondition to the exercise of

120. Section 77(1)(a) of the CAR Act.
121. Section 77(1)(b) of the CAR Act.
122. Section 77(1)(c) of the CAR Act.

these powers under s 77(1) is common: it must "appear[] that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case".[123]

[110] The Governor or the Attorney-General may refuse to consider or otherwise deal with a petition,[124] and may also defer consideration of a petition in certain circumstances.[125] Without limiting the power of refusal, they may do so if it appears that the matter has been fully dealt with in the proceedings,[126] has previously been dealt with under Pt 7 or the previous review provisions,[127] has been the subject of a right of appeal or to apply for leave to appeal but the convicted person has not appealed or not so applied,[128] or has been the subject of an appeal or an application for leave to appeal which has been withdrawn or allowed to lapse[129]; and the Governor or the Attorney-General is not satisfied that there are special facts or special circumstances that justify the taking of further action.[130]

[111] A petition made to the Governor also enlivens a duty upon the Attorney-General to cause a report to be given to the Supreme Court as to any action taken by the Governor or the Attorney-General under s 77 — whether that be to direct an inquiry to be undertaken, to refer the case to the Court of Criminal Appeal, to request that Court's opinion on a point in the case, to refuse to consider or otherwise deal with the petition, or to defer consideration of the petition.[131] As has been explained, this duty recognises, as does the cognate duty of the Supreme Court under s 78(2) in respect of applications for review of convictions and sentences to the Supreme Court, that the process of inquiries and referrals under Pt 7 reflects the political control of the prerogative.

Division 3 — Application for inquiry to Supreme Court

[112] Division 3 of Pt 7 then provides for an application to be made to the Supreme Court, rather than a petition to the Governor. Section 78(1) provides that "[a]n application for an *inquiry into a conviction or sentence* may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person" (emphasis added). A copy of the application must be given by the registrar of the Criminal Division of the Supreme Court to the Minister.[132] The "Minister" is, of course, a State Minister, namely the Attorney-General.

[113] After considering an application under s 78 for an *inquiry into a conviction or sentence*, or on its own motion, the *Supreme Court* — to be construed as the Chief Justice or a judge of the Supreme Court who is authorised by the Chief Justice to exercise the jurisdiction under Pt 7[133]— has two prescribed options: under s 79(1)(a), the Supreme Court may *direct* that an

123. Section 77(2) of the CAR Act.
124. Section 77(3) of the CAR Act.
125. Section 77(3A) of the CAR Act.
126. Section 77(3)(a)(i) of the CAR Act.
127. Section 77(3)(a)(ii) of the CAR Act. Section 74(1) relevantly defines the "previous review provisions" as s 475 of the Crimes Act and s 26 of the Criminal Appeal Act before the introduction of Pt 13A of the Crimes Act, and the provisions of Pt 13A before their transfer into Pt 7 of the CAR Act.
128. Section 77(3)(a)(iii) of the CAR Act.
129. Section 77(3)(a)(iv) of the CAR Act.
130. Section 77(3)(b) of the CAR Act.
131. Section 77(4) of the CAR Act.
132. Section 78(2) of the CAR Act.
133. Section 75 of the CAR Act.

inquiry be conducted by a judicial officer into the *conviction or sentence*, *or*, under s 79(1)(b), the Supreme Court may refer the whole case to the Court of Criminal Appeal, to be dealt with *as an appeal* under the Criminal Appeal Act. That is, the Supreme Court has two of the three powers which the Governor and the Attorney-General have under Div 2 in respect of petitions,[134] but does not have the power to request the Court of Criminal Appeal to give an opinion on any point arising in the case.[135] The referral to the Court of Criminal Appeal is to be dealt with *as an appeal* under the Criminal Appeal Act because that procedure has been adopted as a mechanism for dealing with an application for the exercise of the prerogative by a person who will, apart from exceptional cases, have exhausted judicial remedies to challenge the conviction and sentence that constitute the final disposition of the judicial process. It will be necessary to return to consider this aspect further in addressing Div 5 of Pt 7.

[114] Again, like the powers of the Governor and the Attorney-General under Div 2, action under s 79(1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.[136] The Supreme Court may refuse to consider or otherwise deal with an application[137] in the same range of circumstances that the Governor or the Attorney-General may refuse to consider or otherwise deal with a petition,[138] and may also defer consideration of an application[139] in the same set of circumstances that the Governor or the Attorney-General may do so.[140]

[115] Proceedings under s 79 are not judicial proceedings.[141] Again reflecting the political role of the process in Pt 7, the registrar of the Criminal Division of the Supreme Court must report to the Minister as to any action taken by the Supreme Court under s 79.[142]

Division 4 — Inquiries directed by Governor or Supreme Court

[116] Division 4, headed "Inquiries", provides the procedures for an inquiry to be conducted as directed by the Governor under s 77(1)(a) *or* as directed by the Supreme Court under s 79(1)(a). An inquiry is to be conducted as soon as practicable after a direction for it has been given under s 77 or s 79.[143]

[117] The procedure to be adopted for conducting an inquiry is set out in s 81: if the inquiry is directed by the Governor, a judicial officer appointed by the Governor conducts the inquiry, and, if the inquiry is directed by the Supreme Court, a judicial officer appointed by the Chief Justice conducts the inquiry.[144] The judicial officer has the powers, protections and immunities conferred on a commissioner under specific provisions of the Royal Commissions Act 1923 (NSW).[145]

134. Section 77(1)(a) and (b) of the CAR Act.
135. Compare s 77(1)(c) of the CAR Act.
136. Section 79(2) of the CAR Act.
137. Section 79(3) of the CAR Act.
138. See [110] above.
139. Section 79(3A) of the CAR Act.
140. Section 77(3A) of the CAR Act.
141. Section 79(4) of the CAR Act. See the reasons of Kiefel CJ, Gageler and Gleeson JJ, at [17].
142. Section 79(5) of the CAR Act.
143. Section 80 of the CAR Act.
144. Section 81(1) of the CAR Act.
145. Section 81(2) of the CAR Act.

[118] On completing an inquiry, the judicial officer must cause a report on the results of the inquiry (incorporating a transcript of the depositions given in the course of the inquiry) to be sent to the Governor, in the case of an inquiry held on the direction of the Governor, or to the Chief Justice, in the case of an inquiry held on the direction of the Supreme Court.[146] In addition to this mandatory reporting, the judicial officer *may also refer the matter* (together with a copy of the report) to the Court of Criminal Appeal for consideration of the question of whether the *conviction* should be quashed (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to the guilt of the convicted person), or for review of the *sentence* imposed on the convicted person (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to any matter that may have affected the nature or severity of the sentence).[147] Where a report is furnished to the Chief Justice under s 82, the Supreme Court must, after considering that report, cause its own report on the matter (together with a copy of the judicial officer's report) to be sent to the Governor.[148] Ultimately, the Governor may then dispose of the matter in such manner as to the Governor appears just.[149]

Division 5 — Court of Criminal Appeal

[119] Division 5 of Pt 7, headed "Court of Criminal Appeal", deals with the Court of Criminal Appeal's functions and jurisdiction following: the grant of pardons under the prerogative of mercy; Div 4 inquiries; and referrals to it under s 77(1)(b), s 77(1)(c) or s 79(1)(b).

[120] First, s 84 provides the Court of Criminal Appeal with a power, but not a duty,[150] to quash a conviction in respect of which a free pardon has been granted.[151] An application may be made to the Court of Criminal Appeal for the quashing of a conviction by a person to whom a pardon has been granted or by another person on behalf of that person.[152] The registrar of the Court must provide a copy of any such application to the Minister.[153] Section 85 then sets out a range of procedures the Court of Criminal Appeal is to follow in any proceedings in respect of such an application, including that the Court is to consider the judicial officer's report to the Chief Justice and the Supreme Court's report to the Governor as well as any submissions made by the Crown or the convicted person on any such report,[154] and that the rules of evidence do not apply to such proceedings.[155] And, importantly, the provisions of Pts 3 and 4 of the Criminal Appeal Act apply to such proceedings as if the application is an "appeal" and the convicted person an "appellant" under those Parts.[156] That is, on

146. Section 82(1) of the CAR Act.
147. Section 82(2) of the CAR Act.
148. Section 82(3) of the CAR Act.
149. Section 82(4) of the CAR Act.
150. Section 84(2) of the CAR Act.
151. Section 84(1) of the CAR Act, read with s 83 definition of "pardon".
152. Section 84(3) of the CAR Act. However, s 84(4) provides that such an application may not be made in respect of a free pardon arising from an inquiry under Div 4 if the matter has previously been dealt with under Div 5 as a consequence of a reference to the Court, under s 82(2) (or so dealt with under the corresponding previous review provisions), by the judicial officer conducting the inquiry.
153. Section 84(5) of the CAR Act.
154. Section 85(1)(b) of the CAR Act.
155. Section 85(2) of the CAR Act.
156. Section 85(4) of the CAR Act.

an application under s 84 for the quashing of a conviction following the grant of a pardon, the Court of Criminal Appeal is invested with jurisdiction under the Criminal Appeal Act by which it may quash the conviction and direct a judgment and verdict of acquittal to be entered[157] on the usual bases that it may allow an appeal against conviction under that Act.[158]

[121] Second, where a judicial officer has exercised their discretion following a Div 4 inquiry to refer the matter the subject of the inquiry for consideration as to whether the conviction should be quashed or for review of the sentence imposed,[159] s 88 then imposes a duty upon the Court of Criminal Appeal to deal with the matter so referred in the same way as if an application had been made to it for the quashing of a conviction following the grant of a pardon, as discussed in the preceding paragraph.

[122] Third, where under s 77(1)(b) the Attorney-General, or under s 79(1)(b) the Supreme Court, has referred a whole case to the Court of Criminal Appeal to be dealt with as an appeal, s 86 imposes a duty upon the Court of Criminal Appeal to exercise the jurisdiction conferred on it under the Criminal Appeal Act by mandating that that Court is to deal with the case so referred in the same way as if the convicted person had appealed against the conviction or sentence under that Act.

[123] Finally, s 87 imposes a duty upon the Court of Criminal Appeal to consider, and furnish the Attorney-General with its opinion on, a point raised by the Attorney-General in a request under s 77(1)(c), being a request made after consideration of a petition to the Governor, and the Governor may then dispose of the matter in such manner as to the Governor appears just.

Dialogue between Executive and Supreme Court in Pt 7

[124] As has been seen, the reporting required under Pt 7 indicates that there is a mandated dialogue between the judicial and Executive arms of government, reflecting the political control of the prerogative. By way of summary, the Attorney-General must report to the Supreme Court about the Governor's or the Attorney-General's exercise of powers in relation to petitions to the Governor under Div 2,[160] the Supreme Court must give to the Minister, being the Attorney-General, a copy of any application made to the Supreme Court under s 78 for an inquiry into a conviction or sentence[161] and the Supreme Court must report to the Minister as to the Supreme Court's exercise of powers in relation to an application for an inquiry under Div 3.[162] On completing an inquiry under

157. Section 84(1) of the CAR Act, read with s 85(4) and s 6(2) of the Criminal Appeal Act.
158. Section 6(1) of the Criminal Appeal Act provides that:

> "The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

159. Section 82(2) of the CAR Act.
160. Section 77(4) of the CAR Act.
161. Section 78(2) of the CAR Act.
162. Section 79(5) of the CAR Act.

Div 4, where a judicial officer has been appointed by the Governor because the Governor has directed under s 77(1)(a) that an inquiry be conducted, the judicial officer is to report on the results of the inquiry to the Governor,[163] but where a judicial officer has been appointed by the Chief Justice because the Supreme Court has directed under s 79(1)(a) that an inquiry be conducted, the judicial officer is to report to the Chief Justice,[164] which report the Supreme Court must consider before it must give its own report on the matter, together with a copy of the judicial officer's report, to the Governor.[165] It is a politically controlled process.

Specific features of ss 78 and 79

[125] The focus of argument in this appeal has been on one provision in Div 3 of Pt 7 — s 79 of the CAR Act. Section 79 is not to be construed in isolation from the legislative scheme of which it forms part.[166]

[126] As has been explained, s 78 is the entry point for both of the identified pathways in s 79(1). It is s 78(1) which provides that "[a]n application for an *inquiry* into a conviction or sentence may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person" (emphasis added). This is important context — the application is one which seeks an "inquiry" under s 78. It may be accepted that the s 79(1) pathways are premised upon, although not solely conditioned upon,[167] an application being made under s 78, but it is relevantly only after considering an application for an inquiry under s 78 that the Court decides which of the pathways, if any — an inquiry (s 79(1)(a)), or a referral without inquiry (s 79(1)(b)) — is to be adopted.

[127] And, as has been seen, once the precondition to the exercise of power under s 79(1) is satisfied — "that there is a doubt or question as to the convicted person's guilt" or one of the other matters — there are two distinct pathways open to the Supreme Court should it decide to consider an application: a direction that an inquiry be conducted by a judicial officer into the conviction or sentence (s 79(1)(a)) or a referral of the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act (s 79(1)(b)). That is, there is one power enlivened by a condition, and two choices as to how to exercise that power.

[128] It is for those reasons that, in practice, the Pt 7 scheme most commonly works as an *addition* to the appeal process once exhausted, rather than an alternative to that process. That is unsurprising given that the grounds for the Governor or the Supreme Court to refuse to deal with a petition or application, or to defer it, include that the person has not exhausted their appeal rights.[168]

[129] It is necessary to say something further about each pathway.

Section 79(1)(a) pathway — Inquiry into conviction or sentence

[130] As has been explained, the s 79(1)(a) pathway is an inquiry conducted by a judicial officer into a conviction or sentence. If the Supreme Court chooses the inquiry pathway, there are two potential, and alternative, ultimate exercises of

163. Section 82(1)(a) of the CAR Act.
164. Section 82(1)(b) of the CAR Act.
165. Section 82(3) of the CAR Act.
166. *Solomons v District Court of New South Wales* (2002) 211 CLR 119; 192 ALR 217; [2002] HCA 47 (*Solomons*) at [15].
167. Because the Supreme Court may invoke either pathway "on its own motion": s 79(1) of the CAR Act.
168. See ss 77(3)(a)(iii)–(iv), (3A)(a)–(b), 79(3)(a)(iii)–(iv), (3A)(a)–(b) of the CAR Act.

judicial power that may result from such an inquiry. First, if the Governor, in disposing of a matter in such manner as to the Governor appears just,[169] decides to grant a pardon under the prerogative of mercy,[170] that then enlivens a judicial power,[171] but not a duty,[172] of the Court of Criminal Appeal to quash the conviction which is the subject of the pardon.[173] Second, if the judicial officer has exercised their discretion to refer the matter to the Court of Criminal Appeal following an inquiry under s 82(2), there is the exercise of judicial power of the Court of Criminal Appeal to quash a conviction or review a sentence.[174] Accordingly, if s 79(1)(a) could apply to federal offences, then these two potential and alternative judicial outcomes of that procedure, under ss 84 and 88, would be the exercise of federal judicial power.

Section 79(1)(b) pathway — Referral of whole case to Court of Criminal Appeal

[131] If the Supreme Court chooses the referral pathway to the Court of Criminal Appeal under s 79(1)(b), then, under s 86, that Court "is to" — read "must" — "deal with the case so referred in the same way as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act 1912, and that Act applies accordingly". Thus, once referred to the Court of Criminal Appeal, the ultimate determination of the case, being a determination made under the Criminal Appeal Act, would be an exercise of judicial power. Accordingly, if s 79(1)(b) could apply to federal offences, then the ultimate judicial outcome of that procedure, under s 86 applying the Criminal Appeal Act, would be the exercise of federal judicial power.

Question 1: Division 3 of Pt 7 of the CAR Act is an administrative function conferred on Supreme Court judges *persona designata*

[132] A majority of the Court of Appeal held that the power exercised by a judge under s 79 of the CAR Act was administrative in nature and that the judge exercising it did so *persona designata*. All parties and the amici curiae supported that conclusion in this Court. There being no argument to the contrary, the answer to Question 1 is "Yes".

Question 2: Section 79 does not apply of its own force to federal offences

[133] Part 7 of the CAR Act does not operate, of its own force, with respect to a "conviction or sentence" for an offence against a law of the Commonwealth. Question 2 should be answered "No".

[134] The phrase "conviction or sentence" is the "hinge" for each Division in Pt 7.[175] "Conviction" and "sentence" are not defined by reference to convictions or sentences imposed by State courts, but by reference to *offences*. The specific inclusion in the definition of "conviction" of particular verdicts provided for in New South Wales legislation[176], and not cognate provisions in federal statutes[177],

169. Section 82(4) of the CAR Act.
170. Section 83, definition of "pardon", and s 114 of the CAR Act.
171. Section 84(1) of the CAR Act.
172. Section 84(2) of the CAR Act.
173. Section 84(1) of the CAR Act.
174. Section 88, read with s 84(3), of the CAR Act.
175. See *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956; 405 ALR 402; [2022] HCA 33 (*BHP Group*) at [36], [59].
176. Section 22(1)(c) and (d) of the Mental Health (Forensic Provisions) Act 1990 (NSW).

is one indication that that term is confined to offences against New South Wales laws. Another is that "sentence" is inclusively defined by reference to a "conviction".

[135] Further, Div 2 of Pt 7, concerned with petitions to the Governor of New South Wales for a review of a conviction or sentence or the exercise of the Governor's pardoning power, cannot operate with respect to a "conviction" or "sentence" for a Commonwealth offence. The Governor of New South Wales cannot exercise the prerogative of mercy in respect of Commonwealth offences. That power is reserved for the Governor-General. It would therefore be futile to read Div 2 as operating, of its own force, with respect to a "conviction or sentence" for an offence against a law of the Commonwealth when the petition is one that is given to the Governor of New South Wales. Furthermore, the outcome of a decision made by the Governor, or the New South Wales Attorney-General, to direct that an inquiry be undertaken under Div 4[178] or to request the opinion of the Court of Criminal Appeal,[179] respectively, would be, in the former case, for the judicial officer to provide a report to the Governor on the outcome of the inquiry,[180] and, in the latter case, for the Court of Criminal Appeal to furnish the New South Wales Attorney-General with its opinion.[181] Such outcomes would, of course, be futile in respect of Commonwealth offences — they could lead to no exercise of Commonwealth executive power.

[136] And there is nothing to suggest that the reference to a "conviction or sentence" in Div 3, dealing with an application for an inquiry to the Supreme Court, can be or should be read differently so as to extend to a conviction or sentence in relation to an offence against a law of the Commonwealth. On the contrary, as a matter of statutory construction, absent some contrary indicator, the same words are to have the same meaning throughout Pt 7.[182]

[137] That conclusion is reinforced by the extensive and interrelated reporting requirements in Pt 7 described earlier in these reasons — the dialogue between the Supreme Court and the State Executive.[183] Again, it would be futile to read Div 3 as operating, of its own force, with respect to a "conviction or sentence" for an offence against a law of the Commonwealth when such a process would lead to no exercise of power by the State Executive.

[138] Further, to the extent that Pt 7 confers jurisdiction upon the Court of Criminal Appeal to deal with matters referred to it, it would be beyond State legislative power for it to apply to Commonwealth offences.[184]

[139] To the extent that s 79(1)(a) provides the gateway to a prospective exercise of jurisdiction by the Court of Criminal Appeal where a judicial officer has exercised their discretion, following an inquiry, to refer a matter to that

177. See, for example, Pt IB Divs 7–9 of the Crimes Act 1914 (Cth).
178. Section 77(1)(a) of the CAR Act.
179. Section 77(1)(c) of the CAR Act.
180. Section 82(1)(a) of the CAR Act.
181. Section 87(1) of the CAR Act.
182. *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21; 391 ALR 270; 178 ALD 42; [2021] HCA 19 (*Moorcroft*) at [25], quoting *Registrar of Titles v Franzon* (1975) 132 CLR 611 at 618; 7 ALR 383 at 387 (*Franzon*).
183. See above at [124]. See also ss 78(2), 79(5) and 82(1)(a), (b), (3) of the CAR Act.
184. *Rizeq v Western Australia* (2017) 262 CLR 1; 344 ALR 421; 57 Fam LR 294; [2017] HCA 23 (*Rizeq*) at [103]; see also at [22]; *Masson v Parsons* (2019) 266 CLR 554; 368 ALR 583; 59 Fam LR 503; [2019] HCA 21 at [30].

Court[185], it cannot validly operate as the enlivening condition for the exercise of federal jurisdiction. That is because a State law cannot determine "the powers that a court has in the exercise of federal jurisdiction nor how or in what circumstances those powers are to be exercised".[186] For the same reasons, as Kiefel CJ, Gageler and Gleeson JJ identify,[187] the s 79(1)(b) pathway also would be beyond the legislative power of the State if it applied to a person convicted and sentenced in federal jurisdiction for a Commonwealth offence.

[140] Finally, the conclusion that the reference to a "conviction or sentence" in Divs 2, 3 and 4 cannot be read as including a conviction or sentence in relation to an offence against a law of the Commonwealth is consistent with what has been described as the "general rule of construction"[188] which would confine references to courts, matters, things and persons in a State enactment to references to courts, matters, things and persons in that State.[189]

[141] For those reasons, the answer to Question 2 is "No". Accordingly, if ss 78 and 79 can have force in respect of federal offences, such force may only be given by operation of s 68(1) of the Judiciary Act 1903 (Cth).

Question 3: Section 68(1) of the Judiciary Act cannot pick up and apply Div 3 of Pt 7 of the CAR Act as federal law

[142] Specific aspects of s 68 of the Judiciary Act should be noted. The section appears in Pt X of the Judiciary Act, headed "Criminal jurisdiction", and concerns the application of laws in that jurisdiction. Division 1, headed "Application of laws", contains s 68, which itself is headed "Jurisdiction of State and Territory courts in criminal cases".

[143] It was common ground that the objective of s 68 is to achieve parity in criminal procedure: "to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice".[190] That policy was directed to the administration of criminal justice *by courts* where the exercise of federal jurisdiction by State courts could only be made effective by the adoption of an approach that "proceed[ed] by analogy".[191]

[144] To achieve that objective, s 68(2) of the Judiciary Act, under the power given by s 77(iii) of the Constitution,[192] invests "[t]he several Courts of a State or Territory" with "like jurisdiction" with respect to persons charged with Commonwealth offences — in the exercise of federal judicial power or the performance of functions incidental to the exercise of that judicial power — in relation to identified subject matters of State or Territory jurisdiction with respect

185. Section 82(2) of the CAR Act, s 88 read with s 85(4). See above at [130].
186. *Rizeq* at [103]; see also at [22].
187. Reasons of Kiefel CJ, Gageler and Gleeson JJ, at [37].
188. *Solomons* at [9], citing *Seaegg v R* (1932) 48 CLR 251 at 255 (*Seaegg*) and *Commissioner of Stamp Duties (NSW) v Owens (No 2)* (1953) 88 CLR 168 at 169 (*Owens (No 2)*). See also *BHP Group* at [36], [59].
189. *Seaegg* at 255; *Solomons* at [9], [37]; s 12 of the Interpretation Act 1987 (NSW).
190. *Williams v R (No 2)* (1934) 50 CLR 551 at 560; [1934] ALR 314 (*Williams (No 2)*). See also *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345; 4 ALR 293 at 298–9; *R v Murphy* (1985) 158 CLR 596 at 617; 61 ALR 139 at 149 (*Murphy*); *Leeth v Commonwealth* (1992) 174 CLR 455 at 467; 107 ALR 672 at 678–9; *R v Gee* (2003) 212 CLR 230; 196 ALR 282; [2003] HCA 12 at [6]–[7], [63]–[64], [115]; *Putland v R* (2004) 218 CLR 174; 204 ALR 455; [2004] HCA 8 (*Putland*) at [4].
191. *Williams (No 2)* at CLR 561; *Peel v R* (1971) 125 CLR 447 at 468–9; [1972] ALR 231 (*Peel*).
192. *Murphy* at CLR 614–18; ALR 147–50.

to persons charged with State or Territory offences: the summary conviction; the examination and commitment for trial on indictment; the trial and conviction on indictment; *and* "the hearing and determination of *appeals* arising out of any such trial or conviction or out of any *proceedings* connected therewith"[193] (emphasis added). Section 68(2) therefore expressly authorises a degree of translation "by analogy"[194] by conferring "like jurisdiction". The extent of the translation of State laws is confined practically by the fact that s 68(2) is dealing with the jurisdiction of courts.

[145] Section 68(1) provides that the laws of a State or Territory "*respecting* the arrest and custody of offenders or persons charged with offences, and the *procedure for*" (emphasis added) identified matters, as well as holding accused persons to bail, shall apply and be applied "so far as they are applicable" to persons charged with Commonwealth offences in respect of whom s 68 confers jurisdiction on the several courts of that State or Territory. Relevantly, one of the identified matters is "the hearing and determination of *appeals* arising out of any such trial or conviction or out of any *proceedings* connected therewith" (emphasis added).

[146] In its terms, s 68(1) is capable of applying the procedures for the hearing and determination of "*appeals* arising out of any such trial or conviction or out of any *proceedings* connected therewith" (emphasis added) "so far as they are applicable" to persons who are charged with offences against the laws of the Commonwealth. But what does that mean? "Appeal" is defined in s 2 to include "an application for a new trial and any *proceeding* to review or call in question the *proceedings* decision or jurisdiction of any Court or Judge" (emphasis added). At the time of the enactment of the definition, references to "appeal" in the Judiciary Act were all in the context of appeals to a court or to the King in Council; that is, "appeal" referred only to a judicial proceeding.[195] "[P]roceeding" is used twice in the s 2 definition. The second reference is to a judicial proceeding. It is to be assumed that the word is used consistently in the same provision.[196] In short, "appeal" in s 2 refers to a proceeding to be heard and determined by a court in the exercise of judicial power.[197]

[147] In its operation in relation to procedures for "the hearing and determination of appeals", s 68(1) operates in tandem with s 68(2). That is, the respective fields of operation of s 68(1) and (2) in this respect are complementary and co-extensive; they are both confined to judicial proceedings.

[148] There are four requirements to be met for a State law to be picked up by s 68(1). First, the State law is to answer the description of one of the identified matters in s 68(1). In this appeal, the relevant question is whether, under

193. Section 68(2) of the Judiciary Act therefore invests state and territory courts with federal jurisdiction in relation to offences created by laws made by the Commonwealth Parliament: s 76(ii) of the Constitution.
194. *Williams (No 2)* at CLR 561; *Peel* at CLR 468–9.
195. Sections 20 (appeals from judges of federal jurisdiction), 21 (application for leave to appeal to the High Court), 23 (decision in case of difference of opinion), 27 (no appeal as to costs), 34, 35, 37 (appellate jurisdiction of the High Court), 39 (federal jurisdiction of State courts), 40 (removal into the High Court), 77 (no other appeals to the High Court) of the Judiciary Act 1903 (Cth) (No 6 of 1903, as made).
196. *Moorcroft* at [25], quoting *Franzon* at CLR 618; ALR 387.
197. See *Williams (No 2)* at CLR 560; *Peel* at CLR 457, 460, 467–8; *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 124–5; 66 ALR 593 at 595–6 (*Rohde*).

s 68(1)(d), read with the definition of "appeal",[198] the State law answers the description of a law respecting the procedure for the hearing and determination of a proceeding by a court in the exercise of judicial power[199] arising out of a trial or conviction on indictment or out of any proceedings connected therewith. If the State law cannot answer that description, it cannot be picked up.

[149] Second, s 68(1) cannot pick up a State law if to do so would be inconsistent with other Commonwealth laws or would contravene a constitutional limitation on Commonwealth legislative power.[200] This issue is referred to below.[201]

[150] Third, in order that a State law may be picked up under s 68(1), it may only apply "so far as [it is] applicable" to persons charged with Commonwealth offences. In respect of the relevantly analogous phrase in s 79 of the Judiciary Act — "in all cases to which they are applicable" — that means that a State law can only be picked up if its meaning is unchanged.[202] That principle applies equally in respect of s 68(1).[203] This issue is addressed below.[204]

[151] That third requirement — that a State law can only be picked up if its meaning is unchanged — is underpinned by fundamental separation of power considerations. In the process of "picking up" under s 68, it is the *court* which is required to adopt, "by analogy",[205] the State law as Commonwealth law. The broad purpose of s 68 is to achieve parity in criminal procedure, and, like s 79 of the Judiciary Act, "to ensure that the laws of the States are applied *by courts* in the exercise of federal jurisdiction".[206] The requirement is a limit upon *courts* seeking to apply State law in federal jurisdiction: a court exercising federal jurisdiction cannot "alter the language of a State statute and apply it in that altered form".[207] That is because the court is not the legislature. It is the function of the Parliament, not a Ch III court exercising federal judicial power, to legislate.[208] Put in different terms, if a court exercising federal judicial power were to pick up and apply a State law purportedly by s 68 and if by doing so it

198. See above at [146].
199. See *Williams (No 2)* at CLR 560; *Peel* at CLR 457, 460, 467–8; *Rohde* at CLR 124–5; ALR 595–6.
200. *Putland* at [7], [41], [121].
201. See [176].
202. *Rizeq* at [81], [91], [200]. See also *Pedersen v Young* (1964) 110 CLR 162 at 165–6; [1964] ALR 798 (*Pedersen*); *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; 173 ALR 619; [2000] HCA 39 at [13], [52]; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30; 200 ALR 403; [2003] HCA 47 at [67], [157], [171].
203. *Putland* at [36]–[38], [121].
204. See [161]–[166] and [170]–[174].
205. *Williams (No 2)* at CLR 561; *Peel* at CLR 468–9.
206. *John Robertson & Co Ltd (in liq) v Philips Industries Pty Ltd (the fourth defendant)* (1973) 129 CLR 65 at 95; 1 ALR 21 at 43 (*John Robertson*).
207. *John Robertson* at CLR 95; ALR 43; see also CLR 80–1, 83, 88; ALR 32–3, 34, 38, cited in *Maguire v Simpson* (1977) 139 CLR 362 at 376; 18 ALR 469 at 478 (*Maguire*).
208. *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 164, 252, 371–2; [1948] 2 ALR 89; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 503–4, 520; [1972] ALR 3; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 485–6; 128 ALR 1 at 63–4.

were to give that State law an altered meaning, the court would be, in effect, rewriting the statute. That is not permissible.[209] The section does not authorise a court to "redraft a statute".[210]

[152] But that does not mean that the State law cannot, upon being picked up, be translated; the adoption of State law "must proceed by analogy".[211] For example, a State law giving a right of appeal against acquittal or sentence to an Attorney-General of a State or the Director of Public Prosecutions of a State may be picked up and applied under s 68(2) in a way that gives that right to the A-G (Cth) or the Commonwealth Director of Public Prosecutions[212]. But adoption of State law "by analogy" reinforces the fact that a State law will only be capable of being picked up if its meaning is unchanged. As this Court has recognised, "[t]here may be statutory provisions couched in terms which make it impossible for them to be 'picked up'"[213] because the degree of translation required is too great. In respect of those laws, it is no longer adoption "by analogy" but rewriting of the statute. And that is not permitted.

[153] A fourth requirement, a corollary of the third, is that a provision cannot be picked up if it is an "integral part of a State legislative scheme" such that to pick up some but not all of it under s 68(1) "would be to give an altered meaning to the severed part of the State legislation".[214] By way of contrast, in *Rohde*,[215] where the State law conferred on a State official the power to institute appeals against sentences imposed for State offences, the references in the State law to the State official were capable of being translated under s 68(2) to the cognate Commonwealth official in circumstances where there was no relevant effect on, or change in meaning of, the statutory scheme. Similarly, a State law providing for jury trials, as picked up and applied as federal law, can operate without an altered meaning even though the provisions in the State law for trial by judge alone,[216] or for majority verdicts,[217] cannot be picked up. Those provisions are capable of operating independently.

[154] For the purpose of the fourth requirement, the question is whether, by picking up one element of a legislative scheme divorced from the context of the balance of the scheme, the law has a different legal operation. Where a particular provision is an integral part of a State legislative scheme, s 68 could not operate

209. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268–70; [1956] ALR 163; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; 195 ALR 24; 72 ALD 1; [2003] HCA 2 at [102].
210. *Spence v Queensland* (2019) 268 CLR 355; 367 ALR 587; [2019] HCA 15 at [87], quoting *Pidoto v Victoria* (1943) 68 CLR 87 at 111; [1944] ALR 1.
211. *Williams (No 2)* at CLR 561; *Peel* at CLR 468–9.
212. *Williams v R (No 1)* (1933) 50 CLR 536 at 543, 545; [1934] ALR 1 (*Williams (No 1)*); *Williams (No 2)* at CLR 557–8, 561–2; *Peel* at CLR 457, 460, 469; *Rohde* at CLR 125, 127; ALR 595, 597.
213. *Kruger v Commonwealth* (1997) 190 CLR 1 at 140; 146 ALR 126 at 217, quoted in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; 177 ALR 329; 37 ACSR 1; [2001] HCA 1 at [72], in turn quoted in *Solomons* at [24].
214. *Solomons* at [24], citing *Commonwealth v Mewett* (1997) 191 CLR 471 at 556; 146 ALR 299 at 352 (*Mewett*). See also *Maguire* at CLR 376; ALR 478, quoting *Pedersen* at CLR 165, in turn citing *Owens (No 2)*.
215. At CLR 125, 127; ALR 595, 597. See also *Williams (No 1)* at CLR 543, 545; *Williams (No 2)* at CLR 557–8, 561–2; *Peel* at CLR 457, 460, 469.
216. *Brown v R* (1986) 160 CLR 171 at 200–1, 206–7, 218–19; 64 ALR 161 at 180, 185, 194 (*Brown*).
217. *Cheatle v R* (1993) 177 CLR 541 at 563; 116 ALR 1 at 14 (*Cheatle*).

to pick up some but not all of it if to do so would be to give an altered meaning to the part of the State legislation which has been severed and sought to be picked up.[218]

[155] So, for example, in *Solomons*,[219] the provision of the State law sought to be picked up by s 79 of the Judiciary Act — the grant of a costs certificate — could not be divorced from the statutory scheme because that provision was a precondition to the making of an application to the Executive, an application which would have been futile if the certificate was granted under the provision as picked up and applied as federal law.[220]

[156] Similarly, in *Mewett*,[221] Gummow and Kirby JJ, whose reasons the plurality in *Solomons* endorsed as support for the fourth requirement,[222] held that provisions of a State Act providing limitation periods on actions could not be picked up and applied as federal law under s 79 of the Judiciary Act without picking up other aspects of that State Act providing for a "regime of extensions of limitation periods as an integral part of the legislative scheme", as to do so would be to give the State legislation an altered meaning.[223]

[157] As will be seen, neither s 79(1)(a) nor s 79(1)(b) can be picked up by s 68(1). The s 79(1)(a) pathway cannot be picked up because it would not meet the first requirement: an inquiry held under Div 4 is not a judicial proceeding as required by s 68(1), read with the definition of "appeal". In any event, s 79(1)(a) does not meet the third requirement: it is not "applicable" as required by s 68(1) because the meaning of the relevant State provisions in Pt 7 and thus their legal operation *would* be changed; the degree of translation required is too great — it would amend the statute. And to pick up s 79(1)(b) without s 79(1)(a) would not meet the fourth requirement: it would be to pick up only part of an "integral part of a State legislative scheme".[224] Picking up s 79(1)(b) without s 79(1)(a) would give a different legal operation to the scheme by the Court removing — abolishing — a pathway that the legislature has said should be available. Finally, and in any event, s 79(1)(b) also does not meet the third requirement: as with s 79(1)(a), s 79(1)(b) is not "applicable" as required by s 68(1).

Section 79(1)(a) not picked up by s 68(1) — Not procedure for hearing and determination of an "appeal"

[158] The s 79(1)(a) pathway could be picked up by s 68(1) of the Judiciary Act only if it were a procedure for "the hearing and determination of *appeals* arising out of any such trial or conviction or out of any proceedings connected therewith", where "appeal" is defined in turn to include "any proceeding to review or call in question the proceedings [or] decision". It is not.

[159] It is an administrative process — an inquiry which is conducted by a judicial officer — which is not respecting an *appeal*, but the potential exercise of the prerogative of mercy. And that conclusion is reinforced by the fact that if an "appeal" was taken to extend to such an inquiry (and it does not), the word would have a different operation between s 68(1) and (2) simply because s 79(1)(a) is

218. *Solomons* at [24].
219. (2002) 211 CLR 119; 192 ALR 217; [2002] HCA 47.
220. At [25]–[28].
221. (1997) 191 CLR 471; 146 ALR 299.
222. *Solomons* at [24].
223. *Mewett* at CLR 556; ALR 352.
224. *Solomons* at [24], citing *Mewett* at CLR 556; ALR 352.

administrative. Thus, s 79(1)(a), which authorises a Div 4 inquiry by a judicial officer in a designated capacity, does not fall within the scope of s 68(1). Section 79(1)(a) cannot be characterised as a law respecting "the procedure for … the hearing and determination of appeals".

[160] Further, as has been explained,[225] although an inquiry conducted under Div 4 after a direction made pursuant to s 79(1)(a) may result in the exercise of judicial power — either by the ultimate exercise of the Court of Criminal Appeal's power to quash a conviction following the grant of a pardon, or by its exercise of jurisdiction under the Criminal Appeal Act following a discretionary referral to it following an inquiry — in no way can those exercises of judicial power be considered an "appeal" so as to be picked up under s 68(1). That exercise of judicial power is contingent only, and inextricably bound up with the administrative process of a Div 4 inquiry. It would be to pick up a part of an "integral part of a State legislative scheme" such that to pick up some but not all of it under s 68(1) "would be to give an altered meaning to the severed part of the State legislation".[226]

Section 79(1)(a) not picked up by s 68(1) — Not "applicable" — Meaning changed

[161] Even if s 79(1)(a) were a procedure for the hearing and determination of an appeal within the terms of s 68(1) of the Judiciary Act (and it is not), the s 79(1)(a) pathway still could *not* be picked up by s 68(1) because it would require too much rewriting to apply it to Commonwealth offences — the meaning of the relevant State provisions in Pt 7, and thus their legal operation, *would* be changed.

[162] In short, there are a number of possible end points of an inquiry directed under s 79(1)(a) but, in every case, a report is sent to the Chief Justice,[227] which report the Supreme Court must consider before it then must send its own report and a copy of the original report to the Governor[228] and the Governor may then dispose of the matter in such manner as to the Governor appears just[229]— which disposal may include a pardon under the prerogative of mercy.[230]

[163] The New South Wales Governor could not dispose of a matter relating to a Commonwealth offence — that is a matter for Commonwealth executive power, not State executive power. It would only be possible to take substantive action on receiving a report in respect of a federal offence if "Governor" in s 82 could be read as "Governor-General". That is not possible because the Governor-General acts on the advice of Commonwealth officials (namely, Ministers of State for the Commonwealth[231]), not State officials, pursuant to the system of responsible government provided for by the Constitution.[232] The report sent to the Governor under s 82(3) is that of the "Supreme Court"; however, "Supreme Court" in Pt 7 is to be construed as the Chief Justice, which would mean the Chief Justice of the Supreme Court of New South Wales, or a

225. See above at [130].
226. *Solomons* at [24], citing *Mewett* at CLR 556; ALR 352. See also *Maguire* at CLR 376; ALR 478, quoting *Pedersen* at 165, in turn citing *Owens (No 2)*.
227. Section 82(1)(b) of the CAR Act; see [118] above.
228. Section 82(3) of the CAR Act; see [118] above.
229. Section 82(4) of the CAR Act; see [118] above.
230. Section 83, definition of "pardon", and s 114 of the CAR Act; see [130] above.
231. Sections 61, 64, 65, 70 of the Constitution.
232. *FAI Insurances* at CLR 364–5; ALR 16–17.

judge authorised by the Chief Justice.[233] That report is to be sent along with a copy of the judicial officer's report previously sent to the Chief Justice, where that judicial officer — a State judicial officer — has conducted the inquiry with the powers of a commissioner under the Royal Commissions Act.[234] The context of the legislative scheme indicates that the reports are prepared so as to inform the Governor's disposal power under s 82(4), which may lead to the grant of a pardon under the prerogative of mercy.[235] Those reports are thus provided to the Governor, and are prepared, by State officials. Although, in practice, the Governor-General acts on the advice of the Executive Council,[236] that interposition would not change the conclusion that to translate Governor to Governor-General would be to presuppose that the Governor-General would, in effect, rely and act on the advice of State officials.

[164] The cases in which State laws regulating the jurisdiction of courts have been considered to be amenable to being picked up by s 68 and the relevant State officials have been translated into Commonwealth officials[237] stand in stark contrast. In such cases, there is need for flexibility in translation when giving effect to the constitutional imperative in s 77(iii) for State courts to exercise Commonwealth judicial power because otherwise the exercise of federal jurisdiction would be stultified. That is not this case. No such imperative arises from the exercise of *executive* power by a broad range of executive decision-makers in a multi-stage scheme involving officials at the highest level of government, including the Governor of the State.

[165] These anomalies cannot be reconciled. It would run counter to the federal system for the Governor-General to receive a report from a State judicial officer who was appointed to conduct an inquiry by a State Chief Justice and who was acting under State royal commissions legislation, and to also receive a report prepared by the State Chief Justice (or a State judicial officer authorised by the Chief Justice) after receipt and consideration of that State judicial officer's report. And it would be anomalous and futile if such reports were provided to a State Governor about a conviction or sentence for a federal offence, over which the Governor could not exercise any powers.

[166] Further, and critically, in the not uncommon case where the conviction or sentence for which an inquiry is granted is for both State *and* Commonwealth offences, that would create the unworkable situation whereby the Chief Justice of the Supreme Court of New South Wales (or a State judicial officer authorised by the Chief Justice) would be required to report to the State Governor in respect of State offences, and to report separately to the Commonwealth Governor-General in respect of Commonwealth offences. The Commonwealth Governor-General would not be able to grant a pardon in respect of State offences, and nor could the State Governor grant a pardon in respect of Commonwealth offences. This would be unworkable in circumstances where the issues canvassed in the inquiry may have elements of overlap in respect of the relevant State and Commonwealth offences.

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233. Section 75 of the CAR Act; see [113] above.
234. Section 81(2) of the CAR Act.
235. Section 83, definition of "pardon", and s 114 of the CAR Act; see [130] above.
236. *FAI Insurances* at CLR 364–5; ALR 16–17; *Mallard* at [6].
237. *Williams (No 1)* at CLR 543, 545; *Williams (No 2)* at CLR 557–8, 561–2; *Peel* at CLR 457, 460, 469; *Rohde* at CLR 125, 127; ALR 595, 597.

Section 79(1)(b) not picked up by s 68(1) — Cannot be picked up without s 79(1)(a) — Integral part of legislative scheme

[167] The next question is whether, despite the s 79(1)(a) pathway being unable to be picked up, the s 79(1)(b) pathway may nevertheless be picked up by s 68(1) of the Judiciary Act. For the following reasons, it cannot.

[168] Section 79(1)(b) is but one pathway or mechanism — part of an integrated scheme — available for the review or scrutiny of criminal convictions and sentences.[238] Its selection, where an application is made to the Supreme Court, as *the* pathway for the potential review or scrutiny of criminal convictions and sentences is not automatic. The integrated scheme is drafted on the basis that it is not always a simple matter to determine, in any particular case, what is the most appropriate pathway.[239] Put in different terms, the text, structure, operation and history of Pt 7 of the CAR Act, in the context of the royal prerogative of mercy, recognise that there is a choice to be made about the appropriate way to address an application for mercy. In particular, the bringing together of the two pathways in the CAR Act in respect of applications made to the Supreme Court was *not* to remove one as an available option in an appropriate case but to ensure that the "same outcomes be available for the disposition of the application regardless of the preferred venue".[240] That is, the inclusion of the s 79(1)(b) pathway *as an option* for applications made to the Supreme Court was consistent with the original legislative intention, in respect of petitions to the Governor, to fuse the inquiry and referral pathways into the one scheme so as to eliminate their "incompatibility"[241] and because, critically, each "offers advantages" which the other does not.[242]

[169] If s 79(1)(b) was capable of being picked up without s 79(1)(a), the alternative pathway critical to the scheme — an inquiry — would be absent. The need to retain a separate s 79(1)(a) pathway (formerly s 475) was addressed and accepted.[243] If s 79(1)(b) was picked up so as to be available for Commonwealth offences without the s 79(1)(a) pathway it would, in effect, abolish the s 79(1)(a) pathway for such offences.[244] That abolition was the very thing that the 1992 review did not endorse,[245] and the Parliament ultimately rejected. The desirability of the continued existence of the s 79(1)(a) pathway was recognised, among other grounds, because the judicial officer has a broad discretion to determine the procedure at such an inquiry[246] and because of the limited scope

238. See above at [106]–[123].
239. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, p 11.
240. New South Wales, Legislative Council, *Parliamentary Debates*, Hansard, 12 September 1996, p 4096. See also New South Wales, Legislative Assembly, *Parliamentary Debates*, Hansard, 12 June 1996, p 2897.
241. New South Wales, Legislative Assembly, *Parliamentary Debates*, Hansard, 27 October 1993, p 4575.
242. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, p 19.
243. Section 3, Sch 1 item 3 of the Crimes Legislation (Review of Convictions) Amendment Act 1993 (NSW).
244. Compare *Brown* at CLR 200–1, 206–7, 218–19; ALR 180, 185, 194; *Cheatle* at CLR 563; ALR 14. See above at [153].
245. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, pp 16–23.
246. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, p 17.

of what is now the s 79(1)(b) pathway.[247] Adapting and adopting what was said in the Issues Paper, "the procedure under [s 79(1)(a)] offers advantages which [s 79(1)(b)] does not and vice versa. The availability of the [s 79(1)(b)] procedure may not therefore on its own justify abolishing the [s 79(1)(a)] procedure".[248] It is not the role of the Court to redraft Pt 7 of the CAR Act to abolish the s 79(1)(a) pathway for Commonwealth offences but leave it intact for State offences. The A-G (Cth) accepted that the Commonwealth could enact a like procedure. If the Parliament wishes such a procedure to be available for federal offences, it should do so.

Section 79(1)(b) not picked up by s 68(1) — Not "applicable" — Meaning changed

[170] Even if picking up s 79(1)(b) divorced from s 79(1)(a) were permissible (which it is not), s 79(1)(b) is not "applicable" within the meaning of s 68(1).

[171] As has been explained, a referral to the Court of Criminal Appeal under s 79(1)(b) proceeds after an application is made under s 78(1) and is considered by the Supreme Court.[249] Such an application enlivens a duty upon the Supreme Court to provide a copy of that application to the State Attorney-General,[250] and a referral under s 79(1)(b) enlivens a further duty upon the Supreme Court to report to the State Attorney-General as to the fact of that referral.[251] In order to pick up s 79(1)(b), the Supreme Court's duties to report would need to be translated so that it would be required to make such reports to the A-G (Cth) in respect of applications concerning Commonwealth offences, or to the State Attorney-General *and* the A-G (Cth) in respect of applications concerning Commonwealth offences and State offences.

[172] It is important to emphasise the purposes of the reporting duties. The first is practical. For example, there is utility in the Executive being provided with a copy of an application made to the Supreme Court and notice of the Supreme Court's decision under s 79(1)(a) to direct an inquiry under Div 4, because the outcome of such an inquiry is that the Executive will be provided with the relevant reports,[252] which are intended to assist in the Governor's decision whether to grant a pardon. That is, the Executive is given notice of an application and an inquiry because it will, at some stage in the future, have to form a view on whether to grant a pardon. The same practical reasons attend the inverse reporting requirement in Div 2, whereby the Attorney-General is to report to the Supreme Court on any action taken on a petition[253]— the Supreme Court is informed of what it may, in the future, have to do in respect of such a petition.

[173] However, if those practical reasons were the only reasons for such reporting, then the Supreme Court's duty to report to the Executive in respect of a referral under s 79(1)(b) would only have utility insofar as it would indicate to the Executive that the Executive has nothing further to do in respect of an application it has been advised of — it has no future role in the outcome of the

247. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, pp 18–19.
248. New South Wales Attorney-General's Department, Criminal Law Review Division, *Review of Section 475 of the Crimes Act 1900*, Issues Paper, 1992, p 19.
249. Or on the Supreme Court's own motion: s 79(1) of the CAR Act.
250. Section 78(2) of the CAR Act.
251. Section 79(5) of the CAR Act.
252. Section 82(3) of the CAR Act.
253. Section 77(4) of the CAR Act.

Court of Criminal Appeal's exercise of power under s 86. But there is a second and more critical reason for these provisions, as explained earlier in these reasons. Such reporting reflects the legislative intention that there be a mandated dialogue between the judicial and Executive arms of government — a political process[254]— in respect of the mechanisms available to assist in the Executive's consideration of the exercise of the prerogative of mercy. And an essential reason for that dialogue is that, at all times, the Executive may decide, notwithstanding a s 79(1)(b) referral (or any action taken or not taken under s 79), to grant a pardon.[255]

[174] In those circumstances, the translation required to the reporting duties for s 79(1)(b) to be picked up would be unworkable. In the not uncommon case of an offender charged with both Commonwealth *and* State offences, if s 79(1)(b) were to be picked up, the "whole case" being referred to the Court of Criminal Appeal would include both Commonwealth and State offences. Thus, the reporting on an application and a referral under s 79(1)(b) would be required to be made to both the State Attorney-General *and* the A-G (Cth). A critical purpose of the reporting duties is to assist the Executive to determine whether to grant a pardon notwithstanding that another mechanism, such as a referral, has been invoked. But each of the Governor and the Governor-General can only pardon an offender in respect of offences of their respective jurisdiction — the Governor can only grant a pardon for State offences, and the Governor-General can only grant a pardon for Commonwealth offences. However, in such a case, the issues raised by that "whole case" referred are likely to have elements of overlap between the State and Commonwealth offences such that, for the purpose of either the Governor or the Governor-General determining whether to grant a pardon, those issues cannot be disentangled. In those circumstances, a critical purpose of the reporting duties would be undermined.

[175] For those reasons, the answer to Question 3 is "No".

Victoria's constitutional issues

[176] The Attorney-General of Victoria submitted that Div 3 of Pt 7 of the CAR Act applying as a Commonwealth law by force of s 68(1) of the Judiciary Act may infringe specific limitations on Commonwealth legislative power. Two were identified: that the Commonwealth Parliament cannot confer on a judge of a court in their personal capacity a non-judicial function unless the individual judge has consented[256]; and that it cannot impose an administrative duty on the holder of a State statutory office without State legislative approval.[257] Given the views expressed, it is unnecessary to address these important issues.[258] But the issues raised reinforce that the Commonwealth should enact its own procedure if it wishes such a procedure to be available for federal offences; and if, as part of that

254. See above at [124].
255. Section 114 of the CAR Act.
256. *Grollo v Commissioner of the Australian Federal Police* (1995) 184 CLR 348 at 364–5; 131 ALR 225 at 234–5; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 13; 138 ALR 220 at 227–8.
257. *O'Donoghue v Ireland* (2008) 234 CLR 599; 244 ALR 404; [2008] HCA 14 at [13]–[20], [52]–[57].
258. *Lambert v Weichelt* (1954) 28 ALJR 282 at 283; *Duncan v New South Wales* (2015) 255 CLR 388; 318 ALR 375; 151 ALD 62; [2015] HCA 13 at [52]; *Knight v Victoria* (2017) 261 CLR 306; 345 ALR 560; [2017] HCA 29 at [32].

procedure, it seeks to engage with a Chief Justice or judge of a State court or a State official, it must do so within power.

Conclusions and orders

[177] For those reasons, the appeal should be dismissed. There should be no order as to costs.

Edelman J.

Introduction

[178] Four issues arise in a case concerning a State or Territory law applied by a State or Territory court exercising federal jurisdiction. First, what is the State or Territory law that is sought to be applied? This requires characterisation of rules within a State or Territory statute, at a level of generality consistent with their common purpose, that are so closely associated as to form a single "law". Secondly, is there a Commonwealth law that confers federal jurisdiction upon the relevant State or Territory court to adjudicate upon the subject matter of the relevant State or Territory law? Two such Commonwealth laws which are relevant to this appeal are ss 39(2) and 68(2) of the Judiciary Act 1903 (Cth). Thirdly, if the State or Territory court has federal jurisdiction over the subject matter, does the State or Territory law apply of its own force? This requires consideration of (i) whether the State or Territory law purports to operate in federal jurisdiction, and (ii) if so, whether it is within the power of the State or Territory Parliament to provide for the law to operate in federal jurisdiction. Fourthly, if the State or Territory law does not apply of its own force in federal jurisdiction, then is the text of that law picked up by a provision such as s 68(1) or s 79(1) of the Judiciary Act and applied as a Commonwealth law to permit the State or Territory court to exercise jurisdiction by reference to that Commonwealth law?

[179] These issues arise in this appeal in the context of Mr Huynh's conviction of a Commonwealth offence in the District Court of New South Wales, namely conspiracy to import a commercial quantity of a border-controlled precursor in breach of ss 11.5(1) and 307.11(1) of the Criminal Code (Cth). After his appeals were dismissed, Mr Huynh applied to the Supreme Court of New South Wales for an inquiry into his conviction under s 78 of the Crimes (Appeal and Review) Act 2001 (NSW) (the CAR Act).

[180] Mr Huynh's application for an inquiry into his conviction was dismissed by Garling J, on the basis that the requirements of s 79(2) of the CAR Act were not satisfied. Mr Huynh sought judicial review of that decision. The Court of Appeal of the Supreme Court of New South Wales raised, and decided, a preliminary question as to whether the procedure for an inquiry was available to a person who had been convicted of a Commonwealth offence — that is, who had been convicted in federal jurisdiction. That preliminary question raised the four issues mentioned at the start of these reasons. A majority of the Court of Appeal dismissed Mr Huynh's application for judicial review.

[181] As to the first issue, it was common ground between the parties before the Court of Appeal and in this Court that the State law in question in this case is comprised by those provisions of Div 3 of Pt 7 of the CAR Act, namely ss 78 and 79, concerning applications to the Supreme Court of New South Wales for an inquiry into a conviction or sentence. Section 78 empowers a convicted person or their representative to apply to the Supreme Court for an inquiry into the

conviction or sentence. Section 79 empowers the Supreme Court, on considering such an application or of its own motion, to either: (i) direct that an inquiry be conducted by a judicial officer into the conviction or sentence; (ii) refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal under the Criminal Appeal Act 1912 (NSW); or (iii) do nothing, in circumstances including where it does not appear that there is a doubt or question as to the convicted person's guilt.

[182] As to the second and third issues, the Court of Appeal correctly concluded that s 68(2) of the Judiciary Act confers federal jurisdiction on the Supreme Court of New South Wales when dealing with a Commonwealth offence, but a majority of the Court of Appeal (Basten JA, with whom Bathurst CJ, Gleeson and Payne JJA agreed; Leeming JA dissenting) held that ss 78 and 79 of the CAR Act did not apply of their own force. The result of the present appeal is that this Court is unanimous that, although s 68(2) of the Judiciary Act confers federal jurisdiction on the Supreme Court of New South Wales when dealing with a Commonwealth offence, s 79 of the CAR Act cannot operate of its own force in federal jurisdiction.

[183] As to the fourth issue, regarding whether s 68(1) of the Judiciary Act can pick up s 79 of the CAR Act, the Court of Appeal was unanimous that it could not. This Court is also unanimous that s 68(1) of the Judiciary Act cannot pick up and apply that part of s 79 that empowers the Supreme Court to direct that an inquiry be conducted in response to a convicted person's application for an inquiry into a conviction or sentence. The issue upon which this Court divides is whether s 68(1) of the Judiciary Act can pick up only part of the text of ss 78 and 79 of the CAR Act and apply it as a Commonwealth law, effectively rewriting the scheme of which ss 78 and 79 form part. My view in dissent, like that of Gordon and Steward JJ, is that s 68(1) of the Judiciary Act cannot selectively pick up part of the text of ss 78 and 79 of the CAR Act.

[184] In permitting the text of a State or Territory law to be picked up and applied as a Commonwealth law, s 68(1) of the Judiciary Act permits a court to alter aspects of the text that is picked up provided that the essential meaning of the law is not changed. A court can alter aspects of the text by reading references to State or Territory institutions or officers as references to corresponding Commonwealth institutions or officers. A court can also read down, sever, or partially disapply the text so that it remains valid when applied in federal jurisdiction. But, beyond that, any amendment to the text by a court would be a legislative, not a judicial, act.

[185] The severance of that part of s 79 of the CAR Act which empowers the Supreme Court to direct an inquiry would alter the essential meaning of the State law concerning an application for an inquiry. The law concerning an application for an inquiry would be rewritten with the effect that it would be a nonsense to describe the application, as s 78 does, as an application for an inquiry. A person convicted of a Commonwealth offence would apply for an inquiry but, in response, the Supreme Court could never direct an inquiry: it could only refer the case to the Court of Criminal Appeal, or do nothing. The severance of that part of s 79 would also create a new law with an operation that contradicts a purpose of the pre-severed law, which was to ensure that the Supreme Court had the same powers as the Executive to direct an inquiry or refer a case to the Court of Criminal Appeal.

[186] To permit severance of that part of s 79 of the CAR Act would go further than any decision of this Court has ever gone in permitting severance of part of a law. For s 68(1) of the Judiciary Act to permit severance of the Supreme Court's power to order an inquiry from the law concerning applications for an inquiry — so as to enable the operation of the remainder of s 79 in federal jurisdiction — would require "the Court … to turn aside from its judicial duties and, assuming the role of legislator, proceed to manufacture out of the material intended to compose the old enactment an entirely new enactment with a fresh policy and operation".[259]

[187] I gratefully adopt the background and facts set out in the reasons of Gordon and Steward JJ. For the reasons below, I would answer the three questions posed by the Attorney-General of the Commonwealth in the same way as their Honours and I would make the same orders as their Honours.

Sections 78 and 79 of the CAR Act and s 68 of the Judiciary Act

[188] Sections 78 and 79 of the CAR Act relevantly provide as follows:

> 78 *Applications to Supreme Court*
>
> (1) An application for an inquiry into a conviction or sentence may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person.
>
> (2) The registrar of the Criminal Division of the Supreme Court must cause a copy of any application made under this section to be given to the Minister.
>
> 79 *Consideration of applications*
>
> (1) After considering an application under section 78 or on its own motion —
>
> (a) the Supreme Court may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or
>
> (b) the Supreme Court may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912.
>
> (2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.
>
> (3) The Supreme Court may refuse to consider or otherwise deal with an application. Without limiting the foregoing, the Supreme Court may refuse to consider or otherwise deal with an application if —
>
> (a) it appears that the matter —
>
> (i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or
>
> (ii) has previously been dealt with under this Part or under the previous review provisions, or
>
> (iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or
>
> (iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where

259. *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386; [1931] ALR 37 (*Australian Railways Union*).

the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and

(b) the Supreme Court is not satisfied that there are special facts or special circumstances that justify the taking of further action.

…

(4) Proceedings under this section are not judicial proceedings. However, the Supreme Court may consider any written submissions made by the Crown with respect to an application.

(5) The registrar of the Criminal Division of the Supreme Court must report to the Minister as to any action taken by the Supreme Court under this section (including a refusal to consider or otherwise deal with an application).

[189] Section 68 of the Judiciary Act relevantly provides as follows:

"*Jurisdiction of State and Territory courts in criminal cases*

(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

(a) their summary conviction; and

(b) their examination and commitment for trial on indictment; and

(c) their trial and conviction on indictment; and

(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

(2) The several Courts of a State or Territory exercising jurisdiction with respect to:

(a) the summary conviction; or

(b) the examination and commitment for trial on indictment; or

(c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth."

Three questionable assumptions that weaken the authority of this decision

[190] A court decision is only authority for propositions it contains if those propositions have been the subject of argument. Even a matter that forms part of a decision's ratio decidendi "is not binding on later courts if the particular court merely assumed its correctness without argument".[260] Where a decision is based upon an assumption that has not been the subject of argument, a later court is not bound by that decision if it concludes that the assumption was not correct. In that respect, the authority of a decision is only as strong as the assumptions which support it.

260. *CSR Ltd v Eddy (as administrator representing the estate of Thompson (dec'd))* (2005) 226 CLR 1; 222 ALR 1; [2005] HCA 64 at [13]. See also *Spence v Queensland* (2019) 268 CLR 355; 367 ALR 587; [2019] HCA 15 at [294]; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; 372 ALR 555; [2019] HCA 29 at [28].

[191] Unfortunately, the foundations of this appeal were built upon three questionable and compounding assumptions, which significantly reduce the extent of this decision's authority. The falsification of any of these assumptions would prevent any aspect of s 79(1) of the CAR Act from being picked up and applied as a Commonwealth law.

The first assumption

[192] The first assumption was that s 79(1) of the CAR Act does not confer power on the Supreme Court at all, but rather empowers the Chief Justice or an authorised Judge of the Supreme Court (who can conveniently be described as the "designated officer") acting personally as *persona designata*[261]. This assumption means that the "jurisdiction" of the "Supreme Court"[262], being exercised by a designated officer under s 79(1), is not the jurisdiction of the Supreme Court at all.

[193] To the extent that s 79(1) can be picked up and applied as a Commonwealth law, the first assumption has two associated aspects. First, it means that neither the Chief Justice nor any Judge authorised by the Chief Justice can be compelled to be a designated officer.[263] Secondly, it arguably means that the designated officer cannot be under a duty to act in any circumstance[264] (or, if the designated officer were under such a duty, then somehow s 4AAA of the Crimes Act 1914 (Cth) could operate upon a law of a State to remove that effect[265]).

[194] This assumption — that the power under s 79(1) was a non-judicial power conferred *persona designata* — was questioned by this Court at the start of the oral hearing of this appeal. But none of the parties sought to depart from it and there was no argument as to its correctness. If the assumption were incorrect, then s 68(1) of the Judiciary Act could not, consistently with the separation of powers at the Commonwealth level, operate in federal jurisdiction to pick up and confer the non-judicial power under s 79 of the CAR Act,[266] unless that non-judicial power could be said to be merely incidental to judicial power.[267] Further, as the Attorney-General for the State of Victoria cogently submitted, if either the first or the second associated aspects to this assumption were incorrect then s 68(1) would be unable to pick up s 79 of the CAR Act because to do so would contravene the Constitution.[268]

The second assumption

[195] The first assumption was compounded by a further assumption. The parties assumed that s 68(1) of the Judiciary Act — requiring various laws of a State or Territory to "apply and be applied" to persons who are charged with

261. See ss 75 and 79(4) of the CAR Act.
262. Section 75 of the CAR Act.
263. *Grollo v Commissioner of the Australian Federal Police* (1995) 184 CLR 348 at 364–5; 131 ALR 225 at 234–5.
264. See s 79(3) of the CAR Act.
265. *O'Donoghue v Ireland* (2008) 234 CLR 599; 244 ALR 404; [2008] HCA 14 (*O'Donoghue*) at [15]–[16], [44]–[45]. See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 83; [1947] ALR 377.
266. See s 79(4) of the CAR Act. See also *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; 177 ALR 329; 37 ACSR 1; [2001] HCA 1 (*Edensor Nominees*) at [73]; *Solomons v District Court of New South Wales* (2002) 211 CLR 119; 192 ALR 217; [2002] HCA 47 (*Solomons*) at [24].
267. *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151; [1953] ALR 30; *R v Murphy* (1985) 158 CLR 596 at 614; 61 ALR 139 at 147.
268. *Putland v R* (2004) 218 CLR 174; 204 ALR 455; [2004] HCA 8 at [7].

offences against the laws of the Commonwealth — operated generally to provide power to officials including State or Territory judicial officers and State or Territory police officers. But just as s 79(1) is expressed to apply various State or Territory laws to *courts* rather than officials or other persons,[269] s 68(1) is expressed to apply various State or Territory laws to "persons who are charged with offences against the laws of the Commonwealth". Section 68(1) is not expressed to apply State or Territory laws to officials or other persons.

[196] It would be one thing, for example, for s 68(1) to pick up a State law to enable a court warrant to be issued for the arrest of a person charged with a Commonwealth offence. That would arguably be to apply a State law to the person charged with a Commonwealth offence. But it may be another thing for s 68(1) to pick up and apply to a Commonwealth offence those State laws concerning the extent and operation of a State police officer's powers of arrest without a court warrant.[270] That might, arguably, be a law addressed to the police officer, not to a person charged with a Commonwealth offence.

[197] So, too, it would be one thing for s 68(1) to pick up a State law empowering, or even requiring, the Court of Criminal Appeal to accept an application for referral by a person convicted of a Commonwealth offence, or their representative. That would arguably be to apply a State law to the person charged with a Commonwealth offence. The same point might even be made of a broad power of referral by the Executive: "it seeks to set in train, by a referral, the case to be heard and determined as if it were an appeal by the offender".[271] But it may be another thing for s 68(1) to pick up a State law that requires a designated officer to consider an application for referral in a particular way and subject to particular criteria and, applying those criteria, to decide whether to exercise the power of referral. That would arguably be a law addressed to the designated officer, not to the person charged with a Commonwealth offence. In all of these cases, it will depend on the characterisation of the law as a matter of substance as to whether the law is one that applies to persons who are charged with offences against the laws of the Commonwealth. But no submissions were made about this issue on this appeal. It was simply assumed that s 79 of the CAR Act was a law that applied to persons charged with offences against a law of the Commonwealth.

The third assumption

[198] The second assumption was compounded by a third assumption. The third assumption was that s 68(2) of the Judiciary Act is capable of picking up s 86 of the CAR Act, with the effect of conferring jurisdiction on the Court of Criminal Appeal to hear and determine an application referred to it by the designated officer under s 79(1)(b) of the CAR Act.

269. *Solomons* at [23], [25], [54], [57]; *Rana v Australian Federal Police* (2006) 44 AAR 151; [2006] FCAFC 169 at [30]; *Rizeq v Western Australia* (2017) 262 CLR 1; 344 ALR 421; 57 Fam LR 294; [2017] HCA 23 (*Rizeq*) at [82].

270. Section 99 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). Compare s 14A of the Australian Federal Police Act 1979 (Cth), read with s 4(1) (definitions of "protective service offence" and "protective service officer"); s 3W of the Crimes Act 1914 (Cth).

271. *Yasmin v Attorney-General (Cth)* (2015) 236 FCR 169; 330 ALR 570; [2015] FCAFC 145 at [11].

[199] There are two aspects to the third assumption. The first is that s 86 of the CAR Act involves the exercise of judicial power within the broad meaning of an "appeal" by requiring the Court of Criminal Appeal to hear and determine a case "in the same way as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act 1912". That assumption can readily be accepted, particularly in light of the history of the exercise of such a power,[272] and the breadth of the essential meaning of "appeal[]" in s 68(2) as explained later in these reasons.

[200] The second aspect to this assumption is more difficult. It assumes that the designated officer's discretion under s 79(1)(b) to refer a case to the Court of Criminal Appeal is an incident of the appellate power in s 86 of the CAR Act, and therefore that s 79(1)(b) is a law "respecting … the procedure for … the hearing and determination of appeals".[273] A referral might readily be seen to be an incident of appellate power where the referral to the Court of Criminal Appeal is made following an application to the Court of Criminal Appeal by the convicted person, or even by a law officer.[274] But the legislated *process* of applying to, and obtaining a decision from, a designated officer is arguably sufficiently separate from any later appeal to preclude it from being treated as a mere incident of appellate power.

[201] The designated officer, as the decision maker, is interposed between the statutory application by the convicted person and the referral of the case to the Court of Criminal Appeal. There is no obligation for the application to be considered by the designated officer.[275] But, unlike a broad power of referral that might be conferred upon a law officer, there may arguably be a duty upon the designated officer, subject to exceptions,[276] to make the referral if the designated officer chooses to consider the application[277] and has "a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case".[278] It is therefore arguable that the step taken in s 79(1)(b) is more than a mere incident of appellate jurisdiction or procedure for determining an appeal. But that was not the subject of any argument in this Court.

The first issue: What is the state or territory law that is sought to be applied?

Identifying the relevant "law"

[202] When difficult issues arise in federal jurisdiction the starting point will almost always be to identify the State or Territory law that is sought to be applied, either of its own force or by being picked up and applied as a Commonwealth law by a provision such as ss 79(1) and 68(1) of the Judiciary Act. In this context, a "law" is a statutory rule on a particular subject. A statutory enactment might contain rules on different subjects and, therefore, different "laws". But difficult questions may arise when determining where one rule ends and another begins.

272. *Mallard v R* (2005) 224 CLR 125; 222 ALR 236; [2005] HCA 68 (*Mallard v R*) at [2]–[7].
273. Section 68(1)(d) of the Judiciary Act 1903 (Cth).
274. See Criminal Appeal Act 1907 (7 Edw VII c 23).
275. Section 79(3) of the CAR Act.
276. Section 79(3B) of the CAR Act.
277. See s 79(3) and (3A) of the CAR Act.
278. Section 79(2) of the CAR Act. See *Ward v Williams* (1955) 92 CLR 496 at 505–8; [1955] ALR 308; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134–5, 138–9.

Further, the subject of the rule can be stated at a higher or lower level of generality. The higher the level of generality at which the rule is stated, the broader will be its scope.

[203] In some instances, the relevant law will be a large part of, or the entirety of, the statutory regime on a subject. In *Commonwealth v Mewett*,[279] one question was whether s 79(1) of the Judiciary Act picked up the limitation period contained in ss 14(1) and 63(1) of the Limitation Act 1969 (NSW) with the effect that upon expiry of the time period (including any extension of time under the Act) the causes of action of two of the respondents were extinguished. The initial period of limitation had expired before any action was commenced by the relevant respondents, but each had applied for an extension of time under the extension provisions in the Limitation Act, so the period could not yet be said to have expired.

[204] In the reasons of Gummow and Kirby JJ in *Mewett*, with which Brennan CJ generally agreed, it was explained that s 79 had to operate upon the whole of the Limitation Act regime, including the extension provisions. Since the "regime of extensions" was "an integral part of the legislative scheme", s 79 "could not operate to pick up some but not all of the otherwise applicable terms of the [Limitation Act], for to do so would be to give an altered meaning to the State legislation".[280] That reasoning was later applied by five members of this Court.[281]

The relevant law is Div 3 of Pt 7 of the CAR Act

[205] Yet another assumption upon which this appeal was conducted was that the relevant law to apply in federal jurisdiction was the provisions of Div 3 of Pt 7 of the CAR Act in respect of an application for an inquiry into a conviction or sentence, namely ss 78 and 79 of the CAR Act. That law must necessarily include the provisions concerning an inquiry under s 79(1)(a)[282] and the provisions concerning a referral to the Court of Criminal Appeal under s 79(1)(b).[283]

[206] On one view, however, it is artificial to treat ss 78 and 79 in isolation from the rest of the scheme of review of convictions and sentences of which they form part. That view would treat the law as one concerned with review of convictions and sentences and comprised by all the provisions of Pt 7 of the CAR Act. The careful analysis by Gordon and Steward JJ of the interrelationship of many of these provisions provides support for this broader view of the law that would need to be picked up in its entirety by s 68(1), subject to the severance of any of the provisions of Pt 7 which could not be picked up in federal jurisdiction.

279. (1997) 191 CLR 471; 146 ALR 299 (*Mewett*).
280. At CLR 556; ALR 352.
281. *Solomons* at [24].
282. Div 4 of Pt 7 of the CAR Act.
283. Div 5 of Pt 7 of the CAR Act.

The second issue: Can federal jurisdiction be conferred upon the state or territory court?

The nature of federal jurisdiction and the need for its conferral

[207] Jurisdiction is "the authority which a court has to decide the range of matters that can be litigated before it".[284] Following Federation, State courts had concurrent State jurisdiction for some matters that fell within federal jurisdiction, such as matters between residents of different States.[285] But where a matter concerned exclusive federal jurisdiction then, by definition, that jurisdiction (authority) required federal authorisation. Prior to the enactment of s 39 of the Judiciary Act in 1903, the federal authority for State courts to decide matters under Commonwealth laws was conferred by covering cl 5 to the Constitution, which bound State courts and State judges to use their existing powers to apply Commonwealth laws.[286]

[208] Immediately after Federation, a State court dealing with a matter arising under a Commonwealth law would therefore have exercised its powers with federal authority. A State court might have been treated as a component part of the federal judicature, but it was not a federal court. The Constitution recognises "in the most pronounced and unequivocal way" that it remains a State court even where the adjudication of a federal matter "utilize[s] the judicial services of State Courts".[287]

[209] Section 39(1) of the Judiciary Act, enacted pursuant to s 77(ii) of the Constitution, removed the authority of State courts to adjudicate upon federal matters. Then, pursuant to s 77(iii) of the Constitution, ss 39(2) and 68(2) invested new federal authority in State courts with conditions regulating that federal authority. The new federal authority took State courts as they existed[288]: the conferral was of "additional judicial authority upon a Court fully established by or under another legislature".[289] The new federal authority also left unaffected many existing State laws that could be the subject of adjudication with the new authority conferred: there was a single composite body of law within the federal jurisdiction that "remains the same, but the *source* [of authority to adjudicate upon those laws] is different".[290]

The conferral of federal jurisdiction by s 68(2) of the Judiciary Act

[210] Since s 68(2) of the Judiciary Act confers federal jurisdiction upon the courts of a State or Territory, any consideration of the operation of s 68 must begin with the federal jurisdiction conferred by s 68(2), before turning to the

284. *Harris v Caladine* (1991) 172 CLR 84 at 136; 99 ALR 193 at 229; 14 Fam LR 593 at 625. See also *Edensor Nominees* at [64]; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; 227 ALR 425; 45 MVR 288; [2006] HCA 27 at [5].

285. *Rizeq* at [136], [138].

286. *Felton v Mulligan* (1971) 124 CLR 367 at 394; [1972] ALR 33. See also *Edensor Nominees* at [57]; *Rizeq* at [6].

287. *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437 at 452; 22 ALR 413. See also *Peacock v Newtown, Marrickville & General Co-operative Building Society (No 4) Ltd* (1943) 67 CLR 25 at 37; [1943] ALR 246 (*Peacock*).

288. See *Peacock* at CLR 37; *Russell v Russell* (1976) 134 CLR 495 at 517; 9 ALR 103 at 120; 1 Fam LR 11,133 at 11,148; *Brown v R* (1986) 160 CLR 171 at 218–19; 64 ALR 161 at 194 (*Brown*). See also *Mewett* at CLR 493; ALR 302.

289. *Le Mesurier v Connor* (1929) 42 CLR 481 at 496; [1930] ALR 41.

290. *Momcilovic v R* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34 at [100] (emphasis in original), quoting *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed, 2002, p 90. See also *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed, 2016, p 135.

State or Territory laws within that federal jurisdiction that are picked up and applied as Commonwealth laws by s 68(1).

[211] The general policy of s 68(2) 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 to avoid the establishment of two independent systems of criminal justice".[291] In implementing that policy, the federal jurisdiction conferred by s 68(2) in relation to Commonwealth criminal matters is in addition to the federal jurisdiction conferred by s 39(2).[292]

[212] In cases in which both provisions have been potentially applicable, this Court has not previously resolved which of them contains the relevant conferral of jurisdiction — or whether it is contained in both.[293] On some occasions, this Court has focused upon the jurisdiction conferred by s 39(2) on the premise that s 68(2) had not relevantly detracted from the conferral of jurisdiction in s 39(2).[294] On other occasions, members of this Court have focused upon s 68(2), as the more specific of the two provisions,[295] or because it may be "more extensive" even though s 39(2) "also confers upon State courts federal jurisdiction in criminal matters".[296]

[213] The focus in this case was upon s 68(2) simply because it was the relevantly broader provision. Section 68(2) was extended in 1932[297] in response to the decision of this Court in *Seaegg v R*,[298] which had denied that State courts had jurisdiction under either s 39(2) or s 68(2) to hear appeals from convictions for Commonwealth offences.[299] It suffices to focus upon s 68(2) for that reason. Importantly, in the present case it was not suggested by counsel for any party, or by the amici curiae, that s 68(2) "displaces" s 39(2), at least if that expression is taken to mean that s 68(2) covers the field in the areas of its subject matter generally so that s 39(2) would be incapable of conferring jurisdiction over a matter that falls within the subject matter but outside the scope of s 68(2). That would be a most unusual interpretation of a jurisdictional provision.[300] It may also be an interpretation that is contrary to the background and purpose of s 39(2), especially in light of the existence, until 2006, of s 39(2)(d) of the Judiciary Act.[301] And it may also be an interpretation that is inconsistent with the approach unanimously taken by this Court regarding the concurrent operation of ss 68 and 79(1) of the Judiciary Act.[302] In any event, consistently with the caution

291. *Williams v R (No 2)* (1934) 50 CLR 551 at 560; [1934] ALR 314 (*Williams (No 2)*).
292. Section 68(11) of the Judiciary Act 1903 (Cth), inserted by s 14 of the Judiciary Amendment Act 1976 (Cth).
293. See Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed, 2020, p 158.
294. See, for instance, *R v Bull* (1974) 131 CLR 203 at 258–9, 272–3, 275; 3 ALR 171 at 214–15, 272–3, 227. See also at CLR 242; ALR 201.
295. See, for instance, *Brown* at CLR 197; ALR 178. See also *Solomons* at [16]; *R v Gee* (2003) 212 CLR 230; 196 ALR 282; [2003] HCA 12 (*Gee*) at [39].
296. *Brown* at CLR 217; ALR 193.
297. Section 2 of the Judiciary Act 1932 (Cth).
298. (1932) 48 CLR 251.
299. See *Peel v R* (1971) 125 CLR 447 at 466; [1972] ALR 231 (*Peel*).
300. *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; 125 ALR 1 at 10; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255; 165 ALR 373; [1999] HCA 48 at [11].
301. Repealed by Judiciary Legislation Amendment Act 2006 (Cth) in order to *expand* the operation of s 39(2). See Australia, House of Representatives, *Parliamentary Debates*, Hansard, 28 November 2006, p 157.
302. *Cheatle v R* (1993) 177 CLR 541 at 563; 116 ALR 1 at 14 (*Cheatle*), fn 11.

exercised by this Court in previous cases,[303] it is neither necessary nor appropriate to decide such a large question without argument.

[214] A limitation upon s 68(2) that is necessary to address on this appeal is the reference in that provision to "appeals". The context and background to s 68(2) suggest that the essential meaning of an appeal includes a judicial proceeding. The long title of the Judiciary Act is "An Act to make provision for the Exercise of the Judicial Power of the Commonwealth". As the amici curiae submitted, the provisions of the Judiciary Act on enactment were all concerned with judicial appeals from judicial proceedings.[304] The inclusive definition of "appeal" in s 2 is likewise confined to judicial proceedings, extending to applications for new trials and applications for judicial review related to "the proceedings decision or jurisdiction of any *Court or Judge*" (emphasis added). The essential meaning of "appeal", established at its intended level of "full generality" so that it can be applied to new developments such as case stated procedures,[305] thus requires at least a judicial proceeding involving some form of challenge to a decision.

Section 68(2) of the Judiciary Act confers federal jurisdiction on a state or territory court with respect to Div 3 of Pt 7 of the CAR Act

[215] In assessing whether s 68(2) confers federal jurisdiction on the Supreme Court in relation to the relevant subject matter in Div 3 of Pt 7 of the CAR Act, it is useful to conceive of s 79(1)(a) and (1)(b) as "gateways" (to adopt the metaphor used by Basten JA in the New South Wales Court of Appeal[306]) to the jurisdiction that is conferred by ss 86 and 88 of the CAR Act.

[216] Section 86 confers jurisdiction on the Court of Criminal Appeal following: (i) a referral under s 77(1)(b) by the Attorney-General in response to a petition for the exercise of the Governor's pardoning power; or (ii) a referral by the designated officer under s 79(1)(b). It confers jurisdiction on the Court of Criminal Appeal to exercise its existing powers to deal with the case referred in the same way as if the convicted person had appealed against the conviction or sentence. That exercise of judicial power involves considering all relevant questions of fact and law in assessing the ultimate question of whether a miscarriage of justice has occurred. The ultimate question is "the same question as would exercise the mind of the Executive were it to deal with a petition rather than refer it to the Court of Criminal Appeal for determination".[307] But the proceeding remains an exercise of judicial power and a species of appeal within the jurisdiction conferred by s 68(2) concerning the hearing and determination of appeals arising out of a conviction on indictment. It is capable of being the subject of federal jurisdiction.

[217] The same is true of s 88. Under s 88, following a referral to the Court of Criminal Appeal by the judicial officer who conducted the inquiry under s 79(1)(a), the Court of Criminal Appeal is to deal with the matter so referred in the same way as if an application for the quashing of the conviction had been made to the Court by the convicted person. The Court is to consider whether to

303. *Gee* at [66].
304. Sections 20, 21, 23, 27, 34, 35, 37, 39, 40 and 77 of the Judiciary Act 1903 (Cth).
305. *Gee* at [13].
306. *Huynh v Attorney-General (NSW)* (2021) 107 NSWLR 75; 396 ALR 422; [2021] NSWCA 297 (*Huynh (NSWCA)*) at [83].
307. *Mallard v R* at [13].

exercise its power to quash the conviction,[308] or to review the sentence imposed.[309] The process for the exercise of those powers, provided in s 85, is different from a conventional appeal, in that the only material to be considered without leave of the Court is the report by the judicial officer, the report by the designated officer and any submissions by the Crown or by the convicted person. Nevertheless, the matter remains a judicial proceeding and an "appeal" within s 68(2) of the Judiciary Act, falling within the extended definition in s 2 as an application for review of the decision of any court.

[218] Section 88 of the CAR Act is therefore capable of being the subject of a conferral of federal jurisdiction by s 68(2) of the Judiciary Act. Section 85 of the CAR Act regulates the jurisdiction of the Court of Criminal Appeal by providing for a particular procedure for the process of consideration by the Court of Criminal Appeal. Section 85 of the CAR Act concerns "the procedure for … the hearing and determination of appeals" and thus, for reasons explained below, if the text of s 79 were to be picked up in its entirety, then the text of s 85 must also be picked up by s 68(1) of the Judiciary Act.

The third issue: Can ss 78 and 79 of the CAR Act operate of their own force in federal jurisdiction?

Limits on the power of state parliaments to legislate within federal jurisdiction

[219] Although the new federal authority conferred by provisions such as ss 39(2) and 68(2) of the Judiciary Act took State courts as it found them and generally authorised the adjudication of disputes arising from existing State laws, the conditions upon, and regulation of, that authority over federal subject matters is exclusively a matter for the Commonwealth Parliament. State laws cannot "govern" or "regulate" the exercise of federal jurisdiction over those subject matters any more than they can confer that federal jurisdiction.[310]

[220] There is, unfortunately, significant difficulty in identifying whether a State law is one that governs or regulates the exercise of federal jurisdiction, or whether it is one that can apply of its own force in federal jurisdiction. In *McKain v R W Miller & Co (South Australia) Pty Ltd*,[311] Mason CJ said that "rules which are directed to governing or regulating the mode or conduct of court proceedings" are "the essence of what is procedural". Subsequently, five members of this Court referred to this statement and said that "'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and all other provisions or rules are to be classified as substantive".[312]

[221] Those laws that are said to govern or regulate the exercise of federal jurisdiction are plainly, at their heart, procedural. There is also no difficulty in describing as "procedural laws" those described in s 79(1) of the Judiciary Act as "laws relating to procedure, evidence, and the competency of witnesses". But the distinction between procedural and substantive laws is "sometimes doubtful or

308. Section 82(2)(a) of the CAR Act.
309. Section 82(2)(b) of the CAR Act.
310. *Rizeq* at [103]; *Masson v Parsons* (2019) 266 CLR 554; 368 ALR 583; 59 Fam LR 503; [2019] HCA 21 (*Masson*) at [1].
311. (1991) 174 CLR 1 at 26–7; 104 ALR 257 at 267 (*McKain*). See also *Stevens v Head* (1993) 176 CLR 433 at 445; 112 ALR 7 at 14; 17 MVR 1 at 7.
312. *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36 (*John Pfeiffer*) at [99].

even artificial".[313] And it may have been an overstatement by members of this Court to describe *all* laws that govern or regulate the exercise of federal jurisdiction as procedural.

[222] In *Rizeq*,[314] this Court did not explain how to identify a law that governs or regulates the exercise of federal jurisdiction. As Professor Gummow has observed, that case created a "fresh area for disputed characterisation", arising from the purported distinction drawn between those laws that govern or regulate the exercise of federal jurisdiction and those that do not.[315] The joint judgment in *Rizeq* did contrast laws that regulate the manner of exercise of federal jurisdiction with laws that are determinative of the rights and duties of persons and which operate of their own force.[316] But that distinction is not exhaustive, because there will be some laws that fall into neither category. And, as Leeming JA observed in the Court of Appeal in this case, there will also be some laws that could fall into either category, depending upon the circumstances of their application.[317]

[223] At the margins there will, therefore, be very difficult questions concerning whether a State law is one that purports to govern or regulate the exercise of federal jurisdiction, such that the text of the State law could only operate if it is picked up by a Commonwealth law (such as the Judiciary Act) and applied as a Commonwealth law.[318]

[224] Laws concerning the powers of a court are an example of a category of laws which do not fall neatly within this dichotomy of laws which govern or regulate federal jurisdiction and those which do not. On the one hand, there are laws concerning the powers of a Supreme Court which might not govern or regulate the authority of the court, such as those with respect to the power, originally equitable, to grant a declaration of right (being a "restatement of a substantive right"[319]). On the other hand, there are laws concerning powers, such as the inherent powers of the Supreme Court of New South Wales as a superior court of record, which do regulate the authority of the court[320]: "powers to punish contempt … to protect the subject matter of the litigation, to correct accidental slips and omissions in court records, including in orders of the court, and to stay proceedings in order to prevent the abuse of the processes of the court".[321]

Two obstacles to s 79 of the CAR Act operating of its own force in federal jurisdiction

[225] In principle, it could have been possible for s 79 of the CAR Act to operate of its own force to federal offenders over whom the Court of Criminal Appeal exercises jurisdiction under s 86 or s 88 of the CAR Act. For instance,

313. *McKain* at CLR 40; ALR 277, quoted in *John Pfeiffer* at [46], [97].
314. (2017) 262 CLR 1; 344 ALR 421; 57 Fam LR 294; [2017] HCA 23.
315. Gummow, "The Law Applicable in Federal Jurisdiction" in *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines*, Griffiths and Stellios (Eds), 2020, p 104, at 117.
316. At [105], as explained in *Masson* at [30].
317. *Huynh (NSWCA)* at [199], [202], quoting *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; 374 ALR 627; [2019] HCA 45 at [229].
318. *Masson* at [43].
319. Zakrzewski, *Remedies Reclassified*, 2005, p 158.
320. Continued by s 22 of the Supreme Court Act 1970 (NSW). See *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7; [1972–73] ALR 1046. See also at CLR 5, 9, 10; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1; 325 ALR 168; 109 ACSR 349; [2015] HCA 36 at [37].
321. *NH v Director of Public Prosecutions* (2016) 260 CLR 546; 334 ALR 191; [2016] HCA 33 at [69].

s 79 would have been within State legislative power if it were limited to permitting a judicial officer to: (i) inquire into, and provide a report to the Governor in respect of, a State conviction or sentence; and (ii) inquire into, and provide a report to the Governor-General in respect of, a federal conviction or sentence. A State Parliament has power to confer such a non-judicial, executive power on State judges, acting *persona designata*, provided that the power is not one that purports to govern or regulate the way federal jurisdiction is exercised[322].

[226] In dissent in the New South Wales Court of Appeal, Leeming JA saw s 79 as operating in this manner. His Honour's view was that s 79: (i) was a law that applied to State judges as *persona designata*; (ii) was intended to apply to Commonwealth offences as well as to State offences; and (iii) was not a law that governed or regulated federal jurisdiction. On these premises, the conclusion of Leeming JA that Div 3 operated of its own force was incontrovertibly correct. But, with great respect and recognising that the ill-defined notion of governing or regulating federal jurisdiction has no clear boundaries, steps (ii) and (iii) cannot be accepted.

Section 79 of the CAR Act does not purport to apply to Commonwealth offences

[227] Although the matter is finely balanced, the better interpretation is that the Parliament of New South Wales impliedly confined Div 3 of Pt 7 of the CAR Act to New South Wales offences, including offences under the common law of Australia as modified from time to time in New South Wales.[323] It is true that Div 3 makes no express mention of the jurisdiction of the laws under which offenders were convicted. It is also true that the definition of "sentence", relevant to "an inquiry into a conviction or sentence" in s 78, includes a sentence or order "made by *any* court following a conviction".[324] But the implication throughout Pt 7 is that a "conviction" and a "sentence" (the inclusive definition of which is based on a "conviction") will be for a State offence and (necessarily) that "any court" means any State court. Three matters contribute to this implication.

[228] First, the "hinge" or central subject matter upon which Div 3 of Pt 7 operates, at the appropriate level of generality, is a "conviction or sentence". Subject to indications to the contrary, s 12(1)(b) of the Interpretation Act 1987 (NSW) recognises common expectations that, in a New South Wales Act, the central subject matter of a "conviction or sentence" will be taken to refer to a conviction or sentence "in and of" New South Wales[325].

[229] Secondly, an inquiry by a judicial officer into a conviction or sentence can be ordered by the Governor under Div 2[326] or by the Supreme Court under Div 3.[327] The scope of a "conviction or sentence" must be the same in each case. And the "conviction or sentence" with which the Governor is concerned in Div 2 can only be a conviction or sentence under State law. That is because, as s 76

322. See *O'Donoghue*.
323. See *John Pfeiffer* at [2]. Compare *D151 v New South Wales Crime Commission* (2017) 94 NSWLR 738; 345 ALR 484; [2017] NSWCA 143.
324. Section 74(1) of the CAR Act, definition of "sentence" (emphasis added) read with definition of "sentence" in s 3(1).
325. *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956; 405 ALR 402; [2022] HCA 33 at [61]–[63].
326. Section 77(1)(a) of the CAR Act.
327. Section 79(1)(a) of the CAR Act.

contemplates, a consequence of the inquiry could be a pardon by the Governor, and the State Governor cannot pardon a person who has been convicted of a Commonwealth offence.

[230] Thirdly, the inclusive definition of "conviction" in s 74(1) focuses only on an extension within State law to verdicts under the particular State mental health legislation.

The parliament of New South Wales would not have had power to extend s 79(1)(b) to Commonwealth offences

[231] Another reason that s 79 of the CAR Act cannot operate of its own force, at least in part, is that, on the assumptions upon which this appeal was conducted, s 79(1)(b) is a law that governs or regulates federal jurisdiction. As explained, a State or Territory Parliament has no power to pass a law that governs or regulates federal jurisdiction.

[232] On the first and third assumptions upon which this appeal was conducted, the exercise of power under s 79(1)(b) by a designated officer of the Supreme Court acting *persona designata* is an exercise of executive power which is incidental to the jurisdiction of the Court of Criminal Appeal. This executive power gateway to the jurisdiction of the Court of Criminal Appeal operates as a pre-condition upon any federal jurisdiction of the Court of Criminal Appeal. If the terms of the CAR Act purported to apply s 79(1)(b) to Commonwealth offences, the consequence would therefore be that, to that extent, s 79(1)(b) would be an impermissible attempt to govern or regulate the federal jurisdiction of the Court of Criminal Appeal.

The fourth issue: Can s 68(1) of the Judiciary Act pick up the text of ss 78 and 79 of the CAR Act?

Picking up the text of a state or territory law

[233] Since those State or Territory laws that purport to govern or regulate federal jurisdiction are unable to operate in federal jurisdiction of their own force, and since some State or Territory laws do not purport to operate in federal jurisdiction, there will be some laws concerning subject matters of federal jurisdiction which do not apply uniformly in State (or Territory) and federal jurisdiction. Provisions such as ss 68(1) and 79(1) of the Judiciary Act have been said to fill the "gap in the law governing the exercise of federal jurisdiction by picking up State laws which regulate the exercise of State jurisdiction"[328] and "operat[ing] only" to that extent.[329] But the metaphor of "filling the gap" is not entirely apt. A better description of the purpose of these provisions is that they seek to ensure, as far as possible, that the laws in federal jurisdiction are the same as those in State or Territory jurisdiction in respect of the relevant subject matters.

[234] The differences between State or Territory laws that operate in federal jurisdiction and those that operate outside federal jurisdiction are not confined to laws that govern or regulate a court's jurisdiction. In the field of criminal justice, for example, State or Territory laws might concern processes that are anterior to the exercise of a court's jurisdiction, such as arrest and custody of offenders by State or Territory police officers. Or State or Territory laws might concern processes that are posterior to the exercise of a court's jurisdiction, such as whether a pardon should be granted for an offender.

328. *Masson* at [1].
329. *Masson* at [43].

[235] Section 68(1) is not merely concerned with the judicial processes governing or regulating the jurisdiction of a court. It is also concerned with anterior and posterior processes. Just as the purpose of s 68(2) in conferring federal jurisdiction with respect to a particular subject matter — criminal justice — on State or Territory courts is to avoid the creation of two substantively different jurisdictions of criminal justice, so too the purpose of s 68(1) is to avoid the creation of substantively different legal rules for persons charged with Commonwealth offences. Section 68(1) seeks to achieve this alignment in respect of: (i) those rules governing or regulating the administration of criminal justice that apply to persons charged with State or Territory offences; and (ii) those rules concerning the anterior or posterior processes of criminal justice that apply to persons charged with State or Territory offences.

[236] The technique used by s 79(1) to align federal and State (or Territory) laws in these areas takes the texts of the "laws of each State or Territory" and picks them up to be applied as Commonwealth laws "in all cases to which [those laws] are applicable". Similarly, s 68(1) takes the text of the "laws of a State or Territory" and picks up and applies those laws "so far as they are applicable". Both provisions raise issues in respect of the meaning of "law" in this context, and how far a court can go in picking up the text of a law, and making it "applicable". Neither s 79(1) nor s 68(1) purports to grant courts the creative latitude to make the text of a law "applicable" by, in effect, creating a new law. That would cease to be an exercise of judicial power and would amount to the exercise of legislative power.

The judicial power to make the law "applicable"

[237] In order to "apply" the State or Territory law, as s 68(1) requires, the meaning and scope of application of the law's text can be extended in a limited way, without changing its essential meaning, from State or Territory circumstances to federal circumstances. For instance, a State law applicable to the Attorney-General or Director of Public Prosecutions of a State can be extended to apply to the Attorney-General of the Commonwealth or the Commonwealth Director of Public Prosecutions.[330] Or, a State law that applies to the Crown in right of the State of New South Wales can be extended to apply to the Crown in right of the Commonwealth.[331]

[238] The meaning and scope of application of the text of the law can also be narrowed in applying the law to federal circumstances but without changing its essential meaning. This process of picking up the text of a State or Territory law and converting it into a Commonwealth law is not an exercise of interpretation of either a State or Territory law or a Commonwealth law, so it does not involve the application of any State (or Territory) or Commonwealth interpretation provisions. But three ways by which a court can change the non-essential meaning or application of a State or Territory law in the process of picking up that law correspond with the three techniques under s 15A of the Acts Interpretation Act 1901 (Cth), and its State and Territory equivalents: (i) the law can be "read down" to give it a more limited interpretation; (ii) independent and separate words can be severed from the text of the law; or (iii) the scope of the

330. *Williams (No 2)* at CLR 557–8, 561–2; *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 125, 126–7; 66 ALR 593 at 595, 596–7 (*Rohde*).
331. *Peel* at CLR 457, 460, 469.

terms of the law can be limited by "partial disapplication" of the law.[332] These techniques mark the boundary beyond which a court will move from adjudicating to legislating.

[239] The relevant technique relied upon by the Attorney-General of the Commonwealth in this case was severance of s 79(1)(a) from s 79(1)(b) of the CAR Act. In *Harrington v Lowe*,[333] six members of this Court described the process of severance as "textual surgery by operation of the 'blue pencil' rule so that the valid portion could operate independently of the invalid portion, or, failing that, by treating the text as modified". But, their Honours emphasised, severance is only possible where:

> "there is effected no change to the substantial purpose and effect of the impugned provision, and, in particular, there is not left substantially a different law as to the subject-matter dealt with from what it would otherwise be".

[240] As explained above, in *Mewett* this Court rejected the possibility of the severance of part of the single law concerning limitation of actions. In *Mewett*, the limitation of actions scheme was too closely interrelated and interdependent to be the subject of severance. Another example where the possibility of severance was rejected is *Solomons*.[334] The issue in that case was whether s 2 of the Costs in Criminal Cases Act 1967 (NSW) could be picked up and applied as a Commonwealth law by s 68 or s 79 of the Judiciary Act. Section 2 created a power for a court to grant a costs certificate, including to a defendant who had been acquitted of an offence. Section 4 provided that a person who had been granted a costs certificate could apply to the Under Secretary of the Attorney-General's Department for payment from the Consolidated Revenue Fund of the costs to which the costs certificate related. A decision as to whether the making of a payment was justified was to be made by the Treasurer. It was held that s 4 could not be picked up and made "applicable" in federal jurisdiction by the "transmutation" of an obligation for payment by a State official for a State offence to an obligation for payment by a State official for a Commonwealth offence.[335] And given that s 2 was part of the same law as s 4, the joint judgment posed the question: "what would be the utility of the certificate, unless it might found an application under s 4 …?"[336]

[241] In contrast with cases such as *Mewett* and *Solomons*, however, two decisions of this Court that were discussed by Basten JA in the Court of Appeal can be seen as instances that fall on the other side of the divide. Those cases illustrate the scope of legitimate severance in relation to a State law concerning juries that, following the severance of an invalid part, could be picked up and applied by s 68(1) of the Judiciary Act.[337]

[242] The first case permitting severance is *Brown*[338]. In South Australia, s 68(2) of the Judiciary Act had vested federal jurisdiction in State Supreme and District Criminal Courts for the trial on indictment of offences against laws of the

332. *Clubb v Edwards* (2019) 267 CLR 171; 366 ALR 1; [2019] HCA 11 at [415]–[425]; *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1; 95 ALJR 490; 391 ALR 188; [2021] HCA 18 at [89]; *Thoms v Commonwealth* (2022) 96 ALJR 635; 401 ALR 529; 178 ALD 514; [2022] HCA 20 at [75].
333. (1996) 190 CLR 311 at 328; 136 ALR 42 at 52; 20 Fam LR 145 at 155.
334. (2002) 211 CLR 119; 192 ALR 217; [2002] HCA 47.
335. *Solomons* at [27].
336. *Solomons* at [26].
337. *Huynh (NSWCA)* at [96]–[97].
338. (1986) 160 CLR 171; 64 ALR 161.

Commonwealth.[339] It appears to have been assumed in *Brown* that prior to 1984 the text of the provisions of the Juries Act 1927 (SA) that regulated such trials would be picked up by s 68(1) of the Judiciary Act.

[243] In 1984, a new s 7 of the Juries Act came into force. That provision added a discrete and separate component to the regulation of trials on indictment. It gave an accused person, in certain circumstances, a power to elect for a trial by judge alone. A majority of this Court held that s 7 would have been inconsistent with s 80 of the Constitution and therefore invalid if it had purported to apply to Commonwealth offences. Section 7 was not "applicable" to those offences.[340] The effect, as Dawson J in the majority described it, was to "disregard s 7 in the application of the Juries Act" because the remaining provisions of the Juries Act could "operate independently of s 7 which introduced waiver of trial by jury by election only in 1984".[341]

[244] The second case is *Cheatle*.[342] In that case, this Court unanimously held that s 80 of the Constitution precluded s 57 of the Juries Act from validly authorising a conviction by the purported return of a majority verdict of guilty in a trial on indictment for a Commonwealth offence. This Court unanimously held that s 57 could be severed from the remainder of the Juries Act and that the remaining provisions could otherwise be applied with the meaning unchanged.[343] As a result, s 57 was severed from the remainder of the text of the Juries Act, and the remainder of that text was picked up and applied to Commonwealth offences.

[245] In *Re Application of Pearson*,[344] Wood CJ at CL relied upon the decisions in *Brown* and *Cheatle* to conclude that s 68(1) could pick up selective parts of ss 474D(1) and 474E(1) of the Crimes Act 1900 (NSW), provisions which were the predecessors to ss 78(1) and 79(1) of the CAR Act. This reasoning is accurate in so far as those cases support s 68(1) of the Judiciary Act picking up the text of a law with an independent and discrete part severed from it. But Wood CJ at CL's reasoning was not so constrained. His Honour relied upon *Brown* and *Cheatle* to pick up part of the text of a law by severing an interrelated and dependent part, in effect creating a substantially new law. In my respectful view, the New South Wales Court of Appeal was correct to conclude that this approach is neither permissible nor legitimate.[345]

Section 79(1)(a) could not be picked up by s 68(1)

[246] The first problem with picking up the text of s 79 to be applied as a Commonwealth law is that s 79(1)(a) is not even within the scope of the jurisdiction conferred by s 68(2)[346]. Section 68(2) could arguably provide authority for the exercise of an executive power that could be characterised as one that was with respect to the hearing and determination of appeals by a State or Territory court[347]. But s 68(2) cannot provide authority for the exercise of the independent executive power by a designated officer under s 79(1)(a). On the first assumption upon which this appeal was conducted, a direction by a designated

339. At CLR 205; ALR 184.
340. *Brown* at CLR 200, 206; ALR 180, 184.
341. *Brown* at CLR 218; ALR 193.
342. (1993) 177 CLR 541; 116 ALR 1.
343. At CLR 562–3; ALR 14.
344. (1999) 46 NSWLR 148; 162 ALR 248; [1999] NSWSC 143 at [76]–[81].
345. See *Huynh (NSWCA)* at [97].
346. See above at [214].
347. Compare *Solomons* at [45].

officer under s 79(1)(a) of the CAR Act confers executive power for an inquiry upon a judicial officer as *persona designata*. The power to order an inquiry under s 79(1)(a) is independent of any appeal. It has an inquiry as the immediate consequence. Indeed, it need not even result in a referral to the Court of Criminal Appeal.

[247] In any event, the text of s 79(1)(a) of the CAR Act cannot be picked up and applied as a law of the Commonwealth by s 68(1) of the Judiciary Act. Contrary to Mr Huynh's submission, s 68(1) is not capable of picking up the text of s 79(1)(a). There is a broad scope to the laws encompassed by the reference in s 68(1)(d) to "the procedure for … the hearing and determination of appeals"[348]. But one significant limit to the breadth of that scope is that an "appeal" has an essential meaning which excludes a non-judicial proceeding, as discussed above in reference to s 68(2) and as reflected in the 1932 extension of s 68.

Section 79(1)(b) could be picked up by s 68(1) if s 79(1)(a) were severed

[248] As to s 79(1)(b), the combination of the three assumptions upon which this appeal was conducted has the effect that if s 79(1)(a) were severed, the remainder of s 79 would fall within s 68(1)(d) respecting the procedure for the hearing and determination of an appeal. Section 79(1)(b) would theoretically be picked up and applied to a person charged with a Commonwealth offence by empowering a designated officer, acting *persona designata*, to refer a case to the Court of Criminal Appeal as an incident of the appellate power in s 86 of the CAR Act.

Section 79(1)(a) cannot be severed

[249] The severance that was recognised in *Brown*[349] and *Cheatle*[350] was in the context of judge-alone trial provisions and majority verdict provisions that had been separately added to a law concerning the operation of juries. Unlike the law in *Solomons*, the South Australian law considered in *Brown* and *Cheatle* had previously operated, and could continue to operate in the same manner, without the judge-alone trial provisions and majority verdict provisions.

[250] Section 79(1)(a) of the CAR Act cannot be seen as independent of the remainder of ss 78 and 79 in a manner analogous to the particular judge-alone trial provisions and majority verdict provisions in *Brown* and *Cheatle*. Those decisions were based on a characterisation of the law in question as one concerning the "jurisdiction in respect of trials on indictment".[351] The two streams of jurisdiction — trial by jury and trial by judge alone — and the two modes of verdict that could be taken were severable from each other. By contrast, apart from acts of the Court's own motion, s 79(1)(a) and (b) both depend upon an application by the convicted person under s 78 for an inquiry into conviction or sentence. The invalidity in federal jurisdiction of an inquiry means that the application under s 78 would be for a remedy in federal jurisdiction that does not exist.

348. See *Williams (No 2)*; *Peel*; *Rohde*; *Gee*.
349. (1986) 160 CLR 171; 64 ALR 161.
350. (1993) 177 CLR 541; 116 ALR 1.
351. *Cheatle* at CLR 563; ALR 14.

[251] A closer analogy to the issue of severance of s 79(1)(a) of the CAR Act is the decision of this Court in *Australian Railways Union*.[352] In that case, this Court held that it was not possible to sever an invalid provision (which provided for a particular application) from a related provision (which provided for a consequence of that application). Section 34 of the Commonwealth Conciliation and Arbitration Act 1904 (Cth) provided for the appointment of Conciliation Committees by the Governor-General upon application. Section 33 had the effect that the result of a successful application would be to transfer the authority of the Court of Conciliation and Arbitration to the Conciliation Committee. A majority of the Court held that s 34 was invalid and that it could not be severed from s 33. As Rich, Starke and Dixon JJ observed, the terms of s 33 were "expressed to depend upon [s 34(2)]".[353]

[252] There is, however, an even more fundamental reason that prevents s 79(1)(a) from being severed from s 79 in the process of picking up the law as a Commonwealth law under s 68(1) of the Judiciary Act. Such severance would defeat the purpose of the legislative amendments that created this scheme. That purpose was to ensure that the "Supreme Court" would have the same powers as the Executive.

[253] From 1912, the Minister of Justice had power "on the consideration of any petition for the exercise of the [Governor's] pardoning power" to refer the whole case to the Court of Criminal Appeal to be heard and determined by the court as in the case of an appeal by the convicted person.[354] In 1993, the referral power of the Minister of Justice became part of the Crimes Act 1900 (NSW).[355] That power is now reflected in the power of the Attorney-General under s 77(1)(b) of the CAR Act.

[254] From 1883, there was a separate power for a Justice of the Supreme Court, either on the direction of the Governor following a petition by (or on behalf of) a convicted person or of the Justice's own motion, to hold an inquiry for the purpose of reporting to the Governor as to any proposed exercise of the Governor's prerogative power of mercy.[356] That power to direct an inquiry is now reflected in the executive power of the Governor in s 77(1)(a), and the power of a designated officer of the Supreme Court in s 79(1)(a) of the CAR Act.

[255] There was an obvious gap in this scheme. The Executive, through the Minister of Justice or the Governor, had the power: (i) to direct an inquiry; or (ii) to refer a matter to the Court of Criminal Appeal. But a designated officer of the Supreme Court only had power (i) to direct an inquiry. The 1996 legislative amendment which introduced the modern form of both s 79(1)(a) and (b)[357] responded to this gap by introducing the power for a designated officer of the Supreme Court to refer a matter to the Court of Criminal Appeal. This was included to ensure that the Supreme Court had the same power as the Executive to choose between directing an inquiry into conviction or sentence, or referring the whole case to the Court of Criminal Appeal to be dealt with as an appeal. As

352. (1930) 44 CLR 319; [1931] ALR 37.
353. At CLR 386.
354. Section 26 of the Criminal Appeal Act 1912 (NSW).
355. As s 474C(1)(b) of the Crimes Act 1900 (NSW). See Sch 1, Item 3 of the Crimes Legislation (Review of Convictions) Amendment Act 1993 (NSW).
356. Section 383 of the Criminal Law Amendment Act of 1883 (NSW).
357. See Sch 1, Items 7, 11 of the Crimes Amendment (Review of Convictions and Sentences) Act 1996 (NSW).

the Attorney-General explained in the second reading speech, the amendments were designed to "give the Supreme Court the same power as the Governor":[358]

> "It may be that the court considers that the matter warrants collective expertise of three judges sitting as the Court of Criminal Appeal rather than a judge sitting alone. This will remain a choice solely within the discretion of the Supreme Court. Given that a petitioner may choose between an application to the Governor and an application to the Supreme Court, it is considered desirable that the same outcomes be available for the disposition of the application regardless of the preferred venue."

[256] If the text of s 79(1)(b) of the CAR Act were to be picked up by s 68(1) of the Judiciary Act without s 79(1)(a), this severance of s 79(1)(a) — in relation to Commonwealth offences — would defeat the purpose of the 1996 legislative amendment that introduced s 79 of the CAR Act. Such selective picking up of s 79 would not merely create an inequality between the Executive and the designated officer of the Supreme Court that the 1996 legislative amendment sought to avoid; it would also exacerbate that inequality by authorising the designated officer of the Supreme Court to only exercise the alternative power of referral to the Court of Criminal Appeal.

Conclusion

[257] The scope for dealing with post-conviction, and usually post-appeal, miscarriages of justice involving Commonwealth offences has relied, on a wing and a prayer, upon the creativity of the judiciary to permit provisions of the Judiciary Act to pick up the text of a patchwork of different State legislative schemes, administrative in part and judicial in part. The conclusion reached in these reasons is that such judicial creativity crosses the Rubicon between (permissible) adjudicating and (impermissible) legislating when it is applied to divide the single scheme of s 79 of the CAR Act. But even if such judicial creativity were permissible, s 68(1) of the Judiciary Act would only be capable of picking up s 79(1)(b) of the CAR Act on the three compounding and questionable assumptions set out at the beginning of these reasons. The rejection of any of those assumptions would also preclude s 68(1) of the Judiciary Act from picking up the text of s 79(1)(b).

[258] The result which I would reach on this appeal is unfortunate. It would mean that there is a gap for miscarriages of justice in federal jurisdiction because a State law that is intended to respond to miscarriages of justice is unable to be picked up by s 68(1) of the Judiciary Act and applied in federal jurisdiction. But even on the result favoured by a majority of this Court, and on the large assumptions on which this appeal was conducted, there remains a gap for miscarriages of justice which is the very gap which the New South Wales Parliament had legislated to avoid. The Supreme Court does not have the same power as the Executive to order an inquiry. On any view, there is a solution to either gap which would bring clarity, certainty and consistency for the approach to Commonwealth offences throughout the Commonwealth. The Commonwealth Parliament could legislate its own scheme to deal with miscarriages of justice of this nature and that scheme could apply consistently across Australia in relation to Commonwealth offences.

[259] Orders should be made as proposed by Gordon and Steward JJ.

358. New South Wales, Legislative Council, *Parliamentary Debates*, Hansard, 12 September 1996, p 4096.

[260] **Jagot J.** The question discussed in these reasons is whether s 68(1) of the Judiciary Act 1903 (Cth) operates to apply ss 78(1), 79(1)(b) and, to the extent it refers to ss 79(1)(b), 86 in Pt 7 of the Crimes (Appeal and Review) Act 2001 (NSW) (the CAR Act) to a person convicted by a New South Wales court in respect of an offence against a law of the Commonwealth.

[261] Mr Huynh committed an offence against a law of the Commonwealth. He was convicted in the District Court of New South Wales. After exhausting his rights of appeal, he applied for an inquiry into his conviction under s 78 of the CAR Act. Garling J, a judge of the Supreme Court of New South Wales, dismissed Mr Huynh's application on the basis that the statutory condition for further action under s 79(1) of the CAR Act (that it "appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case"[359]) was not satisfied.[360]

[262] Mr Huynh filed a summons seeking judicial review of the dismissal of his application. The judicial review application was dealt with by the Court of Appeal of the Supreme Court of New South Wales. The majority in the Court of Appeal focused on the fact that, in response to an application for an inquiry into a conviction or sentence, pursuant to s 79(1) of the CAR Act the Supreme Court may exercise either one of two powers — to direct that an inquiry into the conviction or sentence be conducted under s 79(1)(a) or to "refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912" under s 79(1)(b). They concluded that s 68(1) of the Judiciary Act could not operate to apply s 79(1)(b) alone, as this would not be to apply the law of the State unaltered but, rather, would be to apply a separate part of the law of the State which s 68(1) of the Judiciary Act did not permit.[361]

[263] The Court of Appeal declared that the power conferred by s 79 of the CAR Act: (a) is to be exercised by the Chief Justice or a judge of the Supreme Court authorised by the Chief Justice as a persona designata; and (b) is not available with respect to a conviction or sentence for an offence against a law of the Commonwealth heard and determined in a New South Wales court. The Court also dismissed the summons.[362]

[264] The Attorney-General of the Commonwealth, who was joined as a party in the proceeding below, obtained a grant of special leave to appeal. The arguments in the appeal were confined to the question whether s 68(1) of the Judiciary Act operates to apply ss 78 and 79(1)(b) of the CAR Act to a person convicted or sentenced by a New South Wales court for an offence against a law of the Commonwealth.

[265] It may be taken from the confined question I have identified above that I agree that, for the reasons given in other judgments: (a) ss 78 and 79 of the CAR Act do not apply of their own force to a conviction or sentence for an offence against a law of the Commonwealth; and (b) "appeals", as referred to in s 68(1)(d) of the Judiciary Act, are confined to a proceeding involving the exercise of judicial power arising from a trial or conviction by a court of a State or Territory. It may be taken that I also agree that, for the reasons given by Kiefel CJ, Gageler and Gleeson JJ: (a) s 78(1), s 79(1)(b) and, to the extent it

359. Section 79(2) of the CAR Act.
360. *Huynh v Attorney-General (NSW)* [2020] NSWSC 1356 at [53]–[55].
361. *Huynh v Attorney-General (NSW)* (2021) 107 NSWLR 75; 396 ALR 422; [2021] NSWCA 297 (*Huynh (NSWCA)*) at [1], [63], [83], [128], [267]–[268].
362. *Huynh (NSWCA)* at [127].

refers to s 79(1)(b), s 86 of the CAR Act are laws respecting any proceedings connected with "the hearing and determination of appeals arising out of any such … conviction" as referred to in s 68(1)(d) of the Judiciary Act; and (b) the administrative functions to be exercised by the Supreme Court under ss 78 and 79 of the CAR Act are incidental to the exercise of a judicial function by the Court of Criminal Appeal, if a referral to that Court is made under s 79(1)(b) of the CAR Act.[363]

[266] For the following reasons I agree with Kiefel CJ, Gageler and Gleeson JJ that s 68(1) of the Judiciary Act operates to apply ss 78(1), 79(1)(b) and, to the extent it refers to ss 79(1)(b), 86 in Pt 7 of the CAR Act to a person convicted by a New South Wales court in respect of an offence against a law of the Commonwealth.

Section 68 of the Judiciary Act

[267] Section 68(1) of the Judiciary Act applies to the relevant "laws of a State or Territory … so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth".

[268] The "laws" of the State or Territory referred to in s 68(1) are statutory laws. The direction in s 68(1) is that the relevant State or Territory laws apply, and are to be applied, so far as they are applicable to offences against the laws of the Commonwealth. This direction, and the whole of s 68(1), is to be construed in context, including the context given by s 68(2), which provides for the courts of a State or Territory, exercising jurisdiction with respect to the identified topics, to have "like jurisdiction" with respect to persons who are charged with offences against the laws of the Commonwealth as those courts have with respect to persons charged with offences against the laws of the State or Territory.

[269] The vesting of "like jurisdiction" in s 68(2) of the Judiciary Act means that the application of that provision "must proceed by analogy"[364] and on the assumption that "State laws on the topics mentioned are to be applied in federal jurisdiction".[365] Section 68(1) also necessarily operates on the assumption that laws applying to persons charged with an offence against a law of a State or Territory may apply to a person charged with an offence against a law of the Commonwealth. This potential extension of the operation of a State or Territory law does not give the State or Territory law an altered meaning merely because the State or Territory law evinces an intention to apply only to offences against the laws of the State or Territory.[366] Accordingly, and not unlike s 68(2) in its application to courts, the required hypothesis for s 68(1) is that persons charged with an offence against a law of the Commonwealth "do not necessarily lie outside [of the] field of application"[367] of State or Territory laws for the topics specified in s 68(1). But if an altered meaning is given to the law or that part of the law that s 68(1) would apply to a person charged with an offence against a

363. *R v Murphy* (1985) 158 CLR 596 at 614; 61 ALR 139 at 147.
364. *Williams v R (No 2)* (1934) 50 CLR 551 at 561; [1934] ALR 314 (*Williams (No 2)*), quoted in *Peel v R* (1971) 125 CLR 447 at 469; [1972] ALR 231.
365. *John Robertson & Co Ltd (in liq) v Philips Industries Pty Ltd (the fourth defendant)* (1973) 129 CLR 65 at 95; 1 ALR 21 at 44 (*John Robertson*).
366. *John Robertson* at CLR 83, 95; ALR 34, 44; *Maguire v Simpson* (1977) 139 CLR 362 at 376; 18 ALR 469 at 478; *Putland v R* (2004) 218 CLR 174; 204 ALR 455; [2004] HCA 8 (*Putland*) at [37].
367. *John Robertson* at CLR 95; ALR 44.

law of the Commonwealth, s 68(1) is precluded from operating.[368] This flows from the principle that no court can, "by adopting a standard criterion or test merely selected by itself, … redraft a statute".[369] Redrafting a statute is an exercise of legislative, not judicial, power.

[270] If only one part of a State or Territory law, legally or practically, may apply to a person charged with an offence against a law of the Commonwealth, seeking to identify the "laws" or "law" of the State or Territory in issue involves a conclusion reached by some other process of analysis. The plural "laws" includes the singular "law".[370] On one level, an entire statute or more than one statute dealing with the same subject matter may be a single "law". On another level, each provision of a statute may also be a separate "law". If the task starts with trying to identify the relevant "law", the determinant of the operation of s 68(1) will be the choice of focal length. But if recognised as a tool or technique to assist in determining the limits of the operation of s 68(1), resolving the appropriate focal length to apply to the State or Territory law in issue may be helpful. It is a legitimate technique routinely applied as part of the judicial method.

[271] Similarly, in such a case, asking whether the State or Territory law involves an integrated statutory scheme[371] is another tool or technique to assist in ascertaining if the application of s 68(1) of the Judiciary Act to only part of a law of a State or Territory impermissibly involves giving an altered meaning to that part. This conceptual framework is another legitimate judicial technique of interpretation and characterisation. Further, asking if that part of a State or Territory law which may be applied by s 68(1) of the Judiciary Act to a person charged with an offence against a law of the Commonwealth is able to "operate independently"[372] from the balance of the State or Territory law which cannot be applied to that person[373] is another legitimate judicial tool or technique to ascertain if any altered meaning is being given to that part. But it does not follow from this that if the State or Territory law in issue involves a statutory scheme, including potentially different pathways to a range of possible outcomes, s 68(1) is necessarily inapplicable to that law (or those laws) or any part of it (or them). The State or Territory law may be capable of operating in part as a State or Territory law by operation of the doctrine of severance.[374] If so, the application of s 68(1) of the Judiciary Act to apply an otherwise severable part of the State or Territory law[375] to a person charged with an offence against a law of the Commonwealth may not involve giving the law an altered meaning.

[272] These concepts are all useful. But, individually or cumulatively, they do not necessarily yield an answer to the application of s 68(1) of the Judiciary Act. It must also be recognised that, to some extent or another, all statutory provisions are capable of being characterised as part of a statutory scheme. Accordingly,

368. *Putland* at [37].
369. *Pidoto v Victoria* (1943) 68 CLR 87 at 111; [1944] ALR 1.
370. Section 23(b) of the Acts Interpretation Act 1901 (Cth).
371. *Solomons v District Court (NSW)* (2002) 211 CLR 119; 192 ALR 217; [2002] HCA 47 (*Solomons*) at [24], citing *Commonwealth v Mewett* (1997) 191 CLR 471 at 556; 146 ALR 299 at 352.
372. *Brown v R* (1986) 160 CLR 171 at 218; 64 ALR 161 at 193 (*Brown*).
373. For example, *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 125, 130; 66 ALR 593 at 596, 599.
374. Section 31(2) of the Interpretation Act 1987 (NSW).
375. For example, as a matter of state or territory law.

while these concepts may all expose something meaningful about the operation of s 68(1) of the Judiciary Act with respect to a particular State or Territory law, the relevant question remains whether the State or Territory law, as would be applied by s 68(1), is given an altered meaning in its application to a person charged with an offence against a law of the Commonwealth (that is, altered as compared to its meaning as applied to a person charged with an offence against a law of the State or Territory)[376]. Examples of cases falling on one or other side of the divide assist in exposing this limitation on the operation of s 68(1).

Examples of s 68(1): Permissible extension or impermissible alteration?

[273] In *Brown*[377], s 68(1) of the Judiciary Act did not apply to a person charged with an offence against a law of the Commonwealth a provision of a State Act permitting an accused to elect a trial before a judge alone (because the application of that provision in federal jurisdiction would contravene s 80 of the Constitution) but did apply to that person the balance of the State Act relating to juries. The effect was that an accused charged with an offence against a law of the Commonwealth did not have the same right to make an election for a trial before a judge alone which an accused charged with an offence against the laws of the State would enjoy. This effect, implicitly at least, was not characterised as giving an altered meaning to the part of the State law applied by s 68(1) of the Judiciary Act.

[274] Similarly, in *Cheatle v R*[378], s 68(1) of the Judiciary Act did not apply to a person charged with an offence against a law of the Commonwealth a provision of a State Act enabling majority verdicts (because the application of that provision in federal jurisdiction would contravene s 80 of the Constitution) but did apply to that person the balance of the State Act relating to trials on indictment. The effect was that an accused charged with an offence against a law of the Commonwealth could be convicted only by unanimous verdict of the jury, whereas an accused charged with an offence against a law of the State could be convicted by a majority verdict. Again, this effect, implicitly at least, was not characterised as giving an altered meaning to the part of the State law applied by s 68(1) of the Judiciary Act.

[275] A case in which the nature and extent of the integration of the relevant provisions of the laws of the State, and the lack of relevant equivalent legal or factual circumstances in federal jurisdiction, meant that no part of the law could be applied by s 68(1) of the Judiciary Act is *Solomons*.[379] In that case, the statute concerned the grant of a costs certificate by a court in which the only purpose of the grant was to enable an application for the payment of costs by the State.[380]

The present case

[276] In the present case, the majority in the Court of Appeal distinguished *Brown* and *Cheatle* on the basis that those decisions concerned parts of a law of a State inconsistent with the Constitution and not "the extent to which a *particular* State law can be changed" in its operation.[381] In so doing, the majority

376. *Solomons* at [60].
377. (1986) 160 CLR 171; 64 ALR 161.
378. (1993) 177 CLR 541; 116 ALR 1 (*Cheatle*).
379. (2002) 211 CLR 119; 192 ALR 217; [2002] HCA 47.
380. *Solomons* at [15].
381. *Huynh (NSWCA)* at [97] (emphasis in original); see also at [1], [128], [269].

also disapproved of *Re Application of Pearson*,[382] in which Wood CJ at CL held that s 68(1) of the Judiciary Act operated to "pick up some, but not all of the otherwise applicable terms, of Div 3 of Pt 13A" of the Crimes Act 1900 (NSW).[383] Wood CJ at CL reasoned that the State law, the then equivalent to Pt 7 of the CAR Act, was not being altered in its meaning by the partial application effected by s 68(1) of the Judiciary Act, the difference being procedural rather than substantive (that is, confining the options available to the Supreme Court, being a direction for the conduct of an inquiry or the referral of the case to the Court of Criminal Appeal to be dealt with as an appeal for State offences, to the latter option only for offences against a law of the Commonwealth).[384]

[277] It is not apparent why the reason that s 68(1) of the Judiciary Act does not apply to one part of a State or Territory law (such as constitutional invalidity, or inconsistency with a law of the Commonwealth, or practical impossibility) determines whether the application of s 68(1) to another part of the law involves giving an altered meaning to that part. In *Brown* and *Cheatle*, the State laws as to juries, by operation of s 68(1) of the Judiciary Act, operated differently on an accused charged with an offence against a law of the Commonwealth from an accused charged with an offence against a law of the State.

[278] In the present case, there is undoubtedly a statutory scheme. The statutory provisions have a complex legislative history, as identified in the other judgments. Section 78 of the CAR Act, in referring to an "application for an inquiry into a conviction or sentence", reflects the legislative history of the provisions in which the prerogative power of mercy was (and, by s 114 of the CAR Act, remains) vested in the Governor of each State as the representative of the Crown. The other provisions of the CAR Act supplement this prerogative power, reflecting two main statutory pathways. The first is a pathway available since the late 19th century enabling the Supreme Court to conduct an inquiry into a conviction or sentence, resulting in a report to the Governor and a potential exercise of the prerogative power of mercy.[385] The second is a pathway available since the commencement of the Criminal Appeal Act 1912 (NSW) by which the relevant Minister could refer a petition to the Governor for an exercise of the prerogative of mercy to the Court of Criminal Appeal for the case to be "heard and determined by the court as in the case of an appeal by a person convicted".[386]

[279] The Crimes Amendment (Review of Convictions and Sentences) Act 1996 (NSW), for the first time, enabled the Supreme Court, on an application for an inquiry into a conviction or sentence, to either "direct that an inquiry be conducted by a prescribed person into the conviction or sentence" or "refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under

382. (1999) 46 NSWLR 148; 162 ALR 248; [1999] NSWSC 143 (*Re Application of Pearson*).
383. *Re Application of Pearson* at [73]. Division 3 of Pt 13A of the Crimes Act 1900 (NSW), at the time, contained the predecessor provisions to those in the CAR Act relating to inquiries into a conviction or sentence, including the referral of an application for an inquiry "to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912": s 474E(1) of the Crimes Act 1900 (NSW).
384. *Re Application of Pearson* at [75]–[81].
385. Sections 383 and 384 of the Criminal Law Amendment Act of 1883(NSW); s 475 of the Crimes Act 1900 (NSW), as enacted.
386. Section 26(a) of the Criminal Appeal Act 1912 (NSW) as enacted, the relevant minister in that Act then being referred to as the Minister of Justice.

the Criminal Appeal Act 1912".[387] These options are now reflected in s 78(1) together with s 79(1)(a) and (b) of the CAR Act.

[280] The fact that s 78(1) of the CAR Act refers to an "application for an inquiry" and not an application for an inquiry or referral to the Court of Criminal Appeal is of no great moment for present purposes. Section 78(1) is to be construed in the context of s 79. Under s 79, an application for an inquiry may result in one of three outcomes: (a) under s 79(3), the Supreme Court may "refuse to consider or otherwise deal with [the] application"; (b) under s 79(1)(a), the Supreme Court may "direct that an inquiry be conducted by a judicial officer into the conviction or sentence"; or (c) under s 79(1)(b), the Supreme Court may "refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912".

[281] It follows that while an application under s 78 is *styled* as an application for an inquiry, that application may engage two distinct powers — a direction for an inquiry under s 79(1)(a) or a referral of the whole case to the Court of Criminal Appeal under s 79(1)(b). Further, while the Supreme Court's consideration of the application as a pre-condition to any exercise of power as specified in s 79(1) does not involve an exercise of judicial power,[388] if there is a referral under s 79(1)(b): (a) it is the "whole case" which is referred to the Court of Criminal Appeal; and (b) that "whole case" is to be dealt with "as an appeal under the Criminal Appeal Act 1912". In such a case, moreover, the only further provision of the CAR Act which is engaged is s 86, which provides that, on receiving a referral under s 77(1)(b) (from the Attorney-General on receipt of a petition for a pardon by the Governor) or s 79(1)(b), "the Court is to deal with the case so referred in the same way as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act 1912, and that Act applies accordingly". That is, once the Court of Criminal Appeal is seized of the whole case by reason of a referral under s 79(1)(b), the Court of Criminal Appeal is doing nothing other than exercising judicial power.

[282] On this basis, if ss 78, 79(1)(b) and 86 of the CAR Act are considered in isolation (for the moment): (a) the operation of s 68(1) of the Judiciary Act on the making of an application under s 78 for an inquiry (understood in context as an application potentially engaging a referral under s 79(1)(b) and not merely an inquiry under s 79(1)(a)); (b) the referral of the whole case to the Court of Criminal Appeal under s 79(1)(b); and (c) the Court of Criminal Appeal dealing with that whole case "as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act 1912", with that Act applying "accordingly", involve no alteration to these State laws or parts of State laws.

[283] The potential alteration in meaning arises at, and is confined to, the first stage, in the exercise of the non-judicial incidental power of the Supreme Court under s 79 of the CAR Act to consider the application and decide which pathway to take (to make a direction for an inquiry, or to make a referral to the Court of Criminal Appeal, or to refuse to consider or otherwise deal with an application). In that exercise of non-judicial power, for an offence against a law of the

387. Section 474E of the Crimes Act 1900 (NSW), as amended by the Crimes Amendment (Review of Convictions and Sentences) Act 1996 (NSW).
388. Section 79(4) of the CAR Act provides that proceedings under s 79 are not judicial proceedings.

Commonwealth, one option which would otherwise have been available to the Supreme Court for an offence against a law of the State (a direction for an inquiry under s 79(1)(a)) is unavailable.

[284] As will be explained, ss 78, 79(1)(b) and 86 of the CAR Act, understood in their context, are not given an altered meaning in their application to a person charged with an offence against a law of the Commonwealth. They apply to that person exactly as they would apply to a person charged with an offence against a law of the State. The unavailability of one option to the Supreme Court on the making of an application for an inquiry by a person charged with an offence against a law of the Commonwealth (a direction for an inquiry to be conducted) does not alter the State law.

[285] Sections 78(1), 79(1)(b) and, to the extent it refers to ss 79(1)(b), 86 in Pt 7 of the CAR Act are not integrated with the other provisions forming the scheme in Pt 7 of the CAR Act in a manner rendering them altered in their application to a person charged with an offence against a law of the Commonwealth merely because one option (a direction for an inquiry) is inapplicable to such a person. They are capable of independent operation.

[286] This conclusion gives effect to: (a) the language of s 68(1) of the Judiciary Act (requiring application of the law of the State so far as applicable); (b) the purpose of s 68(1) and (2) of the Judiciary Act (to put offences against a law of the Commonwealth on the same footing as offences against the laws of the relevant State or Territory in which the offence is dealt with[389]); and (c) the required hypothesis or assumption on which subss (1) and (2) of s 68 of the Judiciary Act operate, that a law of a State or Territory can be applied by that section notwithstanding that the legislative intention evinced by that law is that it apply only to offences against the laws of the State or Territory. On analysis, this conclusion also accords with the legislative intention evinced by Pt 7 of the CAR Act construed in context, as a matter of State law. The question remains the application of s 68(1) to the provisions of the CAR Act. But the proper construction of the State or Territory legislation, although not the issue to be determined, informs the answer.[390]

[287] The following matters in respect of the construction and characterisation of the provisions of Pt 7 of the CAR Act as a matter of State law indicate that ss 78, 79(1)(b) and 86 of the CAR Act, understood in their context, are not given an altered meaning in their application to a person charged with an offence against a law of the Commonwealth merely because s 68(1) of the Judiciary Act cannot apply s 79(1)(a) of the CAR Act to that person.

[288] First, s 31(2) of the Interpretation Act 1987 (NSW) provides that if "any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament" then: (a) "it shall be a valid provision to the extent to which it is not in excess of that power"; and (b) "the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected". Section 31 applies to the CAR Act except insofar as the contrary intention appears in that Act.[391] Provisions such as s 31 "reverse the presumption that a statute is to

389. *Williams (No 2)* at CLR 560.
390. *John Robertson* at CLR 80; ALR 32.
391. Section 5(2) of the Interpretation Act 1987 (NSW).

operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible".[392] To displace this presumption "it must sufficiently appear that the invalid provision forms part of an inseparable context".[393] What is required is "a positive indication … in the enactment that the legislature intended it to have either a full and complete operation or none at all".[394]

[289] No such positive indication is apparent in Pt 7 of the CAR Act. The text and context of Pt 7 of the CAR Act support the conclusion that s 79(1)(a) and (b) are divisible and are intended to have a distributive operation to the extent legally or practically required in respect of any application for an inquiry made under s 78. If that is so as a matter of State law, it is difficult to conclude that the operation of s 68(1) of the Judiciary Act to ss 78 and 79(1)(b) of the CAR Act, but not s 79(1)(a) of that Act, would give an altered meaning to the CAR Act.

[290] Second, and as noted, an "application for an inquiry" in s 78 of the CAR Act must be construed in the context of s 79 as embracing both options — a direction for an inquiry or a referral to the Court of Criminal Appeal. It follows that, at least to the extent that the application for an inquiry can engage the power of the Supreme Court to refer the whole case to the Court of Criminal Appeal, an application for an inquiry by a person convicted and sentenced by a court of New South Wales in respect of an offence against a law of the Commonwealth can be a valid application and that application can have utility if s 68(1) of the Judiciary Act operates. This may be contrasted with the legal and practical circumstances in *Solomons*.

[291] Third, while one option (the direction for an inquiry) is removed from the Supreme Court in response to an application by a person charged and convicted of an offence against a law of the Commonwealth, the Supreme Court retains the options of doing nothing under s 79(3) of the CAR Act or referring the whole case to the Court of Criminal Appeal under s 79(1)(b). That is, in such a case, the Supreme Court is not forced to take one pathway rather than another merely by reason of the unavailability of the pathway of a direction for an inquiry. It can decide to do nothing in respect of the application. Further, the Supreme Court would not be precluded from considering the unavailability of the option of a direction for an inquiry, whatever the reason for that unavailability, to the extent it might be relevant to its administrative decision either to refuse to consider or otherwise deal with an application or to "refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912". That is, the unavailability of the option of a direction for an inquiry under s 79(1)(a) could not be said to undermine the sensible and cogent operation of the provisions. By its own processes of consideration under s 79(1) to (3), the Supreme Court can ensure the available provisions do have a sensible and cogent operation. If it were otherwise, practical unavailability of the option of an inquiry (for whatever reason) itself might invalidate the Supreme Court's process of consideration.

392. *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 371; [1948] 2 ALR 89 (*Bank of New South Wales*).
393. *Bank of New South Wales* at CLR 371.
394. *Cam & Sons Pty Ltd v Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454; [1951] ALR 930. See also *Tajjour v New South Wales* (2014) 254 CLR 508; 313 ALR 221; [2014] HCA 35 at [169]–[170].

[292] Fourth, and related to the third consideration, while the Supreme Court undertakes a single process of consideration under s 79(1) of the CAR Act ("[a]fter considering an application …"), s 79(1)(a) and (b) vest two distinct powers in the Supreme Court, each conditioned on the appearance of doubt under s 79(2). This is reinforced by the fact that each of s 79(1)(a) and (b) starts with the words "the Supreme Court may …". Consistently with this, s 79(3) provides that the "Supreme Court may refuse to consider or otherwise deal with an application". As noted, the Supreme Court may refuse to deal with an application even if it concludes that it appears there is a doubt within the meaning of s 79(2).

[293] Fifth, the fact that the power to refer the whole case to the Court of Criminal Appeal under s 79(1)(b) of the CAR Act, like the power in s 79(1)(a), is enlivened only when, under s 79(2), "it appears that there is a doubt or question as to the convicted person's guilt …", is important. In the face of this provision, it is difficult to conclude that Pt 7 of the CAR Act manifests a legislative intention that ss 78 and 79 not operate at all if, for any reason, the options in both s 79(1)(a) and (b) are not available. For example, assume invalidity of s 79(1)(a) of the CAR Act for some reason. Given s 31(2) of the Interpretation Act, it is not apparent why the doctrine of severance would not operate to preserve the operation of s 79(1)(b).

[294] Sixth, the s 79(1)(a) pathway (a direction for an inquiry) involves an administrative and not a judicial function. In contrast to the duty on judges to exercise judicial functions, the judges of the Supreme Court may agree or not agree to exercise the administrative functions involved in Pt 7 of the CAR Act[395]. It follows from this that there may be practical reasons why the administrative function of an inquiry may not be able to be performed either at all or in a timely manner in response to an application for an inquiry under s 78. The circumstances of the application, such as urgency of a final judicial determination of the conviction or sentence, may make the pathway of a direction for an inquiry impractical or unjust, especially given that one possible outcome of an inquiry under s 79(1) of the CAR Act (and no doubt the outcome sought by the person making the application under s 78) is referral of the matter to the Court of Criminal Appeal. Further, and for example, the judge considering the application under s 78 may take the view that their doubt as to the soundness of the conviction is sufficiently strong so as to make the "considerable resources required to mount and conduct an inquiry"[396], before any possible referral to the Court of Criminal Appeal, unjustified. Again, given that the taking of any action in response to an application requires it to appear that "there is a doubt or question as to the convicted person's guilt …", it seems unlikely that the New South Wales legislature intended that, if the administrative option of an inquiry under s 79(1)(a) was unavailable or unable to be performed in a timely manner for some reason, the s 79(1)(b) pathway also would be unavailable. The potential for serious injustice, in that event, is manifest.

[295] Seventh, the Crimes Amendment (Review of Convictions and Sentences) Act 1996 (NSW), which enabled the Supreme Court, on an application for an inquiry into a conviction or sentence, to either "direct that an inquiry be

395. Section 75 of the CAR Act provides that the "jurisdiction of the Supreme Court under this Part is to be exercised by the Chief Justice or by a Judge of the Supreme Court who is authorised by the Chief Justice to exercise that jurisdiction".

396. New South Wales, Legislative Council, *Parliamentary Debates*, Hansard, 12 September 1996, p 4096.

conducted by a prescribed person into the conviction or sentence" or "refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912", was enacted against the background of s 31(2) of the Interpretation Act. The statement in the Second Reading Speech for the Crimes Amendment (Review of Convictions and Sentences) Bill 1996, that "it is considered desirable that the same outcomes be available for the disposition of the application regardless of the preferred venue",[397] concerns giving to the Supreme Court the same power as vested in the Governor either to direct the conduct of an inquiry or to "refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912".[398] It does not concern the distributive or unitary operation of the provisions once a person has selected their "venue" (be it a petition to the Governor or an application for an inquiry to the Supreme Court).

[296] Eighth, it is one thing to conclude that Pt 7 of the CAR Act applies only to convictions and sentences imposed by a court of New South Wales for offences against a law of New South Wales. It is another thing to conclude that the CAR Act, contrary to fact, operates in a vacuum sealed off from the reality that the courts of New South Wales routinely convict and sentence people for offences against a law of the Commonwealth. In this context, a construction of Pt 7 of the CAR Act which gives s 79(1)(a) and (b) a distributive operation better accords with: (a) this reality; (b) the unlikelihood that the New South Wales legislature intended that, where a judge entertains a genuine doubt about a person's conviction or sentence, that person would be left without any remedy merely because the option of a direction for an inquiry under s 79(1)(a) was unavailable for whatever reason (legal or practical); and (c) the lack of any positive indication constituting a "contrary intention" for the purpose of s 31(2) of the Interpretation Act.

[297] For these reasons, the effect of s 68(1) of the Judiciary Act applying ss 78(1), 79(1)(b) and 86 of the CAR Act to a person charged with an offence against a law of the Commonwealth, and not the provisions of that Act enabling a direction for the conduct of an inquiry, is to create a permissible extension of the laws of the State to a person charged with an offence against a law of the Commonwealth, as in *Brown* and *Cheatle*, and not the giving of an altered meaning to the laws of the State.

[298] I otherwise agree with Kiefel CJ, Gageler and Gleeson JJ that: (a) whether the notification and reporting requirements in ss 78(2) and 79(5) of the CAR Act are applied and translated by s 68(1) of the Judiciary Act need not be determined; and (b) Garling J, being the judge authorised by the Chief Justice to exercise the jurisdiction of the Supreme Court under Pt 7 of the CAR Act in respect of Mr Huynh's application, must be taken to have consented to the conferral of that function.

[299] The orders Kiefel CJ, Gageler and Gleeson JJ propose should be made.

397. New South Wales, Legislative Council, *Parliamentary Debates*, Hansard, 12 September 1996, p 4096.

398. The equivalent powers of the governor are now in s 77(1) of the CAR Act. See also New South Wales, Legislative Council, *Parliamentary Debates*, Hansard, 12 September 1996, p 4096.

Orders

1. Appeal allowed.
2. Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 8 December 2021.
3. Remit the matter to the Court of Appeal for the hearing and determination of the further amended summons in accordance with the judgment of this Court.

DR DAVID ROLPH