Third Zines Symposium: Issues in Australian Constitutional Law[1]

Fault lines from *Attorney-General (Cth) v Huynh*

Matthew Howard[2]

> Federal jurisdiction is fascinating and challenging. Perhaps it can be compared with the known Australian food spread Vegemite because in my experience most lawyers and judges either hate it or love it.[3]

There is at least one other respect in which the comparison between federal jurisdiction and Vegemite holds true in my experience: neither becomes clearer with concentrated study.[4]

Mr Huynh was convicted in the New South Wales District Court of a Commonwealth drug offence. His appeal against that conviction in the NSW Court of Criminal Appeal was unsuccessful,[5] as was his special leave application to the High Court.[6]

Subsequently, Mr Huynh applied to the NSW Supreme Court for an inquiry into his conviction pursuant to s 78(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**NSW Act)**.

By way of introduction here to the relevant provisions of the NSW Act, Mr Huynh's application was made pursuant to s 78(1) and was an application within Div 3 (headed 'Applications to Supreme Court'), of Pt 7 (headed 'Review

---

[1] This paper was delivered at the ANU on 30 November 2024 and is subject to revision before its forthcoming publication.

[2] I am very grateful for Prof. Stellios' comments on an earlier draft. However, all errors, unfortunately, remain mine.

[3] Professor Lindell: 'Other reflections on the applicable law in the light of ***Rizeq*** and ***Masson v Parsons***' in *Current Issues in Australian Constitutional Law* (from the first Zines Symposium) 2020 (Griffiths & Stellios, ed.s), page 119.

[4] Both topics have also generated significant academic writing. In the case of Vegemite that has spanned culture and history, semiotics, industrial processes, recipes and chemical composition at the least. I say 'at the least' because I had to stop myself from reading the literature or this paper would be about something quite different.

[5] ***Cranney v R*** [2017] NSWCCA 234; (2017) 325 FLR 173.

[6] ***Huynh v R*** [2019] HCASL 6.

of convictions and sentences').[7] Division 3 comprises only ss 78 and 79 of the NSW Act.

An application under s 78 of the NSW Act was described variously as an 'entry point',[8] or a 'gateway'[9] to an inquiry being conducted under s 79(1)(a), *or* to a referral being made under s 79(1)(b) of the NSW Act to the Court of Criminal Appeal under s 86 to be dealt with as an appeal. Other options provided in s 79 included the Supreme Court refusing to consider or otherwise deal with the application: s 79(3); or deferring consideration of the application: s 79(3A) of the NSW Act.[10]

That application was determined on the papers by Garling J who, having considered the issues raised, had no doubt as to Mr Huynh's guilt and dismissed the application.[11] Garling J, understandably, did not consider any of the issues touched on in this paper.

In the NSW Court of Appeal Mr Huynh sought judicial review of, and an order quashing, the dismissal by Garling J.

That judicial review application was dismissed by the NSW Court of Appeal sitting a bench of five.[12] There were three judgments of Basten JA, Leeming JA and Payne JA. By a majority (Leeming JA in dissent), the NSW Court of Appeal

---

[7] Section 35(1) of the *Interpretation Act 1987* (NSW) provides that headings to Parts and Divisions are to be taken as part of the Act.
[8] ***Huynh HCA*** [126] (Gordon and Steward JJ).
[9] ***Huynh HCA*** [19] (Kiefel CJ, Gageler and Gleeson JJ); [139] (Gordon and Steward JJ); [215] (Edelman J); 107 NSWLR 75 [83] (Basten JA); [140] (Leeming JA)
[10] Jagot J stated that an application may result in one of three outcomes under s 79 of the NSW Act: ***Huynh HCA*** [280], with her Honour not considering the possibility of deferring the application as a separate outcome; see also [19] (Kiefel CJ, Gageler and Gleeson JJ).
[11] ***Application of Huy Huynh under Part 7 of the Crimes (Appeal and Review) Act 2001 for an Inquiry*** [2020] NSWSC 1356 [55] - [56].
[12] ***Huynh v Attorney General (NSW)*** (2021) 107 NSWLR 75.

held that the NSW Act did not apply of its own force, nor through s 68(1) of the *Judiciary Act* and, so, the decision of Garling J was void for a want of jurisdiction.

From that dismissal, Mr Huynh appealed to the High Court.[13] There were four judgments in the High Court: Kiefel CJ, Gageler and Gleeson JJ writing together, and with whom Jagot J formed the majority. Gordon and Steward JJ wrote together, with Edelman J writing separately to form the minority.

The majority held that the NSW Act, relevantly, was applied by s 68(1) of the *Judiciary Act*. The appeal was allowed and the matter remitted to the NSW Court of Appeal for the hearing and determination of Mr Huynh's judicial review application.[14] As will be apparent, I have tended to refer to the seven judgments of the 12 judges collectively as 'judgments' in this paper.

Nature of the power being exercised

There are many places at which this paper might start. Strangely, perhaps, I start with three inter-related propositions which were not controversial in whole (for the first two) or in part (for the third) in the High Court.

They are: the power in s 79 of the NSW Act was non-judicial or administrative in character; secondly, the power was reposed in a judge of the NSW Supreme Court as a *persona designata*; and thirdly, that non-judicial power was incidental to the exercise of judicial power.

That it was administrative power exercised by a *persona designata* was identified by Edelman J as the first 'questionable' assumption made in the Court.[15] Edelman J was correct to note that this assumption had been questioned by the Court at the

---

[13] ***Attorney-General (Cth) v Huynh*** [2023] HCA 13; (2023) 97 ALJR 298; (2023) 408 ALR 684 (***Huynh HCA***).
[14] ***Huynh HCA*** [84] (Kiefel CJ, Gageler and Gleeson JJ); [299] (Jagot J).
[15] ***Huynh HCA*** [192].

start of the oral hearing[16] - it was, in fact, the first question asked by the Court, but not substantively returned to.[17]

I suggest that a limited version of the third proposition was accepted by all of the justices in the High Court; that is: *if* a referral was made under s 79(1)(b) of the NSW Act that power would be incidental to judicial power to be exercised by the NSW Court of Criminal Appeal under s 86. It was certainly accepted by the majority. It may be argued that Gordon and Stewart JJ[18] and Edelman J[19] would have accepted the limited proposition as far as it went. By Kiefel CJ, Gageler and Gleeson JJ[20] expressing the proposition as s 79(1)(b) being a law respecting the procedure for the hearing of appeals (whether or not a referral was made), it appears the majority accepted the proposition more broadly.

The broader proposition was described by Edelman J as the second aspect to the third 'questionable assumption' made in the Court.[21]

I do not necessarily want to interrogate the correctness of these three propositions referred to above which were accepted (in whole or in part) by the High Court. However, given that Edelman J referred to them as being questionable assumptions, it would not be too brave to suggest that they represent fault lines.

Rather, the three inter-related propositions are very significant to any discussion of the case and the consequences which flow from them are worth considering.

---

[16] ***Huynh HCA*** [194].
[17] At ts 4 [2022] HCATrans 190.
[18] ***Huynh HCA*** [131]. Noting that if accepted by their Honours it would not have been dispositive and would not change their result.
[19] ***Huynh HCA*** [200].
[20] ***Huynh HCA*** [77]; Jagot J agreeing at [265]. See also (2021) 107 NSWLR 75 [72] (Basten JA).
[21] ***Huynh HCA*** [200].

A second matter to note under this heading is that there is likely a difference between the power under s 79 of the NSW Act and the authority to exercise that, and the authority which the NSW Court of Appeal exercised on the judicial review application.

What was in the matter which arose under Commonwealth law

The NSW Court of Appeal (and the High Court) accepted that Mr Huynh's application to the NSW Court of Appeal arose under a Commonwealth law. That was because his conviction against a law of the Commonwealth provided the subject matter.

Each of the NSW Court of Appeal judgments cited ***LNC Industries Ltd v BMW (Australia) Ltd***[22] to support that characterisation. In that case, the contracts providing the dispute were concerned solely with entitlements under Commonwealth regulations and the Act under which the regulations were made.[23] There was a directness in the connection between the subject matter of the dispute and the Commonwealth enactment.

Considering the application made in the NSW Court of Appeal, it might be thought this case is more analogous to a case like ***Bramco Electronics Pty Ltd v ATF Mining Electrics Pty Ltd***.[24] In that case, the Commonwealth enactment and subject matter was at a further remove from the issues there in dispute in the NSW Court of Appeal. The 'direct' dispute was about contracts which had settled patent infringement proceedings brought in the Federal Court, rather than the patents themselves.

---

[22] ***LNC Industries Ltd v BMW (Australia) Ltd*** (1983) 151 CLR 575 (***LNC Industries***); see (2021) 107 NSWLR 75 [11] (Basten JA); [133] (Leeming JA); [252] (Payne JA).
[23] ***LNC Industries*** 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).
[24] ***Bramco Electronics Pty Ltd v ATF Mining Electrics Pty Ltd*** (2013) 86 NSWLR 115.

I am not suggesting that this conclusion in ***Bramco Electronics*** is contestable. But it does raise the question as to how close or direct the connection must be between the subject matter or issues in dispute and the federal law that they are said to arise under.

Classically, in ***Fencott v Muller***, it was accepted that:

> The concept of 'matter' [w]as a justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy.[25]

Here, there has been a 'completion' of the Commonwealth criminal process against Mr Huynh, and no further order has been made under s 79 of the NSW Act, and yet the application to the NSW Court of Appeal remains within the scope of the controversy 'between' the Commonwealth and Mr Huynh, and so is a matter of federal jurisdiction. I suggest that this is quite the attenuation. It also goes to the robustness of the conclusion that this power was permissibly conferred as being 'incidental' to an exercise of federal jurisdiction.

The application made under the NSW Act might be thought to be at one remove from the Commonwealth criminal process against Mr Huynh. That is in circumstances where the provisions of Div 3 Pt 7 of the NSW Act, and the possible outcomes under it, sit outside of the normally recognised end points of a criminal trial and appeals brought therefrom.[26]

The distinct features of the power under, particularly, s 79(1)(b) of the NSW Act were also (differently) identified in the second aspect of the third 'questionable' assumption identified by Edelman J. That is, the process of applying to, and

---

[25] ***Fencott v Muller*** (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan and Deane JJ).

[26] See, for example, the description that 'a conviction and sentence following a trial on indictment constitute the conclusive determination of criminal liability, subject only to an appeal …' ***Huynh HCA*** [10] (Kiefel CJ, Gageler and Gleeson JJ); see also their Honours at [70] and that the criminal liability had been spent and merged in the conviction and sentence.

obtaining a decision from, a judge personally was arguably 'sufficiently separate' from any later appeal.[27] I accept that this observation was made in relation to whether the application could be said to be a 'mere incident of appellate power', but the observation resonates at this point as well.

Leeming JA adopted, by analogy, observations made in an earlier NSW Court of Appeal decision in ***Lodhi v Attorney General (NSW)***[28] by Basten JA, for the Court. There, an application for an inquiry into a jury following a federal conviction was described as being 'at one remove from a direct challenge to the conviction for a federal offence … which will not, of itself, affect the applicant's convictions'.[29]

Leeming JA said:

> The exercise of administrative power by Garling J, even though Mr Huynh was seeking for there to be a further hearing by the Court of Criminal Appeal, was not performed in association with any further hearing by the Court of Criminal Appeal. This suggests the function performed by Garling J is not to be regarded as incidental to the potential exercise of judicial power in the future by the Court of Criminal Appeal.[30]

I should note that Basten JA in ***Huynh*** saw ***Lodhi*** as having a different relevance to the present case:

> Its relevance for present purposes is that the greater the distance between the administrative function and any exercise of judicial power, the greater the likelihood that the function falls within State legislative power, and that the legislation was intended to operate regardless of any possible distant federal effect.[31]

---

[27] ***Huynh HCA*** [200].
[28] ***Lodhi v Attorney General (NSW)*** [2013] NSWCA 433; (2013) 241 A Crim R 477.
[29] [2013] NSWCA 433; (2013) 241 A Crim R 477 [62], as cited by Leeming JA (2021) 107 NSWLR 75 [204]; see also at [187].
[30] (2021) 107 NSWLR 75 [172]; see also at [83] per Basten JA.
[31] (2021) 107 NSWLR 75 [71].

If Mr Huynh's application under the NSW Act might be described as being at one remove, then the application he made to the NSW Court of Appeal is yet further removed, from the Commonwealth criminal process which provides the federal 'matter'.

And that also affects, as identified by Edelman J, how 'incidental' the application made under s 78 of the NSW Act appears to be to the exercise of (appellate) judicial power.

The vesting of federal jurisdiction

Accepting that Mr Huynh's application to the NSW Court of Appeal was a matter of federal jurisdiction, how was that jurisdiction vested.

Noting the observations above as to the features of an application under s 78(1) of the NSW Act, consideration needed to be given to the vesting of the jurisdiction in the NSW Court of Appeal distinctly from the vesting of federal jurisdiction in the NSW District Court for Mr Huynh's trial and in the NSW Court of Criminal Appeal for his appeal against conviction.[32]

The distinct nature of the application and process under Div 3 of Pt 7 of the NSW Act was, mostly, rather subsumed in a consideration of the language of s 68 of the *Judiciary Act*.

With respect, I agree with Leeming JA's observation about the NSW Court of Appeal here that:

[32] As Leeming JA uncontroversially traced, the NSW District Court was exercising federal jurisdiction in hearing and determining the charge against the Commonwealth law via s 68(2) of the *Judiciary Act.* The NSW Court of Criminal Appeal was also exercising federal jurisdiction invested by s 68(2) of the *Judiciary Act*: (2021) 107 NSWLR 75 [138] - [140].

> The present is a (rare) case where it is not sufficient to point to the general investments of federal jurisdiction in s 39(2) and s 68(2) of the *Judiciary Act.* [33]

While it is trite that the matter of federal jurisdiction must be identified independently of the proceedings brought for its determination,[34] the vesting of the authority to hear and decide it must still be identified.

It is also trite that the question of the vesting of federal jurisdiction ought not be conflated with the law to be applied in the exercise of that jurisdiction. In his oft-cited statement, Windeyer J in ***Felton v Mulligan*** said: 'The existence of federal jurisdiction depends upon the grant of an authority to adjudicate rather than upon the law to be applied or the subject of adjudication'.[35]

Or as Kiefel CJ put it:

> … the investment of 'federal jurisdiction' is not a direction as to the law to be applied …
>
> Federal jurisdiction, understood as the authority conferred upon a court to adjudicate a matter, is to be distinguished from the law that that court applies in the exercise of the jurisdiction.[36]

Given that the power in s 79 of the NSW Act was non-judicial and not to be exercised by a court, there did not need to be a vesting of federal jurisdiction in any court in respect of it.

In respect of Mr Huynh's application to the NSW Court of Appeal, it might have been thought the candidates for the vesting of federal jurisdiction were s 68(2)

---

[33] (2021) 107 NSWLR 75 [135].
[34] In ***re Judiciary and Navigation Acts*** (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
[35] ***Felton v Mulligan*** (1971) 124 CLR 367, 393; approved of, eg, in ***Fencott v Muller*** (1983) 152 CLR 570, 606 (Mason, Murphy, Brennan and Deane JJ); ***Momcilovic v The Queen*** (2011) 245 CLR 1 [99] (French CJ).
[36] ***Rizeq v The State of Western Australia*** (2017) 262 CLR 1 [7], [9]; see also [54] (Bell, Gageler, Keane, Nettle and Gordon JJ); [143] (Edelman J).

and s 39(2) of the *Judiciary Act*.[37] The relationship between the two sections will be returned to below.

The focus of most of the judgments in the High Court was on whether the NSW law here could be applied via s 68(1) of the *Judiciary Act*. That reflects the assumptions made in the Court as noted.

As seen, the majority held that if a referral was made under s 79(1)(b) of the NSW Act, then s 68(2) of the *Judiciary Act* would vest jurisdiction in the NSW Court of Criminal Appeal to hear the referral.[38] The power (under s 79(1)(b) of the NSW Act) would then be permissibly conferred by the Commonwealth as incidental to the (later) exercise of (appellate) judicial power.

Kiefel CJ, Gageler and Gleeson JJ rejected the submission that ss 78(1) and 79(1) of the NSW Act could be characterised as laws respecting the procedure for the 'trial and conviction on indictment' within s 68 of the *Judiciary Act*.[39] But their Honours accepted that s 79(1)(b) and ss 86 and 88 of the NSW Act (if a referral was made) were in respect to the 'hearing and determination of appeals' to be in s 68(1)(d) and s 68(2) of the *Judiciary Act*.[40] From there, the conclusion was reached that ss 78(1) and 79(1)(b) of the NSW Act were laws respecting the

---

[37] It was also argued in the NSW Court of Appeal that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) may have been engaged: see (2021) 107 NSWLR 75 [135] (Leeming JA). I have left the 'large question' (as Leeming JA called it) of whether the ADJR Act was engaged out of this paper. Whether leaving it to one side here is a papering over of a crack or a fault line will be seen in the fullness of time.

[38] Which referral would be heard as an appeal under the *Criminal Appeal Act 1912* (NSW) by s 86 of the of the NSW Act.

[39] ***Huynh HCA*** [70]. That rejection appears to undermine the basis on which the majority in the NSW Court of Appeal through the judgment of Basten JA (2021) 107 NSWLR 75 [8] - [9], [11] held there had been the vesting of the federal jurisdiction in it. It may be noted that apart from generally agreeing with Basten JA, Payne JA did not separately consider the vesting of federal jurisdiction.

[40] ***Huynh HCA*** [72], [74]; Jagot J agreeing at [265].

procedure for the hearing of appeals under s 86 and so could be applied by s 68(1) of the *Judiciary Act*.[41]

It is not clear how the power (under s 79(1)(b) of the NSW Act) would be permissibly conferred if there was no referral to the NSW Court of Criminal Appeal and no (ultimate) exercise of judicial power. That is, where there was no judicial power to which the application might be incidental.

No argument was addressed to the High Court as to the vesting of jurisdiction in the NSW Court of Appeal to hear and determine Mr Huynh's application to it. And it is not clear what consideration, or answer, was given to that issue by the High Court.

Edelman J considered the vesting of federal jurisdiction more directly. He identified that s 39(2) and s 68(2) of the *Judiciary Act* may have conferred federal jurisdiction, but it is not clear whether that was in respect of the 'underlying' criminal process against Mr Huynh; any appeal which might be heard following a referral; or in respect of Mr Huynh's application to the NSW Court of Appeal.[42]

Additionally, it appears that Edelman J held that s 68(2) vested the jurisdiction as the provisions of Div 3 of Pt 7 were within the 'full generality' of the definition of 'appeal' within the *Judiciary Act*.[43] Here it appears he was referring to the (possible) appeal on a referral as he referred to s 79 as a 'gateway' to the jurisdiction conferred on the NSW Court of Criminal Appeal by ss 86 and 88 of the NSW Act,[44] and the latter remained a species of appeal within s 68(2) of the *Judiciary Act* and was capable of being the subject of the conferral of federal

[41] ***Huynh HCA*** [77]; Jagot J agreeing at [265].
[42] ***Huynh HCA*** [178], [182].
[43] ***Huynh HCA*** [214].
[44] ***Huynh HCA*** [215].

jurisdiction.[45] In this respect, his Honour would have agreed with the majority. But, as noted, he considered it questionable whether the process under s 79 of the NSW Act (of itself) was incidental to any later appeal.[46]

For Basten JA, the primary source of Garling J's authority under the NSW Act had been s 68(2) of the *Judiciary Act* as Mr Huynh was a federal offender.[47] It may be that he was speaking at a high level, rather than specifically about the (non-judicial) s 79 of the NSW Act because as he later concluded, s 68 of the *Judiciary Act* was not validly engaged.[48]

While accepting that s 68(2) had vested jurisdiction in the NSW District Court and the Court of Criminal Appeal for Mr Huynh's trial, conviction and appeal, Leeming JA considered that the question of the vesting of federal jurisdiction to hear an application under Pt 7 was 'much more complex'.[49]

Leeming JA said the NSW Court of Appeal was exercising federal jurisdiction because the basis of the application was a challenge to the conviction of a federal offence.[50]

While identifying that there was a 'deal of complexity in the way in which this Court has been invested with federal jurisdiction',[51] Leeming JA did not clearly identify how the federal jurisdiction was vested. It may be that s 39(2) of the *Judiciary Act* would have vested such jurisdiction.

---

[45] ***Huynh HCA*** [216] - [218].
[46] ***Huynh HCA*** [200].
[47] (2021) 107 NSWLR 75 [8] - [9], [11]. Payne JA saw both the conviction and the 'current challenge to that conviction' under the NSW Act as arising under the Commonwealth's *Criminal Code*: (2021) 107 NSWLR 75 [252].
[48] (2021) 107 NSWLR 75 [120].
[49] (2021) 107 NSWLR 75 [140], see also [135].
[50] (2021) 107 NSWLR 75 [133]; as had Basten JA at [11].
[51] (2021) 107 NSWLR 75 [135]; see also his Honour's description of the 'palpable' complexity at [156].

His Honour then said that even if the NSW Court of Appeal decided Mr Huynh's judicial review application was not within its jurisdiction and dismissed it, the Court's undoubted authority to decide whether the claim was within its jurisdiction would be an exercise of federal jurisdiction.[52]

Following those observations, (as to the assessment of whether the application was within jurisdiction), I raise the following as something of a side speculation. To do so, I have departed from the assumption that power in s 79(1)(b) of the NSW Act was non-judicial power, and have rather assumed it was vested in the NSW Supreme Court. I consider that there is real scope, in an appropriate case, for the assumption actually made to be revisited at a later point.

An application under s 78 of the NSW Act, because it is an application by a federal offender, would be a matter of federal jurisdiction as per the reasoning of the NSW Court of Appeal on the subject matter of the application as noted above.

If on an application under s 78 of the NSW Act, Garling J had made an assessment of whether federal jurisdiction had been vested in the NSW Supreme Court under the *Judiciary Act* or otherwise, that would also have been an exercise of federal jurisdiction.

The characterisation of such being an 'exercise' of federal jurisdiction, does not, obviously enough, answer the question of how the jurisdiction would be vested through Ch III of the *Constitution*. If Garling J had found that s 68 of the *Judiciary Act* did not apply (including s 68(2) of the *Judiciary Act*) (as the NSW Court of Appeal found), then the question of the vesting would remain unanswered.

---

[52] (2021) 107 NSWLR 75 [133].

That may point to a vesting of such jurisdiction via the more general provision of s 39(2) of the *Judiciary Act*.[53]

It might come to be seen as being within an approach quite recently taken by the WA Court of Appeal in ***Hanssen Pty Ltd v Owners of Strata Plan 58161***.[54] There, a distinction was drawn between 'substantive' and 'jurisdictional' controversies which were said to 'generally constitute separate matters',[55] within the Constitutional meaning of the word.

The distinction was drawn as follows:

> *jurisdictional controversies* arising under ch III of the *Constitution* … concern the authority of a court or tribunal to adjudicate on a substantive controversy which is the subject of proceedings before that court or tribunal; and
>
> *substantive controversies* about the validity of a law which do not concern the authority of a court or tribunal to adjudicate on the matter but rather concern the substantive rights, duties and liabilities at issue between the parties.
>
> In either case there will be a matter arising under the *Constitution* or involving its interpretation within the meaning of s 76(i) of the *Constitution*. …[56]

The distinction drawn by the WA Court of Appeal may, by parity of reasoning, I suggest, apply equally to determining the authority, here, of the NSW Supreme Court to hear and determine the application of Mr Huyhn as a matter arising under a Commonwealth law; including whether such jurisdiction had been validly vested.

---

[53] Noting immediately that as discussed elsewhere, this would be contrary to the reasoning of Kiefel CJ, Gageler and Gleeson JJ on the specific relationship between s 39(2) and s 68(2) of the *Judiciary Act*.
[54] ***Hanssen Pty Ltd v Owners of Strata Plan 58161*** [2024] WASCA 87 (***Hanssen Pty Ltd***). At the time of writing, this decision remains the subject of an undetermined special leave application.
[55] ***Hanssen Pty Ltd*** [61].
[56] ***Hanssen Pty Ltd*** [60] (emphases in the original).

The WA Court of Appeal considered and articulated that distinction in a context well removed from Mr Huynh's case as it involved the jurisdiction of a (non-court) State tribunal.

However, if Mr Huynh's application under the NSW Act was a matter of federal jurisdiction 'merely' because he was a federal offender, and consideration of whether federal jurisdiction had been vested in a judge of the NSW Supreme Court was a 'jurisdictional matter' or otherwise an exercise of federal jurisdiction, then the vesting of jurisdiction for that jurisdictional matter via s 39(2), rather than s 68(2), of the *Judiciary Act* may be a viable (if not the preferable) analysis.

The NSW Supreme Court might have had authority vested under s 39(2) of the *Judiciary Act* to determine the 'jurisdictional controversy' which relied on the argument of the application being incidental to the exercise of federal jurisdiction.

Of course, time will tell as to whether the distinction articulated by the WA Court of Appeal is useful, robust and, or, will be accepted.

Nature of the power being exercised and s 68 of the Judiciary Act

Basten JA said that s 68 of the *Judiciary Act* may vest authority to perform an administrative function on a court if it is incidental to the exercise of judicial power.[57] Uncontroversially, he proceeded on the basis that one part of s 79 of the NSW Act (the power to refer to the Court of Criminal Appeal under Div 5 Pt 7 of the NSW Act) could reasonably be treated as incidental to an exercise of federal jurisdiction where the referral involved a federal conviction.[58]

[57] See, for example, (2021) 107 NSWLR 75 [9] (Basten JA).
[58] (2021) 107 NSWLR 75 [72].

However, here (as seen) it was accepted that the function was not vested in a court. In seeking to identify the federal provision which conferred that authority on the judge, Basten JA said:

> … the only federal law identified was a provision of the Judiciary Act investing a 'court of the State' with federal jurisdiction. … Section 68(2) of the Judiciary Act may be invoked because jurisdiction is conferred on a court of a State. If the State law picked up and applied in the exercise of federal jurisdiction is not conferred on a court exercising State jurisdiction, s 68 will not be engaged.[59]

Basten JA considered that s 68(1) was significant here because it picked up State laws which might be described as incidental to, or ancillary to, the exercise of the judicial function.[60] He went on to conclude that whatever the limits to the incidental power in relation to federal jurisdiction, a State law conferring a non-curial power on a Supreme Court judge could not engage s 68(1) of the *Judiciary Act*.[61] His Honour saw that as a potential interference with the operation of the State as an independent polity, contrary to the ***Melbourne Corporation*** case.[62] The difficulty, here, for Basten JA was that no law of the Commonwealth other than the *Judiciary Act* was identified as purporting to confer the administrative function in ss 78 and 79 of the NSW Act which was incidental to a judicial function.[63]

This appears to be a different issue from the argument put by Victoria in the High Court which assumed that s 68(1) of the *Judiciary Act* could confer an administrative function on a *persona designata*, subject to conditions which it contended had not been satisfied. Again, as the High Court did not seek to resolve

[59] (2021) 107 NSWLR 75 [40], [42].
[60] (2021) 107 NSWLR 75 [77].
[61] (2021) 107 NSWLR 75 [93].
[62] (1947) 74 CLR 31 as quoted by Basten JA in (2021) 107 NSWLR 75 [93].
[63] (2021) 107 NSWLR 75 [117].

all of the questions raised by Victoria,[64] and, so, one would not need to be too brave to identify the arguments raised as fault lines for the future.

The answer inferred to be given by the majority to this 'difficulty' identified by Basten JA is that the administrative function on the *persona designata* is conferred by s 68(1) of the *Judiciary Act* as being incidental to the judicial power vested in the Court of Criminal Appeal under s 86 of the NSW Act.[65] The issue was not otherwise addressed or explained.

If that is the answer given, then it would seem to be an area which will be ripe for further development and explanation. The majority applied quite a different 'target' for the operation of s 68(1) of the *Judiciary Act*, than had been done by the majority in the NSW Court of Appeal (through the judgment of Basten JA). This is the question of interpretation raised by Edelman J in the second assumption he identified as "questionable":[66] that s 68(1) is directed to "persons" and is *not* expressed to apply State laws to officials or other persons (of a State character or otherwise) like Garling J.

It also may be another way of highlighting the centrality to the majority's reasoning of the view taken as to what is 'incidental' to an exercise of judicial power. That is especially so here, where at the time of the application under s 78 of the NSW Act, there may never be an exercise of judicial power subsequently by the NSW Court of Criminal Appeal.

---

[64] ***Huynh HCA*** [82] (Kiefel CJ, Gageler and Gleeson JJ); [176] (Gordon and Steward JJ).
[65] see ***Huynh HCA*** [77].
[66] ***Huynh HCA*** [195].

The NSW Act did not apply of its own force

The High Court unanimously held that the NSW Act did not apply directly, or of its own force, to allow Mr Huynh's application to proceed.[67] Indeed, including the NSW Court of Appeal, only one (from the 12) judge held that the NSW Act applied of its own force.

In those circumstances, one might imagine there is not likely to be a 'fault line' worth discussing. However, in the post-***Rizeq*** world it may not yet be so straight-forward.

It may be noted that the judgments which held that the NSW Act did not apply of its own force, started with a consideration of the terms of the statute and whether it was intended to apply in respect of a federal conviction. That is, there was some primacy given to the intention of the State legislature. The impact of a State's legislative intention will be returned to below.

The question of interpretation arose as s 78(1) of the NSW Act allowed an application 'for an inquiry into a conviction or sentence' to be made. While there were definitions of 'conviction' and ‘sentence’ in s 74(1) of the NSW Act, they were inclusive definitions which did not answer the question of whether they included Commonwealth convictions and sentences or were limited to convictions and sentences for State offences.

In ***Rizeq***, by way of contrast, the interpretation exercise of the WA Act was not nearly as prominently undertaken. Having held the WA enactment was purporting to regulate an exercise of federal jurisdiction, the plurality held that s 114(2) of the *Criminal Procedure Act* (WA) allowing for majority verdicts applied, as a

---

[67] ***Application of Huy Huynh under Part 7 of the Crimes (Appeal and Review) Act 2001 for an Inquiry*** [2020] NSWSC 1356.

matter of interpretation, to a WA court only when exercising Western Australian jurisdiction.[68] That was consistent with the 'prescription' in s 7 of the *Interpretation Act* (WA), which in fairly standard terms provided that: 'Every written law shall be construed subject to the limits of the legislative power of the State and so as not to exceed that power … .'[69]

The interpretation in ***Rizeq*** followed the characterisation of the *Criminal Procedure Act* (WA) being a law which would govern or regulate the exercise of federal jurisdiction. That characterisation and the statutory prescription led to the interpretation adopted.

There is clear interaction between deciding on which side of the ***Rizeq*** divide a State law falls and construing the statute. It may be that it is not particularly important, or ultimately helpful, to have a preferred order of considering the two interacting considerations.

Notwithstanding that reservation, I would suggest that firstly classifying the State law as per ***Rizeq*** makes the necessary analysis clearer.

If the State law could apply of its own force under ***Rizeq***, then it will fall to be construed solely under the applicable interpretation rules in that State. Of course, it might be that the provision does not, on its proper construction by those rules, have application.

If the State law falls on the other side of ***Rizeq*** and purports to extend into the regulation of the exercise of federal jurisdiction, then the exercise has to be undertaken as to whether that State law can be applied via a Commonwealth

---

[68] (2017) 262 CLR 1 [104] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[69] Noting that there is not an equivalent provision in Western Australia to s 12(1)(b) of the *Interpretation Act 1987* (NSW).

application provision, including addressing the questions of whether there are any conflicting provisions of the *Constitution* or another federal law, and the degree of permissible translation of the State law. The interpretation rules which apply on this side are different.

For the State law falling on this side, its legislative validity will generally be saved by the offending provision, as a matter of interpretation, being read down by provisions such as s 7 of the *Interpretation Act* (WA).

The complicating factor in ***Huynh*** may have been that a Commonwealth conviction was in issue. For example, Basten JA started with a consideration of the "constitutional scope of State legislative power",[70] but not, it would seem, because of the negative implications of Ch III which would inform the two steps I have suggested above.

Rather, Basten JA[71] identified the principle of statutory interpretation which:

> … especially in construing laws having the potential to affect the exercise of government powers by another polity, reads a law which does not expressly identify the scope of its operation as having local effect only.[72]

The 'localising principle' was said to be identified in s 12(1) of the *Interpretation Act 1987* (NSW),[73] but it is plain that the principle exists and applies independently of s 12 of the *Interpretation Act* (NSW).

---

[70] (2021) 107 NSWLR 75 [67].
[71] Relying in part on ***Solomons v District Court of NSW*** (2002) 211 CLR 119 [9] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
[72] (2021) 107 NSWLR 75 [67].
[73] There are analogues to that NSW provision in some, but not all, State and Territories: *Interpretation of Legislation Act 1984* (Vic) s 48(b); s 35(1)(b) of the *Acts Interpretation Act 1954* (Qld); s 27(b) of the *Acts Interpretation Act 1931* (Tas); s 38(1)(b) of the *Interpretation Act 1978* (NT); s 122(1)(b) of the *Legislation Act 2001* (ACT). Such provision build upon the presumption identified, eg, by O'Connor J in ***Jumbunna Coal Mine NL v Victorian Coal Miners' Association*** (1908) 6 CLR 309, 363: '… statutes … are always read as being prima facie restricted in their operation within the territorial limits'. Interestingly, NSW has had an equivalent provision to its current s 12 of the *Interpretation Act 1987* since s 17 was enacted within the *Interpretation Act 1897 No. 4* (NSW) which became operative in June 1897.

Following that approach, the reference to 'conviction or sentence' in s 78 of the NSW Act was held by Basten JA to be read as applying to a conviction for a State offence in a NSW court.[74] So, it was held that the NSW Act did not purport to apply to Mr Huynh's conviction[75] - presumably so as not to offend the constitutional limits on NSW interfering with the Commonwealth exercise of government powers via the prosecution of Mr Huynh. There were, also, for Basten JA other indications within Pt 7 of the NSW Act that it was not intended to operate of its own force with respect to federal convictions.[76]

On this approach, Basten JA, appears not to have found it necessary to address which side of the ***Rizeq*** divide the NSW Act would fall.

Leeming JA, having decided that the NSW Act could apply of its own force (after analysing the ***Rizeq*** divide), turned to the construction of the provision and concluded (contrary to the majority in that Court) that ss 78 and 79 applied to convictions and sentences imposed by NSW courts and not just to those imposed for NSW offences.[77] In doing so, Leeming JA identified a different 'hinge' on which the NSW Act applied.

Leeming JA identified the four steps in his reasoning to the conclusion that ss 78 and 79 of the NSW Act applied of their own force.[78] The second of those was that the rights conferred by ss 78 and 79 were 'better regarded' as going to the rights of persons, rather than governing the exercise of jurisdiction of a court and so fell on the direct application side of the ***Rizeq*** divide.[79]

---

[74] (2021) 107 NSWLR 75 [69].
[75] (2021) 107 NSWLR 75 [13(1)].
[76] (2021) 107 NSWLR 75 [72] - [75] per Basten JA.
[77] (2021) 107 NSWLR 75 [211].
[78] (2021) 107 NSWLR 75 [188].
[79] (2021) 107 NSWLR 75 [188(2)].

Kiefel CJ, Gageler and Gleeson JJ did not see the localising principle in s 12(1)(b) of the *Interpretation Act* (NSW) as being of assistance.[80] Rather, they thought the conclusion of Basten JA that the NSW Act was not intended to apply to a federal offence was compelling. That was because the alternative construction (that it applied to a federal offender) would be constitutionally futile and beyond the legislative power of the State.[81] In this respect, they were not drawing on the ***Rizeq*** divide, however, it appears that they also saw the NSW Act as falling foul by extending into an exercise of federal jurisdiction.[82]

Gordon and Steward JJ again answered the question as to whether Pt 7 of the NSW Act operated of its own force via an interpretation exercise.[83] However, their Honours did then go on to consider the ***Rizeq*** divide.[84]

Although Edelman J considered the matter to be finely balanced, he concluded that the 'conviction or sentence' in s 79 of the NSW Act meant a conviction or sentence under State law.[85] Edelman J also referred, after the interpretation exercise, to the fact that the relevant part of the NSW Act would be beyond the State legislature's power applying the ***Rizeq*** divide.[86]

Leaving now those observations about the "ordering" of the enquiry, I want to return to Leeming JA's conclusion quoted above as to the rights conferred by ss 78 and 79 being 'better regarded' as going to the rights of persons, rather than governing the exercise of jurisdiction of a court.

---

[80] ***Huynh HCA*** [33]; *cf* Edelman J at [228].
[81] ***Huynh HCA*** [35] - [36].
[82] ***Huynh HCA*** [37].
[83] ***Huynh HCA*** [134], [138].
[84] ***Huynh HCA*** [139].
[85] ***Huynh HCA*** [228], [230].
[86] ***Huynh HCA*** [231] - [232].

His Honour stated:[87]

> … s 78 and s 79 are not directed to the exercise of jurisdiction by a court in the sense stated in ***Rizeq***. They confer a right upon a person convicted of an offence to apply to a judicial officer who will make an administrative decision as to whether there will be an inquiry or whether the matter will be removed to the Court of Criminal Appeal. Those provisions do not themselves direct the exercise of federal jurisdiction by a court. Rather, they are laws conferring a new 'right' upon the parties …

With respect, although numerically challenged in the result, I suggest that characterisation is not easily dismissed.

Whether others would accept that characterisation, it does point to the potential outworkings of a pronounced 'fault line' from ***Rizeq*** (rather than a fault line *from* this case).

It also feeds into the discussion below as to whether the application and its consideration under ss 78(1) and 79(1)(b) were truly incidental to, or a proceeding for, the hearing of an appeal. As noted below, the view which Leeming JA took was not without support in the judgment of Edelman J albeit, perhaps, by side-wind of including it as the second aspect of the third questionable assumption.

Part of that fault line might be thought to be apparent when a provision appears, reasonably and sensibly, to either confer rights and liabilities as well as going to the exercise of the court's jurisdiction in respect of them; or where reasonable minds can differ as to which side of the ***Rizeq*** divide the provision falls.

Edelman J reiterated his view that there is 'significant difficulty' in identifying which side of the divide a law falls.[88]

---

[87] (2021) 107 NSWLR 75 [200].
[88] ***Huynh HCA*** [220], [222]; see also, for example, ***Rizeq v The State of Western Australia*** (2017) 262 CLR 1 [118] - [119] (Edelman J); ***Masson v Parsons*** (2019) 266 CLR 554 [67] - [68] (Edelman J).

In identifying this, I am probably not doing anything different from making good the observations made in the first of these symposia by Professor Gummow who identified the ***Rizeq*** divide as creating 'a fresh area for disputed characterisation'.[89]

Beyond State legislative power

There may be a hidden question of State legislative power in ***Huynh***, which is suggested by the emphasis on the interpretation of the NSW Act and which may arise particularly where State legislation manifests an intention to apply to a matter proscribed by ***Rizeq***.

That is not commonly the case on the face of the State legislation.

The common situation is that the relevant State Act is openly worded as was the case here, and also in ***Rizeq***[90] where s 114(2) of the *Criminal Procedure Act* (WA) referred to 'a jury', 'a charge', and 'verdict', without further express limitation on those words.

It is well-established that a State legislature lacks power to extend one of its enactments to regulate or govern the exercise of federal jurisdiction.[91]

It must be assumed that an openly worded State law which *could* be read to govern the exercise of federal jurisdiction is not invalidly passed as a result of that alone.[92] Rather the enactment, while valid as a matter of State legislative

---

[89] Gummow W, 'The Law Applicable in Federal Jurisdiction' in Griffiths and Stellios (eds) *Current Issues in Australian Constitutional Law* (2020) p 104 at 117.
[90] (2017) 262 CLR 1.
[91] For example, ***Rizeq v State of Western Australia*** (2017) 262 CLR 1 [57] - [64] (Bell, Gageler, Keane, Nettle & Gordon JJ). The State Parliaments lack the capacity 'to command a court as to the manner of exercise of federal jurisdiction conferred on or invested in that court' [61]; see also Kiefel CJ [15]. The position was endorsed by Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ in ***Masson v Parsons*** (2019) 266 CLR 554 [30].
[92] Lindell *Cowen and Zines's Federal Jurisdiction in Australia* (4th ed) 2016, p 361.

power, is ineffective to apply that part of the law to govern the exercise of federal jurisdiction.

So, the potential extension is ineffective and read down, rather than the provision being invalidly passed. That allows the application provisions (s 68(1), s 79(1) and s 80 of the *Judiciary Act*) to potentially operate and apply a State law, where it could not otherwise apply.

It is the extension into the regulation of federal jurisdiction that is beyond power. Where the State Act is openly worded, then it will be read down to apply within the State's legislative power.[93] If statutory intervention is required to provide that rule of construction then there are provisions similar to s 7 of the *Interpretation Act* (WA).[94]

However, I suggest different considerations apply where a State Act expressly by its terms purports to regulate or govern a matter undoubtedly affecting the exercise of federal jurisdiction.

Where an express provision is made, then it presumably cannot be read down. Rather, that express enactment would be severed from the rest as being beyond State legislative power.

If that is correct, it would seem that the Commonwealth application provisions may not have a valid State enactment to pick up or apply.

---

[93] See for example Pearce *Statutory Interpretation in Australia* (9th ed) 2019 [5.11] and the cases and materials cited therein.
[94] Section 31 *Interpretation Act 1987* (NSW); s 6 of the *Interpretation of Legislation Act 1984* (Vic); s 9 *Acts Interpretation Act* (Qld); s 3 *Acts Interpretation Act* (Tas); s 15 *Acts Interpretation Act* (SA); s 120 *Legislation Act 2001* (ACT); s 59 *The Interpretation Act 1978* (NT).

The question is not a theoretical one as there are, now, some State provisions which expressly apply to matters clearly going to the regulation of the exercise of federal jurisdiction.

For example, ss 83 and 84 of the *Criminal Procedure Act 1986* (NSW) extend prohibitions on directions requiring the attendance of complainants in committal proceedings for certain Commonwealth offences which correspond to certain nominated State offences.[95]

Another example is the *Bail Act 2013* (NSW), where s 16B(1)(g) expressly applies to certain Commonwealth offences under Pt 9.1 of the Commonwealth *Criminal Code*.

The question which has not yet been tested is whether these express provisions of State law must be severed as beyond State legislative power and so are not 'available' to be picked up by a Commonwealth application provision.

The issue might be illuminated by considering a non-*Judiciary Act* universe.

The question in the non-*Judiciary Act* universe might be put as whether there was State invested authority in its courts to apply Commonwealth laws.

Edelman J provided a possible summary of the position thus:

> …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. …

[95] See, for example, (d) in the definition of 'complainant' in s 83(3) and the definition of 'offences involving violence' at s 84(3)(h)(i) in the *Criminal Procedure Act 1986* (NSW).

> Immediately after Federation, a State court dealing with a matter arising under a Commonwealth law would therefore have exercised its powers with federal authority.[96]

In support of part of the above, Edelman J relied, principally, on the judgment of Windeyer J in ***Felton v Mulligan***, where his Honour said:

> Upon federation s 5 of the *Constitution Act* made all valid laws made by the Commonwealth Parliament 'binding on the courts, judges and people of every State and of every part of the Commonwealth'. This and s 109 of the *Constitution* assured the paramountcy of federal law.[97]

Windeyer J's statement should be understood, I think, as being addressed to matters arising under federal laws if they did not concern exclusive federal jurisdiction. The statement necessarily supports the proposition that covering cl 5 provided the command for State courts to apply Commonwealth laws (if not in exclusive federal jurisdiction). The State courts at that time would not have been recipients of federal authority.

MZXOT v Minister for Immigration and Citizenship,[98] supports the proposition that a State court generally would have had State judicial power to decide a matter under a Commonwealth law by, at the least, covering cl 5 to the *Constitution*.[99] There were certain exceptions, as identified by Inglis Clark,[100] being: matters in which the Commonwealth was a defendant; matters in which a State may be compelled under the Commonwealth *Constitution* to become a defendant; and

---

[96] ***Huynh HCA*** [207] citations omitted. It may be that by [208] (but *cf* [209]) , his Honour saw that federal authority was required by a State court even for matters not "exclusively federal". If that is so, the I am not sure, with respect, that would be supported by the passages quoted from ***Felton v Mulligan*** and ***MZXOT*** quoted.
[97] (1971) 124 CLR 367, 394.
[98] (2008) 233 CLR 601.
[99] ***MZXOT v Minister for Immigration and Citizenship*** (2008) 233 CLR 601 [26] (Gleeson CJ, Gummow and Hayne JJ); ***Rizeq*** [56] (Bell, Gageler, Keane, Nettle and Gordon JJ); ***Burns v Corbett*** (2018) 265 CLR 304 [72] (Gageler J).
[100] ***MZXOT*** (2008) 233 CLR 601 [26] (Gleeson CJ, Gummow and Hayne JJ).

matters in which a writ of mandamus or prohibition or an injunction was sought against an officer of the Commonwealth.[101]

Without the *Judiciary Act*, the authority to decide such a matter would derive from the particular State of which the Court was a part and empowered.

The particular State would have legislative power to make provision to regulate how a matter within the description of s 76(ii) of the *Constitution* were to be heard and determined in the State court exercising State jurisdiction (absent the stripping of federal jurisdiction via s 39(1) of the *Judiciary Act*).

So, in the non-*Judiciary Act* universe, provisions such as those identified in the *Criminal Procedure Act* (NSW) or the *Bail Act* (NSW) would be validly passed provisions which a State court (exercising the authority vested in it by its State legislature) could determine although they concerned in part matters under Commonwealth law.

Hence, it may be contended that in the non-*Judiciary Act* universe there is an analysis available where such State provisions are not beyond State legislative power.

While that may be thought to be theoretical (because of the non-Constitutional *Judiciary Act*), it has the effect of State laws being validly passed but not applied in the exercise of federal jurisdiction without a Commonwealth application provision.

The effect is that the passing of a State law which (like those identified above) purports to expressly apply procedural requirements or laws to Commonwealth

[101] These would seem to be the matters described by Edelman J above as concerning "exclusive federal jurisdiction".

offences would not, of itself, be beyond that State's legislative powers. Rather, it would be more properly read down (in a manner similar to the openly worded provisions discussed above) but still be capable of being picked up by a Commonwealth application provision.

The alternative is that provisions like those from the *Criminal Procedure Act* (NSW) and the *Bail Act* (NSW) referred to above, are not validly passed laws. So the infringing provisions would be severed from the balance of the enactment and there would then be no valid State law which could be applied through the Commonwealth application provisions.

Assuming that there was no other express Commonwealth provision (which would have prevented, in any event, the operation of, say, s 68(1) of the *Judiciary Act*) then the express enactment of the State would not be capable of being picked up and, depending on the drafting, it may be that the more general openly worded provision also would not apply. Indeed, the fact that there had been an express provision in the relevant State enactment might be taken as a manifestation of legislative intent that the more general openly worded provision would not apply to the particular Commonwealth topic. So, the gap would not be filled.

The application of the NSW Act by s 68(1) of the *Judiciary Act*

The High Court split four-three as to whether s 68(1) of the *Judiciary Act 1903* (Cth) could apply the NSW Act. Taking into account the NSW Court of Appeal, then at least seven judges considered that s 68(1) could not so operate, as opposed to the four that did.[102]

[102] Leeming JA did not need to consider the question, but it may be that he would have followed the approach of the majority in the High Court by reference to (2021) 107 NSWLR 75 [158] where he said: 'But the provisions in the Act on one view lend themselves readily to a divisible approach'.

Many of the questions raised by the prospect of s 68(1) of the *Judiciary Act* applying the NSW Act have been considered under different headings elsewhere, and I do not revisit them here. Rather, I want to turn to what might be seen to be the most obvious fault line, even if it, ultimately, is likely to be the least interesting because of it being tied to the particular interpretation of the NSW Act.

The permissible degree of translation and change of meaning

Of course, s 68(1) of the *Judiciary Act* is not the only Commonwealth application provision which raises this issue. It has also been considered extensively in the context of s 79(1) of the *Judiciary Act*.

I will come to the statement by Kiefel CJ, Gageler and Gleeson JJ in ***Huynh*** as to the relationship between the two provisions. But, it is perhaps as well to approach this aspect with the observation of Kirby J in ***Solomons v District Court of New South Wales***:

> The large number of dissenting opinions in this field of discourse indicates the scope for differences of view as to the statutory leeways for adaptation.[103]

Kitto J in ***Pedersen v Young*** stated (classically in this area):

> … the *Judiciary Act* does not purport to do more than pick up State laws with their meaning unchanged.[104]

Of course, care must be taken with the words ‘meaning’ and 'unchanged'.

In ***John Roberson & Co v Ferguson Transformers Pty Ltd***, Walsh J after quoting Kitto J's statement with approval said: ‘the extent of the operation

[103] (1964) 110 CLR 162, 165.
[104] (2002) 211 CLR 119 [103].

of State laws governed by s 79 is, of course, changed'.[105] So, the operation changes, but not its meaning.

But, for example, the change or adaptation allowed is broader than, for example, the State law having to be capable of 'virtually automatic application', or 'apt for immediate application', or only requiring a 'relatively modest adaptation'.[106]

It is always where the line is to be drawn. Correctly, with respect, Edelman J in ***Rizeq*** said that one of the 'difficult issues' which remained with the operation of s 79(1) 'is the extent to which [it] can apply the text of a State statute with a changed meaning'.[107] That issue has got no easier after this case.

The plurality in ***Rizeq*** stated that two aspects of how s 79 operates to adopt a State statute have emerged with 'tolerable clarity' and were together captured in the quoted statement from Kitto J in ***Pedersen v Young***. The second of those was:

> … s 79 so operating does not alter the meaning of the text of the State law other than to make that text applicable to a federal court exercising jurisdiction in the State even though the State law on its proper construction applies only to a State court.[108]

McHugh, Gummow and Hayne JJ in ***British American Tobacco v State of Western Australia*** stated that the limitation in s 79 of the *Judiciary Act*:

---

[105] (1973) 129 CLR 65, 83.
[106] ***ASIC v Edensor Nominees Pty Ltd*** (2001) 204 CLR 559 [197] (Kirby J). It may be that Kirby J accepted that his view as to the limited operation of s 79 of the *Judiciary Act* was not the law following the other judgments in ***Edensor Nominees***: see ***Solomons v District Court of New South Wales*** (2002) 211 CLR 119 [83].
[107] ***Rizeq v State of Western Australia*** (2017) 262 CLR 1 [200].
[108] ***Rizeq v State of Western Australia*** (2017) 262 CLR 1 [81] (Bell, Gageler, Keane, Nettle and Gordon JJ).

> … to those 'cases to which they are applicable' is reflected in the statements made in various cases that the State laws do not have their meaning changed. (citations omitted)[109]

Gummow and Kirby JJ in ***The Commonwealth v Mewett*** stated:

> Section 79 could not operate to pick up some but not all of the otherwise applicable terms of the NSW Act for to do so would be to give an altered meaning to the State legislation.[110]

After quoting Kitto J's statement from ***Pedersen v Young***, Gibbs J in ***Maguire v Simpson*** described an 'exception to the generality' of the statement where the wording of the State enactment would be limited in its application to the courts of that State, but nonetheless might be applied to a court exercising federal jurisdiction by s 79 of the *Judiciary Act*.[111]

Of that 'exception', Mason J in ***John Robertson & Co v Ferguson Transformers Pty Ltd*** (1973) 129 CLR 65 said that:

> Section 79 requires the assumption to be made that federal courts lie within the field of application of State laws on the topics to which it refers, at least in those cases in which the State laws are expressed to apply to courts generally. This departure from the general principle of the section requires a State law to be applied according to its terms is justified, indeed demanded, by the clear requirement that State laws on the topics mentioned are to be applied in federal jurisdiction.[112]

In ***Huynh***, Kiefel CJ, Gageler and Gleeson JJ said that there was 'difference in the nature and degree of translation is required' between s 68(1) and s 79(1)[113] and there was a promise that the 'difference' would be explored 'in

---

[109] ***British American Tobacco v State of Western Australia*** (2003) 217 CLR 30 [67].
[110] (1997) 191 CLR 471, 556.
[111] ***Maguire v Simpson*** (1977) 139 CLR 362, 376.
[112] ***John Robertson & Co v Ferguson Transformers Pty Ltd*** (1973) 129 CLR 65, 95.
[113] ***Huynh HCA*** [42].

some detail'. It is not quite clear where the difference or differences are traced in that detail.

That suggests one thing that is perhaps left for future development is whether the recognition in s 68(2) of the *Judiciary Act* that the adoption of State law proceeds by analogy[114] is, in the result, any different from an application of s 79(1) where the authorities dealing with the 'translation' allowed by s 79(1) were significant to the judgments in ***Huynh***.

There is an acceptance in the judgments in ***Huynh*** that the degree of permissible translation must be observed, lest a court via an application provision so changes the meaning or operation of the State law as to stray into the legislative field. Of course, as said, the principle is not in doubt, it is the drawing of the line.

In all of the statements quoted above as to the relevant application provision not altering the meaning of the State law, lies the anterior question: what is the State law being applied.

At a very real level, the identification of what was the State law which might be applied by s 68(1) of the *Judiciary Act* split the High Court.

Notwithstanding its significance, there is, no express guidance as to how the relevant law is to be identified in the High Court judgments.

The majority saw the law to be applied as the combination of ss 79(1)(b) and 86 of the NSW Act. The minority defined it more broadly as all of Div 3 Pt 7 of the NSW Act, which relevantly included s 79(1)(a).

---

[114] ***Huynh HCA*** [45] (Kiefel CJ, Gageler and Gleeson JJ).

Although to different conclusions, Edelman and Jagot JJ alluded to the same idea - albeit by a different language - where Edelman J said:

> In this context, a 'law' is a statutory rule on a particular subject. The 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. … the subject of the rule can be stated at a higher or lower level of generality.[115]

Or, as Jagot J put it:

> 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.[116]

It can safely be said that the identification of the law was in this case the very real fault line on which the case turned. It is hard to say, however, that there are general principles which bear on that identification, or whether it is always going to be a case-by-case analysis.

The relationship between s 39(2) and s 68(2) of the *Judiciary Act*

Kiefel CJ, Gageler and Gleeson JJ considered that the 'specific investiture' by s 68(2) displaced the 'general investiture' by s 39(2) of the *Judiciary Act*.[117] They said:

> … 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).[118]

---

[115] ***Huynh HCA*** [202].
[116] ***Huynh HCA*** [270].
[117] ***Huynh HCA*** [46].
[118] ***Huynh HCA*** [46]. Their Honours cited ***Brown v R*** (1986) 160 CLR 171, 197; ***R v Gee*** (2003) 212 CLR 230 [66] - [67]; and Professor Lindell in support *Cowen & Zines's Federal Jurisdiction in Australia* 4th ed 2016 pp 302 - 303.

That view or proposition was either not considered or approved of by the other judgments in the High Court.

Indeed, Edelman J considered it was not necessary or appropriate to decide such a 'large question' in this case as he considered that no party had argued that s 68(2) displaced s 39(2) of the *Judiciary Act* relevantly in this case.[119]

Again, it is perhaps not too brave to suggest that this, in an appropriate case, will reveal another fault line.

The policy behind s 68 of the *Judiciary Act*

There was an acceptance of the 'general policy' of s 68 of the *Judiciary Act* as articulated by Dixon J in ***Williams v R [No. 2]***[120] and by Gleeson CJ in ***R v Gee***:[121] to administer criminal justice in relation to federal offences uniformly within each State with the procedures for State offences.[122]

This has been the orthodox position since at least ***Williams [No. 2]*** as to the 'general policy' of s 68 of the *Judiciary Act*.

However, I suggest that 'general policy' has been effectively undermined or made very significantly weaker by the very 'extensive' provisions which the Commonwealth has made increasingly over the years via provisions such as are contained in the *Crimes Act 1914* (Cth).

Basten JA recognised this and remarked on the 'extensive provisions' made by the Commonwealth.[123] This description is in no way inaccurate, but it does not

---

[119] ***Huyhn HCA*** [213].
[120] (1934) 50 CLR 551.
[121] (2003) 212 CLR 230.
[122] ***Huynh HCA*** [53] (Kiefel CJ, Gageler and Gleeson JJ); [143] (Gordon and Steward JJ); [211] (Edelman J).
[123] (2021) 107 NSWLR 75 [79].

immediately convey just how 'extensive' the Commonwealth provisions are. For example, there are currently more than 750 pages of the *Crimes Act* (Cth) and the overwhelming majority of those are devoted to the sort of topics identified by Basten JA, and other matters incidental or ancillary to criminal law enforcement and procedures, and the prosecution and conviction of federal offenders.

A similar point might be made, for example, by reference to Div 1A of Pt III of the *Federal Court of Australia Act 1976* (Cth), of which 50 pages or so: '… sets out procedures to be followed during criminal proceedings in the [Federal] Court relating to certain indictable offences'.[124]

That is, there is force in the proposition that the Commonwealth by its separate and extensive (other) enactments no longer should be taken as intending the general policy still being attributed to s 68 of the *Judiciary Act*.

Clearly, that (once) general policy of the Commonwealth has also been undermined or weakened by developments in State criminal procedure such as majority verdicts and trial by judge alone of indictable offences.[125]

Certainly I can say anecdotally from my previous professional life that, at least in Western Australia, more thoughtful accuseds or offenders knew clearly whether they were State or Commonwealth accused or offenders. The same can be confidently asserted in respect of those prosecuting Commonwealth and State offences.

The shifts which have occurred in the Commonwealth making specific and detailed provision for criminal procedure, and the States moving in the way they

---

[124] s 23AA to the *Federal Court of Australia Act*; see also ss 68A, 68B, 68C and 68D of the *Judiciary Act*.
[125] Having made the mistake once in respect of majority verdicts, I am not suggesting that they or trial by judge alone apply to Commonwealth offences.

have, suggests that s 68(1) of the *Judiciary Act* might be more accurately described as having a 'gap-filling role'[126] like s 79(1) of the *Judiciary Act* and, with respect, contrary to the view expressed by Kiefel CJ, Gageler and Gleeson JJ.[127]

A second matter which might be thought to arise under this general heading is, perhaps paradoxically, does the Commonwealth need to expressly enact similar provisions to those in Div 3 Pt 7 of the NSW Act for its offenders.

Some might consider that the availability of such post-conviction reviews should rest on a firmer foundation than the slender majority in this case.[128] Whether or not such concerns are amplified by Edelman J's views as to precedential value of ***Huynh*** are perhaps moot.[129]

Section 21D of the *Crimes Act* (Cth) recognises, and does not affect, the exercise of the Royal prerogative of mercy as vested in the Governor-General. However, without State and Territory provisions directed to the same end as Div 3 Pt 7 of the NSW Act,[130] Commonwealth offenders would lack the extra (albeit admittedly variable) protections that provisions of State and Territory laws provide.

Basten JA posited heads of Commonwealth power which may support the Commonwealth establishing a statutory scheme similar to that of the NSW Act.[131]

---

[126] Noting that Edelman J in ***Huynh HCA*** at [233] considered tat the metaphor of "filling the gap" was not entirely apt.
[127] ***Huynh HCA*** [42]; Leeming JA raised that possibility, albeit on a different basis (2021) 107 NSWLR 75 [222].
[128] Or as Edelman J expressed it: …on a wing and a prayer" ***Huynh HCA*** [257].
[129] ***Huynh HCA*** [190] and following.
[130] See for example s 327 of the *Criminal Procedure Act 2009* (Vic); s 140 of the *Sentencing Act 1995* (WA); s 419 of the *Criminal Code Act 1924* (Tas); s 173(1) of the *Criminal Procedure Act 1921* (SA); s 431 of the *Criminal Code 1938* (NT); s 672A of the *Criminal Code* (Qld); Pt 20 of the *Crimes Act 1900* (NSW). In referring to these, I am not suggesting that they are, in any way, all perfect analogues of the position in NSW under the NSW Act.
[131] (2021) 107 NSWLR 75 [65].

Certainly Gordon and Steward JJ were in no doubt '… that the Commonwealth should enact its own procedure if it wishes such a procedure to be available for federal offences …'[132]

[132] ***Huynh HCA*** [176].