OUTLINE OF SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA ON JURISDICTIONAL ISSUES

COURT DETAILS	
Court	Supreme Court of New South Wales
List	Court of Appeal
Registry	Sydney
Case number	2021/00015614
TITLE OF PROCEEDINGS	
First Applicant	**Huy Huynh**
First Respondent	**Attorney General of New South Wales**
Second Respondent	**Attorney-General of the Commonwealth of Australia**
Third Respondent	**Supreme Court of NSW**
FILING DETAILS	
Filed for	**Attorney-General of the Commonwealth of Australia**
Legal representative	Matthew Blunn, the Australian Government Solicitor
Legal representative reference	23003443
Contact name and telephone	[redacted]
Contact email	[redacted]

PART I INTRODUCTION

1 The applicant, Mr Huy **Huynh**, is a Commonwealth offender, who was convicted in 2015 in the District Court of New South Wales for an offence against s 11.5(1) and 307.11(1) of the *Criminal Code* (Cth)[1] of conspiracy to import a commercial quantity of a border-controlled precursor (pseudoephedrine). Having exhausted available avenues of appeal,[2] he sought to avail himself of the post-conviction review procedure in Part 7 of the *Crimes (Appeal and Review) Act 2002* (NSW) (**CAR Act**).

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1 Being the Schedule to the *Criminal Code Act 1995* (Cth).

2 *Cranney v The Queen; Huynh v The Queen* [2017] NSWCCA 234; (2017) 325 FLR 173 (Price J, with Hoeben CJ at CL and Latham J agreeing); *Huynh v The Queen* [2019] HCASL 6 (Keane and Edelman JJ).

2 In *Application of Huy Huynh under Part 7 of the Crimes (Appeal and Review) Act 2001 for an Inquiry* [2020] NSWSC 1356 (**Primary Decision**), Garling J dismissed Mr Huynh's summons on the papers.

3 By a Summons dated 18 December 2020 and filed on 18 January 2021, Mr Huynh sought judicial review of the Primary Decision pursuant to s 69 of the *Supreme Court Act 1970* (NSW) (**Supreme Court Act**), alleging error of jurisdiction and error of law.[3]

4 By a Further Amended Summons dated 19 August 2021,[4] Mr Huynh applied for judicial review of the Primary Decision pursuant to the inherent jurisdiction of the Court, ss 65, 69 or 101 of the *Supreme Court Act*, s 5 of *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), or s 39(2) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

5 In *Attorney-General (Cth) v Huynh* [2023] HCA 13, a majority of the High Court of Australia held that, by force of s 68(1) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), ss 78(1) and 79(1)(b) of the CAR Act (but not s 79(1)(a)) are applied as surrogate federal laws to persons convicted in New South Wales courts of Commonwealth offences.[5] The High Court remitted the matter to this Court for the hearing and determination of Mr Huynh's Further Amended Summons.

6 On 14 June 2023, Mr Huynh filed an 'Amended Summons', together with a 'Statement of Grounds' dated 22 May 2023. Those documents were provided to the Attorney-General by the Registry on 29 June 2023. The 'Amended Summons' essentially reverts to the content of the initial Summons filed on 18 January 2021, with some minor changes including naming the Attorney-General of the Commonwealth as respondent in the place of the Attorney General of New South Wales.[6] The Amended Summons once again seeks relief solely pursuant to s 69 of

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3 The Summons named the Attorney General of New South Wales as respondent. By an order made on 1 February 2021, the Supreme Court of New South Wales was joined as second respondent. After Mr Huynh had filed an Amended Summons and Further Amended Summons in which the Attorney-General of the Commonwealth was named as an additional respondent, the Attorney-General of the Commonwealth consented to his joinder: see *Huynh v Attorney General (NSW)* (2021) 107 NSWLR 75 at 81-82 [7], 119 [151] (Leeming JA).

4 An earlier Amended Summons was filed on 19 July 2021, seeking relief pursuant to the inherent jurisdiction of the Court, or ss 65, 69 or 101 of the Supreme Court Act.

5 [2023] HCA 13 at [8] (Kiefel CJ, Gageler and Gleeson JJ), [266] (Jagot J). The High Court set aside the Court of Appeal's decision in *Huynh v Attorney General (NSW)* (2021) 107 NSWLR 75, which had held by majority that Part 7 of the CAR Act did not apply to Commonwealth offenders such as Mr Huynh: see Bathurst CJ at [1], Basten JA at [13], Gleeson JA at [128] and Payne JA at [251].

6 On 5 July 2023, the Registrar made orders (which were not opposed by Mr Huynh) to "re-join" each of the Attorney General of New South Wales (as first respondent) and the Supreme Court of New South Wales (as third respondent).

the Supreme Court Act (omitting the references in the Further Amended Summons to the ADJR Act and the Judiciary Act). The grounds set out in the Amended Summons reflect those in the initial Summons, rather than those contained in the Further Amended Summons dated 19 August 2021.

7 The Attorney-General files these submissions in order to address jurisdictional issues that were not addressed by the Court of Appeal at first instance or by the High Court on appeal.[7] These jurisdictional issues arise because of the interaction between the ADJR Act, the Judiciary Act and the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (**Cross-vesting Act**).

8 The jurisdictional issues arise notwithstanding that the Amended Summons no longer expressly invokes the ADJR Act or the Judiciary Act as a basis for jurisdiction in the present proceedings.[8] As submitted below, this is because the ADJR Act excludes the jurisdiction of any State court in relation to the 'review' of the Primary Decision, other than pursuant to the Cross-vesting Act.

9 The Attorney-General submits that there are three questions that need to be addressed for the purposes of deciding whether the matter should be determined by this Court or should be transferred to the Federal Court pursuant to the Cross-vesting Act.[9] The three questions are:

a. is the matter a 'special federal matter' within the meaning of s 3(1) of the Cross-vesting Act?

b. if it is a special federal matter, are there 'special reasons' for the Court of Appeal to determine the matter, within the meaning of s 6(3)?

c. if there are special reasons, should the Court exercise its discretion under s 6(3) of the Act to order that the matter be determined by this Court?

10 The Attorney-General submits that the answer to all three questions is yes, for the following reasons:

a. *First*, the proceeding falls within paragraphs (c) and/or (e) of the definition of 'special federal matter' in s 3(1) of the Cross-vesting Act: that is, the

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7 The issue of whether jurisdiction is in fact conferred on the Supreme Court is required to be determined at the outset: ***Moore*** *v Commonwealth Director of Public Prosecutions* [2023] NSWCA 153 at [18] (Griffiths AJA, with whom White JA agreed at [1]).

8 Indeed, at the directions hearing held on 5 July 2023, Mr Huynh indicated he did not intend to change the jurisdictional basis of his application. Accordingly, the Commonwealth Attorney-General proceeds on the basis that Mr Huynh seeks relief pursuant to each of the Supreme Court Act, the ADJR Act and the Judiciary Act.

9 *Cf. Huynh v Attorney General (NSW)* (2021) 107 NSWLR 75 at 114 [135], 124 [176] (Leeming JA, dissenting).

application for judicial review of the Primary Decision is a matter arising under the ADJR Act, and/or a matter that is within the original jurisdiction of the Federal Court under s 39B(1A)(c) of the Judiciary Act (as a matter arising under a Commonwealth law).

b. *Secondly*, there are special reasons for ordering that the proceeding be determined by this Court under s 6(3) of the Cross-vesting Act, namely:

    i. keeping the proceedings in the Court of Appeal is consistent with the legislative scheme of territorial uniformity of criminal procedure for all criminal defendants (*i.e.* having uniformity within each State as to the procedure for dealing with State and federal offences), as opposed to national uniformity of criminal procedure for Commonwealth criminal defendants;

    ii. the matter involves the interpretation of State law (albeit picked up and applied as surrogate federal law) and an exercise of power by a State judicial officer (albeit a power conferred by the operation of federal law), and relates to matters arising from the prosecution of charges brought in the Supreme Court;

    iii. the review of post-conviction procedures under the CAR Act is not a class of proceedings which fall within the specialist expertise of the Federal Court, and are proceedings which would ordinarily be considered by the Court of Appeal; and

    iv. the underlying judicial review proceeding has no real prospect of success, and it can and should be determined promptly by the Court of Appeal.

c. *Thirdly*, having regard to those special reasons, and the lengthy procedural history this remitted proceeding, the Court should exercise its discretion under s 6(3) of the Cross-vesting Act to order that the Court determine the matter itself.

11 In those circumstances, the Court should make an order, pursuant to s 6(3) of the Cross-vesting Act, that the matter be determined by this Court (and not be transferred to the Federal Court).

PART II THE COURT'S JURISDICTION

Nature of the power exercised pursuant to ss 78(1) and 79(1)(b) of the CAR Act (as applied by s 68(1) of the Judiciary Act)

12 In order to consider how the questions in relation to the Cross-vesting Act arise in relation to Mr Huynh's further amended summons, it is first necessary to characterise the nature of the power exercised pursuant to ss 78(1) and 79(1)(b) of the CAR Act as picked up and applied to Commonwealth offenders by s 68(1) of the Judiciary Act. The following propositions inform that process of characterisation.

13 *First*, an authorised judge who is considering an application under s 78 of the CAR Act is exercising administrative, and not judicial, power. Subsection 79(4) of the CAR Act states that proceedings under s 79 are not 'judicial proceedings'. Such proceedings involve the exercise of an administrative power or function (whether as *persona designata* or as incidental to the exercise of judicial power).[10]

14 *Secondly*, an authorised judge exercising power under ss 78(1) and 79(1)(b) in relation to a federal offender, such as Mr Huynh, is exercising a power conferred by a law of the Commonwealth (*i.e.* federal executive power). The fact that the power is exercised by a judge of the Supreme Court does not change the source or character of that power.

15 Accordingly, an exercise of power by an authorised judge pursuant to ss 78(1) and 79(1)(b) of the CAR Act as picked up and applied to a federal offender by s 68(1) of the Judiciary Act is reviewable by the Federal Court under the ADJR Act, and 'review'[11] of such an exercise of power is excluded from the jurisdiction of State courts, subject to the operation of the Cross-vesting Act.

a. Section 9(1)(a) of the ADJR Act deprives State courts of jurisdiction to review 'a decision to which this section applies', which is defined in s 9(2) to include a 'decision to which this Act applies' meaning, relevantly, a 'decision of an administrative character made under an enactment', including a

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10 Compare, in relation to the power to direct an inquiry conferred by former s 475 of the *Crimes Act 1900* (NSW), *Varley v Attorney General (NSW)* (1987) 8 NSWLR 30 at 48-50 (Hope JA, Samuels JA agreeing); see also *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 362 [124] (Heydon J, which whom Gleeson CJ (at 322 [1]), Gummow (at 330 [32]), Kirby (at 331 [34]), Hayne (at 331 [35]) and Callinan (at 331 [36]) JJ agreed); *cf Attorney-General (Cth) v Huynh* [2023] HCA 13 at [17] (Kiefel CJ, Gageler and Gleeson JJ), [132] (Gordon and Steward JJ), [265] (Jagot J).

11 As defined in s 9(2) of the ADJR Act.

Commonwealth Act (see the definitions in s 3(1)).[12] A decision of an authorised judge pursuant to ss 78(1) and 79(1)(b) as picked up and applied to a federal offender by s 68(1) of the Judiciary Act meets this description.[13]

b. The exclusion of jurisdiction by s 9(1)(a) of the ADJR Act applies notwithstanding anything contained in any other Commonwealth Act (including the Judiciary Act).

c. Section 9(1)(a) of the ADJR Act therefore deprives this Court of jurisdiction that would otherwise be invested by s 39(2) and/or s 68(2) of the Judiciary Act: *ML v Australian Securities and Investments Commission* (2013) 300 ALR 764 at [5], [12]-[13] (Basten JA).[14]

16 Section 9A of the ADJR Act, which excludes jurisdiction under that Act in relation to certain 'criminal justice process decisions' (including decisions 'in connection with an appeal arising out of the prosecution'), has no application to the present case. The majority of the High Court in *Huynh* held that the proceeding before Garling J in which the Primary Decision was made does not fall within the definition of 'appeal' in s 2 of the Judiciary Act (which is given an identical definition in s 9A(4) of the ADJR Act).[15] In any event, the application under s 78 of the CAR Act is no longer before Garling J, and nor is there any 'appeal' before the Court of Criminal Appeal arising from a referral under ss 79(1)(b) and 86 of the CAR Act.

17 The Federal Court would also have original jurisdiction under s 39B(1A)(c) of the Judiciary Act. Mr Huynh's application for review of the Primary Decision arises under s 68 of the Judiciary Act, and is therefore a matter arising under a law of the Commonwealth (other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter).[16] The Supreme Court's jurisdiction to hear

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12 State legislation which is picked up and applied as federal legislation by the Judiciary Act has been held to be an 'enactment' for the purposes of the ADJR Act: see *Lamb v Moss* (1983) 49 ALR 533 at 559-560 (Bowen CJ, Sheppard and Fitzgerald JJ); *Re Grinter; Ex parte Hall* (2004) 28 WAR 407 at [135]-[141] (Steytler J, Malcolm CJ and McKechnie J agreeing separately at [74] and [156] respectively).

13 See *Martens v Commonwealth* (2009) 174 FCR 114 (where Logan J at 120-121 [24]-[25] treated the ADJR Act as applicable to a decision of the Commonwealth Attorney-General not to refer a case under s 672A of the *Criminal Code* (Qld)).

14 The preservation by s 9(4) of the ADJR Act of jurisdiction conferred on State Supreme Courts by s 32A of the *Federal Court of Australia Act 1976* (Cth) (to hear and determine any applications in Chambers in matters pending in the Federal Court) has no relevance to the present case.

15 *Attorney-General (Cth) v Huynh* [2023] HCA 13 at [50] (Kiefel CJ, Gageler and Gleeson JJ), [265] (Jagot J).

16 An example of a matter arising under a surrogate federal law is *von Arnim v Group 4 Correctional Services Pty Ltd* [2002] FCA 310; (2002) 117 FCR 346, in which Kenny J (at [26]) found that a controversy arising under the *Corrections Act 1986* (Vic) as picked up by s 53 of the *Extradition Act 1988* (Cth) as a surrogate federal law was in the Federal Court's original jurisdiction by operation of s 39B(1A)(c) of the Judiciary Act.

the matter arising under s 68 of the Judiciary Act pursuant to s 39(2) of the Judiciary Act is excluded by s 9 of the ADJR Act.

18 As is made clear by the note to s 9(1) of the ADJR Act, the subsection does not exclude the jurisdiction conferred on State courts by s 4 of the Cross-vesting Act. Decisions of this Court have adopted that view: *Hopkins v Governor-General of Australia* [2013] NSWCA 365; (2013) 280 FLR 49 at [24]-[25] (Basten, Gleeson and Leeming JJA); *Anglo American Investments Pty Ltd v Deputy Commissioner of Taxation* [2017] NSWCA 17; (2017) 347 ALR 134 at [75] (Payne JA, McColl and Meagher JJA agreeing at [1] and [2] respectively).

19 Section 4(1) of the Cross-vesting Act invests the Supreme Court of a State with federal jurisdiction where the Federal Court has jurisdiction with respect to a civil matter, and the Supreme Court of the State would not, apart from s 4 of the Cross-vesting Act, have jurisdiction with respect to that matter.

20 The present proceeding, which involves an application for judicial review of an administrative decision made by an authorised judge under the s 79 of the CAR Act, is properly characterised as a 'civil matter' for the purposes of the Cross-vesting Act.

21 Accordingly, pursuant to s 4(1) of the Cross-vesting Act, this Court has the same jurisdiction in the present matter that the Federal Court would have. However, that conferral of jurisdiction is subject to s 6 of the Cross-vesting Act, which sets out the procedure to be followed where a proceeding is a 'special federal matter'.

22 Section 6(1) of the Cross-vesting Act provides that, if a matter for determination in a proceeding that is pending in the Supreme Court of a State is a 'special federal matter', the Court must transfer the proceeding to the Federal Court unless it makes an order under s 6(3) in relation to the matter. Section 6(3) of the Cross-vesting Act provides:

> The Supreme Court may order that the proceeding be determined by that court if it is satisfied that there are special reasons for doing so in the particular circumstances of the proceeding other than reasons relevant to the convenience of the parties.

23 It is in this context that the three questions set out in paragraph [9] above arise.

Question 1 – Is the matter a 'special federal matter' within the meaning of s 3(1) of the Cross-vesting Act?

24 The policy underlying s 6 of the Cross-vesting Act is that, absent special reasons, a 'special federal matter' that arises in a State Supreme Court must be transferred to the Federal Court of Australia: s 6(1); s 6(6)(a).

25 Section 3(1) of the Cross-vesting Act defines 'special federal matter' as meaning:

> (a) a matter arising under Part IV of the *Competition and Consumer Act 2010* (other than under section 45D, 45DA, 45DB, 45E or 45EA); or
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> (aa) a matter arising under the Competition Code (as defined in section 150A of the *Competition and Consumer Act 2010*) of the Australian Capital Territory or the Northern Territory; or
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> (ab) a matter arising under section 60G of the *Family Law Act 1975* in a court other than the Family Court of Western Australia or the Supreme Court of the Northern Territory; or
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> (b) a matter involving the determination of questions of law on appeal from a decision of, or of questions of law referred or stated by, a tribunal or other body established by an Act or a person holding office under an Act, not being a matter for determination in an appeal or a reference or case stated to the Supreme Court of a State or Territory under a law of the Commonwealth that specifically provides for such an appeal, reference or case stated to such a court; or
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> (c) a matter arising under the *Administrative Decisions (Judicial Review) Act 1977*; or
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> (e) a matter that is within the original jurisdiction of the Federal Court by virtue of section 39B of the *Judiciary Act 1903*;
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> being a matter in respect of which the Supreme Court of a State or Territory would not, apart from this Act, have jurisdiction.

26 In the present case:

a. because the Primary Decision is reviewable under the ADJR Act,[17] the matter is a special federal matter within s 3(1)(c) of the Cross-vesting Act; and

b. because the Federal Court has original jurisdiction to review the Primary Decision pursuant to s 39B(1A)(c) (as a matter arising under Commonwealth law), the matter is a special federal matter within s 3(1)(e) of the Cross-vesting Act.

27 It follows that the Court is required to transfer the proceeding to the Federal Court unless it makes an order under s 6(3) of the Cross-vesting Act.[18] That requires the Court to be satisfied that there are 'special reasons' for ordering that the proceeding be determined in this Court, having regard to the general rule that special federal matters should be heard by the Federal Court and taking into account any submission made in relation to the proceeding by the Attorney-General of the Commonwealth and the Attorney General of New South Wales, who are required to

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17 Noting that Mr Huynh expressed a view at the directions hearing on 5 July 2023 that he wished to maintain the previous jurisdictional basis of his application; *i.e.* relying on the Supreme Court Act, the ADJR Act and the Judiciary Act.

18 Noting that s 6A of the Cross-vesting Act has no application in this case.

be notified pursuant to s 6(4) of the Cross-vesting Act (although formal notice is unnecessary in the present proceedings, as both Attorneys-General are already parties to the proceeding).

Question 2 – If it is a special federal matter, are there 'special reasons' for the Court of Appeal to determine the matter, as described in s 6(3)?

28 The proper construction of the expression 'special reasons', as it appears in s 6(3) of the Cross-vesting Act, has not been the subject of any substantive consideration by any intermediate appellate court or the High Court.[19]

29 In *Baker v The Queen*,[20] Gleeson CJ observed:

> There is nothing unusual about legislation that requires courts to find 'special reasons' or 'special circumstances' as a condition of the exercise of a power.[21] This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors.

30 Special reasons do not require that the circumstances be 'extraordinary or unique'; it is sufficient that the circumstances differ from the ordinary or usual.[22] To be special reasons, the reasons must be 'peculiar to the case' and 'such as to take it out of the mainstream of the legislative intent that such cases be heard in the Federal Court'.[23] Among other things, it is permissible to take into account '[t]he efficient and cost effective conduct of litigation' which 'is not merely a matter of convenience to parties to proceedings, but are matters going to the proper administration of justice'.[24]

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19 *Cf. Hopkins v Governor-General of Australia* [2013] NSWCA 365; (2013) 280 FLR 49 at [27], where the Court of Appeal (Basten, Gleeson and Leeming JJA) endorsed the approach taken at first instance to the construction of the expression 'special reasons' in the circumstances of that case. There, the primary judge accepted the submission of the Attorney-General that 'baseless allegations against the Governor-General should be disposed of promptly, and ought not be allowed to remain on the public record without a judgment being delivered as soon as practicable'.

20 (2004) 223 CLR 513 at [13].

21 eg, *United Mexican States v Cabal* (2001) 209 CLR 165.

22 See eg ***James** & Ors v James (No 2)* [2019] NSWSC 116 at [98] (Slattery J); ***Montgomery** v Porter* [2019] NSWSC 1524 at [25] (Ward CJ in Eq); *Gomez v Carrafa* [2020] VSC 661 at [55] (Daly AsJ); *Zaharis v The Commissioner of Police* [2018] SASC 14 at [78] (Stanley J); *Jin Niu Investments Pty Ltd v Wang* [2019] NSWSC 1697 at [26] (Henry J); compare *R v Baker* [2002] NSWCCA 184; (2002) 130 A Crim R 417 at 427-428 [53] (Ipp JA, Dunford and Bergin J agreeing at [109] and [110] respectively).

23 *Telstra Corporation Ltd v CXA Communications Ltd* [1998] VSC 72; (1998) 146 FLR 481 at [11]-[12] (Chernov J).

24 *Jin Niu Investments Pty Ltd v Wang* [2019] NSWSC 1697 at [28], [32].

31 In the circumstances of Mr Huynh's application, the Attorney-General submits there are four special reasons by which the Court may be satisfied to order that the matter be determined by this Court:[25]

a. *First*, keeping the proceedings in this Court would be consistent with the legislative scheme with respect to criminal procedure of territorial uniformity for all criminal defendants, rather than national uniformity for Commonwealth criminal defendants.[26]

b. *Secondly*, this matter involves the interpretation of State law (albeit as picked up and applied as surrogate federal law) and an exercise of power by a State judicial officer (albeit a power conferred by the operation of federal law), and relates to matters arising from the prosecution of charges brought in the Supreme Court.

c. *Thirdly*, the review of post-conviction procedures under the CAR Act are not proceedings which fall within the specialist expertise of the Federal Court, and are, in fact, proceedings which would ordinarily be considered by the Supreme Court and the Court of Appeal.

d. *Fourthly*, the underlying judicial review challenge is baseless and should be resolved promptly.

Keeping the matter in the Court of Appeal would be consistent with the Commonwealth's legislative scheme for criminal procedure

32 The purpose of s 68(1) of the Judiciary Act 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 avoid the establishment of two independent systems of criminal justice': *R v Gee* (2003) 212 CLR 230 at [6]-[7], [13] (Gleeson CJ), [63] (McHugh and Gummow JJ), [115] (Kirby J), [180] (Callinan J).

33 In enacting s 68 of the Judiciary Act, the Commonwealth Parliament has broadly opted for the approach of territorial uniformity in criminal procedure (subject to the *Constitution*) whereby, for example, all criminal defendants in New South Wales are subject to substantially the same procedures whether they are being tried for, or have been convicted of, federal offences or state offences. This territorial uniformity is advanced by having these procedures administered in the same court, here, the Court of Appeal.

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25 These are the same special reasons identified earlier in these submissions at [10(b)].

26 See *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345 (Mason J); *R v Gee* (2003) 212 CLR 230 at [3] (Gleeson CJ).

34 This scheme of territorial uniformity for all criminal defendants in each State or Territory over national uniformity for Commonwealth criminal defendants has been consistently upheld by the High Court. Most recently, in *Huynh*, the majority of the High Court found that the procedures in ss 78(1) and 79(1)(b) have a sufficient connection to the criminal appeal process to engage the operation of s 68(1)(d) and (2) of the Judiciary Act so as to apply those provisions in relation to Commonwealth offenders who were convicted and sentenced in New South Wales courts.[27]

35 Rather than enacting legislation providing for nationally uniform federal criminal procedure or post-conviction processes for federal offenders, the Commonwealth Parliament has through s 68 of the Judiciary Act adopted an approach of territorial uniformity for federal criminal procedure in each State or Territory. It is consistent with this legislative policy for the post-conviction processes in the CAR Act as picked up and applied to Commonwealth offenders, and any application for judicial review of such processes, to be heard and determined in State courts exercising federal jurisdiction. This itself is a 'special reason' to keep the matter in this Court.

36 Additionally, related to the overarching policy towards Commonwealth criminal justice processes as appearing in s 68 of the Judiciary Act, to transfer the matter to the Federal Court would be to fragment unnecessarily the administration of such processes.[28]

The matter involves the interpretation of an applied State law and matters arising from the prosecution of charges brought in the Supreme Court

37 Given that such surrogate federal laws are picked up with their meaning unchanged,[29] it is necessary to construe the provisions of the CAR Act as a matter of State law. In this case, the interpretation of New South Wales laws is appropriately the domain of the Court of Appeal. For example, in ***Sallway*** *(in their capacity as liquidators of MB Australia Pty Ltd) v Citadel Group Properties Pty Ltd* [2021] NSWSC 709 at [20], Hammerschlag J held that one special reason for an order under s 6(3) was that the matter involved a question of:

> whether an order should be made with respect to the Register kept under the Real Property Act of this State.

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27 [2023] HCA 13 at [71]-[72] (Kiefel CJ, Gageler and Gleeson JJ), [265] (Jagot J).

28 See eg, *Ousley v R* (1997) 192 CLR 69 at 104 (McHugh J), 127 (Gummow J), 148 (Kirby J).

29 *Pederson v Young* (1964) 110 CLR 162 at 165 (Kitto J); *Rizeq v Western Australia* (2017) 262 CLR 1 at [91] (Bell, Gageler, Keane, Nettle and Gordon JJ).

38 By parity of reasoning, the CAR Act is a law of New South Wales and questions of its construction should be undertaken by the Court of Appeal.[30] Although the CAR Act has force in the circumstances of Mr Huynh's application because it is applied by s 68 of the Judiciary Act, its construction would be identical in the federal context (subject to the operation of the Constitution and any conflicting Commonwealth laws).

39 Further, in *Moore*, Griffiths AJA (with whom White JA agreed at [1]), accepted at [69(6)] the Commonwealth Director of Public Prosecutions' submission that the fact that "the claims [raised in that judicial review application] relate to matters arising from the prosecution of charges in a State court" contributed to there being special reasons to keep the matter in the Court of Appeal. The same analogy can be drawn here, as this is also a judicial review application where the underlying controversy relates to a prosecution of charges brought in the Supreme Court.

Proceedings under the CAR Act are not within the specialist expertise of the Federal Court

40 The proceedings seek judicial review of a decision under the CAR Act not to refer Mr Huynh's case to the Court of Criminal Appeal and therefore concern an order made under an applied State law (*i.e.* one that is picked up and applied by s 68 of the Judiciary Act).[31] While the proceeding is in federal jurisdiction, it is of a kind that is regularly instituted within the State Supreme Court and the Court of Appeal when exercising equivalent State jurisdiction. For this reason, the proceeding is in an area where the judges of this Court have expertise, and the specialist expertise of Federal Court judges is not required for the effective administration of justice.[32]

41 In this respect, Mr Huynh's application can be distinguished from *Telstra Corporation v CXA Communications Ltd* (1998) 146 FLR 481 at 482. In that case, one of the principal factors in finding that there were no special reasons to keep the matter in the Victorian Supreme Court was that:

> [t]he Federal Court has a list of specialist judges who hear and determine cases under Pt IV of the [*Trade Practices*] Act. The purpose of this list is to increase the prospect of establishing a degree of uniformity in the interpretation of the legislation which operates nationally. This end would be best achieved if matters concerning Pt IV of the TP Act are dealt with by the Federal Court.

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30 Compare *P1 v Australian Crime Commission* [2012] SASC 229 at [60]-[61] (Gray J).

31 *Sallway* at [20]. Though there the 'special reason' was that the order *sought* was under State law.

32 *Sallway* at [20]; *James* at [109]; *Telstra Corporation v CXA Communications Ltd* (1998) 146 FLR 481 at 483; cf *Charan v Secretary, Department of Social Services* [2018] NSWSC 590.

42 Here, in contrast, the Federal Court has limited criminal jurisdiction.[33]

The underlying judicial review challenge is baseless and should be resolved promptly

43 Recently, in *Moore*,[34] Griffiths AJA (with whom White JA agreed) concluded that there were special reasons for the matter to be determined by the Supreme Court in circumstances where 'the claims made by Mr Moore … are baseless, the claims relate to matters arising from the prosecution of charges in a State court and it is in the interests of justice that the claims be dismissed as soon as practicable'. Similar considerations apply in the present proceedings.

44 In the Primary Decision, Garling J observed that Mr Huynh's application was 'very similar' to Mr Huynh's special leave application.[35] Mr Huynh advanced two grounds as the basis for the application, being that:[36]

a. the conspiracy charge of an ongoing conspiracy which nevertheless involved two importations (in March 2012 and June 2012) constituted an abuse of process; and

b. there was a failure to put Mr Huynh's defence for the June importation to the jury.

45 In relation to the first ground, Garling J concluded at [37]:

> On my review of the evidence, it is plain that no miscarriage of justice was occasioned by a single charge of one conspiracy. It was open to the Crown to charge a single offence and open to the jury to convict on the evidence. There appears to be no evidence of or any compelling reason why the two separate importations would properly be regarded as separate conspiracies. Many of the conspirators remained constant across each importation and the modus operandi of the conspirators remained the same. In short, they were distinct but similar importations carried out as part of the same agreement.

46 His Honour also considered this ground had been 'fully dealt with as part of the trial and appeal in the proceedings'.[37]

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33 See especially Judiciary Act, s 39B(1A)(c).

34 [2023] NSWCA 153 at [69(6)].

35 Primary Decision, [26].

36 Primary Decision, [26].

37 Primary Decision, [45] and see also [53]-55].

47 Garling J concluded that Mr Huynh's second ground, concerning jury misdirection, represented 'a misunderstanding of the charge and the Crown case that he needed to meet at trial'.[38]

48 The decision of Garling J, as noted above, was that the application was 'dismissed'. His Honour noted that it was open to him, under s 79(3), to 'refuse to consider' the application (at [54]-[55]), but said that he had examined the material and had no sense of unease or doubt as to the applicant's guilt. This passage needs to be read with the earlier discussion at [9]-[14], where his Honour said that the appearance of a 'doubt or question' regarding (relevantly) guilt was a precondition to the exercise of the powers in s 79(1). That reflects the terms of s 79(2).

49 In the Court of Appeal at first instance, Leeming JA was the only member of the Court of Appeal to decide the substantive grounds of review contained in Mr Huynh's further amended summons on their merits, dismissing each ground.[39] Leeming JA (with whom Payne JA agreed on this point at [273]) agreed with Garling J that Mr Huynh was remaking arguments that had already been considered by the Court of Appeal (at [230]).

50 As mentioned in paragraph [7] above, Mr Huynh has since further amended his grounds of review to the following (which reflect the grounds set out in the initial Summons filed on 18 January 2021):

> 1. Error of jurisdiction on the part of Garling J as his Honour exercise a power that was not open to him by determining the outcome of legal questions that were submitted in [Mr Huynh's] section 78 application as his Honour was performing an administrative task and was not acting in a judicial capacity as per s 79(4).
>
> 2. Error of law as Garling J's reasons for decision did not apply the relevant principles with respect to [Mr Huynh's] defence not being put to the jury and his honour [sic] also did not apply the relevant principles as to how a conspiratorial agreement is properly proven when addressing the issues [Mr Huynh] raised in the s 78 application.

51 Nevertheless, the arguments elaborated in the "Statement of Grounds" essentially canvass the same matters, and suffer from the same defects.

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38 Primary Decision, [52].

39 The majority did not make any findings on the grounds of application, as they did not need to because they declared instead that Garling J's decision should be set aside as being void for want of jurisdiction. However Payne JA indicated at [273] that if he thought it necessary to decide the merits of Mr Huynh's summons he would dismiss it for the reasons given by Leeming JA.

Question 3 – If there are special reasons, should the Court exercise its discretion under s 6(3) of the Act to order that the Court determine the matter itself

52 If the Court is satisfied that there are special reasons to order that the proceeding be determined by this court for the purposes of s 6(3) of the Cross-vesting Act, it would usually follow that such an order should be made. In so far as the Court has a residual discretion whether to make an order under s 6(3), in addition to the matters set out in relation to Question 2 above, the Court should have regard to the following matters when exercising its discretion under s 6(3):[40]

a. *first*, the 'convenience of the parties'; and

b. *secondly*, the position of the Commonwealth Attorney-General.

Convenience of the parties

53 As long as it is not the determining factor, factors relevant to the convenience of the parties (which s 6(3) expressly excludes from being a 'special reason') can be considered when the Court is exercising its discretion to make an order under s 6(3). These factors might include delay and cost. (It is also recognised that such factors may concern the efficient conduct of litigation and the broader interests of the administration of justice beyond convenience to the parties.)

54 Mr Huynh's application has not been in the Court's list for some time. While Mr Huynh's non-parole period (of 8 years) expired on 1 August 2022 and he was released on parole on 23 June 2023,[41] his head sentence does not expire until 1 August 2026.

55 In *Sallway* at [18], Hammerschlag J stated (emphasis added):

> Special reasons do not require that the circumstances must be extraordinary or unique. It is sufficient if they are unusual or uncommon in character equality or degree, if they differ from the ordinary or usual, or if they are particular or individual, but they need not be unique. Convenience of the parties is not excluded from the Court's consideration, provided that it is not the determining factor: … (emphasis added)

56 Slattery J adopted a similar approach in *James v James (No 2)* [2019] NSWSC 116 at [102].

57 Here, the convenience of the parties (while not being the determining factor) clearly points in favour of keeping the matter in this Court. This is a remitted proceeding with a lengthy procedural history with which this Court is familiar. Mr Huynh is self-

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40 *Montgomery* at [65] for the formulation of the test to keep the matter in the Supreme Court.

41 See parole order sent by the Attorney-General's solicitors to the Court Registry on 28 June 2023.

represented and it would be difficult for him effectively to draft further court documents if the matter were to be transferred to the Federal Court.

The Attorney-General's position

58 Section 6(6)(b) of the Cross-vesting Act requires the Court to take into account any submission made by the Commonwealth Attorney-General (and by the Attorney-General of the State or Territory where the proceeding is pending), and accordingly weight may be given to the position of each Attorney-General when the Court exercises its discretion to make an order under s 6(3) (assuming that it is satisfied that 'special reasons' exist).

59 As is apparent from these submissions, the Attorney-General of the Commonwealth seeks an order that the matter remain in the Court of Appeal under s 6(3) of the Cross-vesting Act.[42]

PART III DISPOSITION

60 For the reasons above, the Court should order, pursuant to s 6(3) of the Cross-vesting Act, that there are special reasons that Mr Hunyh's further amended summons be determined by this Court.

Date: 12 July 2023

[redacted]

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42 *Sallway* at [20].