ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M2 of 2017

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

and

STATE OF VICTORIA
Defendant

PLAINTIFF'S ANNOTATED SUBMISSIONS

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The Plaintiff is serving a life sentence for murder with a non-parole period of 28 years. On 30 September 2016, the Plaintiff's non-parole period expired and he became eligible for the grant of parole. He proceeded to make an application for parole to the Adult Parole Board (the **Board**), which received and considered a report and recommendation from a Case Management Review Committee and made a decision to proceed to parole planning.

3. Before the Board could complete the performance of its functions and the exercise of its powers in relation to the Plaintiff's parole application, the *Corrections Act 1986* (Vic) (the **Act**) was amended and s 74AAA commenced operation. If s 74AAA validly applies to the Board's consideration of the Plaintiff's parole application, it would have the effect of depriving the Board of all relevant jurisdiction and/or power to make a parole order in respect of the Plaintiff prior to his imminent death or serious incapacitation.

4. This proceeding is not about whether the Plaintiff should be granted parole, nor about the circumstances in which, or the conditions on which, prisoners are released on parole. Rather, the special case raises the following issues:

   a. First, the application of s 74AAA is expressed to turn upon the prisoner's having been convicted and sentenced for an offence involving a particular state of mind at the time of his or her offending (namely, knowledge or recklessness as to whether the deceased was a police officer as defined). Is s 74AAA capable of application to the Plaintiff in circumstances where that state of mind was not an issue arising in his trial and is not a matter established by his conviction? Is the Board validly authorised to "*go behind*" the fact of the Plaintiff's conviction and

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sentence, by inscribing additional elements on the record of the court comprised in the conviction and sentence?

b. Secondly, should ss 74AAA and 127A of the Act be construed as not applying to the exercise by the Board of its jurisdiction and power to make a parole order in respect of the Plaintiff – in the case of s 74AAA, on the ground that the Plaintiff's parole eligibility date had arisen, he had applied for parole, and the Board's jurisdiction had been enlivened and exercised, before the commencement of that section; and, in the case of s 127A, on the further ground that the Plaintiff had instituted these proceedings before the commencement of that section?

c. Thirdly, in so far as ss 74AAA and 127A purport to apply to the making of a parole order in respect of the Plaintiff so as to alter or divest the Board's jurisdiction or power after it had been enlivened by the expiration of the non-parole period, engaged by the making of an application for parole, and exercised by the decision to proceed to parole planning, do those provisions exceed the legislative power of the Parliament of Victoria on the ground that they are contrary to the rule of law as an implied limitation derived from and required by the Commonwealth Constitution?

Part III: Section 78B notices

5. The plaintiff has given notice to the Attorneys-General under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Reasons for judgment below

6. This proceeding is commenced in the Court's original jurisdiction, and there are no reasons for judgment of courts below.

Part V: Factual background

Plaintiff's trial and sentence

7. The Plaintiff has been detained in custody in Victoria since 30 May 1986 (SC: [3]). [SCB 76]

8. By presentment filed in the Supreme Court of Victoria, the Plaintiff was, together with Stanley Taylor and two other accused, charged with one count of murder (SC: Annex A). The charge of murder concerned the explosion of a car bomb in the vicinity of the Russell Street Police Complex on 27 March 1986 which resulted in the death of Angela Taylor (SC: Annex C: p 1), who was a Constable in the Victoria Police Force (SC: [7]). [SCB 87-89] [SCB 104] [SCB 77]

9. The Crown's case at trial against each of the accused relied upon the doctrine of concert or joint enterprise (SC: Annex C: pp 7, 13). That is to say, the Crown case on [SCB 110, 116]

the bombing was that Taylor, the two other accused, and the Plaintiff were parties to a common plan to explode the bomb and the Crown conceded that it could not prove the part played by any particular accused, but invited the jury to infer that each accused was a guilty participant. (SC: Annex C: p 7) [SCB 110]

10. Following a trial by jury, the Plaintiff and Taylor were each found guilty and convicted on the count of murder. Of the other accused, one was acquitted on the count of murder, and the other found guilty and convicted of being an accessory after the fact (SC: Annex C: p 2) – but his conviction was subsequently quashed on appeal [SCB 105] (SC: Annex C: p 100). [SCB 203]

11. The crime of murder is a common law offence. Section 3 of the *Crimes Act 1958* (Vic) provided at the relevant time that, notwithstanding any rule of law to the contrary, a person convicted of murder was liable to imprisonment for the term of his or her natural life, or for such other term as was fixed by the court, as the court determined.[1]

12. On 24 August 1988, the Plaintiff was sentenced by the Court (Vincent J) to imprisonment for life with a minimum non-parole period of 28 years (SC: [4]). [SCB 76-77] Taylor was sentenced to life with no minimum term (SC: Annex A). The fixing of a [SCB 87-89] minimum non-parole period in respect only of the Plaintiff constituted an acknowledgment of the differences in the measure of responsibility between Taylor and the Plaintiff (even though the role played by each could not be precisely identified (SC: Annex B: p 7566)), the differences in their prior criminal histories, [SCB 93] their respective ages, and their different prospects of rehabilitation (SC: Annex B: pp [SCB 97-98] 7570-7571).

Eligibility for parole and application for parole

13. The Plaintiff became eligible for parole on 30 September 2016 (SC: [5]), when his [SCB 77] non-parole period expired and his "*parole eligibility date*" under reg 82 of the *Corrections Regulations 2009* occurred. To be considered for release on parole, the Plaintiff was required to make an application to the Board (SC: Annex D: p 1).[2] On [SCB 222] 3 October 2016, the Plaintiff made an application to the Board for parole (SC: [22], [SCB 81, 235] Annex F).

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[1] Section 3 was inserted by s 8 of the *Crimes (Amendment) Act 1986* (Vic) which commenced on 1 July 1986. The stated purpose of the Act was, relevantly, to give courts discretion in the sentencing of persons convicted of murder and other offences for which a mandatory sentence of life imprisonment was required to be imposed: s 1(b).

[2] The Secretary to the Department of Justice and Regulation is an *ex officio* member of the Board (s 61(2)(f); SC: [11](a)). The Secretary, in turn, employs a Commissioner who is responsible for exercising functions [SCB 78] relating to correctional services as determined by the Secretary (s 8A; SC: [15]). At all material times, the [SCB 79] Commissioner has required that prisoners make an application to the Board to be considered for parole (SC: Annex D: p 1). [SCB 222]

14. Case Management Review Committees (**CMRCs**) comprise a chairperson and prison staff who know the prisoner (SC: [17](a)). CMRCs assist the Board to perform its functions by overseeing parole applications in their initial stages, ensuring relevant information is before the Board when it makes any decision to proceed to parole planning, and completing a CMRC Parole Application Report (SC: [16]-[17]).[3] In the Plaintiff's case, on 13 October 2016, a CMRC met with the Plaintiff, endorsed a Parole Application Report, and resolved to support the Plaintiff's parole application (SC: [23], Annex G). [SCB 79] [SCB 79-80] [SCB 81, 240-247]

15. On 20 October 2016, the Board, having "*considered [the Plaintiff's] application*" (which was supported and submitted to the Board by the CMRC) (SC: Annex G: p 8, Annex H), made a decision to proceed to parole planning and to consider the Plaintiff's suitability for release on parole on receipt of a Parole Suitability Assessment (SC: [24]). A Parole Suitability Assessment is intended to assess in further detail the prisoner's history and custodial behaviour (SC: [20]). [SCB 247] [SCB 249-250] [SCB 81] [SCB 80]

16. The Plaintiff contends that, either on 30 September 2016 or at least by 20 October 2016, he had an accrued right and legitimate expectation to the effect that the Board's jurisdiction in relation to his application for parole would be governed by the applicable law as in force at that time.

17. On 25 October 2016, the Plaintiff made a written submission in support of his parole application (SC: [26], Annex I). The appendices to that submission included various certificates of completion of prison programmes, academic and vocational qualifications obtained in prison, and letters of support and testimonials. [SCB 81, 252-365]

18. On 14 December 2016, s 3 of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic) (the **2016 Amendment Act**) commenced, inserting s 74AAA into the Act (SC: [27]). If it applies to the Plaintiff, s 74AAA purports to impose substantive limits on the Board's jurisdiction and power in relation to the Plaintiff's parole. The application of s 74AAA to the Plaintiff, and its validity, is the central question raised in this proceeding. [SCB 81-82]

19. On 3 January 2017, the Plaintiff issued proceedings in this Court challenging the validity of s 74AAA. By subsequent amendments to his pleadings, the Plaintiff also alleged that s 74AAA did not on its proper construction apply to him.

20. On 20 December 2017, s 24 of the *Corrections Legislation Further Amendment Act 2017* (Vic) (the **2017 Amendment Act**) commenced, inserting s 127A into the Act

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[3] CMRCs also have functions in relation to the case management and classification of prisoners: see *Corrections Regulations 2009*, regs 24, 24A, 24B, 24C, 24D and 25. Under s 47(1)(l) of the Act, every prisoner has the right to be classified under a classification system established in accordance with the regulations as soon as possible after being sentenced and to have that classification reviewed annually. The establishment of CMRCs thus gives effect to that right.

(SC: [28]). The application and validity of s 127A is also contested in this proceeding. [SCB 82-83]

21. The Plaintiff's application for parole, and the Parole Suitability Assessment requested by the Board, remain pending, awaiting the outcome of these proceedings (SC: [31]-[32]). [SCB 83]

Part VI: Argument

The statutory scheme

22. Division 5 of Pt 8 of the Act concerns parole. The parole of prisoners is considered and granted (or refused) by the Board, which is established under s 61(1) of the Act. Since March 2015, all prisoners have been required to make an application to the Board in order to be considered for release on parole (SC: [14]-[15], Annex D). [SCB 79, 222-228]

23. Section 74(1) provides that, subject to (relevantly) s 74AAB, the Board may by instrument order that a prisoner serving a prison sentence in respect of which a non-parole period was fixed be released on parole at the time stated in the order (not being before the end of the non-parole period) and, unless the Board revokes the order before the time for release stated in the order, the prisoner must be released at that time. Section 74(1AA) now provides that, for the purposes of s 74(1), the Board must have regard to the record of the court in relation to the offending, including the judgment and the reasons for sentence.[4] In determining whether to make or vary a parole order, the Board must give paramount consideration to the safety and protection of the community (s 73A).

24. Section 74AAB (to which s 74(1) is expressed to be subject) is concerned with the parole of prisoners who have committed certain kinds of serious offences. In particular, s 74AAB(1) establishes a Serious Violent Offender or Sexual Offender Parole division (**SVOSO division**) of the Board whose sole function is to decide whether or not to release a prisoner on parole in respect of, inter alia, a "*serious violent offence*" (s 74AAB(2)). A serious violent offence is defined in s 3(1) by reference to various offences including "*an offence to which clause 2 of Schedule 1 to the* Sentencing Act 1991 *applies*" – that clause deals with "*Violent offences*" including murder.[5] Section 74AAB(3) and (5) provide that an order under s 74 that a prisoner be released on parole in respect of a serious violent offence may only be

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[4] Section 74(1AA) was inserted by s 12 of the 2017 Amendment Act, with effect from 20 December 2017. The Plaintiff submits that this provision, like s 74AAA(3), conflates the reasons for sentence with "*the record of the court in relation to the offending*". Whatever meaning can be given to such provisions, they do not have the effect of converting the reasons for sentence into the record of the court, which is confined to the judgment or order of the court, *i.e.* the conviction and sentence itself.

[5] The definition of "*serious violent offence*" specifies a range of offences, and also includes "*any other offence, whether committed in Victoria or elsewhere, the necessary elements of which consist of elements that constitute an offence referred to*" in the other paragraphs of the definition.

made by the SVOSO division,[6] and only after considering a recommendation from another division of the Board that parole be granted.

Section 74AAA

25. Section 74AAA(1) provides that the Board must not make a parole order under s 74 in respect of a prisoner convicted and sentenced (whether before, on or after that section comes into operation) to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer, unless an application for the parole order is made to the Board by or on behalf of the prisoner.

26. Section 74AAA(6) provides that, in s 74AAA, "*police officer*" means a police officer (a) who, at the time the murder of that police officer occurred, was performing any duty or exercising any power of a police officer; or (b) the murder of whom arose from or was connected with the police officer's role as a police officer, whether or not the police officer was performing any duty or exercising any power of a police officer at the time of the murder.

27. While subs 74AAA(1) does no more than impose on certain prisoners a statutory requirement to make a parole application under the section, sub-s 74AAA(4) substantially deprives the Board of the jurisdiction and/or power to grant parole after considering such an application. Under subs 74AAA(4), the Board must not make a parole order in respect of the prisoner unless it is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner is in imminent danger of dying or is seriously incapacitated and, as a result, no longer has the physical ability to do harm to any person, and that the prisoner has demonstrated that he or she does not pose a risk to the community. Further, the Board must be satisfied that, because of those circumstances, the making of the parole order is justified.

28. Although the requirements in s 74AAA(4) bear some resemblance to the provisions considered by this Court in *Crump v New South Wales*[7] and *Knight v Victoria*,[8] the construction and validity issues raised in this proceeding are quite different and are not resolved by those previous cases. In particular, the class of prisoner to which s 74AAA is expressed to apply differs markedly from the provisions considered in *Crump* (which concerned a parole application made by "*a serious offender the subject of a non-release recommendation*" (as defined)) and *Knight* (which concerned a parole application by "*the prisoner Julian Knight*" (as defined)).

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[6] A note to subs 74AAB(3) provides that a prisoner who is required to go through the process set out in s 74AAA would still obtain an order under ss 74 or 78. While the intended meaning of this note may be somewhat obscure, it appears to clarify that s 74AAA does not itself confer power to make a parole order, but rather restricts the powers conferred on the Board by (relevantly) s 74(1), such that a prisoner to whom s 74AAA applies would also remain subject to the procedural requirement prescribed by s 74AAB(3).

[7] (2012) 247 CLR 1.

[8] (2017) 345 ALR 560.

Further, and significantly for the construction and validity of s 74AAA in its application to the Plaintiff, the present case stands in contrast to both *Crump* and *Knight* in that s 74AAA did not commence operation until after the Plaintiff had become eligible and had applied for parole, and after the Board had commenced its consideration of that application, in accordance with the law as in force at that time. The arguments considered by the Court in *Crump* proceeded on the basis that eligibility for parole was governed by the legislation that existed at the relevant time.[9] The Court found that Crump could not rely on the law as it had been at some time in the past, but rather had to take the law as in force on the day that his non-parole period expired.

29. Upon its commencement, the 2016 Amendment Act contained no transitional provision in respect of s 74AAA.[10] However, following the commencement of this proceeding by the Plaintiff, s 127A was inserted into the Act by the 2017 Amendment Act with effect from 20 December 2017. Section 127A relevantly provides that, "*to avoid doubt*", the amendments made by made by Part 2 of the 2016 Amendment Act (which inserted s 74AAA) also apply to a prisoner convicted and sentenced as mentioned in s 74AAA(1), regardless of whether, before the commencement of those amendments, the prisoner had become eligible for parole, or the prisoner had taken steps to ask the Board to grant the prisoner parole, or the Board had begun any consideration of whether the prisoner should be granted parole.

Section 74AAA does not apply in terms to the Plaintiff

30. Section 74AAA(1) prescribes a condition for its operation and its effect. The condition for its operation is whether a prisoner falls within the class described. If that condition is satisfied, the Board will have been deprived of all relevant jurisdiction and/or power to release that prisoner on parole, notwithstanding the expiry of his or her minimum non-parole period. The class of prisoners identified in s 74AAA(1) is those "*convicted and sentenced ... to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer [as defined in subs (6)]*".

31. The class of prisoner identified in s 74AAA(1) is expressed as a jurisdictional fact,[11] and is not described by reference to, nor made dependent on, the opinion of the

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[9] See *e.g. Crump* (2012) 247 CLR 1 at 28 [70] (Heydon J), and compare the submission made on behalf of the Attorney-General for New South Wales at p 4 ("*The offender was eligible to be released on parole as from 13 November 2003, but only in accordance with what would then be the current parole legislation*").

[10] Compare s 127 of the Act (inserted by s 8 of the 2016 Amendment Act), which expressly provided that other amendments (introducing the so-called "*no body, no parole*" provisions in s 74AABA) were to apply to an application for parole that was made, but had not been determined, before the commencement of the amendments.

[11] The term "*jurisdictional fact*" may be used as a label for a criterion, satisfaction of which enlivens the power of a decision-maker, and the existence or non-existence of which is not within the jurisdiction of the decision-maker to determine (or to determine conclusively) under the relevant section: see *e.g. Southern Han*

Board as to the relevant matters. That stands in contrast to many other provisions throughout the Act whose operation is expressly founded upon the opinion of decision-makers, including that of the Board.[12] Perhaps most markedly, it stands in direct contrast to other subsections in s 74AAA itself whose operation expressly depends upon the Board's satisfaction as to various matters (see s 74AAA(4)(a) and (b)).[13]

32. While s 74AAA(3) provides that the Board must have regard to the record of the court in relation to the offending, that is only so "*[i]n considering the application*" made under s 74AAA(1). Logically (and chronologically), the Board is only at the point of considering an application once it has been validly made by a prisoner who is required to do so under s 74AAA(1). That is, the existence of an obligation to make an application under s 74AAA(1) must be ascertained prior to and independently of any consideration by the Board of the application itself pursuant to s 74AAA(3). If the prisoner is not in fact within the class of prisoners who are required to make an application under s 74AAA(1), then the section has no operation.

33. Turning to the class of prisoner covered by s 74AAA(1), it can be seen that the first relevant criterion is that the prisoner has been convicted and sentenced to a term of imprisonment with a non-parole period for an offence of a particular description. The conviction and sentence must be "*for*" the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer (as defined).

34. The Plaintiff submits that the natural meaning of s 74AAA(1), and its reference to a prisoner's having been convicted and sentenced "*for*" those matters, is that the prisoner must have been convicted and sentenced for an offence whose elements establish those matters. The Plaintiff was not convicted and sentenced "*for*" the murder of a police officer, nor "*for*" for the murder of a person who he knew was, or was reckless as to whether the person was, a police officer.

35. The appearance of "*sentenced*" within the statutory phrase is necessary because the class of prisoner is defined in part by whether the prisoner has been sentenced to a term of imprisonment with a non-parole period. It is also convenient for the drafter to have deployed "*convicted and sentenced*" as a composite expression, as the

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Breakfast Point Pty Ltd (in Liq) v Lewence [2016] HCA 52 at [47], referring to *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28] and *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 139 [43].

[12] See *e.g.* ss 8E, 8F, 9AC, 9A(4)-(7), 19, 29A(1), 30, 30C(3), 30D, 30G, 31, 47(1)(c), 47A, 47I, 50(3)-(5), 51, 53(1)(c), 54A, 55EB(4)(b), 55F(2)(c)-(d), 56AC(2)(a), 57D(1), 71B(3), 71C(2)(a), 71E(2), 74(5B), 74AA(3), 74B(2)(a), 77(3), (5), 77A, 78(4), 78B(2), 79C, 79K(1), 103(3)(d), 104AC(4), 104ZA(2), 104ZG(3), 104ZH(3), 104ZS, 109, 122(5).

[13] See also s 74AABA (also introduced by the 2016 Amendment Act) which provides that the Board must not make a parole order "*unless the Board is satisfied*" that the prisoner has cooperated satisfactorily in the investigation of the offence to identify the location and place of the deceased victim's body or remains.

conviction and sentence may sometimes be practically inseparable. As noted by Dawson and McHugh JJ in *Maxwell v The Queen*,[14] "*it has been said that there can be no conviction until there is a judgment of the court, ordinarily in the form of a sentence, following upon the verdict or plea*". Of course, the "*reasons for sentence*" are not to be confused with the sentence itself,[15] which constitutes the relevant exercise of judicial power and, where it imposes imprisonment, is the warrant for the prisoner's detention.

36. In relation to an indictable offence, the conviction and sentence is a judicial "*factum*" comprising the factual determination by a properly instructed jury that the Crown has proven the elements of the offence beyond reasonable doubt, and a decision of the judge giving effect to that determination of guilt by imposing a specified punishment.

37. That satisfaction of the criteria in s 74AAA(1) depends upon the offence for which the prisoner was convicted and sentenced containing elements establishing those matters is further supported by a consideration of the inconvenient results which would occur on a different construction. The Plaintiff's construction also gives due recognition to what is in fact and law established by the conviction.

38. A jury's verdict of guilty "*necessarily amounts to a finding of every essential element of the crime*".[16] Similarly, a plea of guilty is a confession of every element necessary to constitute the offence.[17] However, the jury's verdict (or the guilty plea) establishes no more.[18] Thus, when sentencing a prisoner who has been found (or who has pleaded) guilty, the judge must make his or her own findings about matters which are relevant to penalty and which are not otherwise established by the verdict (or plea), even if those findings are based on the evidence led during the trial.[19]

39. That the function of the jury is to find only on the essential elements of the offence charged is an important limiting principle. So much was adverted to in *Pickering v The Queen*,[20] where Gageler, Gordon and Edelman JJ observed as follows:

> *In any trial, evidence is received by the court for the purpose of deciding the issues of fact that arise for determination, and to the extent that the evidence is relevant to those issues of fact. In a criminal trial of an indictable offence, the*

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[14] (1996) 184 CLR 501 at 508; see also *Tonks and Goss* [1963] VR 121 at 127; *Griffiths v The Queen* (1977) 137 CLR 293 at 307.

[15] *cf. R v Ireland* (1970) 126 CLR 321 at 330.

[16] *Gilbert v The Queen* (2000) 201 CLR 414 at 423-424 [26] per McHugh J (dissenting in the result); see also *R v Storey* (1978) 140 CLR 364 at 416-417.

[17] *R v D'Orta-Ekenaike* [1998] 2 VR 140 at 146-147 per Winneke P (Brooking JA and Vincent AJA agreeing); *Maxwell v The Queen* (1996) 184 CLR 501 at 508; *Minister of Immigration and Ethnic Affairs v Gungor* (1982) 63 FLR 441 at 464.

[18] *cf. GAS v The Queen* (2004) 217 CLR 198 at 211 [30].

[19] *R v Storey* [1998] 1 VR 359 at 366-367; *Filippou v The Queen* (2015) 256 CLR 47 at 69-70 [64].

[20] (2017) 343 ALR 374 at 385 [53] (footnotes omitted).

indictment identifies the alleged offence, and the elements of that offence (to the extent that they are disputed) define the facts in issue. In short, the trial is directed at the offence that has been charged, and the evidence adduced is to be directed at the facts in issue arising out of that offence.

40. If the application of s 74AAA(1) were to be determined otherwise than by reference to the elements of the offence for which the prisoner was convicted and sentenced, it would lead at least to the following inconvenient results.

a. First, it would lead to lengthy proceedings before the Board, and potential subsequent judicial review proceedings. The nature of the facts and matters in s 74AAA(1) are likely to be contestable in many cases. Whether, for example, the prisoner knew or was reckless as to whether the deceased was a police officer may be complicated enough in any particular case. But it may be further complicated where (as here) the prisoner's conviction was based on the doctrine of concert or joint enterprise and where precise involvement in the offending is unknown. Of course, any factual element in relation to motive is extraneous to the conviction and sentence for the offence of murder.[21] It may also be further complicated by an inquiry into whether the victim was, "*at the time the murder ... occurred, performing any duty or exercising any power of a police officer*" (s 74AAA(6)(a)) or whether the the murder "*arose from or was connected with the police officer's role as a police officer*" (s 74AAA(6)(b)).

b. On the Defendant's construction,[22] these nuanced and contestable issues concerning the state of mind or *mens rea* of the prisoner at the time of the offence would be the subject of inquiry many decades after the relevant events, before a Board which is not bound by the rules of natural justice (s 69(2)), and which is not bound by the rules of evidence or any practices and procedures applicable to courts of record (s 71). In so far as the matters involve jurisdictional facts (see paragraph 31 above), the same contestable issues may then be litigated *de novo* in a supervisory court, this time with the prisoner being entitled to the benefit of procedural fairness and the rules of evidence. In that forum, there may be doubts about the admissibility of findings or observations made in the prisoner's sentencing remarks (see *Evidence Act 2008* (Vic), s 59),[23] and the contradictor would presumably have to marshal much of the same evidence which was led during the prisoner's trial in order to establish the application of s 74AAA(1) (noting that the Plaintiff's trial lasted for more than

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[21] See *e.g. F* (1995) 83 A Crim R 502 at 511-512 per Gleeson CJ: "*[T]he law does not require the Crown to prove a motive for the criminal conduct of the accused*". See also SC: Annex C, pp 68-71. [SCB 171-174]

[22] Defence to the Second Further Amended Statement of Claim dated 9 February 2018 (Amended Defence), para 30C(b) and (c).

[23] In any event, the sentencing remarks or reasons for sentence cannot be conflated with either the "*conviction*" or the "*sentence*" of the court.

100 days (SC: Annex B: p 1)). On its primary construction, the Defendant contemplates that the Board (and any court on judicial review) could have regard to additional evidence or material that was not admitted into evidence, or even was not admissible, at the trial of the prisoner. This could include fresh material, both inculpatory and exculpatory as to the existence of the requisite mental element. On the other hand, the Plaintiff's construction avoids this lengthy and duplicative process. [SCB 91]

c. Further, for future prosecutions of persons accused of murder where the victim was a police officer, the Defendant's construction may encourage a "*trial within a trial*"[24] in which the prosecution and accused would attempt to adduce and test evidence of the accused's knowledge (or ignorance) of the status of the victim, being matters extraneous to the immediate issues raised on the indictment. Conversely, however, persons previously convicted and sentenced for murder would never have had such an opportunity.

41. For the foregoing reasons, it is submitted that s 74AAA(1) should be construed so as to apply only to a prisoner who has been convicted and sentenced for an offence whose elements establish the matters in that section. The Defendant has admitted that the elements of the offence for which the Plaintiff was convicted and sentenced do not establish those matters.[25] It follows that s 74AAA does not apply to the Plaintiff and question (b) of the special case should be answered accordingly.

Section 74AAA does not apply to a prisoner whose non-parole period has already expired, or in respect of whom the Board has commenced exercising its jurisdiction

42. Further, the Plaintiff submits that s 74AAA should be construed so as not to apply to those prisoners (including the Plaintiff) who had become eligible for parole, who had made an application for parole, and/or in respect of whom the Board had commenced to exercise its jurisdiction and power by making a decision to proceed to parole planning, prior to the commencement of that section.

43. The submission is put on two independent bases.

a. First, to construe s 74AAA as applying to the Board's determination of the Plaintiff's application of which it was seised would be contrary to s 32(1) of the *Charter of Human Rights and Responsibilities* (the **Charter**) as it would be otherwise than to interpret s 74AAA so far as possible consistently with its purpose in a way that is compatible with human rights.

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[24] *Pickering v The Queen* (2017) 343 ALR 374 at 385 [54].

[25] Amended Defence, par 30C(c)(i)

b. Secondly, there is a common law presumption of statutory interpretation that an amendment is not to be construed to affect rights and liabilities which have accrued prior to its commencement.[26]

44. It is further submitted that s 127A, which was enacted subsequently to s 74AAA, should not be interpreted to extend the application of s 74AAA to the Plaintiff who, prior to the commencement of s 127A, had already commenced these proceedings seeking declaratory relief that s 74AAA does not apply to him or to the consideration of his pending application for parole.

The Charter

45. Pursuant to s 32(1) of the Charter, so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights (being the civil and political rights set out in Part 2 of the Charter).

46. Section 28 of the Charter provides that a member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared stating whether the Bill is compatible with human rights and, if relevant, the nature and extent of any incompatibility with human rights. The statement of compatibility is laid before the relevant House before the second reading speech for the Bill.

47. Section 31(1) of the Charter provides that Parliament may expressly declare in an Act that that Act or a provision of that Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in the Charter. The effect of such an override declaration is that, to the extent of the declaration, the Charter has no application to that provision: s 31(6).

48. An example of a Charter override declaration is provided for in s 74AA(4) and (5) of the Act, in respect of the conditions for making a parole order for Julian Knight (the validity of which was considered by this Court in *Knight v Victoria*[27]). No such Charter override was made for s 74AAA. Nor was one made for s 127A. That is despite the statement of compatibility for the 2016 Amendment Act raising serious doubts about that Act's compatibility with Charter rights. In particular, the statement of compatibility relevantly noted:[28]

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[26] *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ. See also *Interpretation of Legislation Act 1984* (Vic), s 14(2); *Gerrard v Mayne Nickless Ltd* (1996) 135 ALR 494 at 512; *Esber v The Commonwealth* (1992) 174 CLR 430; *cf. Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340 at 351 [28].

[27] (2017) 345 ALR 560.

[28] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2016, pp 4724-4725 (Ms Neville, Minister for Police). Remarks to the same effect were made in the statement of compatibility for the Bill as introduced in the Legislative Council: Victoria, *Parliamentary Debates*, Legislative Council, 7 December 2016, pp 6578-6579 (Ms Tierney, Minister for Training and Skills).

> Cruel, inhuman, degrading treatment (s 10(b)) and inhumane treatment (s 22(1))
>
> ...
>
> *The effect of the reforms to parole ... is that certain prisoners (who are serving life sentences) may remain effectively ineligible for parole until they are either close to death or permanently incapacitated ... . This may be considered to constitute cruel, inhuman or degrading treatment, or inhumane treatment when deprived of liberty, as the reforms will have the effect of removing the prospect of release of certain offenders and diminishing their possibility of rehabilitation.*
>
> ...
>
> *I also accept that there may be alternative less restrictive means reasonably available to achieve the purpose ... . In this regard, it may be argued that clause 3 [which would introduce s 74AAA] is incompatible with the (sic) ss 10(b) and 22(1) of the charter, in light of the particularly severe retrospective effect the limitation will have on certain individual offenders and the potential availability of less restrictive alternative measures.*

49. Although the statement of compatibility referred to two relevant Charter rights, it is sufficient to turn only to one of those in more detail. Section 10(b) of the Charter provides that a person must not be treated or punished in a cruel, inhuman or degrading way. That reflects Art 3 of the European Convention on Human Rights[29] which relevantly provides that no one shall be subjected to inhuman or degrading treatment or punishment.

50. In *Vinter v United Kingdom*,[30] the Grand Chamber of the European Court of Human Rights held[31] that the imposition of an "*irreducible*" life sentence was incompatible with Art 3 unless there was both a prospect of release and a possibility of review.[32] In that regard, so-called "*compassionate release*" where a prisoner is terminally ill or physically incapacitated was not regarded as a relevant "*prospect of release*".[33] The Charter expressly provides that such international judgments may be considered in interpreting the rights in the Charter.[34]

51. Plainly, on the authority of *Vinter*, s 74AAA has the effect of rendering the life prisoners to whom it applies subject to an irreducible life sentence which is

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[29] i.e. the *Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13).

[30] (2013) 34 BHRC 605.

[31] (2013) 34 BHRC 605 at [107].

[32] (2013) 34 BHRC 605 at [110].

[33] (2013) 34 BHRC 605 at [127].

[34] Charter, s 32(2).

incompatible with the human right in s 10(b) of the Charter, by depriving such prisoners of any relevant prospect of release.

52. Thus, if s 74AAA were construed as applicable to the Plaintiff, it would give the provision an interpretation which is incompatible with human rights. Section 32(1) requires that the Plaintiff's preferred construction, which is one that the provision can reasonably bear,[35] should be given effect so that s 74AAA does not apply to prisoners, such as the Plaintiff, whose parole eligibility date had arisen, who had made application for parole to the Board, and/or in respect of whom the Board had commenced exercising its jurisdiction in relation to parole.

Common law presumption

53. The Plaintiff's parole eligibility date enlivened the Board's jurisdiction and/or power to order the Plaintiff's release on parole. At the latest, that jurisdiction was engaged once the Board began consideration of the Plaintiff's application – following the recommendation made by the CMRC, the Board made an interlocutory decision on 20 October 2016 to proceed to parole planning. Once the Board had commenced exercising jurisdiction in relation to the Plaintiff's release on parole, it was required to complete that consideration, whether or not parole was ultimately granted.

54. By at least 20 October 2016, the Plaintiff had an accrued right to the effect that his application for release on parole would be considered by the Board in accordance with the statutory regime as it existed at that time.[36] And, consistently with the presumption that statutes are not intended to interfere with accrued rights, s 74AAA should be interpreted so as not to apply to the Board's consideration of the Plaintiff's application for parole of which it was seised prior to the commencement of that section.

55. In this regard, as observed by Mason, Murphy and Wilson JJ in *Carr v Finance Corporation of Australia Ltd (No 2)*,[37] the "*common law presumption against imputing to the legislature an intention to interfere retrospectively with rights which have already accrued does not call for a narrow conception of a right*".

56. There are a number of cases which, directly or by analogy, support the Plaintiff's submissions on the proper construction of s 74AAA in relation to parole applications that were pending as at the date of its commencement.

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[35] *cf. Slaveski v Smith* (2012) 34 VR 206 at 215 [23] per Warren CJ, Nettle and Redlich JJA.

[36] *cf. Mathieson v Burton* (1971) 124 CLR 1 at 23 per Gibbs J.

[37] (1982) 150 CR 139 at 151. See also *Western Australia v Richards* (2008) 37 WAR 229 at [37] per Steytler P and the authorities there cited. See also *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at 134-135 [30] per French CJ, Crennan and Kiefel JJ: "*In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations.*"

a. In *Ford v National Parole Board*,[38] an amendment to the parole regulations extended the portion of a term of imprisonment that an inmate "*shall ordinarily serve ... before parole may be granted*". (There was an additional power by which the Board could grant parole at any time, but only if in its opinion "*special circumstances exist*".[39]) A prisoner had been sentenced before the amendments and would have otherwise been ordinarily eligible to be considered for release on parole on and from 5 August 1975. The amendments commenced on 8 June 1973 and, if they applied to him, meant that that date was extended until 5 August 1978.[40] Walsh J held that, while the granting of parole was undoubtedly a privilege and not a right,[41] the Board was nonetheless obliged to consider the prisoner's release on parole in accordance with the regime which existed before the amendments, shorn of any requirement that "*special circumstances*" exist.[42] This conclusion flowed from the character of the Board's obligation to review the prisoner's parole as a corresponding right of the prisoner which had accrued, and that legislation should be presumed not to operate retrospectively on his accrued rights.[43]

b. In *Flynn v Her Majesty's Advocate*,[44] Lord Roger referred with approval to *Ford*, and drew a similar distinction between the absence of a right to be released on parole, but a right "*in practice*" to have the question of the prisoner's release reviewed by the Parole Board. In *Flynn* there was no pre-existing statutory right to review for release on parole, but simply an administratively determined "*first review date*" whose practical effect was to determine the minimum period that would have to be served before the prisoner could be released on parole.[45] Again, the Privy Council came to the view that the new parole regime amendments should not be construed so as to disadvantage the prisoners who had already obtained their "*first review date*" under the preceding regime. Lord Bingham observed that "*[t]he appellants cannot rely on the new procedures to improve their position, but they are entitled to claim that they*

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[38] (1976) 73 DLR (3d) 630; cited with approval in *Flynn v Her Majesty's Advocate* [2004] UKPC D1 at [64] per Lord Roger of Earlsferry; also cited with apparent approval in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th ed, 2014) at 421.

[39] (1976) 73 DLR (3d) 630 at 632.

[40] (1976) 73 DLR (3d) 630 at 632.

[41] (1976) 73 DLR (3d) 630 at 633.

[42] (1976) 73 DLR (3d) 630 at 633, 635.

[43] (1976) 73 DLR (3d) 630 at 632 at 635-636.

[44] [2004] UKPC D1 at [64].

[45] [2004] UKPC D1 at [24].

should not be prejudiced";[46] remarks which were also adopted by Lord Hope of Craighead.[47]

c. In *Bakker v Stewart*,[48] the power of a magistrate to adjourn on recognizance was abolished for certain drink driving offences. Lush J referred to "*the simple proposition that laws mitigating the rigours of the criminal law or its penalties are to be construed retrospectively, and those which increase those matters are not, subject in both cases to any ascertainable intention appearing in the statute*".[49] He went on to hold that the abolishing of the adjournment power (although procedural as a matter of form) should not be interpreted so as to apply retrospectively to those who had allegedly committed the offences before the commencement of the amendments.

d. *Telford v Severin*,[50] in which amendments to the powers of release on home detention applied to all prisoners including those sentenced prior to the commencement of the amendments, is distinguishable. As Duggan J observed in that case,[51] at the time the relevant amendments commenced, the plaintiff in that case had still <u>not</u> served the minimum period required to have enlivened the power to release him on home detention under the pre-existing regime. Accordingly, the plaintiff was forced to contend that the relevant accrued "*right*" arose at the time of sentencing,[52] which is not at all the contention in this case. In the present case, the Plaintiff's non-parole period had expired and his parole eligibility date under reg 82 of the *Corrections Regulations* had occurred, he had made an application to the Board for parole, and had had his application begun to be considered by the Board at the time s 74AAA commenced. As Duggan J observed in *Telford*:[53]

> *The minimum period of imprisonment which the Parliament intends to be served by a prisoner before an order for home detention is made must be the period prescribed in the legislation <u>as at the time when release on home detention is under consideration</u>.*

To like effect, in giving the majority's reasons for refusing special leave to appeal in *Telford*, Gummow J stated "*[t]he amending Act did not operate*

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[46] [2004] UKPC D1 at [8].

[47] [2004] UKPC D1 at [55]. See also at [83] per Lord Roger; [103] per Baroness Hale; [106]-[107] per Lord Carswell.

[48] [1980] VR 17.

[49] [1980] VR 17 at 22.

[50] (2007) 98 SASR 70.

[51] (2007) 98 SASR 70 at 75-76 [21].

[52] (2007) 98 SASR 70 at 76 [22].

[53] (2007) 98 SASR 70 at 76 [24] (emphasis added).

retrospectively, rather it attached to the applicant when he made an application for home detention at the later date".[54]

Section 127A

57. Once it is accepted that s 74AAA should not itself be construed so as to apply to the Plaintiff, the position is not affected by s 127A because the Plaintiff had commenced these proceedings prior to the commencement of s 127A.

58. In *Zainal bin Hashim v Government of Malaysia*,[55] Viscount Dilhorne delivering the advice of the Privy Council, stated that "*for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature*". Such a principle of interpretation is of particular relevance when it concerns the criminal justice process and the liberty of the individual.[56]

59. The Plaintiff notes that s 127A is not itself expressed to commence at any date earlier than its enactment. Moreover, s 127A does not appear to have the quality of a so-called "*declaratory*" Act, which would ordinarily be taken to operate retrospectively. Despite being expressed "*to avoid doubt*", it is plain that s 127A is an attempt to give a significantly new and expanded operation to s 74AAA,[57] and is not simply declaratory of the law as it existed at the time of the commencement of s 74AAA.

60. In any event, even if s 127A were to be treated as a "*declaratory*" Act, that does not overcome the weight of the propositions in paragraph 58 above, and the strong presumption (especially in this criminal justice context) that statutes should not be interpreted so as to affect the accrued rights of parties to pending proceedings. The Plaintiff also relies in this regard upon the Charter considerations at paragraphs 45-52 above as being equally applicable to the construction of s 127A.

Section 74AAA is invalid on the basis that it contravenes the rule of law

61. Further or alternatively, if s 74AAA applies to the Plaintiff, then it is invalid on the grounds that such a construction would offend rule of law principles which are given effect to under the *Constitution*.

62. In *Australian Communist Party v The Commonwealth*,[58] Dixon J stated that "*the rule of law forms an assumption*" of the *Constitution*. To say that the rule of law is an assumption of the *Constitution* is not to say that it is an assumption without legal

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[54] *Telford v Severin* [2007] HCATrans 427 (emphasis added).

[55] [1980] AC 734 at 742; see also *Victoria v Robertson* (2000) 1 VR 465 at 472 [21] per Batt JA.

[56] *R v JS* (2007) 230 FLR 276 at [45]-[46] per Spigelman CJ (Mason P, McClellan CJ at CL, Hidden and Howie JJ agreeing); *cf. Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520, 523 and 532.

[57] *cf. Hawkesbury City Council v Sammut* (2002) 119 LGERA 171; [2002] NSWCA 18 at [51].

[58] (1951) 83 CLR 1.

consequence.[59] That is because, as recognised in more recent judgments of this Court, "*it is an assumption upon which the Constitution depends for its efficacy*".[60] And in *Kartinyeri v The Commonwealth*,[61] it was acknowledged by Gummow and Hayne JJ that this Court has yet to determine "*all that may follow*" from Dixon J's observation.

63. Once one recognises, as this Court has, that the *Constitution* depends upon the rule of law for its very efficacy, it is axiomatic that any law which conflicts with or is abhorrent to the rule of law will be unconstitutional and invalid. This is not to engage in impermissible "*[t]op-down reasoning*".[62] It is simply to distinguish existential exigencies (on which the *Constitution* depends) from constitutional implications (which are its product). It is to recognise that matters extraneous to the constitutional text may nonetheless constitute "*a postulate of the Constitution*"[63] whose continued existence is a condition for the operation of constitutional government.

64. As Gummow and Crennan JJ indicated in *Thomas v Mowbray*, the question is not so much the status of the rule of law as an assumption upon which the *Constitution* depends for its efficacy, "*[b]ut what does the rule of law require?*".[64]

65. In that connection, there is now substantial agreement as to what the rule of law practically requires (at least in the so-called "*thin*" sense). In particular, the influential analysis of Joseph Raz[65], who built on the work of Lon Fuller,[66] identifies various individuated requirements of the rule of law,[67] among them that laws generally be prospective rather than retroactive, and that laws be relatively stable. Lord Bingham (extra-curially) identified[68] eight "*sub-rules*" and included as the very first the rule that "*the law must be accessible and so far as possible intelligible, clear and predictable*".

66. This aspect of the rule of law forms part of British constitutional principle.[69] As Lord Diplock stated in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*:[70]

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[59] *cf. Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 at 135.

[60] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30] per Gleeson CJ and Heydon J (emphasis added); *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] per Gummow and Crennan JJ; *South Australia v Totani* (2010) 242 CLR 1 at 42 [61] per French CJ.

[61] (1998) 195 CLR 337 at 381 [89].

[62] *McGinty v Western Australia* (1996) 186 CLR 140 at 232 per McHugh J.

[63] *Farey v Burvett* (1916) 21 CLR 433 at 453 per Isaacs J. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 141 per Latham CJ (in dissent), 202 per Dixon J.

[64] (2007) 233 CLR 307 at [61].

[65] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2009) at 214-218.

[66] Lon Fuller, *The Morality of Law* (revised ed, 1969) at 39.

[67] Lisa Crawford, *The Rule of Law and the Australian Constitution* (2017) at 21.

[68] Lord Bingham, "The rule of law" (2007) 66(1) *Cambridge Law Journal* 67 at 69ff.

[69] Constitutional Reform Act 2005 (UK), s 1.

> *The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of knowledge is what the statute says.*

67. Likewise, in *Fothergill v Monarch Airlines Ltd*,[71] Lord Diplock stated:

> *Elementary justice, or to use the concept often cited by the European court, the need for legal certainty, demands that the rules by which the citizen is bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.*

68. It is submitted that s 74AAA offends the rule of law and those aspects of it identified above. In particular, in so far as it applies to the Plaintiff, s 74AAA removes or interferes with the jurisdiction of the Board which has been enlivened, engaged and exercised in accordance with the law as then in force. It may be accepted that the Parliament can amend statutory provisions so as to change the basis on which parole is granted *before* a prisoner has become eligible for parole, or *before* the jurisdiction of the Board has been engaged and exercised in relation to a prisoner. However, that is not what is involved in the Plaintiff's case.

69. As the *Constitution* applies throughout the Commonwealth (covering clause 5), and as the legislative power of the State parliaments are subject to it,[72] a State law which infringes the rule of law will be in no better position than a corresponding Commonwealth law.

70. Further, if s 74AAA applies to the Plaintiff, then it is invalid on the grounds that such a construction empowers the Board to go behind the Plaintiff's conviction and sentence. As was recognised by Gleeson CJ, Gummow, Hayne and Hedyon JJ in *D'Orta-Ekenaike v Victoria Legal Aid*,[73] "*the central concern of the exercise of judicial power is the quelling of controversies*" and that, subject to the appellate system, "*the general principle [is] that controversies, once quelled, may not be reopened*".

71. The Plaintiff submits that the effect of s 73 of the *Constitution*, which establishes this Court as the apex court within the integrated national system of courts in respect of judgments, decrees, orders and sentences in a "*matter*", and which constitutionally

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[70] [1975] AC 591 at 638 (dissenting in the result).

[71] [1981] AC 251 at 279. See also *PGA v The Queen* (2012) 245 CLR 355 at 406 [138] per Heydon J (dissenting in the result).

[72] *cf. Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 54 (arguendo).

[73] (2005) 223 CLR 1 at 16 [32], 17-18 [35] (citations omitted).

entrenches a jurisdiction to hear appeals from State Supreme Courts, is that no person or body outside the integrated system of courts provided for in Ch III of the Constitution may add to or alter the Plaintiff's conviction and sentence.

72. So much is critical to give effect to the constitutional imperative of the quelling of controversies, for which Ch III provides the conclusive mechanism. As noted at par 40.b above, the Plaintiff's trial lasted more than 100 days. That trial was conducted more than 30 years ago. The controversy raised by the indictment was quelled by the jury's verdict and Vincent J's sentence. The constitutionally permissible avenue for reopening that controversy was by way of appeal, and that avenue was unsuccessfully pursued by the Plaintiff in the Full Court of the Supreme Court.

73. Section 74AAA is constitutionally objectionable because, on the Defendant's construction, it purports to authorise the Board to inscribe on the Plaintiff's conviction additional elements of *actus reus* and *mens rea* that were not otherwise established upon the quelling of the controversy following the Plaintiff's trial. In so far as s 74AAA purports to confer power on the Board to conduct an inquiry in order to reopen and recharacterise the offence for which the Plaintiff was convicted and sentenced, as was established and finally determined by the judgment and order of the Supreme Court, the provision is contrary to Ch III and the rule of law so as to exceed the legislative powers of the State Parliament.

Part VII: Orders sought

74. The questions stated for the opinion of the Full Court be answered as follows:

(a) No.
(b) No.
(c) Not necessary to answer.
(d) The Defendant.

75. Alternatively, if the answer to (a) and (b) is "*yes*", questions (c) and (d) should be answered as follows:

(c) Yes.
(d) The Defendant.

Part VIII: Estimate

76. The Plaintiff estimates that he will require 2 hours for the presentation of oral argument.

Dated: 8 March 2018

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