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 REPLY

Section 74AAA(1) concerns matters established by conviction

1. *Defendant's Submissions (**DS**) at [45]-[46]*: In considering whether a prisoner comes within the class identified in s 74AAA(1) of the Act, and is thereby required to make a parole application governed by s 74AAA, the Board cannot look to matters beyond those established by the prisoner's conviction. The Defendant ignores the composite nature of the expression "*convicted and sentenced*" – the prisoner must be both convicted for the offence described and sentenced for that offence (to a term of imprisonment with a non-parole period). The presence of the words "*and sentenced*" in s 74AAA(1) is explained in the Plaintiff's Submissions (**PS**) at [35]. Ultimately, it is the matters established by the conviction for which the prisoner is "*convicted and sentenced*".[1]

2. Vincent J's sentencing remarks (which hardly establish the matters in s 74AAA(1) in any event) do not form the basis upon which the Plaintiff was both "*convicted and sentenced*", noting the conjunctive nature of that phrase in s 74AAA(1). In particular, as was recognised by the Full Court on appeal [SC: Annex C: pp 64-71], the existence of motive was not itself a necessary element of the offence charged or found by the jury to have been proven. [SCB 167-174]

3. Where s 74AAA applies, consideration of the reasons for sentence (as contemplated by s 74AAA(3)) may be relevant to whether the making of a parole order is justified under s 74AAA(4)(b). But subs (3) has no operation unless and until an application is required under subs (1). The Defendant's suggestion that the sentencing remarks may be

[1] In addition to *Pickering v The Queen* (2017) 343 ALR 374 at 385 [53] referred to in PS at [39], see also *NH v DPP (SA)* (2016) 90 ALJR 978; 334 ALR 191 at [78] per French CJ, Kiefel and Bell JJ ("*A guilty verdict reflects a collective finding that all the facts necessary to establish the guilt of the accused, according to the law as directed by the trial judge, have been proven beyond reasonable doubt.*").

Darebin Community Legal Centre
732 High St
Thornbury VIC 3071

Telephone: 03 9484 7753
Fax: 03 9484 9442
Email: hui@darebinclc.org.au
Ref: hui@darebinclc.org.au

considered in determining whether a prisoner falls within the class of prisoner identified in s 74AAA(1) is therefore contrary to the text and context of s 74AAA: see PS at [32]. Further, subs (3) does not convert the reasons for sentence into the record of the court, which is comprised only in the judgment or order – relevantly, the conviction and the sentence, being the order that fixes the period of time to be served in custody.[2] Nor does it elevate any findings or observations made for sentencing purposes into matters established by the conviction. The reasons of a sentencing judge or of an appeal court cannot be conflated with, or equated to, the conviction and sentence for the offence as constituted by the order made by the court.

4. *DS at [47]-[49]:* It is not correct that the Plaintiff's construction would leave s 74AAA with no operation. For example, it remains open to the Parliament to enact a criminal offence with elements that correspond to the matters in s 74AAA(1). Moreover, it is possible that a trial judge might take a special verdict on those matters, which may then engage the operation of s 74AAA.

5. *DS at [50]-[52]:* The meaning of s 74AAA for which the Defendant contends (DS at [50]) bears little textual or grammatical resemblance to the provision itself. The Defendant is forced to contend for a disaggregated interpretation of s 74AAA, separating and giving differing operations and reference points to the various matters which are otherwise run together in the section. This places an impermissible gloss on the statutory text, requiring a redrafting of the provision by the insertion of additional words.[3] On the other hand, the Plaintiff's construction does no violence to the statutory text and, moreover, gives proper effect to the presumptions of interpretation regarding human rights under the Charter and accrued rights.

6. Further, the Defendant's suggestion (DS at [52]) that the requisite mental element in s 74AAA(1) could often be determined solely from the reasons for sentence is an unjustified assumption. If the Defendant's construction were to be adopted, the Board would need to embark upon its own inquiry having regard to any and all available evidence and material, including but not limited to the evidence led at the trial: see PS at

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[2] See *Griffiths v The Queen* (1977) 137 CLR 293 at 307 per Barwick CJ (the sentence is the "*definitive decision by the judge on the punishment or absence of it which is to be the consequence of the conviction*"); *McKenzie v Findlay* [1966] VR 3 at 4-6; *Tudman v Flower* (1994) 73 A Crim R 321 at 326; *R v Ireland* (1970) 126 CLR 321 at 330; *cf. Evidence Act 2008* (Vic), s 178.

[3] The Defendant in effect treats s 74AAA(1) as if it referred to "*a prisoner convicted and sentenced ... for the murder of a person ~~who~~, in circumstances where [the Board determines as a matter of fact that] the prisoner knew that the murdered person was, or was reckless as to whether the person was, a police officer ...*"

[40]. But the problems are compounded by the suggestion that the Board might simply purport to draw its own inferences from selected aspects of the reasons for sentence, none of which were directed at the matters required by s 74AAA(1), and purport to make a finding about the requisite mental element without observance of the criminal standard of proof and without any requirement to provide a hearing to the prisoner. These problems point strongly in favour of the Plaintiff's construction.

Sections 74AAA and 127A do not apply to the Plaintiff's parole application

7. *DS at [34]:* Section 127A is not properly characterised as "*declaratory*". It extends the operation of s 74AAA precisely because s 74AAA does not, on its true construction, apply in the way that s 127A now expresses it to apply: PS at [42]-[56]. The Parliament cannot retrospectively recharacterise the intended operation of s 74AAA as at the date the Plaintiff commenced these proceedings.[4] Still less can it do so by using the words "*[t]o avoid doubt*" as the introductory words of the provision which commenced at a later date.[5]

8. Moreover, s 127A(b), for example, reposes a new discretion in the Board to treat steps taken by a prisoner to ask for parole as constituting an application lodged with the secretary of the Board under s 74AAA(2). It is unclear how that is said to be "*declaratory*" of the operation of s 74AAA in circumstances where that latter section did not concern itself with any such matters.

9. *DS at [35]:* There is no suggestion that the Plaintiff's Amended Statement of Claim (or a fair summary of its contents) was before Parliament when s 127A was enacted. Therefore, no legislative intention to affect the instant proceedings can be inferred from any similarity between the factors identified in that pleading and the matters addressed in s 127A.

10. *DS at [41]:* The obligation under s 32(1) of the Charter (*i.e.* to interpret all statutory provisions, so far as it is possible to do so and consistently with their purpose, in a way that is compatible with human rights) is not removed simply because a Minister makes reference to potential impingement on human rights in a statement of compatibility to Parliament. To the contrary, the fact that the potential violation was adverted to, yet the

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[4] *University of Wollongong v Metwally* (1984) 158 CLR 447.

[5] *Harding v Commission of Stamps (Qld)* [1898] AC 769 (PC); *South Coast X-Ray Pty Ltd v Chief Executive Officer of Medicare Australia* (2007) 158 FCR 173 at [32]; *Hawkesbury City Council v Sammut* (2002) 119 LGERA 171 (NSWCA) at [49]-[52].

Parliament did not enact an override declaration under s 31 of the Charter, is probative of a legislative intention not to affect Charter rights in the way apprehended by the Minister.

11. If a Parliament "*consciously*" wishes to abrogate a human right, it may enact an override declaration under s 31. Otherwise the procedure envisaged by ss 36 and 37 of the Charter (whereby the Supreme Court declares that a provision cannot be interpreted consistently with human rights, and reports that matter to Parliament) is apt to apply where the Parliament has inadvertently derogated from human rights.

12. In any event, a subjective intention to affect human rights or accrued rights does not determine the objective meaning of the words of the provision, read in their context.[6] As observed in *R v Bolton; Ex parte Bean*,[7] "*[t]he words of a Minister must not be substituted for the text of the law*", and "*particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual*".

13. *DS at [42]:* If a provision on its true construction involves some form of impingement on human rights under the Charter or on accrued rights, s 32(1) of the Charter and the common law presumption are not spent, but operate such that the provision must nonetheless be construed so as to maximise the operation of those human rights and those accrued rights.[8] Thus, ss 74AAA and 127A ought not to be interpreted to apply to the Plaintiff's application for parole, even if those sections might possibly apply to affect the rights of others prisoners. This is not an "*individualised reinterpretation*", but rather a construction which preserves the jurisdiction and power of the Board in relation to a particular class of prisoners into which the Plaintiff falls.

14. *DS at [23]:* The Plaintiff does not assert any accrued right (nor any legitimate expectation) to be granted parole. Rather, it is submitted that the Board should complete its consideration of the Plaintiff's parole in accordance with the law as it existed at the time that his non-parole period expired, *i.e.* his "*parole eligibility date*" under reg 82 of the *Corrections Regulations*. It is wrong to suggest that the point had not yet been reached where the Board was able to determine the Plaintiff's parole application – under

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[6] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [32]-[34] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

[7] (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ.

[8] See, in relation to the presumption against retrospectivity, *R v JS* (2007) 230 FLR 276 at [45] per Spigelman CJ. See also *Bros Bins Systems Pty Ltd v Industrial Relations Commission of New South Wales* (2008) 74 NSWLR 257 at [69]; *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 at [130].

the Act, the Board's jurisdiction and power to grant parole was enlivened on and from the triggering of the parole eligibility date.[9]

Sections 74AAA and 127A are contrary to the rule of law and invalid

15. *DS at [58]-[60]:* The Plaintiff does not rely on any general constitutional prohibition against retrospective laws. Rather, the Plaintiff argues that s 74AAA and s 127A seek to nullify the Board's jurisdiction and power after it has been enlivened by the parole eligibility date, engaged with by the Plaintiff and the CMRC, and exercised by the Board making an interlocutory decision to proceed to parole planning [SC: Annex H: p 2]. Such [SCB 250] a legislative action is contrary to the binding constitutional assumption of the rule of law because it denies the legal consequences that have already flowed from the expiration of the non-parole period and the "*parole eligibility date*" under reg 82 of the *Corrections Regulations*, as ascertainable by and known to those persons affected by the relevant laws. The Plaintiff's argument means no more than that s 74AAA cannot validly apply to him, so that he remains subject to laws governing parole that are applicable to other prisoners – the Board is not thereby required to administer any different "*system of parole*" (compare DS at [61]).

16. *DS at [54]:* In so far as it impermissibly purports to authorise the Board to "*go behind*" the Plaintiff's conviction, s 74AAA is different from the provision considered in *Knight*.[10] Whereas the provision limiting Knight's prospects of parole did not "*intersect*" with any exercise of judicial power, in this case the Board is being asked to reopen and recharacterise the offence for which the Plaintiff was convicted and sentenced. It is that process, undertaken for the purposes of determining the application of s 74AAA(1), which offends the integrated appellate courts structure for which Ch III provides and is constitutionally impermissible.

Dated: 30 April 2018

C. J. HORAN
Telephone: 03 9225 8430
Facsimile: 03 9225 8668
Email: chris.horan@vicbar.com.au

A. F. SOLOMON-BRIDGE
Telephone: 03 9225 6495
Facsimile: 03 9225 8668
Email: asolomonbridge@vicbar.com.au

[9] In any event, it may be noted that the Defendant's construction would not depend on "*the stage that [the Plaintiff's] application for parole had reached*": *cf.* DS at [23]. On the Defendant's case, s 74AAA(1) would be applicable even if a Parole Suitability Assessment had been completed and the Board had commenced giving "*substantive consideration*" whether to grant parole: *cf.* DS at [21].

[10] *Knight v Victoria* (2017) 345 ALR 560 at 567 at [28]-[29].