



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
 DARWIN REGISTRY

D2 OF 2021

BETWEEN:

THE QUEEN  
 Applicant  
 and  
 ZACHARY ROLFE  
 Respondent

10                                  **APPLICANT’S OUTLINE OF ORAL SUBMISSIONS**

**PART I: CERTIFICATION**

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1. This outline is in a form suitable for publication on the internet.

**PART II: OUTLINE OF PROPOSITIONS**

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*Factual background*

2. On 9 November 2019, the respondent, a police officer, shot Mr Charles Arnold (Kumanjaji) Walker three times. The first shot was not fatal and is not subject of any charge. The second and/or third shots were fatal and are the subject of the charge of, *inter alia*, murder. The respondent does not dispute that he fired the second and/or third shots, such that the only issue at trial is one of justification. The respondent in this regard has indicated that he will rely at his trial on ss 43BD and 208E of the *Criminal Code* and s 148B of the *Police Administration Act 1978* (the **PA Act**): Applicant’s written submissions (**AWS**) at [6]-[16].

*Issue before this Court*

3. This case concerns the ambit or scope of s 148B of the PA Act. At issue is whether the phrase “an act in the performance or purported performance of a function under the Act” in s 148B incorporates the “core functions of the Police Force” set out in s 5(2) of the PA Act: **AWS** [2].
4. The applicant contends that the Full Bench erred in holding that the protection afforded by s 148B extends to the performance of “core functions” under s 5(2), including, relevantly, the protection of life and the prevention of crimes: **AWS** [39], [43]-[45]; Unredacted Core Appeal Book (**AB**) at 197 [180]; 207 [204(a)], [204(b)].

*Ground 1: Full Bench erred in its construction of s 148B of the PA Act*

5. The Full Bench erred in not construing s 148B “strictly” or “jealously” in accordance with the principle in *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105, or absent “clear words or those of necessary intendment”: **AWS** [23], [46]-[48].
6. The purpose of s 148B is to protect a person who engages in acts which of their nature interfere with persons or property. Those otherwise unlawful acts are rendered lawful because they are done “under the Act” which confers an express statutory authority to perform those acts. A fortiori, s 148B does not apply to acts done without the need for the exercise of a statutory power: **AWS** [49]-[53]; Applicant’s reply (**Reply**) [3]-[5].
- 10 7. Section 5(2) does not confer any duty (function) or power on a member. It simply sets out the core objectives of the Police Force, many of which are “of an ordinary character...requiring no special authority”: **AWS** [52]-[53], [60] –[64]; **Reply** [6]-[8].
8. The conferral of authority to exercise power and perform functions “under the Act” is effected by s 25 of the PA Act, which confers on members the duties and powers on police officers “*as are by any law in force in the Territory.*” The “law in force” includes, relevantly:
- a) Part VII of the PA Act (and General Orders issued under s 14A of the PA Act). Those provisions limit when and how a member can exercise the power of arrest. For example, a member can only arrest a person in certain specified circumstances. When effecting an arrest, the member must use reasonable care and avoid unnecessary force.
- 20 b) The common law, which also contains restrictions on the power or duty of a member.
- AWS** [50], [51], [54]-[58]; **Reply** [11].
9. The legislative history of s 148B does not indicate that Parliament intended that the protection afforded by s 148B extends to the performance of “core functions” under s 5(2). The introduction of the word “function” in s 148B together with replacing the word “member” with “person” was to ensure that the immunity was widened to include functions performed by medical practitioners, nurses and qualified persons who performed certain functions under the newly enacted Div 7AA: **AWS** [29]-[38], [65]-[67]; **Reply** [9]-[10].

10. The Full Court’s construction of s 148B renders s 208E of the *Criminal Code* in its application to police officers effectively inutile in circumstances where there was no evident legislative intention to do so: **CAB 233-234** [22]-[24]; **CAB 273** [8].

*Ground 2: Purpose*

11. The issue in ground 2 is the role of purpose in the construction and application of s 148B. In the present case, to determine whether an act was done “in good faith”, it is necessary to identify the purpose for which the act was taken: **AWS** [72(h)].

12. If there are multiple purposes for the doing of the act and one or more of those purposes was extraneous to the exercise of a power or performance of a function under the PA Act, the jury must be directed that s 148B would not apply if that extraneous purpose was a substantial purpose: **AWS** [74]; **Reply** [15]-[18].

*Issues raised in this appeal are not hypothetical*

13. The Full Court’s erroneous construction of s 148B has a material implication for the way the jury will be directed, and in turn the outcome, of this case: **AWS** [76]-[80]; **Reply** [19]. The questions raised in this appeal are grounded in the facts and circumstances, and are not hypothetical: **Applicant’s Note** at [10]-[11], [15]-[19]. Special leave should be granted to correct the Full Court’s decision so that this important murder trial can be held according to law.

14. If Question 3 failed to capture the material controversy between the parties, the Full Court’s answer grappled squarely with that controversy. The question which the Full Court should have asked (and indicated it would answer) is “Does a function under s 148B of the PA Act include the functions listed in section 5(2) of that Act?”. The answer to that question is “no”: **Applicant’s Note** [5]-[12]; **AWS** [2], [81(b)].



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