



BETWEEN:

CRAIG WILLIAM JOHN MINOGUE

Plaintiff

and

STATE OF VICTORIA

Defendant

DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

10 **PART I CERTIFICATION**

This outline is suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. Section 74AAA(1) does not require that it be an element of the offence that the prisoner knew or was reckless as to the identity of the victim as a police officer

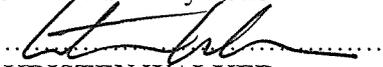
1. The text of s 74AAA supports the State's construction. DS [45]-[46]
 - (a) The text of s 74AAA directs attention beyond the elements of the offence: ss 74AAA(1) and (3) each refer to sentencing. DS [45]-[46]
 - (b) Section 74AAA expressly directs attention to offences committed before the section came into force. However, Victorian law did not (and does not) contain an offence with an element that the murder victim was a police officer. DS [47]
2. The possibility that Parliament legislated on the basis that it might, at some time in the future, create a new offence, or a special verdict, is inconsistent with the text of s 74AAA and is generally unlikely. cf Reply [4]
3. The "inconveniences" said to arise from the State's construction are exaggerated. A prisoner's state of mind could often be inferred from the reasons for sentence. Alternatively, the Board can inform itself from other available evidence. DS [51]-[52]
DS [7]-[11]

B. Section 74AAA applies to the plaintiff notwithstanding that his parole eligibility, his application for parole, and the Board decision to "proceed to parole planning"

4. The text of s 74AAA applies generally and does not exclude persons in the Plaintiff's circumstances. DS [24]
5. Section 74AAA is not retrospective, it applies only to future decisions of the Board. DS [61]
6. The Plaintiff did not have any "accrued right" under the *Corrections Act* to have the Board make a future decision on the basis of the law at any of the dates the Plaintiff identifies: *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485. DS [12]-[23]

7. The cases on which the Plaintiff relies do not assist him. *Ford* (1976) 73 DLR (3d) 630 concerned a very different statutory scheme, while *Flynn* 2004 SC (PC) 1 and *Bakker* [1980] VR 17 concerned different schemes and raised very different issues. DS [36]
8. Section 32 of the Charter does not require s 74AAA to be read as not applying to a prisoner if the Board had begun to consider his application for parole at December 2016. DS [40]-[42]
- (a) That would not be to interpret s 74AAA but to rewrite it: *Slaveski* (2012) 34 VR 306 at [23]-[24].
- (b) Section 32 does not permit an “individualised” reading of s 74AAA that would exclude the Plaintiff from the operation of s 74AAA: *Flynn* 2004 SC (PC) 1 at [69]. DS [42]
9. Section 127A is a complete answer to the Plaintiff’s argument. DS [30]
- (a) It clarifies, rather than extends, s 74AAA: Statement of Compatibility, Legislative Assembly Debates, 6 December 2016 at 4722.
- (b) It is a declaratory provision that operates retrospectively from the date that s 74AAA commenced: *Australian Railways Union* (1930) 44 CLR 319 at 373-375. DS [32]-[34]
- (c) It applies to the Plaintiff notwithstanding that he had commenced this proceeding: *Bawn* (1970) 72 SR (NSW) 466 at 488-489.
- C. Sections 74AAA and 127A are constitutionally valid**
10. The rule of law is not given direct normative operation by the Constitution. DS [56]-[57]
11. There is no absolute constitutional prohibition on retrospective laws. Parliaments may enact retrospective criminal offences, and may alter the law applicable in pending or even completed judicial proceedings. DS [58]-[59]
12. Section 74AAA is not properly characterised as “retrospective”. DS [54]
13. Section 74AAA, construed as the State contends, does not “go behind” a court’s judgment. DS [61]
- (a) The conviction and sentence are unchanged; the parole regime does not intersect with the exercise of judicial power at all: *Knight* (2017) 91 ALJR 824 at [28]-[29].
- (b) Parliament may treat the prisoner’s state of mind as the “factum” for eligibility for parole: *Baker* (2004) 223 CLR 513 at [43]; *Crump* (2012) 247 CLR 1 at [60].

Dated: 15 May 2018


 KRISTEN WALKER
 Solicitor-General for Victoria
 T (03) 9225 7225
 E: kristen.walker@vicbar.com.au


 GRAEME HILL
 T (03) 9225 6701
 E: graeme.hill@vicbar.com.au