

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M2 of 2017

BETWEEN:



CRAIG WILLIAM JOHN MINOGUE
Appellant
and
STATE OF VICTORIA
Defendant

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PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

Part I:

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

Part II:

The decisions in *Crump and Knight* can be distinguished: **PS [28]**

2. The Plaintiff's case is distinguishable from *Crump and Knight* in three respects.
 - a. The relevant factum in s 74AAA is different, and its purported application to the present case is neither straightforward nor uncontested.
 - b. Section 74AAA commenced operation after the Plaintiff had become eligible for parole, and after the Board had commenced consideration of his application for parole.
 - c. Relevant human rights under the Charter are engaged and apply to the interpretation of ss 74AAA and 127A (*cf.* s 74AA(4)-(5)).

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Section 74AAA does not in terms apply to the Plaintiff: **PS [30]-[41]; Reply [11]-[6]**

3. Section 74AAA(1) identifies a class of prisoner by reference to a category of offence or crime – the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer.
4. The natural meaning of “*convicted and sentenced ... for*” in s 74AAA(1) is that the matters specified must have been established by the conviction. “*Convicted and sentenced*” is a conjunctive and composite expression.
- 30 5. A conviction based on a verdict of guilt amounts to a finding of the facts necessary to establish the essential elements of the offence charged, and no more. It was not an element of the offence of which the Plaintiff was convicted that he knew or was reckless as to whether the deceased was a police officer.
6. The construction for which the Defendant contends does not accord with the language or grammatical structure of s 74AAA(1), and involves an impermissible re-drafting of the provision: *cf.* DS [50]. Further, s 127A confirms that s 74AAA is intended to apply to prisoners “*convicted and sentenced as mentioned in section 74AAA*”, without any inquiry by the Board into additional questions of fact.

7. The Defendant's construction would produce inconvenient and undesirable consequences: PS [40], Reply [6]. It is unlikely that the Parliament intended that the Board would conduct an administrative inquiry into the existence of a mental element in connection with a past offence.
8. The matters in s 74AAA(1) cannot be established from sentencing remarks. The reasons for sentence are not part of the record of the court at common law. Subsection 74AAA(3) has no operation (and an application for parole under s 74AAA is not required) unless and until the preconditions in s 74AAA(1) are established.
- 10 9. The Plaintiff's construction of s 74AAA(1) accords with the requirement under s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) that statutory provisions must so far as possible be interpreted in a way that is compatible with human rights. **PS [45]-[52]**
 - a. Protection from cruel, inhuman or degrading treatment: ss 10(b), 22(1).

Vinter v United Kingdom (2013) BHRC 605: life prisoners must have a relevant prospect of release (and not just upon imminent death or incapacitation).
 - b. Right to liberty – review of lawfulness of detention: s 21(7).

Stafford v United Kingdom (2002) 35 EHHR 1121: continued detention after expiry of non-parole period must be capable of review by independent body with power to release prisoner.
- 20 10. Alternatively, if s 74AAA(1) can be construed as referring to the basis on which a prisoner was sentenced, it is limited to cases in which a finding was made under s 3(2)(a) of the *Crimes Act 1958* (Vic).

Section 74AAA does not apply where the Board had commenced to exercise jurisdiction in respect of Plaintiff: PS [42]-[44], [53]-[60]; Reply [7]-[14]
- 30 11. The jurisdiction or power of the Board to release the Plaintiff on parole was enlivened by the "trigger" of the parole eligibility date. At the date of commencement of s 74AAA, the Plaintiff's parole application was a matter pending before the Board, which had commenced but not completed its consideration of the matter.
12. Legislation is presumed not to interfere with accrued rights or pending proceedings, in the absence of a clear intention to the contrary.
 - a. *Interpretation of Legislation Act 1984* (Vic), s 14(2)(e), (g).
 - b. *Esber v The Commonwealth* (1992) 174 CLR 430; *Ford v National Parole Board* (1976) 73 DLR (3d) 630; *Flynn v Her Majesty's Advocate* 2004 SC (PC) 1.

13. Section 127A is not merely “*declaratory*”, and does not apply to a person who had instituted proceedings prior to its commencement.
- a. *Victoria v Robertson* (2000) 1 VR 465 at [21]; *R v JS* (2007) 230 FLR 276 at [45].

Sections 74AAA and 127A are contrary to the implied constitutional assumption of the rule of law: PS [61]-[73]; Reply [15]-[16]

- 10 14. The rule of law is an inherent assumption on which the *Constitution* is based and depends for its efficacy. It is not merely an extrinsic unexpressed assumption of the framers which is not given effect by or under the *Constitution*. It gives rise to implications which are “securely based”.
- a. *Australian Communist Party* (1951) 83 CLR 1 at 193, 262-263.
- b. *Australian Capital Television Pty Ltd* (1992) 177 CLR 106 at 134-135.
- c. *APLA Ltd* (2005) 224 CLR 322 at [30].
- d. *South Australia v Totani* (2010) 242 CLR 1 at [61], [131], [233], [423].
- 20 15. A central aspect of the rule of law requires that laws should be predictable, ascertainable and stable. While retrospectivity *per se* is not necessarily offensive to the rule of law, a Parliament cannot enact a law which purports to “rewrite history”, such as by treating acts that were outside jurisdiction to have always been within jurisdiction, or vice versa. While a statute may change rights and liabilities by reference to past acts or purported acts, it cannot retrospectively confer or withdraw jurisdiction.
16. In the present case, s 74AAA is offensive to the rule of law because it purports to nullify or interfere with the jurisdiction of an independent body established with the sole power to release prisoners on parole, after that jurisdiction had been enlivened, engaged and exercised with respect to the Plaintiff. Section 74AAA purports to “move the goalposts” while the ball is in the air – that is, before the Board could complete the exercise of its jurisdiction.
- 30 17. Further, s 74AAA is inconsistent with the rule of law as given effect in Ch III of the *Constitution* in that it purports to reopen a controversy that was quelled by the Plaintiff’s conviction and sentence for murder, and to recharacterise the offence of which he was convicted by reference to additional elements including alleged *mens rea* at the time that the offence was committed.

Dated: 15 May 2018



C J HORAN
A F SOLOMON-BRIDGE