



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

THE QUEEN
Appellant

and

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ZACHARY ROLFE
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

20 **Part II: Concise statement of the issues**

2. If special leave to appeal is granted, then on the issues between the parties raised by the appeal, the respondent contends that the decision of the Full Court of the Northern Territory Supreme Court was correct. Section 5 of the *Police Administration Act NT* (the "PA Act") confers functions on the police force which consists of and acts through individual members. The respondent can also be performing a function or exercising a power under the PA Act at the same time (the dual purpose ground).

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3. This appeal does not raise any matter of public importance, nor is it capable of resolving any conflict in the law. Further, since the stay of proceedings by Gleeson J was granted on 23 August 2021, the Appellant has disavowed entirely that the respondent cannot rely upon the defence found in section 148B of the PA Act. Rather, the appellant's submissions simply now contend that section 5 of the PA Act does not confer a 'power' or 'function' for the purposes 148B of the PA Act

(Ground 1), and that the respondent cannot both be exercising a power (of arrest) and performing a function (of protecting life) (ground 2). Accordingly, it is apt to refuse special leave to appeal.

Part III: Section 78B *Judiciary Act 1903*

4. This is not a matter which requires notice under section 78B of the *Judiciary Act 1903* (Cth).

10 Part IV: Material facts set out in the appellant's narrative of facts or chronology that are contested

5. The only material fact contested from those set out in the appellant's narrative of facts is that it will be in contest at trial that Constable Eberl was on top of the deceased and pinning him to the ground.¹

Part V: Argument in answer to the argument of the appellant

Question of Special Leave still to be decided

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6. The Full Court's interpretation of section 148B of the PA Act proceeded in orthodox fashion. The Full Court applied orthodox principles of statutory construction and provided an interpretation that was the only construction reasonably open.

Ground 1: Proper construction of s 148B

7. It is the respondent's primary contention that all five Judges of the Full Court in *The Queen v Rolfe* (No 5) [2021] NTSCFC at 6² correctly construed section 148B of the PA Act such that section 148B does extend to the performance of the functions in section 5 of the PA Act.

¹ Appellant's written submissions at [13]

² J [180 – 181] per Kelly and Blockland JJ and Hiley AJ (CAB 197-198); J [139 – 140] per Southwood J and Mildren AJ (CAB 181 – 182).

8. It is helpful to briefly summarise the crucial undisputed facts in this case, and the observations of the Full Court about those facts, having the benefit of viewing the Body Worn Video of the respondent which captures the incident.³

9. On 5 November 2019 a warrant was issued for the arrest of the deceased with regard to breach of order suspending sentence. The warrant was "To all members of the Northern Territory Police Force commanding them to apprehend and bring the offender before the Local Court to be further dealt with according to law."⁴ The respondent was at the time of the alleged offences seeking to execute a warrant for the arrest of the deceased.

10. Also, on the assumed facts the first non-lethal shot followed the deceased stabbing the respondent, and was itself followed in 2.6 seconds by the second shot, and the second shot was itself followed in 0.53 seconds by the third shot. It was common ground that either or both of the second and third shots were lethal. The deceased was arrested with handcuffs successfully applied 1 minute and 20 seconds after he was instructed by the respondent to put his hands behind his back. The deceased had also said during the arrest, "I'm going to kill you mob."⁵

11. Of those facts, and having viewed the Body Worn Video, the Full Court made the following observations:

In any event, it is our opinion, that if the second and third shots can be isolated, and the defendant fired those shots to defend Constable Eberl, those acts fall within the protection of s 148B of the Act so long as he genuinely believed it was necessary to fire the second and third shots to do so. The defendant was under a duty to prevent an attack on Constable Eberl and save his life.⁶

In the same way, the function of protecting life is one which is most apt to be (and will almost always be) performed by an individual member of the Police Force – often in an emergency situation when a police officer sees a life or lives in danger.

³ See CAB 19. This is a image of the USBs which contain the Body Worn Video. The Full Court viewed the Body Worn Video during the hearing

⁴ CAB 16

⁵ CAB 41

⁶ J [120] per Southwood J and Mildren AJ (CAB 170)

How can it be doubted that s 148B was intended to apply to a member of the Police Force engaged in performing such an important core function?⁷

...
We agree that the (assumed) fact that at the time he fired the second and third shots, the accused was trying to defend Constable Eberl, does not mean that, ipso facto, he was not also exercising, or purporting to exercise his power to arrest the deceased. On the assumed facts, it would be open to the jury to find that at the time he fired the second and third shots, the accused was acting with the dual purpose of attempting to arrest the deceased who was violently resisting and trying to defend Constable Eberl.⁸

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The construction argument as to strict or jealous interpretation

12. The first observation to be made about this is that the appellant makes no attempt to remove section 148B from the jury's consideration altogether, that is, the consideration of good faith in the exercise of a power (to arrest). There should be little doubt cast about the intended breadth of the application of section 148B, bearing in mind that section 148B(3) provides that an exercise of a power or performance of a function extends to the purported exercise of the power or performance of the function.

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13. Section 148B is in the form of a defence or a protection from liability, not from prosecution (i.e. suit). It provides that an accused police officer is not criminally liable for an act done in certain circumstances. It does not provide an immunity from suit. The operation of the defence is conditioned upon two anterior factual findings. Axiomatically, in a trial by jury it is the jury, and only the jury, that has findings of fact relevant to the determination of guilt or innocence, including the applicability of any defence. The fact that section 148B provides a defence, as opposed to an immunity from suit distinguishes this case from *Board of Fire Commissioners (NSW) v Ardouin*⁹, *Stephens v Stephens*¹⁰ and *Puntoriero v Water Administration Ministerial Corporation*¹¹ “which hold that immunity provisions will be construed “jealously” or strictly so as to confine the scope of the immunity

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⁷ J [182] per Kelly and Blokland JJ and Hiley AJ (CAB 198)

⁸ J [201] per Kelly and Blokland JJ and Hiley AJ (CAB 206)

⁹ (1961) 109 CLR 105.

¹⁰ (1970) 72 SR (NSW) 459.

¹¹ (1999) 199 CLR 575.

conferred, there is a presumption that the legislature is taken to intend that a statutory power will be exercised reasonably. Relevantly, these cases were also civil actions, as opposed to criminal prosecutions: a different legal landscape from the state prosecuting a citizen for an alleged crime. It is respectfully submitted that *Ardouin, Stephens* and *Puntoriero* are to be distinguished in fact and principle from this application.

10 14. While the appellant readily accepts that section 148B of the PA Act does not effect the imposition of vicarious liability, it only preserves the rights of citizens to make civil claims against the territory and does not bear upon the rights of citizens who might otherwise be the victim of criminal acts by police.¹² That is, with respect, misrepresenting the effect of section 148B of the PA Act as an immunity from suit as opposed to its proper characterisation as a defence. Section 148B does no more than afford the respondent police officer a defence such that it justifies the conduct by acknowledging the invariably difficult role of a police officer. That is no different from the existence of circumstances in the law where conduct that is usually a criminal act is justifiable, including justifiable homicide such as cases of self-defence. In this case, the rights of citizens who might otherwise be victims of criminal acts by police officers can be legitimately effected if the police officer is exercising a power, performing a function or purportedly exercising a power or performing a function – in good faith. To this end, immunity provisions are different in characteristic to protective provisions.

20 15. It is not always the case that protective provisions need be construed strictly or jealously as a matter of course. As Fullagar J held in *Trobridge v Hardy* (1955) 94 CLR 147 at 155-157:

30 I would, however, be disposed myself to take a very broad view of the words used. It may be proper in the case of some protective provisions of this nature to construe them liberally in favour of the persons whom it is intended to protect, but, in view of the iniquitous provision for treble costs, I think it would be in accordance with sound principle to construe this particular provision very strictly against that person.

¹² Appellant's written submissions at [48]

The statute does not apply except in respect of acts done in carrying the *Police Act* into effect against persons offending or suspected of offending against the same. Expressions of this kind have been used in many statutory provisions designed to protect officials against the possible consequences of acts not actually authorized by law but done in a conscientious attempt to perform a public duty, and there is, as I have said, a great mass of authority on the meaning of such expressions. A number of the cases were considered by this Court in *Hamilton v Halesworth*¹³ and by Dixon J (as he then was) in *Little v The Commonwealth*.¹⁴ (citations in original). The current authority has fluctuated somewhat in one respect. It has never been doubted that an act is not done "in pursuance of an Act" or "in carrying an Act into effect" unless it is done in the bona fide belief that it is authorized by the Act and in a bona fide attempt to give effect to the Act.

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16. This is why, the respondent contends, there is no error in the approach by the Full Court interpreting the protective provision of section 148B beneficially, as opposed to strictly or jealously.

The argument as to statutory authority

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17. The argument advanced at paragraph 18 of the appellant's written submissions contends that on the Full Court's construction of section 148B of the PA Act, a police officer could avoid liability (or criminal responsibility) for alleged murder without any consideration by the jury as to whether the use of lethal force was reasonable. It should be rejected.

18. The appellant concedes that the defence in section 148B is available to the respondent if the jury are satisfied that he was exercising the power of arrest.¹⁵ The appellant now simply contends that section 5 of the PA Act does not confer functions or powers for the purpose of section 148B.

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19. The plurality in the Full Court did comment on the issue of reasonableness when comparing the statutory defence in section 208E of the *Criminal Code Act* ("the

¹³ (1937) 58 CLR 369

¹⁴ (1947) 75 CLR 94

¹⁵ Appellant's written submissions at [68]; CAB 274 at [9]

Code"), namely reasonable performance of duties¹⁶, and the defence in section 148B of the PA Act. The plurality stated that *"the two expressions "is not criminally responsible if the conduct is reasonable" and "not criminally liable if they are acting in good faith" are not logically or necessarily inconsistent."*¹⁷

20. On the defence case, at the time the respondent discharged his firearm, he was exercising the power conferred on him by sections 124, 126 or 126A of the PA Act or, alternatively, was carrying out a core function as described by s 5 of the PA Act.

10 21. It is essential to keep in mind the extended definitions in s 148B(3) which make plain that the wrongful or mistaken exercise of a power (i.e., a "purported" exercise of power) may nonetheless attract the protection provided the accused was acting in "good faith" at the time. In *Lumsden v Police* [2019] SASC 178 at [28], Stanley J highlighted the need for a *connection* between the impugned act and the discharge or purported discharge of a power or function.

20 22. Section 148B of the PA Act is a defence from civil or criminal liability for an act done "or omitted" in good faith in the exercise of a power or the performance of a function under the Act. The only provision within the PA Act that identifies the "core functions" of the Police Force and hence the members of the Police Force are those which are set out in section 5(2) of the PA Act. As was observed by the plurality in the Full Court, the appellant accepted that each of the functions identified in section 5(2) must be performed by individuals, as a "corporate entity", which cannot perform physical actions.¹⁸

30 23. The Full Court construed section 5(2) of the PA Act as stipulating the functions to be exercised by a member of the police force for the purposes of the statutory defence provided by s148B.¹⁹ There is nothing unorthodox about this construction, having regard to the nature and purpose of the PA Act.

24. The Northern Territory Police Force (NTPF) is a statutory entity, constituted of a

¹⁶ Which the appellant accepts is a defence open to the respondent during his trial.

¹⁷ J [220] (CAB 214)

¹⁸ J [177] per Kelly and Blokland JJ and Hiley AJ (CAB 196).

¹⁹ J [176 - 182], (CAB 195 - 198); J [189] (CAB 201) and J [204] (CAB 207 - 208) per Kelly, Blokland JJ and Hiley AJ) and J [107] (CAB 163 - 164) and J [111] (CAB 165 - 166) per Southwood J and Mildren AJ

Commissioner and other members holding office under the PA Act.²⁰ The membership of the NTPF are required to perform functions.²¹ The NTPF cannot perform its statutory functions as an amorphous entity, a factor that is acknowledged by virtue of section 6, section 25 and section 26 of the PA Act. It is the Commissioner and the members that are required to discharge those functions set out in section 5 of the PA Act.

25. Relevantly, those functions include to protect life and to detect and prevent offences.

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26. The appellant's argument is that none of the core functions of police stipulated by section 5(2) of the PA Act applies to a person seeking to invoke s 148B, in part, because those functions apply exclusively to the NTPF, and therefore section 5(2) does not provide a source of statutory authority for the exercise of power or the performance of functions by its members.²²

27. This interpretation would defeat the intended operation of the defence to read it narrowly or in a way that artificially separates an allegedly criminal act (here, the discharge of the weapon in respect of shots 2 and 3) from the immediately surrounding circumstances (the attempted arrest with a warrant of a known and violent offender).

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28. Put another way, the appellant's argument (as it is understood) that s 148B has no work to do because the PA Act confers no power to discharge a firearm in the circumstances is circular and, if accepted, would tend to commit s 148B to disuse. The fact that parliament specifically amended the PA Act to provide for the operation of s 148B in the context of *criminal* actions speaks against this.

29. In *The Queen v A2* (2019) 373 ALR 214²³ the High Court (Kiefel CJ & Keane J) observed that in the course of construction, context is to be understood in its widest sense, including consideration of surrounding statutory provisions, what may be

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²⁰ *Police Administration Act 1978* (NT) s 6

²¹ *Police Administration Act 1978* (NT) s 25

²² Appellant's written submissions at [53]

²³ *The Queen v A2* (2019) 373 ALR 214 at [33]-[37]

drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy.²⁴ It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a supposed defect in the law which is now sought to be remedied.²⁵ In the context of section 148B of the PA Act, the legislature specifically amended the scope of the defence to render it available with respect to acts that might otherwise attract criminal liability.

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30. Both section 148B and section 5 of the PA Act use the word "function." Section 5 identifies functions which are at the heart of the policing functions, which are the core functions.

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31. The respondent accepts that provisions such as section 148B are generally construed to apply to the performance of functions and powers that involve the interference with rights. It does not however, necessarily follow that the functions require statutory authority, or plainly, that section 148B will require explicit statutory conferral of a specific power to do the actual thing which has brought about what would otherwise be an infringement of rights for which there could be civil or criminal liability. There could be no exhaustive list because it very much depends on the context and circumstances of a particular case.

32. Part VII of the PA Act headed "Police Powers" is not an exhaustive list of empowerment for police officers to do things that would otherwise give rise to civil or criminal liability.

33. There is no express power in the PA Act that enables a member of police to protect life. There is however section 28 of the Code which prescribes circumstances which directly permit police officers to use lethal force, provided it is necessary:²⁶

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²⁴ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

²⁵ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591 at 614; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 509; [1978] HCA 30; *Wacando v The Commonwealth* (1981) 148 CLR 1 at 17; [1981] HCA 60.

²⁶ *Criminal Code Act 1983* (NT) ss 28(a)(b)(d) and (e).

Circumstances in which force causing death or serious harm is justified

In the circumstances following, the application of force that will or is likely to kill or cause serious harm is justified provided it is not unnecessary force:

(a) in the case of a police officer when lawfully attempting to arrest or to assist with the arrest of a person whom he reasonably believes to be a person who:

- (i) unless arrested, may commit an offence punishable with imprisonment for life;
- (ii) has taken flight to avoid arrest; and
- (iv) the person has been called upon by the police officer or another police officer to surrender and has been allowed a reasonable opportunity to do so;

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(b) in the case of a police officer when attempting to prevent the escape or the rescue of a person from lawful custody whom he reasonably believes to be a person who, unless kept in lawful custody, may commit an offence punishable with imprisonment for life and provided the police officer first calls upon the person attempting to escape or to rescue to surrender or to desist and allows him a reasonable opportunity to do so;

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(c) in the case of a correctional officer (as defined in section 4 of the Correctional Services Act 2014) when attempting to prevent the escape or the rescue of a person from lawful custody and provided the officer first calls upon the person attempting to escape or to rescue to surrender or to desist and allows him a reasonable opportunity to do so;

(d) in the case of a police officer when attempting to suppress a riot if all of the following apply:

- (i) the officer has orally ordered the immediate dispersal of persons who are riotously assembled (the rioters) or has attempted to give that order;
- (ii) the officer believes on reasonable grounds that, because of the rioters' conduct:

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(A) someone other than a rioter is in danger of death or serious harm; or

(bB) an offence in relation to property punishable with imprisonment for life is being committed;

(iii) if it is practicable to do so – the officer attempts to stop the conduct and gives the rioters a reasonable opportunity to stop the conduct;

(e) in the case of a police officer, or a person acting by his authority, when attempting to prevent a person committing or continuing the commission of an offence of such a nature as to cause the person using the force reasonable apprehension that death or serious harm to another will result;

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(g) in the case of a person in command of a ship or an aircraft, or a person acting by his authority or any person on board such ship or aircraft, when attempting to prevent a person committing or continuing the commission of an offence of such a nature as to cause the person using the force reasonable apprehension that death or serious harm will result.

34. It is the respondent's contention that be that as it may with respect to section 28 of the Code, the core function of protecting life available to the police force is also exercisable by its members. It would be a function for which no power to perform it exists.

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35. The oath members swear to prevent offences against Her Majesty's peace would be enough to justify the attempt, including by physical force if necessary, to execute an arrest and to prevent a threat to life.

36. Section 148B should be regarded as conferring a defence from civil or criminal action only insofar as that person is acting in good faith in the exercise of a power or performance of a function under the Act. It is the conduct of the individual who seeks to invoke the defence and all the surrounding circumstances that will inform the jury as to whether the appellant is able to eliminate or exclude the availability of a good faith defence, undoubtedly in part, by reference to what the appellant might contend and indeed does contend implicitly in this appeal, that is, the unreasonableness of conduct such that the defence is not available.

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37. Whilst one must accept that the alleged use of lethal force by a police officer is a matter of significant public importance, the factual matrix that gave rise to the assumed facts upon which the Full Court responded to the third question, now under

challenge, should inform this Court as to the practical reality of the situation that confronted the respondent and gave rise to his use of lethal force by the discharge of three shots. They include the very short duration, a matter of seconds, between the commencement of the arrest of the deceased and his ultimate containment by the deployment of handcuffs. The fact is that the deceased unilaterally used a potentially lethal weapon, stabbing the respondent before using that same weapon on the respondent's partner, Constable Eberl.

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38. In *Woodley v Boyd*²⁷ by reference to *R v Turner*²⁸ and *Lindley v Rutter*²⁹, the phrase was recognised in the importance of evaluating what is reasonable, necessary or reasonably necessary for the duties of police officers. For example, the lawfulness of a police officer who has a prisoner in charge to take all reasonable measures to ensure that the prisoner does not escape, does not injure himself or others. The Court also recognised that arrests are frequently made in circumstances of excitement, turmoil and panic and it is altogether unfair to the police force as a whole *"to sit back in the comparatively calm and leisurely atmosphere of the court room and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances."*³⁰

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39. It was not put to the Full Court, nor is it put, that the good faith defence renders it irrelevant all questions as to the reasonableness of the respondent's actions at the critical time that he discharged shots two and three. The argument advanced by the appellant proceeds on the footing, the respondent says erroneously, that the provision necessarily excludes the notion of reasonableness having any work to do in resolving the question of good faith. That the respondent says is simply not so. Reasonableness is not necessary for the defence, but it is unlikely that unreasonableness could be regarded as definitionally irrelevant to the question of good faith, being a matter to be considered by the jury in light of all the evidence.

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40. In an effort to make good that submission, the appellant offers examples at paragraph 63 of the written submissions. However, as the plurality noted in the Full

²⁷ [2001] NSWCA 35 at [37]

²⁸ [1962] VR 30 at [36]

²⁹ [1981] QB 128 at 134 per Donaldson LJ

³⁰ See *McIntosh v Webster* (1980) 43 FLR 112 at 123, per Connor J.

Court:

"Extreme hypotheticals like the one offered by Mr Strickland, although they can be useful aids to analysis, are not always good guides. Although it must be so that if s 148B extends to acts done in the performance of some of the functions in s 5, it must apply to all of them, some of the functions are such that the performance of them are unlikely to involve a real risk of unlawful conduct (for example road safety education). The requirement that the person be acting in good faith further restricts the potential for s 148B to extend to absurd or extreme cases."

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41. In *Trobridge v Hardy* (1955) 1994 CLR 147 at 157, Fullagar J said the following on the topic of a person's belief:

It seems now to be settled that, while there must be some factual basis for the belief, and while the actual facts known to a defendant may often be relevant to the question of the existence of a real belief, it is not necessary that the belief should be based on reasonable grounds. Dixon J summed up his view of the cases as follows: - "I think that the words 'any arrest or detention in pursuance of this section' occurring in s. 13(3) of the *National Security Act* 1939-1940 cover an arrest or detention by a constable who with some facts to go upon honestly thinks that what he has found or suspects is an offence against the Act committed or about to be committed by the person who he arrests or detains notwithstanding that the arrest and detention are not actually justified and that his error or mistake is in whole or in part one of law.³¹"

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But, although a belief that his act is authorized by law may, even if it is not based on reasonable grounds, bring a constable or other official within a protective statute such as that now under consideration, it is essential not only that such a belief should be honestly entertained, but that the purpose of the act done should be to vindicate and give effect to the law. The statement of the general position by *Erle C.J* in *Hermann v Seneschal*³² has often been referred to in later cases, and has never, I think, been doubted. That learned judge said: - "I think the governing question for the jury was, whether the defendant really believed that the facts existed which would bring the case within the statute..., and honestly intended to put the law in force; and that, if the jury found that the defendant did so really believe, and did so

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³¹ *Little v Commonwealth* (1947) 75 CLR at pp 108-113

³² *Hermann v Seneschal* (1862) 13 C.B. (N.S) 392 [143 E.R 156]

honestly intend, then the defendant was entitled to a verdict."³³ In *Theobold v Crichmore*,³⁴ Lord Ellenborough C.J. said:- "The object" (sc. Of the protective statute) "was clearly to protect persons acting illegally, but in supposed pursuance, and with a *bona fide* intention of discharging their duty under the act of Parliament."³⁵ This passage was quoted by Starke J. in *Hamilton v Halesworth*.³⁶ A defendant is not "acting in pursuance" of a statute, or "carrying into effect" a statute, if there is an absence of such a bona fide intention – if he is "acting wantonly and in abuse of his power" (per Lush J in *Selmes v Judge*).³⁷

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42. The requirement for a police officer to be acting in good faith provides protection against the unwarranted application of this statutory defence and is an answer to the appellant's contention that to permit the construction applied by the Full Court would eviscerate protections against the alleged unlawful actions of police, or emasculate the careful protection that the law offers citizens against excessive police force.³⁸

Ground 2: 'Purpose'

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43. The applicant's argument proceeds on the footing that if the respondent had in mind defending himself or another (the function of protecting life), that is mutually exclusive with exercising a power under the PA Act. That the respondent contends is erroneous. An arrest could well be, in a sense, an act of self-defence and the defence of another. When handcuffs are applied to a suspect, they are applied because the police are concerned that the suspect poses a risk to their safety and that of others around them. Section 126 of the PA Act gives power to a police officer to arrest another person. The section does not require a sole state of mind of the police officer. The section simply requires that the conduct form part of a process (or continuum) that involves the exercise of a power under the Act.

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44. It is far too artificial an approach to suggest that a violent response in the course of effecting a lawful arrest somehow means that the police response is no longer part

³³ *Hermann v Seneschal* (1862) 13 C.B. (N.S) at pp. 402, 403 [143 E.R., at p. 160]

³⁴ *Theobold v Chrichmore* (1818) 1 B. & Ald. 227 [106 E.R. 83]

³⁵ *Theobold v Chrichmore* (1818) 1 B. & Ald. At p.229 [106 E.R. at p.84]

³⁶ *Hamilton v Halesworth* (1937) 58 CLR at p. 374

³⁷ *Selmes v Judge* (1871) L.R. 6 !.B. 724, at p. 728

³⁸ Appellant's written submissions at [64]

of the process of arrest and is no longer justified, or indeed the exercise of a power referable to section 148B of the PA Act.

45. The notion of functions in sections 5 and section 148B of the PA Act are not completely separate. Acting to protect life is consistent with exercising a power under the PA Act. Duality of purpose in the circumstances of the assumed facts in this case is both proper, lawful and permissible.

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46. Where a police officer is exercising a power under the PA Act to conduct an arrest, he does not cease to be exercising that power merely because the arrest (by virtue of a change in circumstances) becomes an atypical or unusual one. It is the impossibility of forecasting with any reliability how the exercise of police powers might provoke a violent reaction, or precipitate an unexpected scenario, that lies behind s 148B.

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47. It is submitted that, here, the acts committed by the respondent incidental to each discharge of his firearm are inextricably connected with the exercise of the power to arrest the deceased in accordance with the warrant issued some days earlier. The use of the firearm was, on the objective evidence, a response or reaction to the deceased's refusal to comply with the arrest procedure. In this respect, the use of the firearm can be seen as forming part of the continuum that was the attempt to arrest the deceased and which commenced at the time that police entered House 511. It can also be seen as reactive to the deceased's violent response and thus consistent with discharging at least one of the core functions reposed in police by section 5 of the PA Act— namely, to protect life.

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48. In the context of this case, the defence is invoked because, manifestly, the respondent was performing his functions and exercising his powers under the PA Act – the power to effect the arrest of the deceased and to protect life. The appellant complains that the jury could (erroneously) acquit the respondent if the jury found as a reasonable possibility that the respondent honestly believed he fired shots 2 and/or 3 to protect Constable Eberl, or the respondent honestly believed that he fired shots 2 and/or 3 to prevent the stabbing of Constable Eberl,³⁹

³⁹ Appellant's written submissions at [78]

because the jury will also be directed that they could acquit the respondent if they accept as a reasonable possibility the respondent believed he fired shots 2 and/or 3 to arrest the deceased and that the respondent honestly believed that the use of force was reasonable to affect that arrest. There is logically no problem with those two propositions such that they cannot co-exist. There is no appreciable concern that the jury could not properly be directed about how they might acquit on either of those two bases.

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49. The relevant test for the jury in determining whether to acquit the respondent is whether the respondent, by reason of section 148B of the PA Act, acted in good faith. The exercise of a power or performance of a function, or purported exercise of a power or performance of a function, gives rise to the occasion on which the jury will determine whether the conduct of the respondent was in good faith, in light of all the relevant evidence.

Part VI: Where applicable, a statement of the respondent's argument on the respondent's notice of contention or notice of cross-appeal

50. Not applicable.

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Part VII: An estimate of the number of hours required for the presentation of the respondent's oral argument

51. The Respondent will require approximately 1 ½ hours to present oral argument.

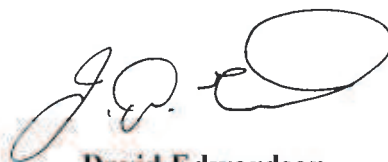
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