



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY**

D2 OF 2021

BETWEEN:

THE QUEEN
Applicant
and
ZACHARY ROLFE
Respondent

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APPLICANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: CONCISE STATEMENT OF THE ISSUES

2. Does a "function" under s 148B of the *Police Administration Act 1978* (NT) (**PA Act**) include the "core functions" listed in s 5(2) of the PA Act?
3. What role does "purpose" have to play in the construction and application of s 148B of the PA Act?

20 **PART III: SECTION 78B**

4. The applicant considers that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CITATIONS

5. The decision of the Full Court of the Supreme Court of the Northern Territory (Southwood ACJ, Kelly and Blokland JJ, Mildren and Hiley AJJ) is *The Queen v Rolfe* [2021] NTSCFC 6 (**J**).

PART V: FACTS

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6. The respondent is charged with the murder of Indigenous man, Charles Arnold (Kumanjaji) Walker (**the deceased**), on 9 November 2019 at Yuendumu in the Northern Territory, contrary to s 156 of the *Criminal Code Act 1983* (NT) (**Criminal Code**). In the alternative, he is charged with manslaughter contrary to s 160 of the Criminal Code; and, in the further alternative, with engaging in a violent act which caused the death of the deceased contrary to s 161A(1) of the Criminal Code: Core Appeal Book (**CAB**) 6-7. The respondent has pleaded not guilty to all counts.

7. At the time of the alleged offending, the respondent was a member of the Police Force of the Northern Territory. The respondent has indicated that he will rely at his trial upon three defences: s 43BD and s 208E of the Criminal Code, and s 148B of the PA Act.
8. The operation of s 148B was the subject of four questions referred by Mildren AJ to the Full Court under s 21 of the *Supreme Court Act 1979* (NT) on 22 and 26 July 2021.¹
9. Attached to the questions referred to the Full Court was a set of “Assumed Facts”, together with annexures: CAB 9-47. The Assumed Facts were submitted to the Full Court to provide a context for the consideration and resolution of the referred questions. The relevant assumed facts can be briefly stated.
- 10 10. On 5 November 2019, a warrant was issued for the arrest of the deceased for breaching an order of suspended sentence: CAB 12 [10], CAB 16.
11. On 9 November 2019, the respondent was deployed as part of a group of officers from Alice Springs to Yuendumu, a remote Indigenous community located 293km from Alice Springs: CAB 12 [11], 13 [15]. The respondent entered house 511 in Yuendumu where the deceased was, and the respondent stated to the deceased at 7:21:50pm, “Just put your hands behind your back”. The deceased then retrieved a secreted pair of scissors and stabbed the respondent in the left shoulder: CAB 14 [19]; CAB 46 (photo depicting the scissors).
12. After the respondent was stabbed, he fired one shot into the middle region of the deceased’s back at 7:22:01pm: CAB 14 [20]. That first shot was not fatal and is not the subject of any charge.
- 20 13. The body-worn video (CAB 19) then depicts that after that first shot, the deceased and the respondent’s colleague, Constable Eberl, fell to the ground. Constable Eberl was on top of the upper body of the deceased, pinning him down on a mattress on the floor.
14. The respondent stood over the deceased, put his hand on Constable Eberl’s body, then, in quick succession, fired two more shots at 7:22:04 (2.6seconds after the first shot) and 7:22:05 (0.53seconds after the second shot), into the deceased’s side left torso from a distance of no more

¹ Question 1, 2 and 3 were referred to the Full Court on 22 July 2021: CAB 10. Question 4 was referred to the Full Court on 26 July 2021: CAB 49.

than five centimetres. It is either or both of those shots which were fatal, and subject of the charges against the respondent: CAB 14 [25].

15. Handcuffs were successfully applied to the deceased at 7:23:10pm and he was transported to Yuendumu Police Station where first aid was administered. He was declared deceased at 9:28pm: CAB 14 [26], [28].
16. There is no issue in the trial that the respondent shot the deceased. The only issue is justification and the availability of any of the statutory defences to the respondent's acts comprising the fatal shot(s) 2 and/or 3.

PART VI: ARGUMENT

10 **Overview**

17. These submissions address the following issues, in turn:

- a. Brief statement of the applicable principles of statutory construction
- b. Statutory scheme and relevant legislative provisions of PA Act;
- c. Legislative history of ss 148B and 5 of the PA Act;
- d. Full Court's decision;
- e. Ground 1: proper construction of s 148B; and
- f. Ground 2: "purpose".

18. On the Full Court's construction of s 148B the respondent police officer could avoid liability for the murder of an Indigenous man without any consideration by the jury as to whether the use of
20 lethal force was reasonable. As will be explained, the Full Court erred in its construction: giving rise to each of Ground 1 and Ground 2.

(a) Principles of Statutory Construction

19. The relevant principles of statutory construction to be applied in the interpretation of s 148B are well-established and can be summarised briefly, commencing with *SZTAL v Minister for Immigration* (2017) 262 CLR 362 at [14], where Kiefel CJ, Nettle and Gordon JJ explained:²

² Citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 45-47; *CIC Insurance v Bankstown Football Club Limited* (1997) 187 CLR 384, 408.

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

20. Gageler J elaborated on the proper approach to statutory interpretation at [38]-[39].³

10 The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from ‘a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural’, in which case the choice ‘turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies’.

Integral to making such a choice is discernment of statutory purpose. ... (citations omitted)

20 21. In ascertaining the meaning of a word, the context in which that word appears is important.⁴ In this case, “performance of a function under this Act” in s 148B, is a composite phrase forming part of a provision which includes the words “in the exercise of power.”⁵

22. Extrinsic material and legislative history also form part of the statutory context,⁶ and can be referred to in identifying statutory purpose.⁷ Such uses of extrinsic material are contemplated by s 62B(1) of the *Interpretation Act 1978* (NT) .

23. Finally, and critically, because s 148B confers a civil and criminal immunity on a public officer, it should be construed “strictly” and “jealously” so as not to derogate in a significant way from the rights of individuals, who may be the subject of those criminal acts.⁸ Absent “irresistible

³ See also *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [20] (Kiefel CJ, Bell and Nettle JJ), [41] (Gageler J) and [64] (Edelman J).

⁴ See eg Gibbs J in *Avondale Motors (Parts) Pty Ltd v Federal Commissioner of Taxation* (1971) 45 ALJR 280 at 283 (“The meaning of the phrase like that of any other ambiguous expression, depends on the context in which it appears”).

⁵ See also Gordon and Edelman JJ in *Binsaris v Northern Territory* (2020) 94 ALJR 664 (*Binsaris*) at [54].

⁶ *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22]

⁷ *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44]. See also *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 90 ALJR 1004 at [25], [30], [34]; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [1] and [33].

⁸ See eg, *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105, 116 (Kitto J) (*Ardouin*); *Australian National Airlines Commission v Newman* (1987) 162 CLR 466, 471 (Mason CJ, Deane, Toohey and Gaudron JJ); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 per Gaudron, McHugh and Gummow JJ at [97]: “Statutory

clearness” or “clear words or those of necessary intendment”,⁹ such intention to so derogate should not be imputed to the legislature.¹⁰ If such provisions are construed too liberally, this would permit police officers to act “wantonly and in abuse of his authority.”¹¹

(b) Relevant legislative provisions of the PA Act

24. Sections 5 and 6 of the PA Act (within Div 1, headed “Establishment of Police Force” of Part II (“Police Force of the Northern Territory”)) provide:

Northern Territory Police Force

- 10
- (1) There is established by this Act the Police Force of the Northern Territory.
 - (2) The core functions of the Police Force are:
 - (a) to uphold the law and maintain social order; and
 - (b) to protect life and property; and
 - (c) to prevent, detect, investigate and prosecute offences; and
 - (d) to manage road safety education and enforcement measures; and
 - (e) to manage the provision of services in emergencies.

Constitution of Police Force

The Police Force shall consist of a Commissioner and other members appointed and holding office under and in accordance with this Act.

25. Also relevant are ss 25 and 26, contained in Div 3 (“Appointment, resignation and dismissal of members) of Part II which provide:

20 **Function of members**

Subject to this Act, a member shall perform the duties and obligations and have the powers and privileges as are, by any law in force in the Territory, conferred or imposed on him.

Members to take oath

- (1) A person shall not exercise or perform any of the powers, functions or duties conferred or imposed upon a member of the Police Force by a law of the Territory unless he or she has taken and subscribed an oath in the form in the Schedule. ...

26. Part VII of the PA Act is headed “Police Powers”. Div 2 contains provisions relating to “Search and entry”, and s 119A(2) provides, for example, that “[t]he member may exercise the power with the assistance, and using the force, that is necessary and reasonable in the circumstances”.

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provisions which permit public authorities to engage in what otherwise would be tortious or otherwise legally wrongful conduct are disfavoured; they are ‘strictly’, even ‘jealously’ construed.”

⁹ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 307-308 [307]-[308] (per Gageler and Keane JJ). See also *Lee v The Queen* (2014) 253 CLR 455 at [31] (per the Court).

¹⁰ *Binsaris* at [25] (Gageler J), [101] (Gordon and Edelman JJ).

¹¹ *Trobridge v Hardy* (1955) 94 CLR 147 at 160.

Div 3 contains “Arrest” provisions, and relatedly, s 126D(1)(b) provides that for ss 126 (power to enter and arrest under warrant), 126A (power to enter and arrest without a warrant) and 126B (power to enter and remain to protect a person), “the member of the Police Force may use such reasonable force that the member thinks necessary to enter the place”.

27. Div 7 concerns “Forensic examinations”; Div 7A relates to “Crime scenes” (including members protecting and restricting access to crimes scenes: s 147K); and Div 7AA relates to “Blood testing for infectious diseases”. Despite being contained within Part VII, Div 7AA contemplates persons other than members performing functions including the taking blood samples, such as a medical practitioner, nurse or qualified person: s 147FR(1). Those persons in taking the blood sample “may use the force that is reasonably necessary for taking the blood sample”: s 147FR(6).
28. Section 148B (CAB 188; J [152]), within Part VIIA (“Protection from Liability of Members, Territory’s Vicarious Liability and Legal Proceedings for Damages for Certain Torts by Members”), Div 2 (“Protection from liability and vicarious liability of the Territory”) provides:

Protection from liability

- (1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act.
- (2) Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.
- (3) In this section:
“exercise”, of a power, includes the purported exercise of the power.
“performance”, of a function, includes the purported performance of the function.

(c) Legislative history

Section 148B

29. Originally, the PA Act contained only s 163(1) as relevant to vicarious liability of the Crown:

Subject to subsection (3), the Crown is liable in respect of a tort committed by a member in the performance of his duties as a member in the like manner as a master is liable in respect of a tort committed by his servant in the course of the employment of that servant and, shall in respect of such tort, be treated for all purposes as a joint tortfeasor with the member.

30. By s 10 of the *Police Administration Amendment (Powers and Liability) Act 2005* (NT), Part VIIA (comprising s 148A through to s 148G) were enacted. At that time, the text of s 148B, contained in Div 2, read:

148B. Protection of members from civil liability

(1) This section applies to a person who is or has been a member.

(2) The person is not civilly liable for an act done or omitted to be done by the person in good faith in the performance or purported performance of duties as a member.

31. Immediately following s 148B within Div 2 was s 148C, headed “Territory’s vicarious liability” which relevantly provided by subsection (1) that the Territory was “vicariously liable for a tort committed by a member in the performance or purported performance of duties as a member”.

32. In the second reading speech introducing the *Police Administration Amendment (Powers and Liability) Bill 2005*,¹² it was noted the amendments would replace s 163 (vicarious liability) and it was “intended to repeal and replace the scheme for claims against police. The proposed scheme is substantially the same as the *Police Legislation Amendments (Civil Liability) Act 2003* (New South Wales), which commenced on 1 January 2004.”

33. The Minister for Police continued:

The threat of an action and the stress of ongoing court proceedings places an un-deserved heavy toll on members whose job of policing has its own inherent difficulties. We intend on rectifying this by ensuring a plaintiff cannot directly sue a police officer for a police tort claim. A police tort claim means a claim for damages, including punitive damages for a tort allegedly committed by a member or a former member in the performance or purported performance of their duty. This does not, of course, prevent claims against police officers alleging that the negligence occurred other than in the course of their duties.

...

The new scheme is intended to regulate the manner in which a person can sue a member of the police force. By virtue of their powers, members of the police force may be required to perform functions and exercise powers under other Acts, often in the capacity of a public official. There are a large number of Acts that give police additional powers or functions. Some of those Acts also contain protection from liability provisions that apply both to employees of the relevant agency and police alike. Unfortunately, not all the protection from liability provisions are identical, so each provision needs to be addressed based on the protection it provides.

...

Ancillary amendments have been made to ensure the new regime does not unintentionally affect existing rights, liabilities or procedures.

¹² NT, *Parliamentary Debates*, Legislative Assembly, 2 December 2004, p 8396, (Mr Henderson, Minister for Police, Fire and Emergency Services) (<https://territorystories.nt.gov.au/10070/420983/0/35>) (accessed 26 September 2021).

34. The introduction of s 148B as amended in 2016 (with effect from 2018) (being the provision subject of these proceedings), was discussed in the concurring judgment at J [41] (CAB 141-142):

Section 7 of the *Police Administration Amendment Act 2016* (NT) repealed s 148B and the whole of the original Division 2 of Part VIIA of the *Police Administration Act* and inserted a new Division 2 which is comprised of a new s 148B. The newly inserted provisions commenced on 28 September 2018. The repeal and replacement of Division 2 of Part VIIA coincided with the enactment of Division 7AA of Part VII of the *Police Administration Act*. Division 7AA established disease-testing regimes and enacted provisions for the taking and testing of blood samples by persons who were not members of the police force. Some of those provisions give functions and powers under the *Police Administration Act* to persons who are not members of the police force. For example, s 147R(3) of the Act requires a medical practitioner, nurse or qualified person to take a blood sample from a person in accordance with a disease test authorisation.

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35. As Southwood ACJ and Mildren AJ noted at J [79] (CAB 155) the “focus of the amending Act was to introduce amendments about the power of police, medical practitioners, nurses and “qualified persons” (see s 147FA) to take forensic samples, while protecting those persons from the risks associated with blood or bodily fluids. There is no mention of s 148B of the Act in the second reading speech for the Bill that introduced the *Police Administration Amendment Act 2016*.” The focus of the Second Reading Speech is solely on the new Div 7AA.¹³

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36. At J [80] (CAB 155), it was noted that the Explanatory Statement stated as follows:

New s 148B provides protection from liability so a person is not civilly or criminally liable for an act done or omitted [...] in good faith in the exercise of a power or performance of a function under the Act. This section reflects changes so as to include people acting under the new provisions of this Bill (i.e. medical practitioners, nurses and qualified persons).

37. Relevantly, the insertion of new (and current) s 148B was effected by the repeal of Part VIIA, Div 2, which also included s 148C. There is no provision equivalent to s 148C in the PA Act. The remaining provisions in Part VIIA enacted in 2005 were unchanged, including s 148A.

Section 5(2)

38. Section 5(2) was inserted into the PA Act by the *Police Administration Amendment Act 2007* (NT). That is, after the original enactment and commencement of Part VIIA in 2005. The Explanatory Statement accompanying the Bill stated the amendment of s 5 “[i]nserts the core

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¹³ NT, *Parliamentary Debates*, Legislative Assembly, 25 May 2016, p 8323, (Mr Giles, Minister for Police, Fire and Emergency) (<https://territorystories.nt.gov.au/10070/443192/0/8>) (accessed 26 September 2021).

functions of the Police Force into the Act.” The Second Reading Speech did not contain express reference to s 5, but stated:¹⁴

As with most pieces of legislation, changing times and procedures means acts need to be continuously reviewed and amended to ensure they continue meeting their objectives. This is probably more important with the Police Administration Act because of the role police and the law enforcement functions they perform. To achieve this, the act sets out powers of police to enable them to do their job efficiently and effectively while still, nevertheless, being held accountable and transparent. This House, therefore, must remain vigilant, ensuring the act does not disadvantage the police from preventing crime, or investigating and prosecuting those persons whose criminal behaviour offends the public’s law.

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(d) Full Court’s decision

Plurality decision

39. The plurality answered question 3 as amended relevantly as follows:

- a. Following *Lumsden v Police* [2019] SASC 178 (Stanley J) (*Lumsden*), s 148B is a beneficial provision for which there is no justification for reading down its terms;¹⁵
- b. the protection from criminal and civil liability conferred by s 148B of the PA Act extends to acts done (or omitted) in the performance or purported performance of functions in s 5 of that Act, because the functions of the Police Force are functions of its members;¹⁶
- c. Section 26(1) of the PA Act and the oath required to be taken by members reinforces that the “function of preventing offences” was one that was conferred on members of the Police Force by the PA Act;¹⁷
- d. on the Assumed Facts it would be open to the jury to find that, at the time he did the acts which are the subject of the charge, (ie firing the second and third shots) the respondent was performing or purporting to perform the function of preventing the commission of an offence by the deceased (ie stabbing Constable Eberl) and/ or the function of protecting life (that of Constable Eberl) and/ or that he was exercising or purporting to exercise a power

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¹⁴ NT, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, p 4839, (Ms Martin, Chief Minister) (<https://territorystories.nt.gov.au/10070/423053/0/0>) (accessed 26 September 2021).

¹⁵ J [180] (CAB 197-198).

¹⁶ J [176] (CAB 195), [180] – [182] (CAB 197-198), [189] (CAB 201) and [204(a)] (CAB 207).

¹⁷ J [183]-[185] (CAB 198-199).

under the PA Act (the power to arrest the deceased under s 124) (ie it would be open to the jury to find that the respondent was acting with a “dual purpose”).¹⁸

- e. once all of the evidence is in, it will be a matter for the trial Judge to direct the jury on the matters they need to be satisfied of to determine whether, as a matter of fact, it is reasonably possible that:
 - i. the respondent performed or purported to perform [a function] and/ or exercised or purported to exercise a power under the PA Act; and
 - ii. the respondent did so in good faith.¹⁹

Concurring judgment

10 40. Southwood ACJ and Mildren AJ answered question 3 (as reformulated), “yes”.²⁰

41. Their Honours found (in reliance on *Rice v Connolly* [1966] 2 QB 414 at 419) that “by virtue of the oath members of the police force take [pursuant to s 26], and the fact that the police force can only act through its members, members are under an obligation and have a duty to carry out the core functions stipulated in s 5 of the Act”.²¹

42. They concluded by finding that “s 5, when considered in light of s 25 of the Act, and the oath of office taken by a member [pursuant to s 26], makes it part of a police officer’s functions and duties, amongst other things, to protect life and prevent offence”²² such that the respondent was “under a duty to prevent an attack on Constable Eberl and save his life”.²³

Error in Full Court’s construction

20 43. The Full Court’s interpretation of s 148B, and conclusion that it incorporated the “core functions” in s 5(2), appears to stem primarily from the use of the word “function” in the two provisions without sufficient regard for the statutory purpose and context of those provisions.

¹⁸ J [201] (CAB 206), [204(b)] (207). See also Southwood ACJ and Mildren AJ at [119] – [120] and [123].

¹⁹ J [204(e)] (CAB 208).

²⁰ J [127] (CAB 174).

²¹ J [105]-[107] (CAB 163-164).

²² J [111] (CAB 165-166).

²³ J [120].

44. The plurality recognised that s 148B is a provision which “gives complete immunity from civil or criminal liability for acts or omissions done by a person in good faith in the exercise of a power or performance of a function under the PA Act (or purported exercise or performance of such)”: J [153] (CAB 188). However, in following *Lumsden*, the Full Court erred at the outset in interpreting s 148B “beneficial[ly]” as opposed to “strictly” or “jealously”.
45. As construed by the Full Court, s 148B provides a complete defence to any civil or criminal liability for any police officer acting, or purporting to act, in the course of any of the wide-ranging and broadly described core functions in s 5(2) of the PA Act, with the only limitation being that the police officer acts in “good faith”. That is, the Full Court’s interpretation would allow a police officer unfettered protection, subject only to the requirement of “good faith”, and not bound by any common law or statutory limitation on the exercise of police power. Such a construction is not consistent with the language and purpose of the specific provisions in Part VII of the Act or the common law, which impose express limitations on police powers and functions such as through the use of “reasonable force.”²⁴

(e) Ground 1: Proper construction of s 148B

Strict construction

46. As it is concerned with the interference or rights, s 148B should be construed “strictly” and “jealously” so as not to derogate in a significant way from the rights of individuals, who may be the subject of those criminal acts.²⁵ As stated above, however, the Full Court did not construe s 148B in accordance with this principle. Courts have limited the scope of good faith defences by carefully scrutinising the officer’s impugned/wrongful act to ensure it does not travel beyond the strict scope of the authority given by the statute.²⁶

²⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]. In *Binsaris* at [101]-[102], Gordon and Edelman JJ’s construction of the limited delegated powers given to police and prison officers under s 157(2) of the *Youth Justices Act* (which did not include the use of a CS fogger) was reinforced by other provisions of the Act which only authorised the use of force that was reasonably necessary for specified purposes.

²⁵ See eg, *Ardouin* at 116 (Kitto J); *Australian National Airlines Commission v Newman* (1987) 162 CLR 466, 471 (Mason CJ, Deane, Toohey and Gaudron JJ); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 per Gaudron, McHugh and Gummow JJ at [97]: “Statutory provisions which permit public authorities to engage in what otherwise would be tortious or otherwise legally wrongful conduct are disfavoured; they are ‘strictly’, even ‘jealously’ construed.”; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at [4], [10], [15], [18] (Gleeson CJ and Gummow J), [34], [35], [37] (McHugh J).

²⁶ See *Webster v Lampard* (1993) 177 CLR 598 at 605 and 608 (Mason CJ, Deane and Dawson JJ) and 617 (Toohey J), *Little v The Commonwealth* (1947) 75 CLR 94 at 108 – 111 and 113 (Dixon J), *Hamilton v Halesworth* (1937) 58 CLR 369 at 374 (Starke J) and 379 (Dixon and McTiernan JJ).

47. As Dixon J held in *Little v The Commonwealth* (1947) 75 CLR 94 at 109-110:

It has, however, been found not easy to define the exact conditions which must be fulfilled to qualify for protection. Bona fides has been regarded as indispensable. But the difficulty has been to give such provisions an operation which, on the one hand, will not be so narrow that it goes little, if at all, beyond what is authorized by the substantive parts of the enactment, and, on the other, will not be wide enough to cover wrongful acts so outside the scope of the authority given by the statute that it can hardly be supposed that it was intended to protect those responsible.

10 48. It is recognised that, by virtue of s 148B(2), s 148B(1) does not affect the imposition of vicarious liability on the Territory for torts committed by police officers in the exercise or purported exercise of their duty. However, s 148B(2) only preserves the rights of citizens to make civil claims against the Territory. It does not bear upon the rights of citizens who might otherwise be the victim of criminal acts by police officers.

“Under the Act”

49. A central issue in the construction of s 148B is whether s 5(2) is a source of statutory authority for the “performance of a function under the Act”.

20 50. Provisions such as s 148B (‘good faith’ defences)²⁷ appear in many statutes. Section 148B is designed to protect a person who engages in acts which of their nature interfere with persons or property. Those acts, which would otherwise be unlawful, are rendered lawful because they are done pursuant to or “under” the PA Act which confers an express statutory authority to perform those acts. Examples of such acts are stopping, detaining and searching a person without warrant in a public place (PA Act, s 120C); arresting a person and taking them into custody without warrant (PA Act, s 124); entering a place for the purposes of arrest (PA Act, s 126, s 126D); taking a blood sample (PA Act, s 147FR).

51. Section 148B, like other ‘good faith defences,’ do not apply to acts done or able to be done without any need for the exercise of a statutory power or power expressly conferred by the common law. In *Colbran v State of Queensland* [2007] 2 Qd R 235, Jerrard JA held at [35] that:

30 The High Court has consistently held for at least the last 50 years against construing an immunity granted when exercising power to take steps “under” an enactment, or an immunity granted when exercising powers conferred by an act or exercising the functions of a statutory

²⁷ See eg, *Webster v Lampard* (1993) 177 CLR 598, 621 (McHugh J).

body, to include an immunity for acts or things done or able to be done without any need for the exercise of a statutory power

52. In *Ardouin*, the respondent sued the Board of Fire Commissioners for damages for personal injuries received by him when his motorcycle came into collision with a motor vehicle belonging to the fire brigade. Section 46 of the *Fire Brigades Act 1909* (NSW) provided persons exercising powers under that Act with a defence in respect of “any damage caused in the bona fide exercise of such powers”. That provision did not provide the Board with a defence to an action in negligence because, as Dixon CJ explained, driving a fire engine is a function of “an ordinary character involving no invasion of private rights and requiring no special authority.” The driving of the fire brigade vehicle to reach the site of the fire did not involve the exercise of any specific power to which s 46 would necessarily attach.²⁸
53. As developed below, the “core functions” of the NT Police Force identified in s 5(2) of the PA Act do not provide a source of statutory authority for the exercise of power or the performance of functions by members of the NT Police Force.

Relevant police powers

54. The starting point is s 25 of the PA Act. Although s 25 is headed “Function of members”, the provision itself refers to “*the duties and obligations and ...the powers and privileges*” of a member. Similarly, s 26 refers to all of the “powers, functions or duties” imposed on members. The words “function” and “duty” are used interchangeably in the PA Act.
55. The “law in force” in the Territory in s 25 includes Part VII of the PA Act headed “Police Powers”, which can only be exercised upon particular conditions being fulfilled (such as a warrant being issued) or a police officer forming a particular belief (such as a suspicion on a reasonable ground). The exercise of powers by a police officer involves the interference of a citizen’s rights. The powers or duties conferred on an officer under Part VII contains limitations or restrictions. There are various provisions in Part VII which confer a power on a member to

²⁸ (1961) 109 CLR 105 at 110 per Dixon CJ; per Kitto J at 117 (section 46 “is intended only in respect of damage caused by doing things actually within the direct authorization of the Act or the by-laws.”); per Taylor J at 124; per Windeyer J at 127. See also *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at [34]-[35] and [37], where McHugh J, applying a “strict” construction read down the general words of s 19(1) “so that they do not apply to functions of an ordinary character performed by the respondent and which are done pursuant to agreements with the consent of private citizens.”

use force.²⁹ Those powers are subject to the restriction that the member use such reasonable force as is necessary. Where a function is conferred on a medical practitioner, nurse or qualified person to take a blood sample, any use of force in carrying out that function is also restricted to that which is “reasonably necessary for taking the blood sample.”³⁰

56. The “law in force” in the Territory also includes the common law. In *Binsaris* at [28], Gageler J stated that:

The powers of a police officer in the Northern Territory include the common law powers of a constable,³¹ and the common law powers of a constable include not only the power to prevent the commission of a crime in certain circumstances but the power to take reasonable steps to ensure the safety of persons in his or her custody³² and the ‘right’ and the ‘duty’ to take steps reasonably necessary to stop a person from breaching the peace in the presence of the constable.³³ (citations in original)

57. Importantly, those common law powers are subject to applicable limitations or restrictions.³⁴

See eg Gordon and Edelman JJ in *Binsaris* at [105]: “[t]he powers and privileges of a police officer are limited. At common law, police have the power to use reasonable force to prevent the commission of an offence or to apprehend a person suspected of having committed an offence”.³⁵

58. Such restrictions on common law powers of police officers have been long enshrined. In *R v McKay* [1957] VR 560 at 572-573, Smith J stated (emphasis added):³⁶

We take one great principle of the common law to be, that though it sanctions the defence of a man’s person, liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from, the force used is not disproportioned to the injury or mischief which it is intended to prevent.

²⁹ Sections 119A(2), 120D(a), s 126C(4), s 126D(b) of the PA Act.

³⁰ Section 147FR (6) of the PA Act.

³¹ *Gardiner v Marinov* (1998) 7 NTLR 181 at 190; see also *Thomson v C* (1989) 67 NTR 11 at 13.

³² *Woodley v Boyd* [2001] NSWCA 35 at [37], quoting *Lindley v Rutter* [1981] QB 128 at 134.

³³ *Albert v Lavin* [1982] AC 546 at 565; *Poidevin v Semaan* (2013) 85 NSWLR 758 at 763-764 [18]-[20].

³⁴ See eg the discussion in *Binsaris* at [100] (per Gordon and Edelman JJ): “Those functions are subject to identified limits. And beyond those functions and limits, the Act does not permit or authorise the commission of some wider class of acts. Thus, the conferral of powers necessary or convenient to enable the superintendent to perform their statutory functions does not give the superintendent general authority to commit what would otherwise be crimes or torts against detainees.”

³⁵ See also *Binsaris* at [49] (“the common law ‘power’, or ‘right’ and ‘duty’, of a police officer to use force reasonably necessary to restrain or prevent a breach of the peace.”).

³⁶ Citing from the report of the Criminal Code Bill Commission of 1879, the Commissioners being Lord Blackburn and Stephen and Lush JJ, with Barry J, of the Irish Bench.

59. As was noted by Deane J in *Cleland v The Queen* (1982) 151 CLR 1 at 26, “[i]t is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed.”

“Core Functions” – s 5(2)

60. By contrast to s 25, s 5(2) does not either in terms, or by implication, tether the “core functions” to any specific statutory or common law power. Section 5(2) sets out the general objectives which the NT Police Force strives to achieve. It is aspirational in nature.³⁷

10 61. A police officer engages in many functions which may be described as “core functions” of the Police Force in s 5(2). They may ask bystanders questions in order to investigate a crime; give warnings to citizens about their anti-social behaviour in order to “uphold the law”. However, engaging in such conduct does not involve the exercise of any specific power or performance of a function under the PA Act. As per *Ardouin*, s 148B does not apply to the performance of such “core functions” because such conduct is not dependent on specific statutory authority.

62. The breadth and indeterminate nature of the “core functions” listed in s 5(2) does not render them susceptible to being the source of statutory authority for the purposes of s 148B(1).

20 63. For example, a “core function” of the Police Force under s 5(2)(a) is to “uphold the law and maintain social order.” This would presumably include a police officer searching a citizen in her home looking for prohibited drugs without turning his mind to whether he had any statutory power to do so – eg, he had no warrant and had no reasonable suspicion that she possessed a prohibited drug. Or a police officer arresting a citizen engaged in a peaceful protest without exercising any specific statutory power. For the purpose of s 148B, it ought not be accepted that on either occasion the officer is performing a “function under the Act” simply because he honestly believed that he was “upholding the law and maintaining social order.”

³⁷ *Wilson v State of New South Wales* (2001) 53 NSWLR 407 at [41]; *Rickard v State of New South Wales* [2010] NSWSC 151 at [49] referring to s 6 of the *Police Service Act 1990* (NSW), relevantly:

Section 6 Mission and functions of NSW Police Force

(1): *The mission of the police service is to have the police and the community working together to establish a safer environment by reducing violence, crime and fear.*

(2) *The police service has the following functions:*

(a) *to provide police services for New South Wales;*

(b) *to exercise any other function conferred on it by or under this or any other Act;*

(c) *to do anything necessary for or incidental to, the exercise of its functions.*

64. If s 148B protected a member from criminal or civil liability for the use of deadly force simply on the basis that the member was acting in good faith to “prevent an offence” or “maintain social order” or “protect life” – all of which are “core functions” in s 5(2) – the careful protection that the law offers citizens against excessive police force would be emasculated.³⁸

Legislative history

10 65. There is no indication from any extrinsic material that the introduction of s 5(2) of the PA Act in 2007, was intended to expand the ambit of powers and functions conferred on members to those enumerated in s 5(2), without restriction or limitation. The second reading speech to the *Police Administration Amendment Act 2007* (NT) (see [38] above) contained, to the contrary, a statement that while the PA Act “sets out powers of police to enable them to do their job efficiently and effectively” they are “still, nevertheless, being held accountable and transparent”. There was no intention to override common law restrictions and limitations simply by inserting an articulation of the core functions of the Police Force.

66. The same can be said about the introduction of the new (and current) s 148B in 2018. There is no indication that the inclusion of the word “function” in s 148B in 2018 was intended by the legislature to alter by a “side-wind” the “careful balance” of statutory and common law police powers and accompanying limitations.³⁹ The *Police Administration Amendment Act 2016* (NT) did not contain “clear words or those of necessary intendment” to do so.

20 67. Rather, the language in s 148B was amended to expand the protection to persons other than members. At J [165] (CAB 192), the plurality accepted that the change from “member” to “person” was to “extend the protection in s 148B to other people performing a range of functions under the PAA”, consistent with the Explanatory Statement that “[t]his section reflects changes so as to include people acting under the new provisions of this Bill (i.e. medical practitioners, nurses and qualified persons).” As noted by Southwood ACJ and Mildren AJ at J [79] (CAB 155), “[t]here is no mention of s 148B of the Act in the second reading speech for the Bill that introduced the *Police Administration Amendment Act 2016*.” The entire focus of the amendments which introduced the term “function” to s 148B was coupled with the deliberate

³⁸ *Re:K* (1993) 46 FCR 336 at 340 citing *Innes v Weate* (1984) 12 A Crim R 45 at 51 (“It is important that a constable should have a wide discretion to act swiftly and decisively; it is equally important that the exercise of that discretion should be subject to scrutiny and control so that he should not too easily or officiously clothe himself with the powers of the State and by so doing affect the rights and duties of other citizens.”).

³⁹ See *Parkdale Custom Built Furniture Pty Ltd v Puxu Ply Ltd* (1982) 149 CLR 191 at 224 (Brennan J).

change from “members” to “persons” to ensure that alongside police officers, medical practitioners, nurses and qualified persons performing function under Div 7AA would be protected by the immunity offered in s 148B in the same way as “members” previously were, with the immunity also extended to criminal liability. There was no clear intention expressed either in the legislation or the extrinsic material to suggest that the change in terminology in s 148B was to capture anything other than functions performed by persons other than police officers under Div 7AA.

(f) Ground 2: “purpose”

10 68. Following on from their (erroneous) interpretation of s 148B of the PA Act, both the plurality and Southwood ACJ and Mildren AJ found that it would be open for the jury to find that the respondent may have been performing a number of functions simultaneously, including the exercise of the power of arrest and trying to protect the life of Constable Eberl.⁴⁰ On the applicant’s interpretation of s 148B, only one of those things falls within the protection of s 148B, and so the Full Court’s discussion of “dual purpose” proceeds from an incorrect starting point. However, the issue is whether and how purpose plays a role in the construction and application of s 148B of the PA Act.

69. In *Little v Commonwealth*,⁴¹ Dixon J stated:

20 The truth is that a man acts in pursuance of a statutory provision when he is honestly engaged in a course of action that falls within the general purpose of the provision. The explanation of his failure to keep within his authority or comply with the conditions governing its exercise may lie in mistake of fact, default in care or judgment, or ignorance or mistake of law. But these are reasons which explain why he needs the protection of the provision and may at the same time justify the conclusion that he acted bona fide in the course he adopted and that it amounted to an attempt to do what is in fact within the purpose of the substantive enactment.

70. White J in *Campbell v Northern Territory of Australia (No 3)* [2021] FCA 1089 (*Campbell*) considered s 216(2) of the *Youth Justice Act 2005* (NT) which is a statutory immunity conferred on certain persons in identical terms to s 148B of the PA Act: set out at [801].

⁴⁰ J [119] (CAB 169-170) (“may have been exercising his power of arrest and simultaneously performing his functions of preventing an offence and protecting the life of Constable Eberl.”) (see also J [126] (CAB 173-174)); J [174] (CAB 171), J [201] (CAB 206) (“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.”); J [204(b)] (CAB 207).

⁴¹ (1947) 75 CLR 94 at 112 (cited by Southwood J and Mildren AJ at J [125] (CAB 172-173)).

71. His Honour considered at [820] the statement of Dixon J in *Little*, set out above and observed that “good faith in this context is directed both to the *ends* to which the actor’s conduct was directed and to the *means* he or she adopted to achieve these ends”.

72. At [822]-[824] of *Campbell*, White J helpfully collected relevant authorities as to the interpretation of provisions like s 148B, and matters relevant to the assessment of whether the defence applies:

(a) provisions such as s 215(2) are generally construed strictly: *Board of Fire Commissioners (NSW) v Ardouin* [1961] HCA 71, (1961) 109 CLR 105 at 116 (Kitto J); *Puntoriero* at [33]-[37];

10 (b) something more than the mere commission of a tort is necessary because, unless there be a tort, there would be no liability attracting the need for good faith defence for which the statute provides: *Little* at 108;

(c) depending on context, the term “good faith” may be a reference to an actual state of mind, irrespective of the quality or character of the causes which induce it, so that something will be done, or omitted to be done, in good faith if the party was honest, albeit careless. Alternatively, the term may be a reference to an objective standard, ie, requiring the exercise of the caution and diligence to be expected of an honest person of ordinary prudence: *Mid Density Developments* at 298; *Cannane v J Cannane Pty Ltd* [1998] HCA 26, (1998) 192 CLR 557 at 596 (Kirby J in dissent);

20 (d) a failure to attempt to discharge the function or duties conscientiously may amount to a lack of good faith, as may a conscious ignoring of the means by which a statutory duty or function may be discharged: *Alamdo* at [49];

(e) there may be a want of good faith even though the respondent has not acted dishonestly: *Alamdo* at [49];

(f) there will be an absence of good faith if the person had no intention of exercising the power for the purpose for which it was granted, or had no honest belief in a state of facts which would have excused the wrongful act: *Webster v Lampard* [1993] HCA 57; (1993) 177 CLR 598 at 606;

30 (g) good faith may require a state of mind or knowledge other than personal honesty and absence of malice: *Alamdo* at [50]; *Mid Density Developments* at 299. As already noted, in the latter case it was said, at 300, that good faith requires more than “honest ineptitude”. In *Mid Density Developments*, that “something more” was lacking because of the absence of a “real attempt” by the officers of the Council to provide accurate information in response to a request made to it – see also *State of South Australia v Clark* [1996] SASC 5499; (1996) 66 SASR 199 at 234; and

(h) the respondents have the onus of establishing the defence: *Vines v Djordjevitch* [1955] HCA 19, (1955) 91 CLR 512 at 519; *Webster v Lampard* at 606; and *Alamdo* at [54].

40 The authorities also indicate that a number of matters may be relevant to the assessment of whether relevant acts or omissions were done or omitted to be done in good faith. These include the purpose(s) for which the action is taken; any motive(s) with which the action was taken; the intention (or its absence) to conform with the statute; the extent to which the action did conform with the statute; and the absence of gross negligence or recklessness.

It is also pertinent that s 215(2) grants the immunity in relation to the exercise or purported exercise of a power or in the performance or purported performance of a function under the

YJ Act. This suggests that attention should be had to the purpose for which the power or function was exercised and whether the act in question constituted an attempt to fulfil the statutory purpose or to undertake the statutory function. (Emphasis added)

73. Identification of the purpose for which the action was taken (ie lethal shots 2 and/or 3) and purpose for which the alleged power or function was exercised is relevant to determining whether s 148B can be invoked.⁴² That is, in determining whether lethal shots 2 and/or 3 (ie the “act”) was done by the respondent in good faith in the exercise (or purported exercise) of power or performance (or purported performance) of a function under the PA Act.
- 10 74. The Crown accepts, depending on the evidence at trial, that s 148B may be open to the respondent to rely upon. However, the provision does not have the breadth as found by the Full Court (see [68] above).
75. Section 148B could only apply if there was evidence adduced at trial that when the respondent fired shots 2 and/or 3, he was or was purporting to arrest the deceased under s 124 of the PA Act.
76. If such evidence were adduced, the jury would be directed that the respondent could be found not guilty of the charges if the jury found as a reasonable possibility that:
- a. the respondent honestly believed that he fired shots 2 and/or 3 to arrest the deceased; and
 - b. he honestly believed that the use of such force was reasonable to affect that arrest.
- 20 77. That is, the jury would have to find as a reasonable possibility that the respondent honestly and genuinely believed (ie “good faith”) that the *ends* to which his conduct was directed and the *means* (ie force) he adopted to achieve these ends were reasonable and necessary.⁴³
78. On the Full Bench’s construction of s 148B, however, the jury would also be directed that the respondent could be found not guilty of the charges if the jury found as a reasonable possibility that:

⁴² See eg *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 56 ALJR 678, at 469.

⁴³ This is so even if valid objectives of arrest are to “prevent injury to the person or property of others, to preserve the peace or to identify the wrongdoer”: eg *Donaldson v Broomby* (1982) 60 FLR 124 at 126. The jury would still have to accept as a reasonable possibility that shots 2 and/or 3 were fired by the respondent in good faith in the performance of the exercise of a power of arrest which includes that he honestly believed (ie “good faith”) that he was exercising the power subject to its limitation of using only force that is reasonably necessary (regardless of the objective).

- a. the respondent honestly believed that he fired shots 2 and/or 3 to protect Constable Eberl (s 5(2)(b)); or
- b. the respondent honestly believed that he fired shots 2 and/or 3 to prevent the stabbing of Constable Eberl (preventing the commission of an offence) (s 5(2)(c)).

79. Such directions would be materially different. It could lead to an acquittal of the respondent on an incorrect basis.

10 80. Left unaddressed by Full Court was the operation and application of s 148B if the impugned act was done for more than one purpose, and only one such purpose for the act or omission was in the exercise of a power or function under the PA Act. If the jury were to find multiple purposes for the power being exercised or the function being performed, and one of those purposes for the act was extraneous to the exercise of power or performance of a function under the Act, the jury must be directed that section 148B would not apply if it found that the extraneous purpose was a substantial purpose.⁴⁴

PART VII: ORDERS SOUGHT

81. The orders sought are:

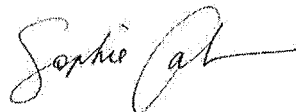
- a) Appeal allowed;
- b) Set aside the Full Court's answers to Question 3 given on 13 August 2021, and in lieu thereof order that Question 3 be reformulated and answered as follows: Does a "function" under s 148B of the PA Act include the functions listed in s 5(2) of the PA Act? "No".

20 PART VIII: ESTIMATE

82. The applicant will require approximately 1.5hrs to present oral argument.



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⁴⁴ *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCA 43 at [17] (Middleton, McKerracher and Griffiths JJ).