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 REPLY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: REPLY

2. The applicant's contention that the respondent cannot rely on s 148B of the PA Act in respect of the "core functions" specified in s 5 has been maintained throughout these proceedings:[1] cf respondent's written submissions (**RWS**) at [18]. Whether or not the respondent can rely on s 148B, at trial, depending on the evidence, in respect of the exercise of the power of arrest is in
20 no way dispositive of the question of statutory construction before this Court, and nor does it otherwise render the Full Court's decision correct: cf RWS [2]-[3].

Ground 1[2]

Strict or jealous construction

3. The respondent submits that *"the fact that section 148B provides a 'defence', as opposed to an immunity from suit"* explains why s 148B should be interpreted liberally in favour of the respondent.[3] There is no sharp distinction drawn in the authorities between "immunity" provisions such as are considered in *Board of Fire Commissioners (NSW) v Ardouin* (***Ardouin***),[4]

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1 The applicant has also maintained throughout these proceedings that s 148B is available if there was evidence available at trial that when the respondent fired shots 2 and 3, he was or was purporting to arrest the deceased: see eg CAB 99 (T/S p 49 before Full Court).

2 The respondent commences his response to Ground 1 with the introduction of further facts. What the respondent fails to note, however, in respect of the deceased's utterance "I'm going to kill you mob", is that it is said by the deceased *after* he has been shot by respondent three times: CAB 41; cf RWS [10]

3 RWS at [13], [14].

4 (1961) 109 CLR 105 at 110-111, McTiernan J set out the relevant provision, being s 46 of the *Fire Brigades Act 1909-1958*: *"The board, the chief officer or an officer of the board exercising any powers conferred by this Act or the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers."*

Puntoriero v Water Administration Ministerial Corporation (***Puntoriero***)[5] and *Stephens v Stephens* (***Stephens***)[6] and "defences" such as s 148B.[7] Both types of provisions often require "anterior factual findings" before they can be said to operate: cf RWS [13].

4. *Ardouin, Puntoriero* and *Stephens* are all concerned with affording protection from liability for an act or omission done in the exercise of powers or functions conferred by the relevant Act or pursuant to an authority which the Act itself conferred.[8] Here too, s 148B was introduced as a "protection from liability" provision to "ensur[e] a plaintiff cannot directly sue a police officer for a police tort claim" and to "regulate the manner in which a person can sue a member of the police force".[9]

10 5. The rationale for the "jealous" construction in the above cases holds good for s 148B. A liberal construction of the provision risks exposing citizens to police excesses or abuses of power tempered only by "good faith". The respondent has provided no reason why s 148B should not be construed "jealously" or "strictly."[10]

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5 (1999) 199 CLR 575 at [12] (Gleeson CJ and Gummow J) setting out s 19(1) of the *Water Administration Act 1986* (NSW): *"Except to the extent that an Act conferring or imposing functions on the [Corporation] otherwise provides, an action does not lie against the [Corporation] with respect to loss or damage suffered as a consequence of the exercise of a function of the [Corporation], including the exercise of a power: (a) to use works to impound or control water, or (b) to release water from any such works."*

6 (1970) 72 SR(NSW) 459 at 462 setting out s 48 of the *Fire Brigades Act 1909* (*"No proceedings whether at law or in equity shall lie or be made or allowed by or in favour of any person against the Crown, the Minister, the Minister for Local Government, a member of the Committee, a council, an officer or employee of the Board of Fire Commissioners of New South Wales or the Forestry Commission of New South Wales, a fire control officers, a fire patrol officer, a captain, deputy captain, group captain or deputy group captain of a bush fire brigade, or any person acting in the execution or intended execution of this Act in respect of anything done bona fide under and for the purposes of this Act."*).

7 In *Fingleton v The Queen* (2015) 227 CLR 166, Gleeson CJ described s 30 of the *Criminal Code* (Qld) as an "immunity" although it does not provide an immunity from suit – "a judicial officer is not criminally responsible for anything done or omitted to be done by the judicial officer in the exercise of the officer's judicial functions…" (at [2]). Gleeson CJ held at [23] that it was "only necessary to identify her functions and powers under the *Magistrates Act* in order to reach the conclusion that she could not be held criminally responsible for the conduct in question."

8 See eg *Ardouin* at 115-116 (Kitto J) and 124 (Taylor J); *Puntoriero* at [15], [18] (Gleeson CJ and Gummow J), [34] McHugh J ("statutory provision limiting liability for government action") [113] (Callinan J); *Stephens* at 462-462 (Mason JA) where his Honour expressly referred to *Ardouin* and s 46 of the *Fire Brigades Act 1909* and stated that "it does not seem that any material distinction can be found which would enable this Court to give to so much of s 48 as relates to 'anything done bona fide under and for the purposes of this Act" a construction which differs from that accorded to [s 46]." See also McHugh J in *Webster v Lampard* (1993) 177 CLR 598 at 620 referring to "a statutory immunity from liability" and at 621 referring to "the defence of statutory protection".

9 See AWS [33] setting out the second reading speech introducing the *Police Administration Amendment (Powers and Liability) Bill 2005* (NT).

10 The respondent's reliance on *Trobridge v Hardy* (1955) 94 CLR 147 is also inapposite: cf RWS [15]. The relevant provision to be construed in that case provided that no action shall lie against, relevantly, a constable, authorised to carry the provisions of the Act into effect: set out at 154. It was in respect of an action against a police constable

Statutory authority

6. For the reasons set out at AWS [49]-[53] and [60]-[64], the core functions in s 5 are not functions the performance of which is dependent on specific statutory authority: cf RWS [22]-[23]. If s 148B was given a construction in the untethered manner contended for by the respondent (see RWS [31]) to apply to "powers" or "functions" whether or not there was any "explicit statutory conferral", this would both overlook the phrase "under this Act" in s 148B and drastically expand police powers to a point of permitting permit police officers to avoid criminal liability for wanton acts in abuse of his or her authority: AWS at [23].[11]

7. The respondent contends that the requirement of "good faith" provides sufficient protection against excessive police force: RWS at [42]. An act may be done in "good faith" even if it is unreasonable to do that act.[12] Reasonableness calls for objective evaluation of a person's conduct.[13] An objective standard provides an authoritative signal and guide to police officers of what the community expects of them in a way that a subjective notion of "good faith" cannot do; and is essential to maintaining both accountability of, and public confidence in the police.[14]

8. Construing s 148B as not including the s 5 "core functions" would not "defeat the intended operation of the defence" or "commit s 148B to disuse": cf RWS at [27]-[28]. The applicant does not contend that s 148B would necessarily be unavailable at the respondent's trial on the evidence if it concerns a purported exercise of the power of arrest: RWS at [3], [12] and [18]. However, s 148B is only available for an act (or omission) which the PA Act specifically authorises. Section 5 "core functions" are not a source of statutory authority: cf RWS [27]. "Prevent[ing] a threat to life" *simpliciter* is not a power or function "under this Act." Accordingly s 148B is not engaged.

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that his Honour held that "it would be in accordance with sound principle to construe this particular provision very strictly *against* that person", that is, the constable. The applicant contends for that same strict interpretation here.

11 In *Ardouin*, Taylor J held (at 124) that it would be erroneous to treat the expression "powers conferred by this Act" to include all of the capacities which the Board enjoys as a body corporate constituted by s 7 of the Act. That expression only describes the "extraordinary powers conferred upon the Board in order that it may properly and effectively fulfill its functions".

12 *Little v The Commonwealth* (1947) 75 CLR 94 at 111-112.

13 See eg [135(3)] of the concurring judgment of Southwood ACJ and Mildren AJ at CAB 177.

14 R Martin "When police kill in the line of duty: Mistaken Belief, Professional Misconduct and Ethical Duties after R. (W 80) [2021] *Crim L.R* 662 at 678-679

"Context"

9. True it is that the replacement of s 148B was to amend the provision to expand the protection to criminal liability, but what the respondent fails to acknowledge in addressing "context" at RWS [29], is the extrinsic material and legislative history of s 148B which bespeaks that the inclusion of "performance of a function" (and the expansion of the provision to "persons" and not simply "members") in s 148B was to provide protection for those performing functions under Div 7AA, which was introduced at the same time: AWS [65]-[67].

10. It is both insufficient and unpersuasive to rely, as the Full Court did, simply on the commonality of the word "function" in ss 5 and 148B as an answer to the question of construction: RWS [30].

10 *Police powers*

11. The applicant does not suggest that Part VII of the PA Act is an "exhaustive list" of police powers: cf RWS [32]. To the contrary, the applicant addresses in some detail s 25 of the PA Act which includes the common law powers of a constable: AWS [54]-[59].

12. That a police officer may, as a defence to certain charges, be able to rely on s 28 of the *Criminal Code Act 1983* (NT)[15] is irrelevant to the construction of s 148B: RWS [33]-[34].[16]

Matters for the jury

13. Critically, this Court is <u>not</u> being asked by the applicant to make any findings of fact 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": RWS [37]; see also [38], [44], [46]-[47]. That is plainly
20 a matter for the jury.[17] The only thing this Court is being asked to do is correct the error of the Full Court as to the proper construction of s 148B.

14. Relatedly, the question of the reasonableness or otherwise of the respondent's conduct is also an evidentiary matter for the jury: RWS [36]-[39]. That is, whether the respondent honestly

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[15] Although not in the present case: see s 43AA(3) of the *Criminal Code*. Here, the relevant statutory defences which arise are s 43BD and s 208E of the *Criminal Code*.

[16] Section 1 of Sch 1 defines "*unnecessary force*" as meaning "force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion".

[17] As is whether or not the firing of shots 2 and/or 3 was an act done by the respondent "in good faith in the exercise of a power or performance of a function under this Act": cf RWS [21].

believed the firing of lethal shots 2 and/or 3 was reasonable and necessary to affect the deceased's arrest: RWS [41], cf AWS [76(b)], [77].[18]

Ground 2

15. Contrary to the respondent's position (RWS [43]), s 148B is not engaged "simply" because the impugned conduct forms part of a process (or continuum) that involves the exercise of a power under the Act. Rather, s 148B demands focus upon the purpose for which the act is undertaken, and for which the power or function was exercised: AWS [73].

16. The respondent continues to suggest that at the time of discharge of the firearm, (he will submit that) he was exercising the power of arrest "or, alternatively, was carrying out a core function as described by s 5 of the PA Act": RWS [20], [47]. The applicant's position is that the protection in s 148B would only be available in the first of those alternatives: AWS [73]-[75].

17. In this respect, it is not a question of co-existence or logical consistency. The jury could not be properly directed if the erroneous construction of s 148B is allowed to stand: AWS [76]-[78]. Of the three propositions (that the respondent fired shots 2 and/or 3 (i) in defence of his colleague's life; (ii) to prevent the commission of an offence; (iii) to effect the arrest of the deceased) only the third proposition is "in the exercise of a power or performance of a function under" the PA Act for the purposes of s 148B.

18. As the respondent recognises, the protection of life *simpliciter* is "a function for which no power to perform it exists": RWS [34]. A police officer cannot avail herself of s 148B if her purpose in firing a fatal shot in good faith was to "protect life".

19. The Full Court's erroneous construction has a real and practical difference to how the jury should be properly directed in this important case: AWS [76]-[80]. This Court should grant special leave and allow the appeal so that the respondent's trial can be conducted according to law.

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[18] On the applicant's case, this is the only matter that the jury could be properly directed about where none of the "core functions" in s 5(2) are matters attracting the protection of s 148B, see Ground 2.