HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

KEVIN GARRY CRUMP PLAINTIFF

AND

STATE OF NEW SOUTH WALES & ANOR DEFENDANTS

Crump v New South Wales
[2012] HCA 20
4 May 2012
S165/2011

ORDER

The questions reserved in the special case dated 28 November 2011 be answered as follows:

Question 1: *Is s 154A of the* Crimes (Administration of Sentences) Act *1999 (NSW), in its purported application to the plaintiff, invalid, in that it has the effect of:*

> *varying or otherwise altering a judgment, decree, order or sentence of the Supreme Court of New South Wales in a "matter" within the meaning of s 73 of the* Constitution*?*

Answer: *No.*

Question 2: *Who should pay the costs of the special case?*

Answer: *There should be no order as to costs.*

Representation

B W Walker SC with G E S Ng for the plaintiff (instructed by Legal Aid NSW)

M G Sexton SC, Solicitor-General for the State of New South Wales with N J Adams and A M Mitchelmore for the first defendant (instructed by Crown Solicitor (NSW))

Submitting appearance for the second defendant

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with K C Morgan intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

S G E McLeish SC, Solicitor-General for the State of Victoria with E A Bennett intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R M Mitchell SC with C S Bydder intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

M G Evans QC with A J Keane intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

CATCHWORDS

Crump v New South Wales

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Sentencing and parole procedure – Whether determination made under s 13A of *Sentencing Act* 1989 (NSW) is a "matter" within s 73 of Constitution – Whether s 154A of *Crimes (Administration of Sentences) Act* 1999 (NSW) invalid for setting aside, varying, altering or otherwise stultifying a judgment, decree, order or sentence of Ch III court.

Words and phrases – "parole", "sentencing".

Constitution, s 73.
Crimes Act 1900 (NSW), s 463.
Crimes (Administration of Sentences) Act 1999 (NSW), ss 143, 154A.
Sentencing Act 1989 (NSW), s 13A.

FRENCH CJ.

Introduction

1 In 1974, the plaintiff was sentenced, in the Supreme Court of New South Wales, to life imprisonment on each of two counts. One sentence was imposed for the murder of Ian James Lamb[1]. The other sentence was imposed for conspiracy to murder Virginia Gai Morse[2]. Mr Lamb was killed by the plaintiff's co-offender, Baker, in the course of an opportunistic robbery. The plaintiff was convicted as an accessory to the murder. Mrs Morse was kidnapped and raped by both the plaintiff and his co-offender and killed by the plaintiff with a rifle shot to her head. The killings were callous, and in the case of Mrs Morse, preceded by pitiless and degrading abuse.

2 Taylor J declined to fix a non-parole period for either the plaintiff or Baker[3]. At the end of his remarks in sentencing the plaintiff and Baker, Taylor J said[4]:

> "I believe that you should spend the rest of your lives in gaol and there you should die. If ever there was a case where life imprisonment should mean what it says - imprisonment for the whole of your lives - this is it."

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1 Imposed as a mandatory sentence pursuant to s 19 of the *Crimes Act* 1900 (NSW).

2 The plaintiff and his co-offender were charged in New South Wales with conspiracy to murder Mrs Morse rather than with the substantive offence of murder because that offence had been committed in Queensland. The offence of the murder of Mr Lamb was committed in New South Wales.

3 Section 4 of the *Parole of Prisoners Act* 1966 (NSW) required a sentencing judge to fix a non-parole period unless by reason of the nature of the offence or antecedents of the convicted person it was "undesirable" to do so. Notwithstanding the judge's refusal to fix a non-parole period, a mechanism for release on licence was in place under s 463 of the *Crimes Act* 1900 (NSW), a provision repealed by the *Prisons (Serious Offenders Review Board) Amendment Act* 1989 (NSW), s 5. See *Baker v The Queen* (2004) 223 CLR 513 at 527-528 [27]-[29] per McHugh, Gummow, Hayne and Heydon JJ; [2004] HCA 45. The remaining mechanism for release was the exercise of the Royal Prerogative of Mercy applicable, inter alia, to remissions subject to conditions analogous to parole conditions: *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364 at 368 per Mason J; [1984] HCA 77.

4 *Remarks on Sentence of Taylor J*, unreported, Supreme Court of New South Wales, 20 June 1974.

At that time his Honour's remarks to the effect that the plaintiff should never be released had no statutory consequences[5]. Later, however, the New South Wales Parliament legislated to attach statutory consequences to such non-statutory, non-release recommendations[6]. The validity of that legislation was upheld in *Baker v The Queen*[7].

3 In 1997, a Judge of the Supreme Court (McInerney J) made an order under s 13A of the *Sentencing Act* 1989 (NSW) ("the 1989 Act") replacing the plaintiff's life sentence for the murder of Mr Lamb with a minimum term of 30 years imprisonment, expiring on 12 November 2003, and an additional term of imprisonment for the remainder of the plaintiff's natural life[8]. That order had the effect that the plaintiff was "eligible" for release on parole from 13 November 2003. He could only be released if the Parole Board of New South Wales ("the Parole Board"), renamed in 2005 as the New South Wales State Parole Authority ("the Authority")[9], made an order to that effect. The life sentence imposed on the plaintiff for the conspiracy to murder Mrs Morse was replaced with a sentence of 25 years imprisonment.

4 In 2001, a new section, s 154A, was introduced into the *Crimes (Administration of Sentences) Act* 1999 (NSW) ("the Administration Act") which had the effect of preventing persons in the plaintiff's category, that of a serious offender the subject of a non-release recommendation, from being released on parole unless in imminent danger of death or so incapacitated that he lacked the

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5 See discussion in *Baker v The Queen* (2004) 223 CLR 513 at 520-521 [7]-[8] per Gleeson CJ, 533-534 [46]-[49] per McHugh, Gummow, Hayne and Heydon JJ.

6 *Crimes (Sentencing Procedure) Act* 1999 (NSW), Sched 1; *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act* 2005 (NSW), Sched 1, Item 1.

7 (2004) 223 CLR 513 at 522 [9] per Gleeson CJ, 534 [49]-[50] per McHugh, Gummow, Hayne and Heydon JJ.

8 *Application of Crump*, unreported, Supreme Court of New South Wales, 24 April 1997.

9 The Offenders Review Board created by the 1989 Act was renamed the Parole Board by the *Sentencing Amendment (Parole) Act* 1996 (NSW), Sched 1, Item 1. The Parole Board was reconstituted as the State Parole Authority by the *Crimes (Administration of Sentences) Amendment (Parole) Act* 2004 (NSW), Sched 1, Item 49 with effect from 10 October 2005: *New South Wales Government Gazette*, No 122, 7 October 2005 at 8167.

physical capacity to harm another[10]. The plaintiff commenced proceedings in the original jurisdiction of this Court. He contended that, in its application to him, s 154A was invalid because it constituted an impermissible legislative alteration of the judicial decision of the Supreme Court which had rendered him eligible for parole from 13 November 2003. He sought declaratory relief.

5 A special case raising the question of validity was agreed between the parties and was referred to a Full Court of this Court. For the reasons that follow, and the reasons given in the joint judgment, s 154A is valid in its application to the plaintiff.

Legislative and sentencing history

6 The statutory scheme for release on parole which was in place at the time that the plaintiff was first sentenced in 1974 was created by the *Parole of Prisoners Act* 1966 (NSW)[11]. That Act was repealed and replaced by the *Probation and Parole Act* 1983 (NSW)[12].

7 The central purpose of the 1989 Act, as described in the Second Reading Speech in May 1989, was to "restore truth in sentencing."[13] At the time, persons sentenced to life imprisonment were said to be serving, on average, 11 to 12 years imprisonment[14]. In November 1989 a package of complementary amending Acts was passed[15]. Their stated purpose, like that of the 1989 Act, was

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10 Section 154A of the Administration Act was introduced by the *Crimes Legislation Amendment (Existing Life Sentences) Act* 2001 (NSW), which commenced operation on 20 July 2001.

11 An earlier parole system and a parole board were created by s 464A of the *Crimes Act* 1900 (NSW) inserted by the *Crimes (Amendment) Act* 1950 (NSW).

12 This followed the recommendations of the Muir Committee, appointed in 1978 after the Report of the Nagle Royal Commission into Prisons. The 1983 Act was subject to a number of amendments until replaced by the provisions of Pt 3 of the 1989 Act.

13 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 May 1989 at 7910.

14 Figgis and Simpson, "Dangerous Offenders Legislation: An Overview", New South Wales Parliamentary Library Research Service Briefing Paper No 14/97 (1997) 31-32.

15 *Crimes (Life Sentences) Amendment Act* 1989 (NSW); *Prisons (Serious Offenders Review Board) Amendment Act* 1989 (NSW); *Sentencing (Life Sentences) Amendment Act* 1989 (NSW).

to "fulfill the Government's commitment to ensuring truth in sentencing."[16] One component of the package, the *Crimes (Life Sentences) Amendment Act* 1989 (NSW), introduced s 19A into the *Crimes Act* 1900 (NSW) ("the Crimes Act"). That section provided that a person who committed the crime of murder was liable to penal servitude for life and that "[a] person sentenced to penal servitude for life for the crime of murder is to serve that sentence for the term of the person's natural life."[17] The section was expressed to apply to sentences passed after the commencement of the section for murders committed before or after its commencement[18]. It did not apply to the sentence imposed upon the plaintiff. Nor did it affect the prerogative of mercy[19].

8 The *Sentencing (Life Sentences) Amendment Act* 1989 (NSW) was another part of the package. It inserted s 13A into the 1989 Act. That was the section applied by McInerney J in resentencing the plaintiff in 1997. Its stated purpose was to enable prisoners who had been sentenced to life imprisonment before 1989 to be considered for possible release on parole[20]. The new section provided that a person serving an existing life sentence could apply, after having served at least eight years of the sentence, to the Supreme Court for the determination of a minimum term and an additional term for the sentence[21]. The Supreme Court was empowered to set both a minimum term of imprisonment that the person must serve for the offence for which the life sentence was originally imposed and an additional term during which the person might be released on parole[22]. The Court could also decline to do so[23]. In setting a minimum term and an additional term, the Court was required to have regard to any report on the person made by the Serious Offenders Review Board[24] and any other relevant reports prepared

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16 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 November 1989 at 14052.

17 Crimes Act, s 19A(2).

18 Crimes Act, s 19A(4).

19 Crimes Act, s 19A(6).

20 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 November 1989 at 14054.

21 1989 Act, ss 13A(2) and 13A(3).

22 1989 Act, s 13A(4)(a).

23 1989 Act, s 13A(4)(b).

24 The Serious Offenders Review Board ("SORB") was established by an amendment to the *Prisons Act* 1952 (NSW). See *Prisons (Serious Offenders Review Board)*

(Footnote continues on next page)

after sentence. The Court was also required to have regard to any relevant comments made by the original sentencing judge when imposing the sentence and any other relevant matter[25]. The Court was directed to have regard to the knowledge of the original sentencing court "that a person sentenced to imprisonment for life was eligible to be released on licence under section 463 of the [Crimes Act] and of the practice relating to the issue of such licences"[26]. A minimum term and an additional term, set pursuant to s 13A, replaced the original sentence of imprisonment for life[27]. An appeal lay to the Court of Criminal Appeal in relation to a determination made under the section or a decision to decline to make such a determination[28].

9 Section 13A reflected similar provisions introduced into Commonwealth law and the laws of other States[29]. It conferred a new jurisdiction on the Supreme Court. The resentencing for which it provided was an exercise of judicial power[30]. The distinction between judicial and executive functions in relation to the sentencing and release of prisoners under the regime established by s 13A was pointed out in the Second Reading Speech[31]:

Amendment Act 1989 (NSW), s 3, Sched 1. One function of the SORB was the preparation of reports for the Supreme Court in respect of applications under s 13A of the 1989 Act. The SORB was abolished and that statutory function was inherited by the Serious Offenders Review Council in 1993: *Prisons (Amendment) Act* 1993 (NSW), s 3, Sched 1.

25 1989 Act, s 13A(9).

26 1989 Act, s 13A(9)(a). The package of amending legislation also repealed s 463 of the Crimes Act, which had provided for release of prisoners on licence, and abolished the Release on Licence Board: *Prisons (Serious Offenders Review Board) Amendment Act* 1989 (NSW), s 5 and Sched 1(2).

27 1989 Act, s 13A(6).

28 1989 Act, s 13A(12).

29 *Correctional Services Act Amendment Act* 1984 (SA), s 38; *Crimes (Amendment) Act* 1986 (Vic), s 14; *Crimes Legislation Amendment Act (No 2)* 1989 (Cth), s 28(1).

30 *Baker v The Queen* (2004) 223 CLR 513 at 529-530 [33] per McHugh, Gummow, Hayne and Heydon JJ.

31 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 November 1989 at 14055.

> "As a result of this amendment, these offenders will be considered for release at a time specified by a Supreme Court judge. It is important to emphasise, however, that this date is only a date at which the prisoner will be considered for release. Whether a particular offender will or will not be released will be a matter for the Offenders Review Board."

10 On 10 December 1992, Loveday J, in the Supreme Court of New South Wales, declined an application by the plaintiff for a determination of a minimum term for his sentences[32]. An appeal against that decision was dismissed by the Court of Criminal Appeal on 30 May 1994[33].

11 Section 13A was amended in 1993[34]. The amendment empowered the Supreme Court, if it declined to set a minimum term, to direct that the person never reapply to the Court under s 13A or that the person not reapply for a specified period[35]. A direction that a person never reapply had the effect that the person was to serve the existing life sentence for the term of the person's natural life[36]. Such a direction, or a direction that a person not reapply for a period exceeding two years[37], could only be made if the person had been sentenced for the crime of murder and only if it was "a most serious case of murder and ... in the public interest that the determination be made."[38]

12 One effect of the amendment was described in the Second Reading Speech[39]:

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32 *Application of Crump*, unreported, Supreme Court of New South Wales, 10 December 1992.

33 *R v Crump*, unreported, New South Wales Court of Criminal Appeal, 30 May 1994.

34 *Sentencing (Life Sentences) Amendment Act* 1993 (NSW).

35 1989 Act, s 13A(8).

36 1989 Act, s 13A(8A).

37 An applicant under s 13A whose application was refused could not apply again until two years from the date of the Court's decision: 1989 Act, s 13A(8B).

38 1989 Act, s 13A(8C).

39 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 October 1993 at 3885.

> "those relatively few prisoners serving life sentences under the old system who deserve never to be released will not in fact be released into the community."

The amendment was also said to reflect the "Government's commitment to ensure that any decision never to release an old life prisoner will remain with the judiciary, where it properly resides, free of Executive interference."[40]

13 In 1996, ss 22A to 22O were introduced into the 1989 Act by the *Sentencing Amendment (Parole) Act* 1996 (NSW). They were applicable only to serious offenders[41]. Section 22C required the Parole Board, at least 60 days before the day upon which a prisoner became eligible for release on parole, to give preliminary consideration to whether the prisoner should be so released, and annually, if the prisoner remained eligible for parole.

14 On 24 April 1997, following a second application[42] by the plaintiff under s 13A, McInerney J determined that[43]:

> "For the murder of Mr Lamb, Crump is sentenced to a minimum term of penal servitude of 30 years commencing on 13 November 1973 and concluding on 12 November 2003. Crump will be eligible for release on parole on 13 November 2003.
>
> I set an additional term for the remainder of Crump's natural life.
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> For the conspiracy to murder Mrs Morse, Crump is sentenced to 25 years' penal servitude commencing on 13 November 1973 and concluding on 12 November 1998."

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40 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 October 1993 at 3885.

41 1989 Act, s 22A. The term "serious offender" had the same meaning as in Pt 10 of the *Prisons Act* 1952 (NSW) which, in 1996, was renamed the *Correctional Centres Act* 1952 (NSW): 1989 Act, s 4; *Prisons (Amendment) Act* 1996 (NSW), s 3, Sched 5, cl 2. A "serious offender" included "a person serving any sentence for which a minimum term and an additional term have been set by the Supreme Court under section 13A of the Sentencing Act 1989": *Correctional Centres Act* 1952 (NSW), s 59(b).

42 An applicant under s 13A whose application was refused could not apply again until two years from the date of the Court's decision: 1989 Act, s 13A(8B).

43 *Application of Crump*, unreported, Supreme Court of New South Wales, 24 April 1997 at 60-61.

The source of the power to resentence the plaintiff for the conspiracy offence is not apparent, but that sentence was not the subject of any appeal and is not in issue in these proceedings. Importantly, the statement that the plaintiff would be eligible for release on parole on 13 November 2003 was not a part of the resentencing determination. It was a consequence of that determination under the statutory scheme for release on parole then in place.

15 Under the 1989 Act, as it stood on 24 April 1997, a prisoner was "eligible for release on parole" only if the prisoner was subject to at least one sentence of imprisonment with a minimum term and had served each such minimum term and was not subject to any other sentence without a minimum term[44]. A prisoner who was eligible for release on parole was "entitled to be released on parole only if a parole order directing the release of the prisoner ha[d] been made"[45].

16 The statutory scheme for release on parole which was in place when McInerney J made his determination under s 13A, conferred the executive power of release on parole on the Parole Board[46]. That power, when exercised in relation to a prisoner serving a sentence in excess of three years, was subject to a number of conditions set out in s 17 of the 1989 Act. Those conditions required a determination by the Parole Board that the release of the prisoner was appropriate having regard to the principle that the public interest is of primary importance[47] and that the prisoner, if released, would be able to adapt to normal, lawful community life[48]. They required consideration of relevant comments made by the court sentencing the prisoner[49], and of reports required by the regulations[50]. The Parole Board was also required to take account of the antecedents of the prisoner, any special circumstances of the case[51], and any

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44 1989 Act, s 14(2).

45 1989 Act, s 15.

46 A prisoner eligible for release on parole was only entitled to be released on parole pursuant to a parole order directing the release of the prisoner: 1989 Act, s 15. The Parole Board was empowered to make or decline to make such a parole order: 1989 Act, ss 19, 25 and 25A.

47 1989 Act, s 17(1)(a).

48 1989 Act, s 17(1)(e).

49 1989 Act, s 17(1)(b).

50 1989 Act, s 17(1)(c).

51 1989 Act, s 17(1)(d).

other relevant matters[52]. In respect of "serious offenders" the Parole Board was required, by virtue of the 1996 amendments to the 1989 Act, as explained above, to give preliminary consideration to possible release on parole at least 60 days before the eligibility date, and annually thereafter while the prisoner remained eligible[53]. There was also provision for notice to victims and submissions from victims before the Parole Board made its decision[54]. As appears below, subsequent legislative change considerably narrowed the scope of the Parole Board's power to order the release on parole of serious offenders the subject of a non-release recommendation. The plaintiff fell into that class of offender.

17 Following the decision of McInerney J, the *Sentencing Legislation Further Amendment Act* 1997 (NSW) was enacted. That Act amended s 13A so that a person who had been the subject of a non-release recommendation was not eligible to make an application under the section unless the person had served at least 20 years of the sentence concerned[55]. The criteria for such a determination were made more stringent[56]. Those amendments did not affect the plaintiff who already had the benefit of the order made by McInerney J. However, a new section, s 22P, was enacted which affected the power of the Parole Board to release on parole a person whose sentence of imprisonment for life had been the subject of a determination under s 13A(4). It therefore applied to the plaintiff. The Parole Board was required, by s 22P, to "have regard to and give substantial weight to any relevant recommendations, observations and comments made by the original sentencing court when imposing the sentence concerned"[57]. It was also required to give consideration to adopting or giving effect to the substance and intention of the original sentencing court[58]. To the extent that it declined to adopt or give effect to those matters, the Parole Board was required to state its reasons for so doing[59]. Section 22P made access to parole more difficult for the

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52 1989 Act, s 17(1)(f).

53 1989 Act, s 22C.

54 1989 Act, s 22F.

55 1989 Act, s 13A(3)(b).

56 1989 Act, s 13A(3A). A challenge to the validity of s 13A(3)(b) and s 13A(3A) was dismissed in *Baker v The Queen* (2004) 223 CLR 513; as explained in the joint judgment in this appeal at [50].

57 1989 Act, s 22P(2)(a).

58 1989 Act, s 22P(2)(b).

59 1989 Act, s 22P(2)(c).

plaintiff. Nevertheless, it left open the possibility that he could eventually be released on parole.

18 On 3 April 2000, the 1989 Act was repealed[60]. It was replaced by the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the 1999 Act"). At the same time the Administration Act was enacted. The 1999 Act and the Administration Act re-enacted the provisions of various Acts dealing with the sentencing of offenders and the administration of sentences imposed on offenders[61].

19 Under the 1999 Act an offender who had served at least 20 years of an existing life sentence, and who had been the subject of a non-release recommendation, could apply to the Supreme Court for the determination of a specified term and a non-parole period for that sentence[62]. The Supreme Court making such a determination could set a specified term for the sentence together with a non-parole period for the sentence[63]. A transitional provision had the effect that the determination made by McInerney J, on 24 April 1997, under s 13A of the 1989 Act, was taken to be a determination of a specified term and non-parole period under the 1999 Act[64].

20 The plaintiff submitted that as at 19 July 2001, the day before the commencement of s 154A of the Administration Act, the continuing effect of the determination by McInerney J was that:

- on 13 November 2003 the plaintiff would, without having to satisfy any further requirements, have at the very least some prospect, however minimal, of being released on parole; and

- following the sixtieth day before 13 November 2003, and in the absence of an opinion having been formed by the Parole Board for the purpose of engaging s 143(2), the plaintiff would be entitled to seek relief in the nature of mandamus if the Parole Board had, by that time, failed to give preliminary consideration as to whether a parole order should be made in relation to him.

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60 *Crimes Legislation Amendment (Sentencing) Act* 1999 (NSW), s 3, Sched 1.

61 Crimes (Administration of Sentences) Bill 1999 (NSW) Explanatory Note, 1.

62 1999 Act, Sched 1, cl 2.

63 1999 Act, Sched 1, cl 4(1).

64 1999 Act, Sched 2, cl 21(3) read with s 104.

It was the alteration by s 154A of that state of affairs that was the focus of the plaintiff's contention that s 154A is invalid in its application to him.

21 On 20 July 2001, the *Crimes Legislation Amendment (Existing Life Sentences) Act* 2001 (NSW) came into effect. The Act increased from 20 years to 30 years the length of time for which a non-release recommendation offender had to serve his or her sentence before becoming eligible to apply for a redetermination. It also provided that a serious offender the subject of a non-release recommendation could be granted parole only if the offender were dying or permanently incapacitated and that such parole could be revoked if the offender subsequently recovered. The latter amendment was effected by the insertion of s 154A into the Administration Act. The text of s 154A is set out in the joint judgment[65]. It is common ground that the plaintiff was, for the purposes of that section, a serious offender the subject of a non-release recommendation by the original sentencing judge.

22 An *ad hominem* component of the objects of the new provision was made clear in the Second Reading Speech by the Premier of New South Wales[66]:

> "These changes mean Baker, Crump and the other never-to-be released prisoners can only ever be released on their death beds or be so incapacitated that they would pose a threat to nobody. It means that the community is protected from these killers forever."

23 By a notice dated 12 September 2003, the Parole Board advised the plaintiff of its view that he was not eligible to be released on parole by reason of s 154A of the Administration Act.

The present proceedings

24 The plaintiff commenced the present proceedings against the State of New South Wales and the Authority on 10 May 2011. He sought declaratory relief to the effect that he is eligible for release on parole and that s 154A of the Administration Act does not validly apply to any consideration by the Authority as to whether he should be released on parole.

25 In his amended statement of claim the plaintiff contended that, in its purported application to him, the effect of s 154A was to render him ineligible to be released on parole unless he met the conditions imposed by that section. This was "notwithstanding that the effect of the April 1997 Sentence was that the

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65 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [54].

66 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 2001 at 13972.

plaintiff would be eligible for release on parole on and from 13 November 2003". Alternatively, the plaintiff alleged that the effect of the purported application of s 154A to him would be "to vary or otherwise to alter the 1997 Sentence."

26 The State of New South Wales demurred to the amended statement of claim dated 17 November 2011. A special case was stated for the opinion of the Full Court pursuant to r 27.08 of the High Court Rules 2004 (Cth). The questions raised in the special case were:

> "1. Is s 154A of the Administration Act, in its purported application to the plaintiff, invalid, in that it has the effect of:
>
> > varying or otherwise altering a judgment, decree, order or sentence of the Supreme Court of New South Wales in a 'matter' within the meaning of s 73 of the *Constitution*;
>
> 2. Who should pay the costs of the Special Case?"

In considering the resentencing order made by McInerney J in April 1997, it is necessary to have regard to the limits of his Honour's order and of the exercise of judicial power which was expressed in making it.

The judicial function in fixing a minimum term

27 The term "sentence" has been said to connote "a judicial judgment or pronouncement fixing a term of imprisonment."[67] The fixing of the minimum term and an additional term under s 13A of the 1989 Act was, as that Act expressly recognised, a resentencing and thereby an exercise of judicial power.

28 There is a clear distinction between the judicial function exercised by a judge in sentencing, and the administrative function exercised by a parole authority in determining whether a person eligible for release on parole, by reason of the judge's sentencing order, should be released. As the plurality in *Power v The Queen*[68] said of the *Parole of Prisoners Act* 1966 (NSW):

> "This separation of the functions of the trial judge and that of the parole board is a clearly expressed policy of the legislation."

In fixing a minimum term before a prisoner can be considered for release on parole, the sentencing judge determines, as McInerney J determined in 1997, that

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67 *Winsor v Boaden* (1953) 90 CLR 345 at 347; [1953] HCA 46.

68 (1974) 131 CLR 623 at 627 per Barwick CJ, Menzies, Stephen and Mason JJ; [1974] HCA 26.

"all the circumstances of the offence require that the offender serve no less than that term, without the opportunity of parole"[69]. The purpose of parole generally is "to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time"[70]. Subject to the particular provisions of the applicable statute, once sentenced the responsibility for the future of a prisoner passes to the executive branch of the government of the State[71]. Even within an unchanging statutory framework, the executive decision to release or not to release a prisoner on parole may reflect policies and practices which change from time to time. There nevertheless remains only one judicial sentence[72]. As Mason J said in *Lowe v The Queen*[73]:

> "although the recommendation of the non-parole period may operate in some circumstances to reduce the period of time which the applicant would spend in prison, it leaves the sentence unaffected as a judicial assessment of the gravity of the offence which he committed."

29 The history of the relevant sentencing legislation in New South Wales since the enactment of the 1966 Act does not indicate any blurring of the distinction between the functions of sentencing judges and those of bodies involved in determining whether a prisoner should be released on parole or on licence, when provision for release on licence existed, or by the exercise of the prerogative of mercy.

The validity of s 154A

30 As appears from the legislative history, there has been a series of changes in the law in New South Wales affecting the powers of executive authorities to release eligible prisoners on parole. The question raised in the present case is

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69 *Bugmy v The Queen* (1990) 169 CLR 525 at 538 per Dawson, Toohey and Gaudron JJ; [1990] HCA 18.

70 *Deakin v The Queen* (1984) 58 ALJR 367 at 367; 54 ALR 765 at 766; [1984] HCA 31; *Bugmy v The Queen* (1990) 169 CLR 525 at 530-531 per Mason CJ and McHugh J, 536 per Dawson, Toohey and Gaudron JJ.

71 *Elliott v The Queen* (2007) 234 CLR 38 at 42 [5] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; [2007] HCA 51.

72 *Power v The Queen* (1974) 131 CLR 623 at 629 per Barwick CJ, Menzies, Stephen and Mason JJ.

73 (1984) 154 CLR 606 at 615, see also 624 per Dawson J, Wilson J agreeing at 616; [1984] HCA 46.

whether the enactment of s 154A in its application to the plaintiff had some constitutionally impermissible interaction with or effect upon the judicial decision of McInerney J to fix a minimum term of 30 years in respect of the life sentence imposed on the plaintiff for the murder of Mr Lamb.

31 Limits upon the power of State legislatures to make laws affecting State courts and their decisions are derived by implication from Ch III of the Constitution as explained in a number of decisions of this Court beginning with *Kable v Director of Public Prosecutions (NSW)*[74]. State legislatures cannot abolish State Supreme Courts[75] nor impose upon them functions incompatible with their essential characteristics as courts, nor subject them, in their judicial decision making, to direction by the executive[76]. A State legislature cannot authorise the executive to enlist a court of the State to implement decisions of the executive in a manner incompatible with the court's institutional integrity[77]. Nor can a State legislature enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member[78]. State legislatures cannot immunise statutory decision-makers from judicial review by the Supreme Court of the State for jurisdictional error[79].

32 The plaintiff advanced as his major premise the further proposition, set out most succinctly in the Outline of Oral Argument, that State legislatures "do not have the power to enact laws which alter or detract from rights or entitlements created by, as distinct from existing independently of, the judgments or orders of State Supreme Courts in a 'matter'". The criterion of validity of a law, in relation to that limit on legislative power, was said to be whether the law effected "an

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74 (1996) 189 CLR 51; [1996] HCA 24.

75 (1996) 189 CLR 51 at 103 per Gaudron J, 111 per McHugh J, 139 per Gummow J; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 543-544 [151]-[153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 4.

76 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49.

77 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 160 [436] per Crennan and Bell JJ, 173 [481] per Kiefel J, see also 92-93 [236] per Hayne J; [2010] HCA 39.

78 *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [47] per French CJ and Kiefel J; [2011] HCA 24.

79 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1.

alteration to the right[s] or entitlements created by the relevant judgment or order — or, to put it another way, the 'effect' of that judgment or order."

33 The major premise raises some large questions. They include:

- whether a law of a State altering a judicial decision would be a purported exercise of judicial power by the legislature of the State;
- whether the State Constitution authorises the exercise of judicial power by the legislature[80];
- whether, in any event, the State legislature is prevented from enacting such a law by an implication drawn from the provisions of Ch III of the Constitution.

34 It is not necessary, in order to answer the questions raised on the special case, to decide these large questions. That is because the application of the plaintiff's major premise in this case depends upon an acceptance of his characterisation of s 154A as a law which alters the "effect" of the decision made by McInerney J. That characterisation should be rejected. On any view, s 154A did not alter or vary the sentence imposed by McInerney J in 1997. Even though directed at a small population of prisoners, including the plaintiff and his co-offender who were named in the Second Reading Speech of the amending legislation, s 154A had no effect upon the legal operation of the resentencing order. The exercise of judicial power by McInerney J was complete when the order was made. In respect of the murder of Mr Lamb, there remained one judicial sentence namely, that which was imposed in April 1997 under s 13A of the 1989 Act. His Honour's decision involved no direction to the Parole Board or its successors. By fixing a minimum term, his Honour enlivened the power of the Parole Board, under the statutory scheme then in place, to consider the plaintiff's release on parole at the expiry of the minimum term.

35 The plaintiff submitted, that the determination by McInerney J not only enlivened the power of the Parole Board to consider the plaintiff's release on parole in due course, but also gave rise to a duty on the part of the Parole Board to give consideration to his release in accordance with the provisions of the 1989 Act as it stood in April 1997. It may be assumed that that was a statutory consequence of the determination by McInerney J. It was not an element of that determination. Section 154A imposed strict limiting conditions upon the exercise of the executive power to release the plaintiff and other serious offenders the subject of a non-release recommendation. It may be said to have altered a statutory consequence of the sentence. It did not alter its legal effect.

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80 See Twomey, *The Constitution of New South Wales* (2004) at 196; cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 109 per McHugh J.

36 The distinction between the legal effect of a judicial decision and consequences attached by statute to that decision is apposite in the context of sentencing decisions and statutory regimes providing for conditional release by executive authorities. The power of the executive government of a State to order a prisoner's release on licence or parole or in the exercise of the prerogative may be broadened or constrained or even abolished by the legislature of the State. Statutes providing for executive release may be changed from time to time. In 1997, after McInerney J had resentenced the plaintiff, s 22P was inserted into the 1989 Act and, as explained earlier in these reasons, made access to parole more difficult for the plaintiff. As Gleeson CJ said in *Baker v The Queen*[81], of sentencing and custodial regimes applicable to prisoners already serving sentences[82]:

> "legislative and administrative changes to systems of parole and remission usually affect people serving existing sentences. The longer the original sentence, the more likely it is that an offender will be affected by subsequent changes in penal policy."

Consistently with that observation, as was pointed out by the Solicitor-General for Victoria, this Court said in *PNJ v The Queen*[83]:

> "It may be greatly doubted that the punishment imposed on an offender is sufficiently described by identifying only the term which the court fixes as the least period of actual incarceration that must be served ... for it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed."

37 In discussing the function of a sentencing judge in the case of a prisoner likely to be deported upon completion of his sentence, Deane, Dawson and Toohey JJ in *R v Shrestha*[84] observed that:

> "a sentencing judge is not ordinarily required or empowered to determine whether a convicted person should in fact be released on parole at some future time. He or she is concerned to decide whether a prisoner should be eligible to be considered for release on parole at that future time."

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81 (2004) 223 CLR 513.

82 (2004) 223 CLR 513 at 520 [7]. See also *Jamieson* (1992) 60 A Crim R 68 at 80 per Gleeson CJ.

83 (2009) 83 ALJR 384 at 387 [11]; 252 ALR 612 at 615; [2009] HCA 6.

84 (1991) 173 CLR 48 at 72-73; [1991] HCA 26.

Their Honours pointed out that when a person is considered by an administrative authority for release on parole factors relevant to the sentencing judge's consideration might have varied[85]:

> "by reason of change of government policy or the intervention of special circumstances, between the time of sentencing and the time when the parole authority considers whether a prisoner should be released on parole."

38 McInerney J did not and would not have been entitled to base his resentencing decision upon any assumptions about the continuity of statutory arrangements then in existence for executive determination of release of the plaintiff on parole. Section 154A did not vary or alter the resentencing decision made on 24 April 1997.

Conclusion

39 For the preceding reasons the questions in the special case should be answered as proposed in the joint judgment.

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85 (1991) 173 CLR 48 at 73.

40 GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. On 20 June 1974, following a trial in the Supreme Court of New South Wales, the plaintiff and his co-accused, Allan Baker, were convicted of the murder of Mr Ian James Lamb and for conspiring to murder Mrs Virginia Gai Morse. The conspiracy had been carried into effect by the abduction of Mrs Morse from her home in the north west of New South Wales and her murder in Queensland. Crump and Baker were sentenced to imprisonment for life and in his remarks on sentence Taylor J made strong statements to the effect that they should die in gaol.

41 At this time, s 463 of the *Crimes Act* 1900 (NSW) conferred upon the Governor a power of release on licence. Of that system, in *Baker v The Queen*[86], McHugh, Gummow, Hayne and Heydon JJ said:

> "Whilst s 463 remained in force, the judicial power to impose sentence upon a person convicted of murder was confined: the only sentence that could be passed was that the offender suffer penal servitude for life. Upon passing that sentence the judicial power was exhausted. Whether the offender served the sentence in prison or at large was a matter which then was to be decided by the Executive, not a court. If the Executive exercised the power given by s 463, the offender obtained a mercy. But in no sense (whether as a matter of substance or as a matter of form) can later legislation, altering the circumstances in which such mercy could or would be extended to a prisoner sentenced to life imprisonment, make that sentence of life imprisonment more punitive or burdensome to liberty."

42 Under this system, and the present parole system, it could not be said, as it has been said of systems in other jurisdictions[87], that the sentence is determined not in the exercise of judicial power, but by the executive branch of government.

43 Subsequently, the *Sentencing Act* 1989 (NSW) ("the 1989 Act") permitted a sentencing court imposing a determinate sentence of imprisonment to fix the minimum term to be served by an offender before being eligible for release on

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86 (2004) 223 CLR 513 at 528 [29]; [2004] HCA 45.

87 *Browne v The Queen* [2000] 1 AC 45 at 48-49. The Privy Council held that under the Constitution of St Christopher and Nevis the selection of a sentence is an integral part of the administration of justice which cannot be committed to the executive and held invalid a law which required a court to impose a sentence of detention at the pleasure of the executive.

parole and introduced a detailed system for the making of parole orders by the parole authority (then constituted by s 44 as the Offenders Review Board) in respect of prisoners who had served their minimum term. In 1992 the plaintiff applied to the Supreme Court for a determination by it of a minimum term to be served and an additional term during which he might be released on parole by the parole authority. The jurisdiction of the Supreme Court which the plaintiff invoked was conferred by s 13A of the 1989 Act, which, with effect as of 12 January 1990, had been added to the 1989 Act by the *Sentencing (Life Sentences) Amendment Act* 1989 (NSW).

44 On 10 December 1992, that application was dismissed by Loveday J and an appeal to the Court of Criminal Appeal (Mahoney JA, Hunt CJ at CL, Allen J) was dismissed on 30 May 1994.

45 Of s 13A of the 1989 Act as it stood at this time, in *Baker*[88], it was observed in the joint reasons:

> "Section 13A was an illustration of legislation which performed a double function of creating new rights and conferring jurisdiction to administer a remedy[89]. These rights and that remedy were subsequent to, and independent of, the determination of the criminal guilt of the appellant and the imposing of the sentences by Taylor J. Undoubtedly the earlier steps had appertained exclusively to the exercise of judicial power.
>
> The effect of an order under s 13A, setting for an existing life sentence both a minimum term of imprisonment and an additional term during which the prisoner might, by the exercise of statutory authority given a non-judicial body, be released on parole, is to alter or vary the order of the sentencing judge. Accordingly, the new jurisdiction conferred by s 13A may readily be seen as attracting the exercise of judicial power."

46 Thereafter, a second application under s 13A was made and heard by McInerney J. At the time of the application, sub-ss (2), (3), (4), (5), (6), (9) and (12) of s 13A provided:

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88 (2004) 223 CLR 513 at 529 [32]-[33].

89 *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 64-65 [22]-[24]; [1998] HCA 78.

"(2) A person serving an existing life sentence may apply to the Supreme Court for *the determination* of a minimum term and an additional term for the sentence.

(3) Any such person is not eligible to make such an application unless the person has served at least 8 years of the sentence concerned.

(4) The Supreme Court may, on application duly made for the *determination* of a minimum term and an additional term for a sentence:

(a) *set* both:

(i) a minimum term of imprisonment that the person must serve for the offence for which the sentence was originally imposed; and

(ii) an additional term during which the person *may* be released on parole (being either an additional term for a specified period or for the remainder of the person's natural life); or

(b) decline *to determine* a minimum term and an additional term.

(5) The minimum term *set* under this section is to commence on ..., if the person was remanded in custody for the offence, the date on which the first such remand commenced.

(6) If the Supreme Court *sets* a minimum term and an additional term under this section, the sentence comprising those terms *replaces* the original sentence of imprisonment for life.

…

(9) The Supreme Court, in exercising its functions under this section, is to have regard to:

(a) the knowledge of the original sentencing court that a person sentenced to imprisonment for life was eligible to be released on licence under section 463 of the Crimes Act 1900 and of the practice relating to the issue of such licences; and

(b) any report on the person made by the Review Council and any other relevant reports prepared after sentence (including, for example, reports on the person's rehabilitation), being in either case reports made available to the Supreme Court; and

(c) any relevant comments made by the original sentencing court when imposing the sentence; and

(d) the age of the person (at the time the person committed the offence and also at the time the Supreme Court deals with the application),

and may have regard to any other relevant matter.

…

(12) An appeal lies to the Court of Criminal Appeal in relation to:

(a) the determination of a minimum term and an additional term under this section ...

The Criminal Appeal Act 1912 applies to such an appeal in the same way as it applies to an appeal against a sentence." (emphasis added)

47 There is some uncertainty as to the means by which the determination upon an application such as that to McInerney J was implemented in the records of the Supreme Court. But it is apparent from s 13A(6) that both the determination, and the decision of the Court of Criminal Appeal on an appeal under s 13A(12), would give rise to a judgment, decree, order or sentence of the Supreme Court, being a "matter" within the meaning of s 73 of the Constitution[90].

48 On 24 April 1997, McInerney J made a determination that the plaintiff be sentenced to life imprisonment with a minimum term of 30 years from 13 November 1973, in respect of the murder conviction, and with a minimum term of 25 years, commencing on the same date, being the date of first remand in custody, in respect of the conspiracy conviction. The result for the parole system if it were to continue to operate unchanged would be that the plaintiff would become eligible on 13 November 2003 to obtain release on parole. Section 14 of

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90 cf *Wong v The Queen* (2001) 207 CLR 584 at 600 [39]; [2001] HCA 64.

the 1989 Act, as it stood at the date of the determination by McInerney J, stated that prisoners "may be released on parole" in accordance with that statute, and that a prisoner was eligible for release on parole "only if" the prisoner (a) was subject to at least one sentence with a minimum term, and (b) had served each such minimum term and was not subject to any other sentence of imprisonment without a minimum term.

49 On 9 May 1997, that is to say shortly after the determination by McInerney J, the 1989 Act was amended by the *Sentencing Legislation Further Amendment Act* 1997 (NSW). Section 13A(3) was omitted and sub-ss (3) and (3A) now provided:

> "(3) A person is not eligible to make such an application unless the person has served:
>
> (a) at least 8 years of the sentence concerned, *except where paragraph (b) applies, or*
>
> (b) *at least 20 years of the sentence concerned, if the person was the subject of a non-release recommendation*.
>
> (3A) *A person who is the subject of a non-release recommendation is not eligible for the determination of a minimum term and an additional term under this section, unless the Supreme Court, when considering the person's application under this section, is satisfied that special reasons exist that justify making the determination*." (emphasis added)

50 In *Baker*, this Court dismissed a challenge to the validity of the emphasised passages in these provisions. The contention was that s 13A purported to vest in the Supreme Court functions which were incompatible with its exercise of the judicial power of the Commonwealth. However, the Court held that there was nothing repugnant to the notion of judicial power in the legislature taking a past non-release recommendation as the criterion for the operation of a subsequent curial regime such as that provided by s 13A.

51 With effect as of 3 April 2000, the 1989 Act was repealed. The regime established by s 13A was substantially re-enacted in the *Crimes (Sentencing*

Procedure) Act 1999 (NSW) ("the Sentencing Act")[91]. The parole system was retained on the terms now set out in Pt 6 of the *Crimes (Administration of Sentences) Act* 1999 (NSW) ("the Parole Act"). Section 183 of the Parole Act constituted a Parole Board. Thereafter, the New South Wales State Parole Authority, the second defendant, was constituted by changes made to the Parole Act in 2004[92].

52 With effect as of 20 July 2001, s 154A was added, not to the Sentencing Act but to the Parole Act, by the *Crimes Legislation Amendment (Existing Life Sentences) Act* 2001 (NSW). It is the validity of s 154A which is challenged in this proceeding in the original jurisdiction of the Court.

53 By notice dated 12 September 2003 the Parole Board informed the plaintiff that by reason of s 154A he was not eligible to be released on parole. In his action in the original jurisdiction of this Court, the plaintiff complains that s 154A had the effect of stultifying the benefit or entitlement accorded to the plaintiff by the decision of McInerney J, the benefit or entitlement being that the plaintiff would be eligible for release on parole on 13 November 2003. In the period since 12 September 2003 the plaintiff has not applied to be released on parole.

54 Section 143 requires the Parole Authority to give preliminary "consideration" within specified periods to whether or not a "serious offender", and the plaintiff is one such, should be released on parole. The chapeau to s 154A reads "Serious offenders the subject of non-release recommendations". The text of s 154A states:

> "(1) Section 143 does not require the Parole Authority to give preliminary consideration as to whether or not a serious offender the subject of a non-release recommendation should be released on parole unless an application for that purpose is made to the Parole Authority by or on behalf of the offender.

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91 Section 44(4) and Sched 1, amended by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW), Sched 1 [3] and the *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act* 2005 (NSW), Sched 1 [1].

92 *Crimes (Administration of Sentences) Amendment (Parole) Act* 2004 (NSW), Sched 1 [49].

(2) An application under this section must be lodged with the Secretary of the Parole Authority.

(3) After considering the application, the Parole Authority may make an order directing the release of the offender on parole *if, and only if*, the Parole Authority:

(a) is satisfied (on the basis of a report prepared by the Chief Executive Officer, Justice Health) that the offender:

(i) is in imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person, and

(ii) has demonstrated that he or she does not pose a risk to the community, and

(b) is further satisfied that, because of those circumstances, the making of such an order is justified.

(4) In this section ***serious offender the subject of a non-release recommendation*** means a serious offender:

(a) who is serving a sentence for which a determination has been made under clause 4 of Schedule 1 to the [Sentencing Act], and

(b) who is the subject of a non-release recommendation within the meaning of that Schedule, as in force from time to time." (emphasis added)

55 It is accepted that the sentencing remarks of Taylor J on 20 June 1974 constituted a "non-release recommendation".

56 In short, the plaintiff submits that (1) the determination by McInerney J pursuant to s 13A(4) was a judgment, decree, order or sentence of the Supreme Court in a "matter", within the meaning of s 73 of the Constitution, (2) the State legislature lacked the power to set aside, vary, alter, or otherwise stultify the effect of that judgment, decree, order or sentence, and (3) in its application to the plaintiff s 154A of the Parole Act is invalid. It will be apparent that

proposition (2) involves considerations related to those engaged in *Australian Education Union v General Manager of Fair Work Australia*[93].

57 The Commonwealth, Queensland, Victoria, South Australia and Western Australia intervened in support of New South Wales, the first defendant. The Parole Authority has entered a submitting appearance.

58 Proposition (1) of the plaintiff's submissions may be accepted, but with a caveat. The caveat is suggested by what was said in the joint reasons of Gummow, Hayne, Heydon, Crennan and Kiefel JJ in *Elliott v The Queen*[94]. Their Honours observed, with respect to trials upon indictment:

> "Subject to the appellate system established by the *Criminal Appeal Act*, the exercise of judicial power with respect to the trials upon indictment of Elliott and Blessington was spent upon the subsequent imposition of the sentences upon them. The controversy represented by the indictment had been quelled and, allowing for any applicable statutory regime, the responsibility for the future of the appellants passed to the executive branch of the government of the State[95]."

59 The subsequent controversy which had been quelled by the determination of McInerney J was whether a determination under s 13A of the 1989 Act should be made, and, if so, upon what terms as permitted by that section. The responsibility of the executive branch of the government for the future of the plaintiff remained regulated by the parole system established by the 1989 Act, as amended from time to time.

60 The plaintiff's case breaks down at the stage of proposition (2). In this, as in other fields of constitutional discourse, regard properly may be had to matters of substance as well as of form and to practical as well as legal effect. The plaintiff sought to do so in developing proposition (2). However, the practical reality which, as Gleeson CJ emphasised in *Baker*[96], faces sentencing judges (including those in the position of McInerney J) is the prospect of legislative and

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93 [2012] HCA 19.

94 (2007) 234 CLR 38 at 41-42 [5]; [2007] HCA 51.

95 See the remarks of Wells J in *R v O'Shea* (1982) 31 SASR 129 at 145.

96 (2004) 223 CLR 513 at 520-521 [7].

administrative changes in parole systems. As a matter neither of form nor substance did the sentencing determination by McInerney J create any right or entitlement in the plaintiff to his release on parole. In that regard, the determination itself had no operative effect. Rather it constituted a factum by reference to which the parole system (later including s 154A) operated[97]. In particular, s 154A(3), by using the phrase "if, and only if" to govern pars (a) and (b) of that sub-section, qualified the jurisdictional facts which had to apply in order to enliven the power of the Parole Authority to make an order directing the release of the plaintiff on parole. Section 154A did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty.

61 Question 1 in the special case asks whether s 154A is invalid in its purported application to the plaintiff. It should be answered "No". Question 2 asks who should pay the costs of the special case. It should be answered "There should be no order as to costs".

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97 See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378; [1970] HCA 8; *Baker v The Queen* (2004) 223 CLR 513 at 532 [43].

62 HEYDON J. The background circumstances of this case are set out in the other judgments.

63 On 20 June 1974, Taylor J, sitting in the Supreme Court of New South Wales, sentenced the plaintiff for various violent crimes against five victims. The sentence relevant to this case is a sentence of life imprisonment for the murder of Mr Lamb. No non-parole period was fixed in respect of that sentence. Thereafter, a legislative change was made permitting the resentencing of the plaintiff. The *Sentencing Act* 1989 (NSW), s 13A, enabled persons in the plaintiff's position to apply to be resentenced for a minimum term and an additional term. The fixing of the minimum term enabled those persons to apply for parole once the minimum term had expired. The plaintiff made an application of that kind.

64 On 24 April 1997, McInerney J, sitting in the Supreme Court of New South Wales, resentenced the plaintiff for the murder of Mr Lamb to a minimum term of 30 years' penal servitude and an additional term of the remainder of his natural life. As the legislation regarding parole then stood, that order meant that on 13 November 2003, 30 years after the plaintiff's imprisonment commenced on 13 November 1973, the plaintiff would become eligible for consideration as meriting release on parole.

65 The plaintiff attacks the validity of s 154A of the *Crimes (Administration of Sentences) Act* 1999 (NSW), which introduced stringent requirements for the grant of parole, namely that as a precondition he be dying or permanently incapacitated[98]. He attacks it because he claims to believe that on 19 July 2001, the day before that section was introduced, he had some prospects of being released on parole on 13 November 2003 without having to satisfy the s 154A requirements. The plaintiff contended that under s 22C of the *Sentencing Amendment (Parole) Act* 1996 (NSW) the Parole Authority of New South Wales was obliged, at least 60 days before he became eligible for release on parole, to give preliminary consideration to whether the plaintiff should be so released. The plaintiff also contended that the Parole Authority of New South Wales was obliged to consider that question annually thereafter, so long as the plaintiff remained eligible for parole.

66 It is highly questionable whether this regime gave the plaintiff bright prospects of release on parole. He went no further than to say that he had "at the very least some prospect, however minimal, of being released". Section 22P(2)(a) and (b) of the *Sentencing Act* 1989 (NSW)[99] read in the light of

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98 See above at [54].

99 See above at [17].

Taylor J's remarks on sentence and the brutal conduct which gave rise to those remarks[100] created serious difficulties for the plaintiff.

67 But however low the plaintiff's prospects of release on parole were before s 154A was enacted, the plaintiff contends that the effect of its enactment was to reduce his prospects of release on parole radically.

68 The plaintiff argued that McInerney J's order resentencing him created in him a right or entitlement to be considered for parole under s 22C. The plaintiff submitted that the enactment of s 154A detracted from that right or entitlement: it "deprived that judicial act of one of its defining and essential characteristics, namely finality and determination of the issue before the Court". The plaintiff also contended that McInerney J's substantive determination gave the plaintiff a real prospect of release once he became eligible to apply for parole on 13 November 2003. The plaintiff argued that that was "its sole characteristic", and that the determination existed for no other reason. The plaintiff submitted that s 154A deprived McInerney J's order of that essential character. According to the plaintiff, s 154A was a legislative judgment regarding his prospects of release on parole. That legislative judgment affected the finality of McInerney J's decision. Finally, the plaintiff argued that it was beyond the power of the New South Wales legislature to enact a law that detracts from a right or entitlement created by a judicial order, or that alters its effect.

69 It is unnecessary to decide whether that last submission is correct. Even if it is correct, the crucial question is whether s 154A altered or varied McInerney J's sentence.

70 The only consequence of the order determining a minimum term was that it created an opportunity for a parole application on 13 November 2003 under the legislative scheme prevailing on 24 April 1997. The question of what a successful parole application might require on or after 13 November 2003 was a question to be answered in the light of whatever the legislation required at the relevant time. Section 154A dealt with parole. It did not deal with McInerney J's sentence. It did not deal with either the minimum term or the additional term.

71 Section 154A, therefore, did not alter either the rights and entitlements created by McInerney J's order or the effect of the order. The effect of McInerney J's order was that the plaintiff was obliged to undergo penal servitude for life. The plaintiff might have hoped that the statutory regime regarding parole at the time of McInerney J's order would still be in force when the minimum term expired. It was more benign than s 22P(2), and much more benign than s 154A. But he had no right or entitlement that that regime should

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100 See above at [2].

continue to apply to him. It was open to the legislature to alter the legislation in place when the order was made in relation to criteria for the grant of parole – either by making it easier for persons in the plaintiff's position to gain release on parole, or by making it harder. In 1997, the legislature may have made it harder when it enacted s 22P(2), but the plaintiff did not say this provision was invalid. In 2001, when s 154A was enacted, the legislature made it harder still. McInerney J's order was unaffected by these changes.

72 This Court explained in *Baker v The Queen* that the effect of the additional term was to fix a period after "which the prisoner might, by the exercise of statutory authority given a non-judicial body, be released on parole"[101]. The statutes giving the statutory authority referred to can change from time to time. The plaintiff conceded this when his counsel said: "the nature of both criteria and restrictions, criteria for release, restrictions upon release ... can obviously be affected from time to time by legislation postdating [McInerney J's] decision". This Court also said in *Elliott v The Queen*[102]:

> "What must always be unknown to a sentencing judge ... are the paths that may be taken with respect to any status quo by future legislation."

The plaintiff did not challenge the correctness of either *Baker v The Queen* or *Elliott v The Queen*. Section 154A left the terms of McInerney J's order untouched. It merely altered the conditions to be met before the plaintiff could be released on parole.

73 Given the obstacles the plaintiff already faced in gaining release on parole, s 154A could not be described as having the substantial effect of depriving the plaintiff of any real prospect of release. Even if it could be, it was not the function of McInerney J's order to give the plaintiff a prospect of release of any particular magnitude. The order had two functions. It fixed the maximum time to be served. And it fixed the minimum term. The minimum term marked the time at which the plaintiff could apply for parole, but it said nothing about the criteria for a grant of parole or the plaintiff's prospects of success in obtaining it.

74 Further, s 154A did not deprive McInerney J's order of the "defining and essential" characteristic referred to by the plaintiff. It did not remove the finality of the order. It did not alter the fact that the order determined the issue before the Court. McInerney J's order stands untouched and unaltered – penal servitude for life. All that s 154A altered was the prospect of earlier release – parole before

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101 (2004) 223 CLR 513 at 529 [33] per McHugh, Gummow, Hayne and Heydon JJ; [2004] HCA 45.

102 (2007) 234 CLR 38 at 50 [41] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; [2007] HCA 51.

the end of the plaintiff's life. That prospect depended, inter alia, on two types of contingency. One was the plaintiff's likely behaviour on release. The other was what legislation affecting parole would be in force from time to time. The plaintiff conceded that he would fail if the insertion of s 154A into the scheme in which McInerney J's order operated did no more "than to adjust in an unexceptionable way the nature of contingencies". Section 154A did no more than that.

75 Section 154A is not invalid. There should be no order as to costs. The questions in the special case should be answered accordingly.