HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

CRAIG WILLIAM JOHN MINOGUE PLAINTIFF

AND

STATE OF VICTORIA DEFENDANT

Minogue v Victoria
[2018] HCA 27
20 June 2018
M2/2017

ORDER

The questions stated by the parties in the special case filed 21 December 2017 be amended and the questions stated (as so amended) be answered as follows:

Question (a)

Is s 74AAA of the Corrections Act *1986 (Vic) ("the Corrections Act") capable of applying to the Plaintiff in circumstances where:*

(i) before the commencement of that section:

(A) the Plaintiff's non-parole period had ended or parole eligibility date had occurred; or

(B) the Plaintiff had made an application for parole; or

(C) the Board had made a decision to proceed with parole planning in respect of the Plaintiff; or

(ii) before the commencement of s 127A of the Corrections Act, the Plaintiff had commenced this proceeding?

Answer

Yes.

Question (b)

Is s 74AAA of the Corrections Act capable of applying to the Plaintiff in circumstances where it was not an element of the offence of which the Plaintiff was convicted that the Plaintiff knew, or was reckless as to whether, the deceased was a police officer as defined by s 74AAA(6)?

Answer

Yes.

Question (ba)

If the answer to question (b) is "yes", is s 74AAA capable of applying to the Plaintiff in circumstances where the sentencing court, in determining the Plaintiff's sentence, did not make a finding for the purposes of s 3(2)(a) of the Crimes Act *1958 (Vic)?*

Answer

Yes.

Question (bb)

If the answer to question (b) and question (ba) is "yes", is s 74AAA capable of applying to the Plaintiff only if he was sentenced on the basis that he knew that, or was reckless as to whether, the murdered person was a police officer as defined by s 74AAA(6)?

Answer

Yes.

Question (bc)

If the answer to question (bb) is "yes", does s 74AAA apply to the Plaintiff?

Answer

No.

Question (c)

If the answer to question (a) and question (b) is "yes", is s 74AAA and/or s 127A of the Corrections Act invalid in their application to the Plaintiff in that they do not operate consistently with the Commonwealth Constitution and the constitutional assumptions of the rule of law?

Answer

Unnecessary to answer.

Question (d)

Who should pay the costs of the special case?

Answer

The defendant.

Representation

C J Horan QC with A F Solomon-Bridge for the plaintiff (instructed by Darebin Community Legal Centre)

K L Walker QC, Solicitor-General for the State of Victoria with G A Hill for the defendant (instructed by Victorian Government Solicitor)

Interveners

M G Sexton SC, Solicitor-General for the State of New South Wales with A M Mitchelmore for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

P J Dunning QC, Solicitor-General of the State of Queensland with A D Keyes for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

P D Quinlan SC, Solicitor-General for the State of Western Australia with J L Winton for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

M J Wait SC with F J McDonald for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

CATCHWORDS

Minogue v Victoria

Criminal law – Parole – Where s 74AAA of *Corrections Act* 1986 (Vic) imposes conditions for making parole order for prisoner convicted and sentenced to imprisonment for murder of person who prisoner knew was, or was reckless as to whether person was, police officer – Where s 127A inserted into *Corrections Act* 1986 (Vic) stating s 74AAA applies regardless of whether prior to commencement of s 74AAA prisoner became eligible for parole, prisoner took steps to ask Adult Parole Board of Victoria ("Board") to grant parole, or Board began consideration of whether prisoner should be granted parole – Where prior to commencement of s 74AAA and s 127A plaintiff became eligible for parole and applied for parole and Board began consideration of whether plaintiff should be granted parole – Whether s 74AAA and s 127A apply to plaintiff.

Words and phrases – "non-parole period", "parole", "recklessness", "sentencing", "statutory construction".

Charter of Human Rights and Responsibilities Act 2006 (Vic), ss 10, 22, 28, 31, 32.
Corrections Act 1986 (Vic), ss 74AAA, 127A.
Crimes Act 1958 (Vic), s 3.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND EDELMAN JJ. On 27 March 1986 a stolen car containing an explosive device was parked in the vicinity of a number of public buildings in Melbourne, including the Russell Street Police Complex and the Melbourne Magistrates' Court building. A little after 1:00pm the explosive device was detonated. It caused serious injuries to a number of persons and the subsequent death of Angela Rose Taylor, who was a constable in the Victorian police force. Constable Taylor had been on duty in the court and was crossing the roadway in her lunch hour when the bomb exploded.

2 The plaintiff and three co-accused were charged with the murder of Constable Taylor. The Crown case relied upon the doctrine of concert or joint enterprise. The case was that the plaintiff and the other accused were parties to a common plan to explode the bomb. The Crown conceded that it could not prove the part played by any particular accused, but invited the jury to infer that each accused was a guilty participant. After a trial before a jury in the Supreme Court of Victoria, the plaintiff and one co-accused were convicted of the murder.

3 The plaintiff was sentenced by Vincent J on 24 August 1988 to a term of imprisonment for life with a non-parole period of 28 years. The plaintiff's non-parole period ended on 30 September 2016 for the purposes of the *Corrections Act* 1986 (Vic) ("the Corrections Act"). It marked his "parole eligibility date" within the meaning of reg 82 of the Corrections Regulations 2009 (Vic). It is not disputed that at this time the Adult Parole Board of Victoria ("the Board"), which is established under the Corrections Act[1], had power under s 74(1) of that Act to order that the plaintiff be released on parole. In determining whether to make a parole order, s 73A requires that the Board give paramount consideration to the safety and protection of the community.

4 The practice of the Board is that it will only consider whether to make a parole order with respect to a prisoner if the prisoner makes an application for parole. The plaintiff made such an application on 3 October 2016.

5 The procedure undertaken by the Board when an application for parole is made to it is first to make a decision as to whether to proceed to parole planning. It does so after receipt of a report from the Case Management Review Committee ("the CMRC") of the prison in which the person is detained. The CMRC's report supported the plaintiff's parole application. Such a recommendation does not bind the Board.

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1 *Corrections Act* 1986 (Vic), s 61.

6 On 20 October 2016 the Board decided to "proceed with parole planning" and to consider the plaintiff's suitability for release on parole on receipt of a Parole Suitability Assessment from Community Correctional Services ("the CCS"). An officer of the CCS was subsequently appointed to the plaintiff's case. On 25 October 2016 the plaintiff provided extensive written submissions in support of his application.

7 On 14 December 2016 s 74AAA ("the 2016 Amendment") was inserted into the Corrections Act[2]. Sub-sections (1) to (3) provide:

> "(1) The Board must not make a parole order under section 74 or 78 in respect of a prisoner convicted and sentenced (whether before, on or after this section comes into operation) to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer, unless an application for the parole order is made to the Board by or on behalf of the prisoner.
>
> (2) The application must be lodged with the secretary of the Board.
>
> (3) In considering the application, the Board must have regard to the record of the court in relation to the offending, including the judgment and the reasons for sentence."

8 "Police officer" is defined by sub-s (6) to mean a police officer:

> "(a) who, at the time the murder of that police officer occurred, was performing any duty or exercising any power of a police officer; or
>
> (b) the murder of whom arose from or was connected with the police officer's role as a police officer, whether or not the police officer was performing any duty or exercising any power of a police officer at the time of the murder."

9 The evident purpose of the 2016 Amendment, where the conditions referred to in the sub-sections set out above are present, is to limit the circumstance in which parole may be granted to a prisoner to whom it applies effectively to the end of his or her life. Section 74AAA(4) provides:

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2 *Justice Legislation Amendment (Parole Reform and Other Matters) Act* 2016 (Vic), s 3.

"After considering the application, the Board must not make a parole order under section 74 or 78 (as the case may be) in respect of the prisoner unless the Board—

(a) is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner—

(i) is in imminent danger of dying, or is seriously incapacitated and, as a result, the prisoner no longer has the physical ability to do harm to any person; and

(ii) has demonstrated that the prisoner does not pose a risk to the community; and

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

10 Sub-section (5) provides that, "[f]or the avoidance of doubt", s 73A also applies to the determination of the Board under the section.

11 When it was enacted, the 2016 Amendment did not contain any transitional provisions. On 20 December 2017 s 127A was inserted into the Corrections Act[3]. It provides:

"To avoid doubt, and without limiting the application of the amendments made by Part 2 of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* in respect of applications for parole made on or after the commencement of those amendments—

(a) the amendments made by that Part also apply to a prisoner convicted and sentenced as mentioned in section 74AAA(1), regardless of whether, before the commencement of those amendments—

(i) the prisoner had become eligible for parole; or

(ii) the prisoner had taken any steps to ask the Board to grant the prisoner parole; or

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3 *Corrections Legislation Further Amendment Act* 2017 (Vic), s 24.

(iii) the Board had begun any consideration of whether the prisoner should be should be [sic] granted parole; and

(b) the Board may, in its discretion, treat any steps taken by a prisoner to ask the Board to grant the prisoner parole, being steps taken before the commencement of those amendments, as being an application lodged with the secretary of the Board under section 74AAA(2)."

12 In January 2017, before s 127A was enacted, the plaintiff commenced proceedings in this Court. In his Amended Writ of Summons filed on 16 June 2017 he sought declarations that s 74AAA does not apply to him or to his application for a grant of parole and that it is invalid in so far as it purports to apply to him. The questions now before this Court are limited to whether s 74AAA applies to the plaintiff.

13 After commencing his proceedings, the plaintiff asked the Board not to take any further action in relation to his application for parole until the determination of these proceedings. The Board acceded to that request. At the time the parties agreed to state questions of law for the opinion of this Court arising out of the special case, the plaintiff's application for parole had not progressed beyond the steps outlined above.

The initial questions

14 The following questions were initially stated for the opinion of the Court:

"(a) Is s 74AAA of the [Corrections] Act capable of applying to the Plaintiff in circumstances where:

(i) before the commencement of that section:

(A) the Plaintiff's non-parole period had ended or parole eligibility date had occurred;

(B) the Plaintiff had made an application for parole; or

(C) the Board had made a decision to proceed with parole planning in respect of the Plaintiff; or

(ii) before the commencement of s 127A of the [Corrections] Act, the Plaintiff had commenced this proceeding?

(b) Is s 74AAA of the [Corrections] Act capable of applying to the Plaintiff in circumstances where it was not an element of the offence of which the Plaintiff was convicted that the Plaintiff knew, or was reckless as to whether, the deceased was a police officer as defined by s 74AAA(6)?

(c) If the answer to (a) and (b) is 'yes', is s 74AAA and/or s 127A of the [Corrections] Act invalid in their application to the Plaintiff in that they do not operate consistently with the Commonwealth Constitution and the constitutional assumptions of the rule of law?

(d) Who should pay the costs of the special case?"

The further questions

15 During the course of the hearing the parties stated two further questions. They are as follows (with some minor grammatical amendments to question (bb)):

"(ba) If the answer to question (b) is 'yes', is s 74AAA capable of applying to the Plaintiff in circumstances where the sentencing court, in determining the Plaintiff's sentence, did not make a finding for the purposes of s 3(2)(a) of the *Crimes Act 1958* (Vic)?

(bb) If the answer to question (b) and question (ba) is 'yes', is s 74AAA capable of applying to the Plaintiff only if he was sentenced on the basis that he knew that, or was reckless as to whether, the murdered person was a police officer as defined by s 74AAA(6)?"

The remaining question

16 If question (bb) is answered in the affirmative, there would remain only one question the answer to which may finally resolve this matter. Whether it is appropriate to do so will be discussed later in these reasons. It may be formulated as:

"(bc) If the answer to question (bb) is 'yes', does s 74AAA apply to the Plaintiff?"

Question (a)

17 There is no right or entitlement to release on parole at the expiration of a minimum term determined at sentencing[4]. It always remains a possibility that a prisoner may be required to serve the whole head sentence imposed[5]. The expiration of a minimum term has been said merely to provide an opportunity for the prisoner to be released[6] and to constitute a factum by reference to which a statutory parole system operates[7].

18 The plaintiff does not now submit that he has a right to parole. He accepts that it is a privilege which is in the grant of the Executive. The right of which he speaks is a right to have the process that he had initiated by his application for parole completed. He submits that the Board's power is engaged once it begins consideration of his application. Once it has commenced it is required to complete its task. Its task is to be completed by reference to the law that was in force prior to the 2016 Amendment, he contends.

19 A similar argument was put in *Attorney-General (Q) v Australian Industrial Relations Commission*[8]. A newly enacted section in the *Workplace Relations Act* 1996 (Cth) required the Commission to cease arbitrating if it was satisfied that the industrial dispute was covered by a State award or employment agreement. The question was whether it applied to a proceeding commenced before it was enacted. The unions submitted that they had acquired the right to have their disputes arbitrated under the pre-existing law. In the joint judgment it was explained[9] that the right asserted is more accurately described as a public

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4 *Crump v New South Wales* (2012) 247 CLR 1 at 26-27 [60]; [2012] HCA 20; *Knight v Victoria* (2017) 91 ALJR 824 at 830 [27]; 345 ALR 560 at 566; [2017] HCA 29.

5 *PNJ v The Queen* (2009) 83 ALJR 384 at 387 [11]; 252 ALR 612 at 615; [2009] HCA 6.

6 *Bugmy v The Queen* (1990) 169 CLR 525 at 538; [1990] HCA 18.

7 *Crump v New South Wales* (2012) 247 CLR 1 at 26-27 [60].

8 (2002) 213 CLR 485; [2002] HCA 42.

9 *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 502 [40].

law right to require the Commission to observe its duty to comply with the laws that exist from time to time. A right of that nature is a right to have a claim or application considered in accordance with the statute that governs its determination. Their Honours went on to say[10] that if the law is changed before an award is made, by placing additional restraints or conditions on the exercise of the power, then the obligation to make a determination according to law is correspondingly modified.

20 In the context of the executive release of prisoners on parole it has been observed in a number of cases, most recently in *Crump v New South Wales*[11], that statutes providing for parole may be expected to change from time to time, to reflect changes in government policy and practice. In rejecting the argument put by the plaintiff in *Crump* that the Parole Board was obliged to determine his application for parole by reference to the law in existence at the time that he was sentenced, Heydon J pointed out[12] that the plaintiff had no right or entitlement that the previous statutory regime should continue to apply to him. The question of what a successful parole application may require is one to be answered in the light of whatever the legislation requires at the relevant time[13]. The relevant time would be when the application for parole comes to be determined.

21 No question of an accrued right to have the plaintiff's application for parole determined by reference to the law prior to the 2016 Amendment arises. His reliance on provisions such as s 14(2) of the *Interpretation of Legislation Act* 1984 (Vic) and cases such as *Esber v The Commonwealth*[14] is misplaced. In the latter respect, s 74AAA cannot be said impermissibly to interfere with the judicial power to be exercised in these proceedings[15].

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10 *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 504 [46].

11 (2012) 247 CLR 1 at 16-17 [28], 19 [36], 20 [37], 26 [60].

12 *Crump v New South Wales* (2012) 247 CLR 1 at 28-29 [71].

13 *Crump v New South Wales* (2012) 247 CLR 1 at 28 [70].

14 (1992) 174 CLR 430; [1992] HCA 20.

15 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 563-564 [19]-[20]; [1998] HCA 54; *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 98 [26], 101-102 [42]; [2015] HCA 32.

22 In any event, the plaintiff's argument fails to take account of s 127A. Regardless of the nature of the right to have his application determined, s 127A(a) expressly provides that s 74AAA applies to a prisoner in his position. It says that s 74AAA will apply regardless of three circumstances: whether a prisoner had become eligible for parole; whether the prisoner had taken steps to ask the Board to grant parole; and whether the Board had begun consideration of whether parole should be granted. These were the three reasons identified by the plaintiff in his Second Further Amended Statement of Claim as to why s 74AAA did not apply to him.

23 The plaintiff contends that s 127A does not apply to him because it was not enacted until after he had commenced proceedings and should not be construed as operating retrospectively. He calls in aid the observation of Viscount Dilhorne in delivering the advice of the Privy Council in *Zainal bin Hashim v Government of Malaysia*[16] that for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that it was the intention of the legislature. Counsel for the plaintiff submits that that principle of construction is of particular importance in the interpretation of legislation affecting the criminal justice system or otherwise impinging on the liberty of the subject[17].

24 That contention cannot be accepted. Read in context, the opening words of s 127A, "[t]o avoid doubt", signify that the provision is declaratory of the intended operation of s 74AAA and, therefore, that s 127A operates from the date of commencement of s 74AAA[18]. As this Court has observed[19], it is open to

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16 [1980] AC 734 at 742. See also *State of Victoria v Robertson* (2000) 1 VR 465 at 472 [21] per Batt JA.

17 See *R v JS* (2007) 230 FLR 276 at 289-290 [45]-[46] per Spigelman CJ (Mason P, McClellan CJ at CL, Hidden and Howie JJ agreeing at 305 [162], 310 [194], [195], [196]); cf *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520 per Mason CJ, Wilson and Dawson JJ, 523 per Brennan J, 532 per Deane J; [1987] HCA 12.

18 See and compare *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 373-375 per Isaacs CJ; [1930] HCA 52; *Seafarers' Retirement Fund Pty Ltd v Oppenhuis* (1999) 94 FCR 594 at 598 [16].

19 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 563-564 [19]-[20]. See also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 143 [53] per French CJ, Crennan and Kiefel JJ; [2012] HCA 19.

Parliament to enact such a law notwithstanding that it may affect or even render nugatory pending proceedings.

25 The answer to question (a) is "yes".

Question (b)

26 It may be accepted, as the plaintiff points out, that s 74AAA is different from the provisions dealt with by this Court in *Crump* and *Knight v Victoria*[20]. Although the provisions in those cases and s 74AAA have in common a purpose to limit the availability of parole and although each may, to an extent, have been modelled on its predecessor, they refer to different classes of prisoner. *Crump* concerned a parole application made by "a serious offender the subject of a non-release recommendation" and the legislation in *Knight* was directed expressly to "the prisoner Julian Knight". The prisoner to whom s 74AAA applies is one who has been "convicted and sentenced … to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer" (as defined in sub-s (6)).

27 The construction which the plaintiff first advances is that for s 74AAA to apply, a prisoner must have been convicted and sentenced for an offence which has as an element knowledge of or recklessness about the identity of the person murdered as a police officer. This is said to follow from the reference to the prisoner being convicted and sentenced "for" those matters in conjunction with the murder. The plaintiff points out that he was not convicted "'for' the murder of a police officer"; and he was not convicted and sentenced "'for' the murder of a person who he knew was, or was reckless as to whether the person was, a police officer". The defendant does not suggest to the contrary.

28 The defendant points out that there never has been and there is not now an offence having these elements. There is no offence which contains as an element that the murder victim was a police officer. The plaintiff's argument would mean that s 74AAA had no operation at the time that it was enacted or now. Yet it expressly directs attention to offences committed before the section came into force. There is obvious force in these contentions.

29 The plaintiff's answer to the claim that his argument gives the section almost no operative effect is that it might apply in the future if an offence was

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20 (2017) 91 ALJR 824; 345 ALR 560.

created having those elements. Another possibility is that those questions could in the future be specifically raised at trial and a special verdict sought. A third is where a person is sentenced on the basis of specific findings to these effects.

30 These submissions cannot be accepted. The text of s 74AAA(1) does not suggest some possible future operation for the section. It is, as the defendant points out, directed to the past events of conviction and sentence. It is not a proper approach to construction to deny a provision any realistic operation. The plaintiff's third possible sphere of operation for the provisions may be taken as directed to the questions which follow, but it is not addressed to the present question.

31 The answer to question (b) is "yes".

Questions (ba) and (bb)

32 It is convenient to deal with these questions together. Both have as their basal proposition that a prisoner's knowledge or recklessness is to be understood as a circumstance connected with the sentencing of the prisoner for murder. On this approach s 74AAA(1) is taken to operate distributively. It is to be read as requiring as a fact that the prisoner has been convicted for the murder of a person who was a police officer; and as a further fact that the prisoner knew or was reckless as to whether the person was a police officer.

Construction generally

33 The first limb of the plaintiff's argument respecting question (ba) is that the reference to sentencing in s 74AAA(1) is to sentencing pursuant to s 3(2)(a) of the *Crimes Act* 1958 (Vic) ("the Crimes Act"). Section 3(2)(a) provides for a standard sentence of 30 years if the prosecution proves beyond reasonable doubt, relevantly, that the person murdered was an emergency worker and the accused knew or was reckless as to that fact. An emergency worker is defined to include a police officer[21].

34 Section 3(2)(a) could not have applied to the plaintiff when he was sentenced. It was enacted afterwards[22]. But the answer to question (ba) must in any event be "yes". True it is that the same mental conditions are referred to in

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21 *Crimes Act* 1958 (Vic), s 3(3); *Sentencing Act* 1991 (Vic), s 10AA(8).

22 *Sentencing Amendment (Emergency Workers) Act* 2014 (Vic), s 11.

s 74AAA(1), but it is apparent from a close textual comparison of the two provisions that their respective areas of operation are very different.

35 A "police officer" as defined in s 3(1) of the Corrections Act means a police officer within the meaning of the *Victoria Police Act* 2013 (Vic) ("the Victoria Police Act"). Consequently, a "police officer" within the meaning of s 74AAA(1) of the Corrections Act (as defined in s 74AAA(6)) means a police officer within the meaning of the Victoria Police Act who, at the time of the murder of that police officer, was performing any duty or exercising any power of a police officer or whose murder arose from or was connected with the police officer's role as a police officer whether or not he or she was performing any duty or exercising any power of a police officer at the time of the murder. By contrast, s 3(2) of the Crimes Act applies to the sentence to be imposed for the murder of a "custodial officer" on duty or an "emergency worker" on duty. A "custodial officer" for that purpose means a custodial officer within the meaning of s 10AA of the *Sentencing Act* 1991 (Vic)[23], which, although it includes "a police custody officer" within the meaning of the Victoria Police Act, does not include a "police officer" within the meaning of the Victoria Police Act[24]. A "police custody officer" as defined is a person employed in Victoria Police under Pt 3 of the *Public Administration Act* 2004 (Vic) who is authorised to act as a police custody officer under s 200D of the Victoria Police Act[25]. A "custodial officer" as so defined also includes: a Governor, prison officer or escort officer within the meaning of the Corrections Act; a person authorised under the Corrections Act to exercise the functions or powers of a Governor, prison officer or escort officer; and a person authorised under s 9A(1A) or (1B) of the Corrections Act to exercise functions or powers referred to in those sub-sections. An "emergency worker" means[26] a police officer or protective services officer within the meaning of the Victoria Police Act and also includes ambulance officers, fire fighters of various kinds and State Emergency Service operators of several kinds. Thus it is apparent that the range of victims to which s 74AAA applies is at once both broader and more circumscribed than the range of victims to which s 3(2)(a) of the Crimes Act applies. It is broader in as much as it applies to police officers whether or not they are on duty. It is more

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23 *Crimes Act* 1958 (Vic), s 3(3).

24 *Sentencing Act* 1991 (Vic), s 10AA(8).

25 *Victoria Police Act* 2013 (Vic), s 3(1).

26 *Sentencing Act* 1991 (Vic), s 10AA(8).

circumscribed to the extent that it only applies to police officers, whereas s 3(2)(a) of the Crimes Act applies not only to police officers but also to protective services officers, police custody officers, prison officers, escort officers and other emergency service workers.

36 Viewed in contrast to s 3(2)(a), there is nothing in the text or purpose of s 74AAA(1) to suggest as narrow an operation as that for which the plaintiff contends. Its natural reading is that whenever the circumstances provided for in s 74AAA(1) are present, s 74AAA applies.

37 Question (ba) should be answered "yes".

38 The essential issue with respect to question (bb) is how the factum that "the prisoner knew was, or was reckless as to whether the [murdered] person was, a police officer" is to be established. Clearly enough both facts – that of conviction for the murder of a police officer and that of the prisoner's knowledge or recklessness as to the person being a police officer – are required to be present before s 74AAA(4) applies. The question is by what means are they to be established.

39 Whether the deceased officer was a police officer who at the time of the murder was performing duties or exercising powers of a police officer or whose murder was connected with his or her role are all matters critical to the assessment of the nature and gravity of the crime and at least in some cases also the prisoner's moral culpability. Thus they should be readily apparent from the sentencing remarks.

40 The critical issue is how it is to be established whether at the time of the murder the prisoner knew or was reckless as to whether the victim was a police officer performing duties or exercising powers of a police officer or whose murder was connected with his or her role as a police officer ("a police officer within the meaning of s 74AAA(1)").

41 It is the plaintiff's contention that s 74AAA(1) is satisfied and s 74AAA(4) applies only if a prisoner was sentenced on the basis that he or she knew or was reckless as to whether the person murdered was a police officer within the meaning of s 74AAA(1) at the time the act causing death was committed. On this approach the Board would apply the findings made by the sentencing judge. Those findings would be the only evidence upon which the Board acts.

42 The defendant argues that the question is entirely one for the Board. It may satisfy itself about a prisoner's state of mind at the relevant time by

making such enquiries as it considers necessary. It would not be limited to the court record and sentencing remarks. It could even disagree with a finding made by the court.

43 The principal difficulty in the way of the construction for which the defendant contends is that it would seem to require the addition of words to s 74AAA(1) to make it clear that the Board is intended to satisfy itself as to the question of the prisoner's state of mind. Those drafting the sub-section could reasonably have supplied words to this effect had it been intended that the Board was to conduct an enquiry into facts other than those which formed the basis for the prisoner's sentencing. It is no function of the courts to fill in gaps in legislation[27]. There is no clear necessity for such an implication[28] in order to give sense and meaning to s 74AAA(1) construed in its context[29]. The text of s 74AAA(1) points to the sentencing process. Section 74AAA(3) requires the Board to have regard to the court record and sentencing remarks. It cannot be said to be necessary to advance the purpose of s 74AAA for the Board to undertake its own enquiry.

44 True it is that the Corrections Act gives the Board a power to "inform itself on any matter as it sees fit"[30]. But this general power is subject to particular provisions which identify the task which the Board is to undertake. There are a number of provisions in the Corrections Act from which it may be inferred that the Board is to make enquiries in order to satisfy itself about matters pertaining to a prisoner. By way of example, s 74AABA(1) provides that the Board must not make a parole order in respect of a prisoner serving a sentence of imprisonment for an offence of murder, conspiracy to murder, accessory to murder or manslaughter "unless the Board is satisfied" that the prisoner has co-operated satisfactorily in the investigation to identify the body or remains of the

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27 *Marshall v Watson* (1972) 124 CLR 640 at 649; [1972] HCA 27; *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 at 12; [1972] HCA 21; *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38]; [2014] HCA 9.

28 *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 232 CLR 314 at 332 [44]; [2008] HCA 9, quoting from *Thompson v Goold & Co* [1910] AC 409 at 420.

29 *Director-General of Education v Suttling* (1987) 162 CLR 427 at 433; [1987] HCA 3.

30 *Corrections Act* 1986 (Vic), s 71.

victim or the place where they may be found. For that purpose, sub-s (3) of that section requires the Board to have regard to certain reports and to the question of the capacity of the prisoner to co-operate in the investigation of the offence.

45 There are other provisions which expressly require the Board to consider circumstances or to make enquiries as to a prisoner's condition. Section 77(3) and (5) provide that the Board must cancel the parole of a prisoner in certain circumstances "unless the Board is satisfied that circumstances exist that justify the continuation of the parole". Section 77A(2) provides that it may revoke the cancellation of a prisoner's parole "if it is satisfied that exceptional circumstances exist". Section 78(4) contains a similar provision with respect to making a parole order where parole has been cancelled on a previous occasion. Section 77D provides that the Board may arrange for a medical, psychiatric or psychological examination of a prisoner and require a report in determining whether to make, vary, cancel or revoke the cancellation of a parole order.

46 Provisions such as these may be contrasted with s 74AAA(1), which contains no mention that the Board inform itself. It describes the prisoner to whom it is to apply by reference to ascertainable facts and s 74AAA(3) enjoins the Board to have regard to the record of the court in relation to the offending, including the judgment and reasons for sentence. The natural reading of s 74AAA(1) is that the mental element necessary is to be gleaned from what has been said by the court on sentencing. It is not necessary to resort to principles which might require a strict approach to the construction of s 74AAA(1), for which the plaintiff contends. A construction which limits the role of the Board in the way explained follows from its terms. Reference to a stricter approach, however, serves to illuminate aspects of the operation of the sub-section, properly construed.

47 The consequence of s 74AAA(4) applying is effectively to deny a prisoner an opportunity for parole. In *Smith v Corrective Services Commission (NSW)*[31] reference was made to the established principle of statutory construction that a penal statute, or one affecting a person's liberty, should be construed strictly. The Court was there dealing with a provision concerning the remission of a period of imprisonment with respect to a prisoner where parole had been revoked. It is unnecessary to decide whether this principle should be viewed as a general rule of construction, as a subsidiary rule of construction, or merely as a matter of context because, however this strict approach to construction is viewed,

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31 (1980) 147 CLR 134 at 139; [1980] HCA 49.

it reinforces the limited role for the Board with respect to s 74AAA(1). That is so regardless of the fact that the plaintiff has no right, as such, to parole, as previously discussed[32].

48 Consistently with a strict approach to construction, regard may be had to the consequences of a prisoner's state of mind being left as a matter for the Board. It is to be recalled that when sentencing a court will not take into account facts which are adverse to the interests of the accused unless they are established beyond reasonable doubt[33]. This may be contrasted with the position of the Board, which is not required to make findings to any particular standard. It is not bound by the rules of evidence or any practice or procedure applying to courts in the performance of its powers, functions or duties[34]. It is not obliged to accord natural justice[35]. It may also be borne in mind that on the defendant's construction, the Board will be making an enquiry into the state of mind of a prisoner with respect to events which occurred many years, probably decades, ago.

49 The defendant submits that to limit the Board to findings made on sentencing would prevent it taking into account any new or compelling evidence bearing upon the prisoner's state of mind at the relevant time. Admissions made whilst in prison might fall into this category. But even if s 74AAA did not apply in a particular case, it would not prevent the Board taking a matter such as this into account in determining whether to grant parole.

Construction by reference to the Charter

50 The plaintiff seeks to support his construction of s 74AAA by reference to s 32(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter"), which requires that:

> "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

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32 See [17].

33 *R v Olbrich* (1999) 199 CLR 270 at 281 [27]; [1999] HCA 54.

34 *Corrections Act* 1986 (Vic), s 71.

35 *Corrections Act* 1986 (Vic), s 69(2).

51 The Charter may be overridden by legislation[36], but the 2016 Amendment contains no such provision. The Charter applies.

52 The human rights to which the plaintiff refers are those listed in s 10(b) of the Charter, which prohibits a person being "treated or punished in a cruel, inhuman or degrading way". Section 10 is in substantially the same terms as Art 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("the Convention").

53 Section 32(2) of the Charter provides that in interpreting a statutory provision regard may be had to international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right to which the Charter applies. In *Vinter v United Kingdom*[37], the European Court of Human Rights (Grand Chamber) ("the ECHR") said[38] that there is now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is possible. The discretion of the Secretary of State to grant parole to prisoners serving a whole life minimum term was confined by a Prison Service Order, which stated that release would only be ordered in circumstances similar to those found in s 74AAA(4) in the present case. The ECHR held that it violated Art 3 because it amounted to ill-treatment. It approved observations that in such a circumstance a prisoner can never atone for his offence and his punishment continues until death[39].

54 In the course of argument it was pointed out that the construction of s 74AAA(1) for which the plaintiff contends would not render it compatible with the human right upon which he relies. It would still apply to prisoners who fulfilled the description there provided. At best, his construction might narrow the class of persons to whom it applies.

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36 *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 31.

37 (2013) 63 EHRR 1.

38 *Vinter v United Kingdom* (2013) 63 EHRR 1 at 38 [114].

39 *Vinter v United Kingdom* (2013) 63 EHRR 1 at 17-18 [54], 38 [112], referring to *R (on the application of Wellington) v Secretary of State for the Home Department* [2008] 3 All ER 248. See also cases which followed: *R v McLoughlin* [2014] 1 WLR 3964; [2014] 3 All ER 73; *Hutchinson v United Kingdom* (2015) 61 EHRR 13.

55 In further submissions provided subsequent to the hearing the plaintiff submits that s 74AAA(1) would accord with s 32(1) if a construction minimised the extent of the incompatibility with or encroachment on human rights. His construction would infringe the human rights of fewer people and would remove the Board's power to grant parole only with respect to persons who had been found by a sentencing court, or a jury on special verdict, to have had the requisite state of mind. By way of analogy, the plaintiff draws upon what has been said about the approach to construction required by the principle of legality, namely that a construction which avoids, minimises or mitigates an encroachment on rights and freedoms is to be preferred[40]. But despite the apparent logic of that submission, no jurisprudence of the ECHR or other foreign or international court was identified as supporting it.

56 It is not necessary, however, to determine whether s 32(1) can be applied in this way. The ordinary processes of construction clearly favour a narrower approach and if the Charter applied in the way contended it would lead to no different conclusion.

57 Question (bb) should be answered "yes".

Question (bc)

58 The affirmative answer to question (bb) means that there is only one further question remaining upon which the resolution of this matter depends, namely, whether s 74AAA in fact applies to the plaintiff, having regard to s 74AAA(1).

59 The defendant submits that a preferable question might be whether it would be open to the Board to conclude that s 74AAA(1) applies to the plaintiff. The submission overlooks that the defendant has itself raised the question in its pleading in this matter. It alleges that "the Plaintiff was sentenced on the basis that he knew that, or was reckless as to whether, the murdered person was a 'police officer' as defined in s 74AAA(6)". The issue is therefore before this Court. Further, all relevant evidence as to this issue is contained in the special case and the parties have addressed it in their submissions. It was for these reasons that the Court advised the parties that in the event that the answer to

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40 *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47 [43]-[44], 200 [512]; [2011] HCA 34.

question (bb) is in the affirmative, it was inclined to answer the remaining question.

60 Section 74AAA(1) refers to knowledge or recklessness on the part of the person convicted of murder as to the fact that the person murdered was a police officer. For the offence of murder, recklessness requires that the accused be aware of the probability that his or her act would cause death or grievous bodily harm[41]. It requires a subjective appreciation or actual foresight on the part of the accused of the probability of the consequence of the act to which he or she was a party[42].

61 The defendant accepts what is required for recklessness in connection with the offence of murder, but submits that for the purposes of s 74AAA(1) it might be necessary for the plaintiff only to have been aware of the possibility that the murder victim was a police officer. This approach is said to be available because the sub-section is concerned with the question of parole. It does not, however, accord with the proper construction of s 74AAA(1), which puts the approach to questions of knowledge in the context of the sentencing of the prisoner for the offence of murder. For the plaintiff to have been sentenced on the basis of his recklessness as to whether the deceased was a police officer, a finding by the sentencing judge would have been required, beyond reasonable doubt, as to the plaintiff's subjective appreciation or actual foresight of that fact and his determination to proceed regardless of it[43].

62 The defendant submits that regard should also be had to the reasons of the Court of Criminal Appeal in this matter, but that would not accord with the terms of s 74AAA, which speaks only of a person being sentenced on a particular basis. Consistently with its terms, regard could only be had to the reasons of an appellate court if it itself engaged in sentencing, that is to say, by allowing an appeal and re-sentencing.

63 The remarks of the sentencing judge contain no reference to the plaintiff's state of mind concerning the identity of the police constable who was killed.

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41 *R v Crabbe* (1985) 156 CLR 464 at 470; [1985] HCA 22.

42 *Pemble v The Queen* (1971) 124 CLR 107 at 119, 127, 135; [1971] HCA 20; *La Fontaine v The Queen* (1976) 136 CLR 62 at 68, 78, 86, 90, 94; [1976] HCA 52.

43 *Pemble v The Queen* (1971) 124 CLR 107 at 119, 127, 135.

That is understandable, given that the offence committed was indiscriminate in its possible effect with respect to victims. Whilst it was possible that police officers could be affected, so could persons working in the court and other public buildings, or people making their way along the street. No particular person or class of person was targeted by the common enterprise and this would seem to be required by s 74AAA(1) and (6).

64 The reasons of the sentencing judge reveal that the plaintiff and those with whom he acted sought to achieve a maximum effect by placing the vehicle not only in front of the Police Complex and opposite the Magistrates' Court building but also, as his Honour said, "in a major thoroughfare, close to the centre of the city of Melbourne and only a short distance from the intersection of that thoroughfare with La Trobe Street which also carries a great deal of traffic. The explosion occurred at lunchtime, on a working day, when by reason of the proximity of the Easter holiday period one might reasonably have expected the roadways and footpaths in the vicinity to be even busier than might normally be the situation."

65 His Honour found that the location selected for the bombing and the time chosen for its detonation were powerful indicators of the underlying motivation for it, namely the plaintiff and his co-accused's "hatred and contempt for this society and its institutions". There was evidence of the plaintiff's hatred of police, but there was no finding to this effect made by the sentencing judge. His Honour did make reference to "violent actions" directed against members of the police force, but this was in connection with the application of the principle of deterrence as relevant to sentencing. It was not directed to the state of mind of the plaintiff at the relevant time.

66 The plaintiff was not sentenced on the basis that he knew that the person murdered was a police officer within the meaning of s 74AAA(1) or that he was reckless as to that fact. Section 74AAA does not apply to him.

Question (c)

67 The question whether s 74AAA and s 127A are invalid as contrary to constitutional assumptions concerning the rule of law was one which drew submissions from the interveners. Given the answers to questions (bb) and (bc), it is not necessary to answer it.

Question (d)

68 The defendant should pay the plaintiff's costs.

Kiefel CJ
Bell J
Keane J
Nettle J
Edelman J

Orders

69 The questions set out above should be answered as follows:

Question (a) – Yes.

Question (b) – Yes.

Question (ba) – Yes.

Question (bb) – Yes.

Question (bc) – No.

Question (c) – Unnecessary to answer.

Question (d) – The defendant.

70 GAGELER J. The Victorian Charter of Human Rights and Responsibilities, as the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) is known[44], has as its main purpose the protection and promotion of human rights by means which include setting out the human rights which the Victorian Parliament specifically seeks to protect and promote[45], ensuring that all statutory provisions are interpreted so far as is possible in a way that is compatible with those human rights[46], imposing an obligation on all public authorities to act in a way that is compatible with human rights[47], and requiring a "statement of compatibility" with human rights to be prepared in respect of every Bill introduced into the Victorian Parliament[48].

71 The human rights which the Victorian Parliament specifically seeks to protect and promote are the civil and political rights set out in Pt 2 of the Charter. Section 6(1) of the Charter refers to them as human rights that "[a]ll persons have".

72 One of the human rights set out in Pt 2 of the Charter that all persons have is the right, set out in s 10(b), not to be "treated or punished in a cruel, inhuman or degrading way". On the widely accepted international understanding that incarcerating a person without hope of release is an affront to the inherent dignity of that person, it is not in dispute that the right set out in s 10(b) encompasses the right of a prisoner serving a life sentence to be "offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved"[49].

73 Another of the human rights set out in Pt 2 of the Charter is that set out in s 22(1), which provides that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person".

74 The Charter has an additional purpose of enabling the Victorian Parliament, in "exceptional circumstances", to make an "override declaration" expressly declaring that a statutory provision has effect despite being

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44 Section 1(1) of the Charter.

45 Section 1(2)(a) and Pt 2 of the Charter.

46 Sections 1(2)(b) and 32(1) of the Charter.

47 Sections 1(2)(c) and 38 of the Charter.

48 Sections 1(2)(d) and 28 of the Charter.

49 *Vinter v United Kingdom* (2013) 63 EHRR 1 at 17-18 [54] (quoting *R (on the application of Wellington) v Secretary of State for the Home Department* [2008] 3 All ER 248 at 268-269 [39(iv)]), 37-38 [110]-[114].

incompatible with one or more of the human rights in the Charter[50]. To the extent that an override declaration is made in respect of a statutory provision, the requirement to interpret that provision in a way that is compatible with human rights does not apply[51].

75 Consistently with the founding principles of the Charter that "human rights are essential in a democratic and inclusive society" and that "human rights belong to all people without discrimination"[52], the legislative process for making an override declaration is constrained in two ways. First, the exceptional circumstances that justify the override declaration are to be explained in a statement made to the House of the Victorian Parliament in which the Bill for the legislation containing the override declaration is introduced[53]. Second, an override declaration expires after five years, but may at any time be re-enacted[54].

76 The first of those constraints on the legislative process for making an override declaration ensures that, before the Victorian Parliament chooses to enact a provision that is to have effect despite being incompatible with a human right of any person, it is required to confront that choice squarely and is placed in a position to evaluate the justification for that choice. The second ensures that a person's human rights once overridden cannot be permanently forgotten. The justification for that person's human rights being overridden must be periodically re-evaluated.

77 When in 2014 the Victorian Parliament enacted s 74AA of the Corrections Act[55], prohibiting the Board from making a parole order in respect of the prisoner Julian Knight unless, amongst other things, the Board is satisfied that he "is in imminent danger of dying, or is seriously incapacitated"[56], the Victorian

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50 Sections 1(3)(a) and 31 of the Charter.

51 Section 31(6) of the Charter.

52 Preamble to the Charter.

53 Section 31(3) and (5) of the Charter.

54 Section 31(7) and (8) of the Charter.

55 Section 3 of the *Corrections Amendment (Parole) Act* 2014 (Vic).

56 Considered in *Knight v Victoria* (2017) 91 ALJR 824; 345 ALR 560; [2017] HCA 29.

Parliament made an override declaration. It specifically declared that the Charter "has no application to this section"[57].

78 When in 2016 the Victorian Parliament came to enact s 74AAA of the Corrections Act[58], prohibiting the Board from making a parole order in respect of a prisoner within the class of prisoners described in s 74AAA(1) unless substantially similar conditions are satisfied, the Victorian Parliament chose not to make an override declaration. That was in spite of the Minister who introduced the Bill for s 74AAA opining, in the statement of compatibility which she laid before the Legislative Assembly, that the constraint on granting parole imposed by the section "may induce a sense of hopelessness in an offender" incompatibly with the human rights in both s 10(b) and s 22(1) of the Charter[59].

79 Against the background of that expression of opinion in the statement of compatibility, the State in this proceeding did not attempt to argue that the limitations imposed by s 74AAA(4) of the Corrections Act on the making of a parole order subjected the human rights of a prisoner within the class of prisoners described in s 74AAA(1) only to what s 7(2) of the Charter describes as "such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom". Because it condemns each of them to a life without hope, the operation of s 74AAA(4) is incompatible with the human rights set out in ss 10(b) and 22(1) of the Charter of every prisoner within the class of prisoners identified in s 74AAA(1).

80 Because s 32(1) of the Charter was relegated to the periphery of the argument, however, this case is not an appropriate occasion for this Court to revisit the important question of the content of the requirement of that provision that "[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights" if all questions concerning the construction of s 74AAA(1) can be resolved in a manner which excludes Mr Minogue from the class of prisoners identified in s 74AAA(1) without reference to s 32(1). Not without hesitation, I am persuaded that they can.

81 None of the four competing interpretations of the class of prisoners described in the text of s 74AAA(1) advanced by the parties in argument can be ruled out by reference to s 35(a) of the *Interpretation of Legislation Act* 1984

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57 Section 74AA(4) of the Corrections Act.

58 Section 3 of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act* 2016 (Vic).

59 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 December 2016 at 4725.

(Vic)[60] ("the Interpretation of Legislation Act") as failing to promote the statutory purpose of the insertion of s 74AAA into the Corrections Act. That purpose was identified in the *Justice Legislation Amendment (Parole Reform and Other Matters) Act* 2016 (Vic) ("the 2016 Amendment Act") in terms no more specific than "to amend [the Corrections Act] ... in relation to conditions for the making of a parole order in relation to a prisoner convicted and sentenced to a term of imprisonment with a non-parole period for the murder of a police officer"[61]. The parties pointed in the course of argument to no statutory reference or extrinsic material which would serve to define that statutory purpose with more precision or which would indicate a parliamentary intention to confine that statutory purpose more narrowly.

82 The first two of the competing interpretations were advanced by Mr Minogue alone. The first was that the prisoner needed to be convicted of the non-existent offence of murder of a police officer of which knowledge that, or recklessness as to whether, the victim was a police officer is an element. The second was that the prisoner needed to be convicted only of the offence of murder but needed to be sentenced under s 3(2)(a) of the Crimes Act. The interpretations are to be rejected because neither interpretation is textually open for reasons elaborated by the plurality: the first gives no work to the bracketed reference in s 74AAA(1) to a prisoner convicted and sentenced before s 74AAA came into operation, and the second can explain part but not all of the definition of "police officer" in s 74AAA(6).

83 The remaining interpretations of the class of prisoners described in the text of s 74AAA(1) were advanced by the State. The third, which the State advanced only in the alternative and which Mr Minogue also took up in the alternative, was that the prisoner needed to be convicted of the offence of murder and needed to be sentenced on the basis that the prisoner knew that, or was reckless as to whether, the victim was a police officer. The fourth, which the State advanced alone, had two variations. On the first variation, the prisoner needed to be a person of whom the Board was satisfied that he or she was convicted and sentenced for murder and of whom the Board was satisfied that he or she knew that, or was reckless as to whether, the victim was a police officer. On the second variation, the prisoner needed to be a person who as an objective fact was convicted and sentenced for murder and who as an objective fact knew that, or was reckless as to whether, the victim was a police officer.

84 The first variation of the fourth interpretation of s 74AAA(1) can be excluded on the basis that it too is not textually open for reasons again elaborated

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60 See *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 262; [1990] HCA 41.

61 Section 1(a)(i) of the 2016 Amendment Act.

by the plurality: it involves reading into s 74AAA(1) a requirement for satisfaction on the part of the Board in the face of requirements for satisfaction on the part of the Board appearing expressly both in s 74AAA(4)(a) and (b) and in s 74AABA(1), which were also introduced by the 2016 Amendment Act.

85 The remaining interpretations, being the third interpretation and the second variation of the fourth interpretation, are, in my opinion, open on the text of s 74AAA(1). There is, to that limited extent, a "constructional choice" to be made[62].

86 The question of whether a prisoner is within the class of prisoners defined by the third interpretation of s 74AAA(1) or within the class defined by the second variation of the fourth interpretation of s 74AAA(1) is on either of those competing interpretations a question of the prisoner's state of mind at the time of committing the offence of murder which must be answered objectively. If in dispute, it must be answered by a court in civil proceedings for pre-emptory declaratory relief or for judicial review of action or inaction of the Board purporting to apply s 74AAA. The difference between the two interpretations lies in the scope of the factual inquiry informing that determination.

87 On the third interpretation of s 74AAA(1), the factual inquiry into the prisoner's state of mind is limited to the facts found by the sentencing judge which formed the basis of the sentence imposed on the prisoner. On established principle, those are facts which the sentencing judge would have needed to have found proved beyond reasonable doubt on the evidence led at trial[63]. On the second variation of the fourth interpretation, in contrast, the court in the later civil proceedings would be permitted and required to re-examine the record of the criminal trial (as it might perhaps be supplemented in the civil proceedings by other evidence) so as to make its own finding on the balance of probabilities as to the prisoner's state of mind.

88 The third interpretation is, in my opinion, to be preferred because it involves no supplementation of the established system of criminal justice by which questions of fact as to a prisoner's state of mind at the time of committing an offence are ordinarily determined once and for all at the criminal trial for that offence and because it avoids entirely the spectre of inconsistent findings in criminal and civil proceedings. Against the background that "a convicted

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62 Cf *Momcilovic v The Queen* (2011) 245 CLR 1 at 50 [50]; [2011] HCA 34. See generally Brysland and Rizalar, "Constructional Choice", (2018) 92 *Australian Law Journal* 81.

63 *R v Olbrich* (1999) 199 CLR 270 at 281 [25]-[27]; [1999] HCA 54; *Filippou v The Queen* (2015) 256 CLR 47 at 69-70 [64]; [2015] HCA 29. See also ss 4 and 141 of the *Evidence Act* 2008 (Vic).

prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication"[64], my opinion is that the third interpretation is also to be preferred because, by producing the narrower class of prisoners to which s 74AAA(4) has the potential to apply in comparison with the only textually available alternative interpretation of s 74AAA(1), it affords the greater prospect of a prisoner in the position of Mr Minogue, through demonstrated rehabilitation and subject to appropriate safeguards, experiencing some measure of the common law right to liberty[65].

89 The third interpretation is accordingly to be preferred without needing to form any view as to whether it is also required by s 32(1) of the Charter. On that interpretation, the reference in s 74AAA(1) to "a prisoner convicted and sentenced (whether before, on or after this section comes into operation) to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer" is to a prisoner convicted of the offence of murder and sentenced on the basis that the prisoner knew that, or was reckless as to whether, the victim was a police officer.

90 For these reasons, I agree with the answers proposed by the plurality to questions (b), (ba) and (bb) concerning the construction of s 74AAA(1).

91 Although the answer to question (bb) strictly renders an answer to question (a) unnecessary, question (a) is proposed to be answered in the affirmative by the plurality. It is appropriate that I express my agreement with that answer.

92 My agreement with the answer to question (a) is sufficiently based on a straightforward reading of s 127A of the Corrections Act. Whether Mr Minogue would have had an accrued right, within the meaning of s 14(2)(e) of the Interpretation of Legislation Act, to have his eligibility for parole considered in accordance with the Corrections Act as it stood before the commencement of the 2016 Amendment Act is a topic on which I prefer to express no view. If he did, s 127A of the Corrections Act manifests a contrary intention within the meaning of s 4(1)(a) of the Interpretation of Legislation Act sufficient to displace the application of s 14(2)(e) of the Interpretation of Legislation Act on and from the commencement of the 2016 Amendment Act.

93 By declaring the applicability of s 74AAA to a prisoner who had become eligible for parole before the commencement of the 2016 Amendment Act in unqualified terms, s 127A sufficiently manifests that contrary intention

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64 *Raymond v Honey* [1983] 1 AC 1 at 10, 14.

65 *Williams v The Queen* (1986) 161 CLR 278 at 292; [1986] HCA 88.

notwithstanding that Mr Minogue commenced this proceeding before s 127A itself was enacted. For the reasons given by Spigelman CJ in *Attorney-General (NSW) v World Best Holdings Ltd*[66], I consider that the Privy Council in *Zainal bin Hashim v Government of Malaysia*[67] overstated the strength of the common law presumption that retrospective legislation will not be interpreted to interfere with rights in issue in pending proceedings unless the statutory language is such that "no other conclusion is possible than that that was the intention of the legislature". As Mason JA had earlier stated in *Bawn Pty Ltd v Metropolitan Meat Industry Board*[68]:

> "Once it is accepted that the general principle of construction recognizes that a statute may operate retrospectively so as to disturb and alter substantive rights which accrued before the commencement of the statute, provided that the statutory intention in that behalf is manifested with sufficient clarity, it is not easy to see why any different rule should be applied to the possible operation of the statute on rights which have already accrued, but are the subject of pending proceedings, at the time when the statute commences to operate. True it is that in the latter case an added element of injustice may arise in the form of a liability to costs in circumstances in which the award of costs lies not in the discretion of the court, but follows automatically the result of the litigation. Nevertheless, it does not seem that the injustice which will or may result from an interference with substantive rights in pending suits is in general so much greater that a stronger presumptive rule should be applied in such a case, in particular a rule which, according to its formulation, insists on a specific or explicit reference to rights in pending actions as an essential preliminary to the application of the new statute to those rights."

94 Finally, for the reasons given by the plurality, I agree with the proposed answer to question (bc) to the effect that Mr Minogue is outside the class of prisoners to which s 74AAA(1) refers with the result that s 74AAA(4) does not apply to him. I also agree with the proposed answers to questions (c) and (d).

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66 (2005) 63 NSWLR 557 at 570-574 [48]-[66].

67 [1980] AC 734 at 742.

68 (1970) 72 SR (NSW) 466 at 487.

95 GORDON J. The plaintiff is serving a life sentence for murder with a non-parole period of 28 years. The deceased was an on-duty police officer crossing the road during her lunch hour. The earliest date on which the plaintiff could be released on parole under s 74 of the *Corrections Act* 1986 (Vic) ("the Act") was 30 September 2016, which was the end of the plaintiff's "non-parole period"[69] – the plaintiff's "parole eligibility date"[70].

96 On 3 October 2016, the plaintiff submitted a parole application form to the Adult Parole Board[71].

97 On 13 October 2016, a case management review committee decided that the plaintiff's application met the requirements for a parole application. On 20 October 2016, the Board decided to "proceed with parole planning" and to consider the plaintiff's suitability for release on parole on receipt of a Parole Suitability Assessment from Community Correctional Services ("CCS") within Corrections Victoria. A CCS officer was appointed and the plaintiff made a written submission in support of his application for parole.

98 Then, on 14 December 2016[72], s 3 in Pt 2 of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act* 2016 (Vic) commenced operation, inserting s 74AAA into the Act. Section 74AAA applies to "a prisoner convicted and sentenced … to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer"[73]. The section provides that parole may not be granted to such a prisoner unless the Board is satisfied that the prisoner is in imminent danger of dying, or is so seriously incapacitated that, as a result, the prisoner no longer has the physical ability to do harm to any person, *and* the prisoner has demonstrated that they do not pose a risk to the community[74]. In its terms, it limits the possible grant of parole to a narrow window at the end of the prisoner's life.

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69 For the purposes of s 74 of the Act.

70 reg 82(1) of the Corrections Regulations 2009 (Vic).

71 Established under s 61 of the Act.

72 s 2(1) of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act* 2016 (Vic).

73 s 74AAA(1) of the Act.

74 s 74AAA(4) of the Act.

99 On 1 January 2017, the plaintiff brought these proceedings in this Court and, by an amended statement of claim filed in June 2017, sought declarations that s 74AAA did not apply to him or his application for a grant of parole and that s 74AAA was invalid insofar as it purports to apply to the plaintiff or to the consideration of the grant of parole to the plaintiff.

100 Then, on 20 December 2017[75], s 24 of the *Corrections Legislation Further Amendment Act* 2017 (Vic) commenced operation, inserting s 127A into the Act. Section 127A relevantly provides that, "[t]o avoid doubt", the amendments made by Pt 2 of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act* 2016 (Vic) (inserting s 74AAA) apply to a prisoner *regardless* of whether before the commencement of those amendments the prisoner had become eligible for parole, the prisoner had taken any steps to ask the Board to grant the prisoner parole, or the Board had begun any consideration of whether the prisoner should be granted parole[76]. By his second further amended statement of claim, the plaintiff also challenges the validity of s 127A.

101 The seven questions stated for the opinion of the Court are set out in the reasons of other members of the Court. For the following reasons, in addition to those set out in the reasons for judgment of Kiefel CJ, Bell, Keane, Nettle and Edelman JJ, I agree with the answers there proposed.

102 I agree that, on the proper construction of the Act, s 74AAA applies only if the prisoner was convicted and sentenced for the murder of a police officer and the prisoner knew, or was reckless as to whether, the person murdered was a police officer. Those facts may be, but do not need to be, an element of the offence for which the prisoner was convicted and sentenced. (In this case they were not.) The Board must have regard to the record of the court[77] in relation to the offending, including the judgment and reasons for sentence[78], in satisfying itself of the existence of those ascertainable facts. The task of the Board is confined. If the court did not find those facts, the section does not apply to a prisoner.

103 I wish, however, to say something more about two aspects of the plaintiff's argument: that s 74AAA takes away or infringes a right or entitlement

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75 s 2(1) of the *Corrections Legislation Further Amendment Act* 2017 (Vic).

76 s 127A(a) of the Act.

77 As to the content of the record of the court, see Chitty, *A Practical Treatise on the Criminal Law*, (1847), vol 1 at 720 cited in Turner, *Kenny's Outlines of Criminal Law*, 19th ed (1966) at 553 [650] n 1.

78 s 74AAA(3) of the Act.

of the plaintiff and, further, that s 74AAA (either alone or in conjunction with s 127A) operates retrospectively. The points are closely related. Both of these points should be rejected. Both fail at the first hurdle – the proper construction of the Act.

Infringe or take away right?

104 At the expiration of a minimum term fixed by a sentencing judge, the Act does not provide for or grant any right or entitlement to release on parole and the plaintiff did not contend otherwise[79]. A minimum term does no more than set a period during which a person is not eligible to be released on parole[80]. That was the position prior to the introduction of s 74AAA. The Act provided, and still provides, that the Board *may* make a parole order[81]. Prior to the enactment of s 74AAA, the only express criterion governing the Board's decision under s 74(1) was the requirement in s 73A for the Board to give paramount consideration to the safety and protection of the community.

105 And, under the Act or otherwise, a prisoner has no right, entitlement or expectation that the Board's jurisdiction concerning an application for parole would be governed by the statutory regime in force at their "parole eligibility date" or when an application for parole is submitted.

106 In October 2016, the Board, having considered the plaintiff's application, decided to "proceed with parole planning" in order to consider the plaintiff's suitability for release on parole. That "decision" of the Board does not have any statutory effect. That "decision" does not enliven any statutory entitlement, or accrued right or expectation, to a grant of parole or to have a parole application determined by reference to any particular criteria under the Act. In fact, prior to the enactment of s 74AAA(1), which includes the words "unless an application … is made to the Board by or on behalf of the prisoner", there was no statutory requirement for a prisoner to make an application for parole. Rather, it was a "practice" (not a statutory requirement) to require a prisoner to make an application for parole to the Board. There was nothing that the Act required the plaintiff to do and, therefore, nothing for him to "enliven".

107 The Act reflects that it is the executive that has the power or retains the privilege to order a prisoner's release on parole and, further, that the system to determine the exercise of that power or privilege may be amended from time to

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79 See *Knight v Victoria* (2017) 91 ALJR 824 at 830 [27]; 345 ALR 560 at 566; [2017] HCA 29.

80 *Knight* (2017) 91 ALJR 824 at 830 [27]; 345 ALR 560 at 566.

81 s 74(1) of the Act.

time, both legislatively and administratively, to reflect changes in policy and practice[82].

108 In short, s 74AAA did not take away or infringe any right or entitlement to parole because, prior to the enactment of that section, the Act did not give or grant any such right or entitlement to parole.

Retrospective?

109 Those provisions of the Act also provide a complete answer to the plaintiff's contention that s 74AAA – either alone or in conjunction with s 127A – operates retrospectively. That contention proceeds from the premise that before the enactment of one or both of those provisions the plaintiff had some right or entitlement. As just explained, the plaintiff did not have a right or entitlement under the Act *capable* of being withdrawn by s 74AAA. The plaintiff's position, legally and factually, both prior to and after the enactment of s 74AAA, never rose higher than a *possibility* that the Board may make a parole order by reference to the applicable criteria at the time when his application for parole was determined. The fact that the Board's assessment of whether or not a parole order should be made is subject to different conditions following the enactment of s 74AAA does not alter that conclusion.

110 Section 74AAA operates prospectively[83]. It did not seek to, and does not, "readjust rights and burdens ... and upset otherwise settled expectations"[84] that have existed for any period, let alone any significant period. On its proper construction, s 74AAA takes the prisoner as it finds them[85] – convicted and sentenced for an offence of a particular kind. It is then necessary to consider s 127A. It did not operate retrospectively[86]. As the opening words of s 127A

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82 *Crump v New South Wales* (2012) 247 CLR 1 at 19-20 [36]-[37], 26 [60]; [2012] HCA 20.

83 See generally *Maxwell v Murphy* (1957) 96 CLR 261 at 267; [1957] HCA 7; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 309 [57]-[58]; [1998] HCA 20.

84 *United States v Carlton* 512 US 26 at 37 (1994) citing *Connolly v Pension Benefit Guaranty Corporation* 475 US 211 at 229 (1986) and *Usery v Turner Elkhorn Mining Co* 428 US 1 at 16 (1976).

85 See *R v Roussety* (2008) 24 VR 253 at 264 [18].

86 cf *Zainal bin Hashim v Government of Malaysia* [1980] AC 734 at 742 cited in *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 at 487 [132] and *State of Victoria v Robertson* (2000) 1 VR 465 at 471-472 [21].

expressly state, s 127A is "[t]o avoid doubt" about the intended operation of s 74AAA. It is declaratory of the operation of s 74AAA and operates from the date of commencement of s 74AAA. And, as has just been explained, it was not capable of affecting or infringing any right or entitlement because the plaintiff had no right or entitlement to parole or to any particular system adopted to determine whether the executive would exercise the power, or privilege, to grant parole.

111 Retrospective legislation is somewhat "distasteful" – even more so when retrospective legislation takes away accrued rights[87]. But this is not a matter where society in general, or this plaintiff in particular, has ordered their affairs on a basis that is withdrawn, infringed or negatived retrospectively by legislation. In the future, if legislation or some particular provision in an Act was enacted which had that effect, those issues would need to be addressed. But that question, and therefore where the line might be drawn, does not arise here and does not need to be addressed.

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87 *Boral Windows v Industry Research and Development Board* (1998) 83 FCR 215 at 221.