Never to be released

Stephanie Patterson reports on *Crump v State of New South Wales [2012] HCA 20*

Introduction

In *Crump v State of New South Wales* [2012] HCA 20, the plaintiff (Mr Crump) commenced proceedings in the original jurisdiction of the High Court challenging the constitutional validity of s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) in its application to Mr Crump. Section 154A was introduced in 2001. Section 154A operated to effectively prevent Mr Crump (as an offender who had been the subject of a non-release recommendation) from obtaining parole unless he was in imminent danger of dying or permanently incapacitated. Section 154A had this operation notwithstanding that in 1997, Justice McInerney of the Supreme Court of NSW had made an order setting a minimum term of imprisonment of 30 years, which term expired in November 2003, after which Mr Crump would be eligible for release on parole.

Factual and legislative background

In 1973, Mr Crump was sentenced to life imprisonment for the murder of Mr Ian Lamb, and also to life imprisonment for conspiracy to murder Ms Virginia Morse. The sentencing judge, Justice Taylor of the Supreme Court of New South Wales, declined to fix a non-parole period, and expressed the view that Mr Crump should never be released.

In 1989, amendments were made to sentencing legislation in NSW, and as part of those amendments, s 13A was introduced into the *Sentencing Act 1989* (NSW). That provision provided that a person who was serving an existing life sentence, and who had served at least eight years of that sentence, could apply to the Supreme Court for the determination of a minimum term of imprisonment that the person must serve and an additional term during which the person might be released on parole.

In 1997, upon an application made by Mr Crump pursuant to s 13A of the Sentencing Act, McInerney J made an order replacing Mr Crump's life sentence with a minimum term of 30 years and an additional term of the remainder of Mr Crump's natural life in respect of the murder conviction (his Honour made a similar order, but with a minimum term of 25 years, in respect of the conspiracy to murder conviction). The effect of McInerney J's order was that, if the system of parole continued to operate unchanged[1], Mr Crump would become eligible for release on parole in November 2003.

However, in 2001, s 154A was introduced in to the Administration of Sentences Act. Section 154A provided that, in relation to an offender who was the subject of a non-release recommendation, the parole authority may make an order directing release of the offender on parole if, and only if:

(a) the offender was in imminent danger of dying or was incapacitated to the extent that he or she no longer had the physical capacity to do harm to any person; and

(b) the offender had demonstrated that he or she did not pose a risk to the community.

Mr Crump was the subject of a 'non-release recommendation' (and s 154A therefore applied to him) because of the views expressed by Taylor J when the life sentences were imposed in 1974.

The plaintiff's argument

The basis of Mr Crump's challenge was that s 154A varied or detracted from an entitlement created by McInerney J's order. The plaintiff claimed that because Ch III of the *Constitution* establishes an 'integrated national court system'[2] and because the power to vary or alter judgments or orders is a part of the judicial power for which Ch III provides, the Parliament of New South Wales did not have the power to enact a provision such as s 154A, which had the effect of varying or detracting from an entitlement created by an order made by a judge of the Supreme Court.

The judgments of the High Court

The High Court held that s 154A did not have the effect of altering an entitlement created by McInerney J's order, or of varying his Honour's order.

The majority (Gummow, Hayne, Crennan, Kiefel and Bell JJ) held that in considering the effect of s 154A, it was necessary to have regard to the substance and practical effect of McInerney J's sentencing determination. Their honours concluded that it did not create any right or entitlement on the part of Mr Crump to release on parole. Instead, that determination did not itself have any operative effect, but rather was a fact upon which the parole system (as subsequently

amended by s 154A) operated.[3] Therefore, s 154A did not alter or vary the order made by McInerney J, and so the constitutional question did not arise.

Chief Justice French agreed with the reasons in the joint judgment.[4] His Honour also emphasised that there is a 'clear distinction' between the judicial function exercised by judge in imposing a sentence, and the administrative function exercised by a parole authority in determining whether a person eligible for release on parole should be released.[5] His Honour observed that s 154A imposed strict conditions upon the exercise of *executive* power to release Mr Crump, and it thereby altered what had been the statutory consequences of the sentence imposed by McInerney J. However, his Honour concluded, contrary to Mr Crump's case, that s 154A did not alter the legal effect of the sentence.[6]

Justice Heydon held that the only consequence of McInerney J's determination of a minimum term was that it created an opportunity for a parole application in November 2003 under the legislative scheme governing parole applications, and s 154A only operated on such a parole application, by altering the conditions which must be met before Mr Crump could be released on parole. Section 154A did not deal with the sentence determined by McInerney J, and it therefore did not alter any rights or entitlements created by his Honour's order.[7]

Having concluded that s 154A did not have the effect contended for by the plaintiff, it was unnecessary for the High Court to embark upon any analysis to identify what limits Ch III of the *Constitution* might impose upon a state parliament's power to legislate in a manner which alters or varies orders made by a court.

Endnotes

1. *Crump v State of New South Wales* [2012] HCA 20 at [48] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
2. *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 102, 112, 138.
3. *Crump v State of New South Wales* [2012] HCA 20 at [60] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
4. *Crump v State of New South Wales* [2012] HCA 20 at [5] per French CJ.
5. *Crump v State of New South Wales* [2012] HCA 20 at [28] per French CJ.
6. *Crump v State of New South Wales* [2012] HCA 20 at [35] per French CJ.
7. *Crump v State of New South Wales* [2012] HCA 20 at [70]-[72] per Heydon J.

Motor accident compensation

Daniel Hanna reports on the decision in *Nominal Defendant v Wallace Meakes* [2012] NSWCA 66 (4 April 2012)

On 4 April 2012 the NSW Court of Appeal delivered a leading decision on section 34 of the *Motor Accidents Compensation Act 1999* (NSW). It is also the first major decision on the 'due inquiry and search' test in Nominal Defendant cases since 1975.

Background

Wallace Meakes, a solicitor, was injured on 1 August 2008. He was a pedestrian who was attempting to cross Park Street, near the corner of Elizabeth Street in the Sydney CBD. It was 4.00pm and the traffic was congested. Being in a hurry to get to an appointment, he did not check the pedestrian signals before crossing.

Just before Mr Meakes completed his crossing, he was hit by a car. The driver stopped, got out of the car and spoke with him. Mr Meakes then left the accident scene. He did not take down the details of the car or driver before leaving. A few days later he reported the accident to the police and returned to the scene to find witnesses. A couple of employees at the nearby Starbucks had seen the accident, but nobody had taken down the registration details of the car.

Section 34(1) of the *Motor Accidents Compensation Act 1999* (NSW) provides that an action for the recovery of damages in respect of death of or injury to a person caused by the fault of the owner or driver of a motor vehicle may, if the identity of the vehicle cannot be established, be brought against the Nominal Defendant. However, subsection (1AA) provides that a claim cannot be made against the Nominal Defendant under s 34 unless due inquiry and search has been made to establish the identity of the motor vehicle concerned.

In the District Court trial the Nominal Defendant, represented by Allianz, contested due inquiry and