SUPREME COURT OF QUEENSLAND

CITATION:	*Psaila v Dept of Corrective Services* [2005] QCA 16
PARTIES:	**PAUL ANTHONY PSAILA** (applicant/respondent) **v** **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent/appellant)
FILE NO/S:	Appeal No 11059 of 2004 SC No 8255 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	2 February 2005
JUDGES:	de Jersey CJ, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Declaration made on 15 December 2004, together with the order for costs, be set aside** **3. Declaration that none of the period between the respondent's release on post-prison community-based release on 23 November 1998, and the respondent's recommencing to serve the unexpired portion of his term of imprisonment, on 6 May 2003, is to be regarded as time served in respect of that term of imprisonment** **4. A warrant issue for the arrest of the respondent, to lie in the Registry for seven days prior to any execution of the warrant** **5. The respondent pay the appellant's costs of the hearing below, and of the appeal, to be assessed on the standard basis**
CATCHWORDS:	CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – where respondent's parole was cancelled under s 185 *Corrective Services Act* 1988 (Qld) – where s 190(1) of that Act provided that no time of prisoner's release on parole is

regarded as time served in respect of that term – whether cancellation of parole constituted a transaction past and closed – whether, by virtue of s 268 *Corrective Services Act* 2000 (Qld), s 152 of that Act applied so that time between respondent's release on parole and his breach of parole condition counts as time served.

Service and Execution of Process Act 1992 (Cth)

Acts Interpretation Act 1954 (Qld), s 20(2), s 20(3)
Corrective Services Act 1988 (Qld), s 32(1), s 33(1), s 185, s 189, s 190(1)
Corrective Services Act 2000 (Qld), s 6(1), s 7(1), s 8(1), s 85, s 150, s 152, s 268

Geraldton Building Co Pty Ltd v May (1977) 136 CLR 379, 400, followed

COUNSEL: P A Keane QC, with M O Plunkett, for the appellant
R J Douglas SC, with G R Mullins, for the respondent

SOLICITORS: Crown Solicitor for the appellant
Quinn Scattini for the respondent

Introduction

[1] **de JERSEY CJ**: The *Corrective Services Act* 2000 (Qld) ("the new Act") repealed the *Corrective Services Act* 1988 (Qld) ("the old Act"), as from 1 July 2001. Each Act contains provisions relating to post-prison community-based release (to which I will refer, for convenience, as parole), including as to the consequences of cancellation of parole where a condition of the parole has been contravened.

[2] Under the old Act (s 190), on the resumption of imprisonment, consequent upon the cancellation of parole for breach, no part of the period between release and reimprisonment was to be regarded as time served. The position is different under the new Act (s 152), in that the period between release on parole and contravention of the parole condition does count as time served.

[3] In this case, the respondent's parole was cancelled on 31 August 2000, during the pendency of the old Act, for a contravention which occurred on 16 May 2000. The respondent had relocated to Victoria, and was not taken back into custody until 6 May 2003, during the pendency of the new Act.

[4] In his judgment given on 15 December 2004, the learned primary Judge held that the period during which the respondent was on parole, until the date of breach of the parole condition, being the period 23 November 1998 to 16 May 2000, counted as time served under the sentences which had been imposed in the District Court. To reach that conclusion, His Honour relied on a transitional provision of the new Act (s 268). The appellant challenges the correctness of the learned Judge's construction of that provision.

Factual background in more detail

[5] On 8 May 1997 the respondent pleaded guilty in the District Court to multiple counts of housebreaking, stealing, false pretences, receiving and entering a dwelling

house. He was sentenced to four years imprisonment, with a recommendation that he be considered for parole after serving 12 months of that term.

[6] The West Moreton Regional Community Corrections Board released the respondent on parole, on 23 November 1998, under s 165 and s 175 of the old Act. Then on 16 May 2000, the respondent failed to report as directed, in breach of a condition of the parole order.

[7] The same Community Corrections Board cancelled the parole of the respondent, on 31 August 2000. The Board acted under s 185 of the old Act, relying on the respondent's failure to report as directed on 16 May 2000, and also upon failure to notify a change of address. A warrant was issued for the apprehension of the respondent, under s 188 of the old Act.

[8] The new Act commenced on 1 July 2001, and the old Act was repealed as from that date.

[9] On 28 October 2002, a Magistrate issued a warrant for the arrest and conveyance of the respondent to a prison. The respondent was taken back into custody at Broadmeadows in Victoria on 6 May 2003. An extradition order was made two days later, and on 9 May 2003, the respondent was returned to the custody of the appellant in Queensland at the Arthur Gorrie Correctional Centre.

[10] On 15 May 2003 the West Moreton Community Corrections Board invited the respondent to show cause within 21 days why it should change its decision in relation to the cancellation of his parole. Having considered the respondent's submissions, the Board on 13 June 2003 determined not to change its original decision to cancel the parole.

The legislation

[11] The new Act effected two major policy changes: the prospect of remissions of up to one-third of a sentence for an offence committed after 1 July 2001 was excluded (s 75); and so-called "street time" – between release on parole and contravention of the parole condition – was now to be counted as time served (s 152).

[12] Under the old Act, street time was not counted as time served. Section 190(1) provided:

> "**190(1)** Upon the cancellation of a prisoner's parole, the original warrant of commitment or other authority for the prisoner's imprisonment or detention shall again be in force and no part of the time between the prisoner's release on parole and the prisoner recommencing to serve the unexpired portion of the prisoner's term of imprisonment or detention, other than the period (if any) during which the prisoner was kept in custody consequent upon the prisoner's parole being suspended, shall be regarded as time served in respect of that term."

[13] By contrast, s 152 of the new Act relevantly provides as follows:

> "(1) This section applies if a prisoner's post-prison community based release order is cancelled –

(a) under section 150(1)(a)(i) because the prisoner contravened a condition of the order; or…

(2) The time for which the prisoner was released under the order before 1 of the following events happens counts as time served for the prisoner's period of imprisonment –

(a) the prisoner contravened the condition mentioned in subsection (1)(a)…"

[14] When the Board cancelled the respondent's parole on 31 August 2000, it was not, obviously enough, acting under s 150 of the new Act: it was proceeding under s 185 of the old Act. Without more, therefore, s 152 of the new Act could have no application – s 190 of the old Act had already ordained that none of the street time should be regarded as time served. Because of s 20(2) of the *Acts Interpretation Act* 1954 (Qld), that consequence was unaffected by the repeal of the old Act on 1 July 2001.

[15] The contention of the respondent, accepted by the learned Judge, was, and remains, that the transitional provision, s 268 of the new Act, operates to give the respondent the benefit of s 152 of the new Act. The terms of s 268 are:

"(1) This section applies to an authority –

(a) that was made under a provision of the repealed Acts; and

(b) in relation to which there is a corresponding provision under this Act; and

(c) that was in force immediately before the commencement of this section.

(2) The authority continues in force according to its terms, as if it had been made under the corresponding provision of this Act, with the changes necessary –

(a) to make it consistent with this Act; and

(b) to adapt its operation to the provisions of this Act.

(3) In this section –

authority means an approval, authorisation, certificate, classification, decision, declaration, determination, direction, delegation, guideline, home detention instrument, leave of absence instrument, parole or other order, permit, policy, procedure, register, transfer instrument or other authority."

The approach of the primary Judge

[16] The learned Judge held that the determination to cancel the respondent's parole amounted to an "authority" within the meaning of s 268, which was "continued in force" as if made under "the corresponding provision of (the new Act)".

[17] His Honour reasoned that:

(a) "the term 'authority' [in s 268 of the new Act] includes a parole order but it includes also any 'other order' as well as a 'decision', although such a decision would have to be one

which could be seen as in some sense authoritative and which had an operation which was current 'immediately before the commencement of this section'" [17];

(b) "[t]he relevant authority for this prisoner's imprisonment was the order of the District Court made on 8 May 1997 by which he was sentenced. The cancellation of the parole was not in itself the authority for the further imprisonment of the applicant." [20];

(c) "at least in one respect, the cancellation order had a continuing operation" by permitting the issue of a warrant for the respondent's arrest [20].

His Honour then proceeded to conclude as follows:

"The magistrate's power to issue the warrant under s 189 depended upon *the continued operation* of the cancellation order." [20];

"At least in that way the, the *cancellation order had a continuing operation* as at the commencement of the current Act. It was an *order in the nature of a continuing 'authority'*, at least because it authorised an application to a magistrate pursuant to s 189 of the repealed Act." [21];

"According to s 268(2) then, the *cancellation order continued in force* according to its terms, as if it had been made under s 150, with the changes necessary to make it consistent with the current Act and to adapt its operation to the Act's provisions." [22];

"This example indicates at least one reason why the Parliament would have intended an order made under the repealed Act *for the cancellation of parole to have a continuing operation* as if made under the current Act." [23];

"In my conclusion, s 268 has the effect that *a cancellation order still in operation* at the commencement of the current Act, *continued to have an effect* in all respects as if made under the corresponding provision in s 150 or s 151, and that it is to be treated as a cancellation order under that provision so as to engage s 152." [27].

(Italics added)

Analysis of submissions on appeal

[18] Section 268 was apparently intended to ensure that an authority which, as at 1 July 2001, was operative in the sense that it still had "work to do", would be continued in force, operating consistently with the new Act. Accordingly, s 268(2)(b) refers to adapting its "operation" to the provisions of the new Act.

[19] The appellant submits that whereas the cancellation order, when made, had immediate legal consequences under the old Act (reviving the original authority for the respondent's imprisonment, and disallowing street time in respect of that

imprisonment), it thereafter had no continuing operation: it was spent. Accordingly, it was submitted, it was not relevantly "in force" as at 1 July 2001, within the meaning of s 268(1)(c).

[20] In rejecting that submission, the learned Judge held that the continuing operation of a cancellation order, as at the commencement of the new Act, was illustrated by the dependence of the Magistrate's power to issue a warrant under s 189 of the old Act, on the continued operation of the cancellation order. It was, however, the warrant itself, not the cancellation order, which authorised the apprehension and reincarceration of the respondent, whether issued by a board (s 188(2)) or a Magistrate (s 189(2)). The lawful basis for the respondent's detention from 9 May 2003 was the original sentencing order, and the warrants issued for the respondent's apprehension. The warrants could not have been issued had parole not been cancelled, of course, but that does not mean that the cancellation order is to be regarded as in force and operating, as at the commencement of the new Act, in the sense conveyed by s 268.

[21] The point is that no reliance on s 268 was necessary in order to justify the appellant's holding the respondent in custody when the respondent was returned under the new Act. That is because lawful authority to hold the prisoner in custody arises from the order of the court which imposed the sentence of imprisonment in the first place (s 32(1), s 33(1) old Act, s 6(1), s 7(1), s 8(1) new Act); the recording of the sentence in accordance with the *Criminal Practice Rules* (r 35(1)(b) *Criminal Practice Rules* 1990 (Qld), r 9(1)(b) *Criminal Practice Rules* 1999 (Qld)); and the presentation of the person to be detained, together with the record of sentence, at a corrective service facility.

[22] Mr Douglas SC, who appeared for the respondent, submitted that "the cancellation order was the start, not the end of the process securing further detention of the respondent", pointing out that until the reincarceration occurred, any calculation of the balance time to be served "lay inchoate". But that does not mean that the cancellation order, while an important historical circumstance, retained an operative character which would satisfy s 268.

[23] Mr Douglas also relied on the circumstance that following the respondent's re-incarceration, the corrections board followed the procedure under s 150(5) and s 150(6) of the new Act. Other matters aside, the fact that the Board may have proceeded in a particular way cannot regulate the construction of a provision such as s 268.

[24] I accept the submission for the appellant, that the cancellation of the parole constituted a "transaction past and closed" (*Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379, 400), with the consequences spelt out by the old Act.

[25] But even if the cancellation order should be regarded as "in force", for purposes of s 268(1)(c), it is, by s 268(2), continued in force, "according to its terms". In other words, it is still to be regarded as a cancellation order, although as if made under the new Act. Changes would only be made if "necessary" to make it consistent with the new Act, and to "adapt its operation" to the provisions of the new Act. Section 268 fastens on the operative character of the authority, not its consequences. No change

to the cancellation order would be "necessary" to adapt its operation to the provisions of the new Act.

[26] If the cancellation order is to be regarded as an authority under s 268, it must be noted that the order was made under s 185 of the old Act. The "corresponding provision" of the new Act, for purposes of s 268(1)(b), would be s 150. Accordingly, the authority would by s 268 be continued in force as if made under s 150 of the new Act. That does not however mean that it becomes "necessary" to change it "to adapt its operation" to the provisions of the new Act. Simply put, it could operate without engrafting the consequences of s 152 of the new Act. The contrary position had already come into effect, under s 190 of the old Act.

[27] If the legislature had intended to give all prisoners the benefit of "street time" after 1 July 2001, it would have said so in clear and unambiguous terms. Such expression is entirely lacking. In my respectful view the learned Judge adopted a construction of s 268 which, with relation to the circumstances of this case, was impermissibly broad.

[28] There is an additional consideration arising from the two policy changes to which I referred at the outset. As mentioned there, the new Act effected two major policy changes: the prospect of remissions of up to one-third of a sentence for an offence committed after that date was excluded, and street time was now to be counted as time served. I accept the submission made by the appellant, that the policy changes effected by the new Act may be seen as involving a "trade off". It would be surprising were it intended the new Act be construed in such a way as would leave the respondent with the benefit under the old Act of being considered for remissions (removed from the new Act), and also the benefit under the new Act of counting street time (not available under the old Act).

[29] For these reasons, I respectfully consider that the learned Judge erred, and that none of the period for which the respondent was free on parole, or unlawfully at large, fell to be counted as time served under the sentence to which he was subject.

Orders

[30] I would order:

1. that the appeal be allowed;
2. that the declaration made on 15 December 2004, together with the order for costs, be set aside;
3. that it be declared that none of the period between the respondent's release on post-prison community-based release on 23 November 1998, and the respondent's recommencing to serve the unexpired portion of his term of imprisonment, on 6 May 2003, is to be regarded as time served in respect of that term of imprisonment;
4. that a warrant issue for the arrest of the respondent, to lie in the Registry for seven days prior to any execution of the warrant; and
5. that the respondent pay the appellant's costs of the hearing below, and of the appeal, to be assessed on the standard basis.

[31] **WILLIAMS JA**: I agree with the orders proposed by the Chief Justice, but it is desirable that I state my own reasons for so concluding. I will not repeat unnecessarily non-contentious matters found in the reasons of the Chief Justice.

[32] The critical argument advanced by senior counsel for the respondent is that the process of cancelling the respondent's parole was ongoing or continuing at the time the *Corrective Services Act* 2000 (Qld) ("the 2000 Act") came into force and in consequence by operation of s 268 of that Act the actual cancellation of the parole in question was effected, or was deemed to be effected, under s 150 of that Act. Whether or not there is substance in that submission depends upon the proper construction and effect of the relevant provisions of both the *Corrective Services Act* 1988 (Qld) ("the 1988 Act") and the 2000 Act.

[33] In order to answer the question so raised it is necessary to have regard to a series of events which were not factually disputed.

[34] On 8 May 1997 the respondent pleaded guilty to 56 counts on an indictment alleging a variety of property offences. He was sentenced on some counts to imprisonment for four years and on others to imprisonment for two years. It was then recommended that he be considered eligible for release on parole after serving 12 months. A calendar pursuant to Order VIII rule 3 of the *Criminal Practice Rules* 1900 (Qld) was made recording that sentence. Pursuant to the terms of that rule that calendar "shall be sufficient warrant for the execution of the judgment thereby appearing to have been pronounced." (See now rule 62 of the *Criminal Practice Rules* 1999 (Qld)). The execution of the judgment clearly involved taking the respondent into custody and that was recognised by s 32(1), s 33(1), and s 35 of the 1988 Act. By the latter provision the relevant corrective services officer had to be given the calendar made out pursuant to the *Criminal Practice Rules* 1900 (Qld). [Those provisions are really based on the common law. Traditionally the pronouncing of judgment (sentence) was sufficient authority for the arrest and detention of the offender: see Halsbury (3rd edition) volume 10 para 1219 and now s 49(1) of the *Prison Act* 1952 (UK).]

[35] The respondent was then released on parole on 23 November 1998 by order of the West Moreton Regional Community Corrections Board of that date. A number of conditions were included in that parole order which was made pursuant to the provisions of s 165 and s 175 of the 1988 Act and the period of parole extended to 12 May 2001.

[36] At a meeting on 31 August 2000 the relevant Board considered a report evidencing the respondent's failure to comply with conditions of the parole order and in consequence a "cancellation order" was made pursuant to s 185 of the 1988 Act. Also on that date members of the Board issued a warrant for the respondent's return to custody; that step was taken pursuant to s 188 of the 1988 Act.

[37] In consequence of the cancellation of parole s 190(1) of the 1988 Act then applied; it is in these terms:

> "Upon the cancellation of a prisoner's parole, the original warrant of commitment or other authority for the prisoner's imprisonment or detention shall again be in force and no part of the time between the prisoner's release on parole and the prisoner recommencing to serve the unexpired portion of the prisoner's term of imprisonment or detention, other than the period (if any) during which the prisoner was kept in custody consequent upon the prisoner's parole

> being suspended, shall be regarded as time served in respect of that term."

[38] Given the clear wording of that statutory provision I am of the view that, by its operation, as and from 31 August 2000 the respondent was obliged to serve the whole of the unexpired portion of the term of imprisonment imposed on 8 May 1997, that is four years imprisonment less the time spent in custody between 8 May 1997 and release on parole on 23 November 1998.

[39] There is no doubt that between 31 August 2000 and the coming into force of the 2000 Act the respondent could have been arrested and returned to custody either pursuant to the original warrant of commitment (the calendar of 8 May 1997) or the warrant issued by the Board on 31 August 2000. If he had been so taken into custody prior to the coming into force of the 2000 Act then it is beyond dispute that he would have been legally obliged to serve the whole of the unexpired portion of his sentence as defined above and would not have been entitled to credit for time spent on parole.

[40] The respondent was not taken into custody prior to the coming into force of the 2000 Act; he was apparently in Victoria where he continued criminal activity.

[41] The repeal of the 1988 Act did not affect the operation of s 190 thereof; the consequences of the cancellation of parole provided for by that section had continuing effect (see s 20(2)(b), s 20(2)(c), s 20(2)(d) and s 20(3) of the *Acts Interpretation Act* 1954 (Qld)). On the coming into force of the 2000 Act both the cancellation order of 31 August 2000 and the warrant issued on that date constituted an "authority" for purposes of s 268 of that Act. In consequence s 268(2) applied:

> "The authority continues in force according to its terms, as if it had been made under the corresponding provision of this Act, with the changes necessary –
> (a) to make it consistent with this Act; and
> (b) to adapt its operation to the provisions of this Act."

[42] To my mind s 268 is essentially procedural. It is designed to enable orders made pursuant to the 1988 Act to be implemented pursuant to the 2000 Act; it does not alter substantive rights and obligations derived from the earlier legislation. I cannot read into s 268 anything which would result in the requirement that the respondent serve the whole of the unexpired portion of his sentence, not counting "street time", derived from s 190 of the 1988 Act, being altered. Prior to coming into force of the 2000 Act he was obliged to serve the unexpired portion of his sentence as defined above, and nothing in s 268 alters that. Upon being taken into custody after the 2000 Act had come into force the respondent was obliged by s 150(4)(b) of that Act "to serve the unexpired portion of the period of imprisonment to which the prisoner was sentenced." That period was determined on 31 August 2000 when the cancellation order was made.

[43] It was after the 2000 Act came into force that it became known that the respondent was residing in Victoria. The warrant issued by the Board on 31 August 2000 could not then be executed in Victoria because it was not within the then definition of "warrant" found in the *Service and Execution of Process Act* 1992 (Cth); relevantly that Act then provided that a warrant had to be issued by a Magistrate and not a

Board. Because of that a warrant was issued by a Magistrate on 28 October 2002 pursuant to s 150(2)(b) of the 2000 Act for the arrest of the respondent and that warrant was executed on 8 May 2003. In his reasons for judgment the learned Judge at first instance said "there was no other authority" than s 150(2)(b) for a Magistrate to issue such a warrant. In my respectful view he erred in so observing.

[44] As at October 2002 the original warrant, the calendar of 8 May 1997, was in force and in my view was within the definition of "warrant" in the *Service and Execution of Process Act*; therefore reliance could have been placed on that warrant in order to secure the arrest of the respondent in Victoria.

[45] Further, s 85 of the 2000 Act clearly applied to the respondent. He was then a prisoner "unlawfully at large" as defined therein, and a Magistrate could have issued a warrant for his arrest under that section which was capable of being executed in Victoria pursuant to the provisions of the *Service and Executive of Process Act*. If recourse was had to s 85 then the argument which found favour with the learned Judge at first instance, and on which the respondent relies on the hearing of the appeal, would have been irrelevant.

[46] It must be accepted, however, that the warrant on which the respondent was arrested recited that the respondent's parole had been cancelled pursuant to s 150 of the 2000 Act. As already noted the cancellation order of 31 August 2000 had legal effect under the 2000 Act, and for the purpose of taking further procedural steps it was to be regarded (given s 268) as a cancellation order made under the 2000 Act. It followed that it was appropriate for a Magistrate to issue a further warrant relying on the provisions of s 150(2)(b) of that Act and for that purpose it was not wrong to recite cancellation under s 150. But that does not mean the parole was in law cancelled pursuant to s 150 with the consequences flowing from s 152.

[47] If the respondent had been taken into custody at a time when the 1988 Act was still in force then s 190(2) of that Act would have been applicable. Pursuant to it a relevant Board could have ordered that the prisoner "serve such part only of the unexpired portion of the term of imprisonment … as is specified in the order." In other words the relevant Board had the power to ameliorate the effect of the cancellation order if it thought it appropriate. But, of course, that provision had been repealed by the time this respondent was taken into custody.

[48] That is why when this respondent was returned to custody the procedural provisions found in s 150(5), s 150(6) and s 150(7) were applied to him. By operation of s 150(4) he was obliged to "serve the unexpired portion of the period of imprisonment to which [he] was sentenced" and that was the period determined by operation of the 1988 Act on cancellation of his parole. By giving the respondent notice under s 150(5) the Board was in a position to ameliorate the effect of the cancellation of parole under the 1988 Act if it considered it appropriate to do so. That was a procedure which gave greater recognition to principles of natural justice than did its forerunner found in s 190(2) of the 1988 Act. But the mere fact that those procedural provisions of the 2000 Act applied to the respondent does not mean that his parole was in law cancelled pursuant to s 150 of the 2000 Act.

[49] Section 152 of the 2000 Act deals with the effect of an order pursuant to s 150 cancelling a parole order (in the Act of 2000 called a "post-prison community based

release order"). By operation of s 152(2) where such an order is so cancelled the time during which the prisoner was released under the order counts as time served for the prisoner's period of imprisonment. But that can only apply if the order is cancelled under s 150. As is already made clear in these reasons it is my conclusion that it cannot be said that the parole order of 23 November 1998 was cancelled by an order made under s 150 of the 2000 Act; it was finally cancelled by an order made on 31 August 2000 pursuant to s 185 of the 1988 Act with the consequences provided for by s 190 of that Act.

[50] Whilst I agree with the learned Judge at first instance that the cancellation order of 31 August 2000 continued in force under the 2000 Act for purposes of enabling the respondent to be arrested and returned to custody, and to enable consequential procedural steps to be taken, I cannot accept on the proper construction of the various statutory provisions in question that the cancellation order was not complete until after the 2000 Act came into force. The order was perfected on 31 August 2000 and it had the immediate consequences provided for by s 190 of the 1988 Act. But as an order cancelling parole and providing a legal basis for the respondent's arrest it was an order that had continuing legal effect under the 2000 Act. Section 268 only necessitated there be such changes to that order as made its enforcement possible under the 2000 Act. As s 150(4)(b) of the 2000 Act provided for service of the unexpired portion of the period of imprisonment there was no inconsistency between the legal consequences of the order under the 1988 Act and enforcement provisions under the 2000 Act. In consequence there was no basis in law for concluding that the cancellation order had to be treated as if made under s 150 of the 2000 Act with the result that the respondent received the benefit of s 152(2) thereof.

[51] The 2000 Act clearly evidenced a change of policy on the part of the legislature. Prior to then "street time" was not counted as time spent pursuant to the sentence, whereas after the 2000 Act came into force cancellations of parole pursuant to s 150 of that Act resulted in "street time" being counted as part of time served pursuant to the sentence. That change was recognised by the learned Judge at first instance and the critical passage in his reasoning is the following:

> "As the legislature has seen fit to implement a policy that prisoners be allowed the benefit of their time on parole notwithstanding its cancellation, the more likely legislative intention was to have that policy applied to all prisoners for whom the question would still be relevant. That is consistent with the language of s 268, which is to make an authority, including a parole cancellation order, continue to operate as if made under the corresponding provision of the current Act. In my conclusion, s 268 has the effect that a cancellation order still in operation at the commencement of the current Act, continued to have effect in all respects as if made under the corresponding provision in s 150 or s 151, and that it is to be treated as a cancellation order under that provision so as to engage s 152." [27]

[52] That, with respect, is the reasoning I cannot accept. If that reasoning be correct then the conclusion therein expressed would apply to all prisoners still serving time whose parole had been cancelled under the 1988 Act and who had been taken back into custody before the 2000 Act came into force. For such prisoners the order cancelling parole has continuing legal effect because that order is necessary in order to establish that their continued detention is lawful. If the legislature had intended

that all orders cancelling parole made pursuant to the provisions of the 1988 Act and where the prisoner was still in custody when the 2000 Act came into force, were to have effect as if made under s 150 of the 2000 Act, then specific legislative provision would have been required. There is in my respectful view no basis for inferring a legislative intention derived from s 268 of the 2000 Act that all orders made under the 1988 Act should have all the legal consequences of an order made under s 150 of the 2000 Act.

[53] The source of power for making the cancellation order with respect to the respondent's parole was s 185 of the 1988 Act and the consequences specified in s 190 thereof followed. There is nothing in the 2000 Act to vary the obligation thereby imposed on the respondent.

[54] The critical submission of senior counsel for the respondent was that the "completion of the cancellation" of parole was not reached until a reasonable time had elapsed after the prisoner was taken into custody, such being the time within which the prisoner could seek an order ameliorating the initial cancellation order. On that argument cancellation of the respondent's parole was not complete until some time after May 2003; as completion of the order occurred after the 2000 Act came into force the cancellation order was made thereunder. I cannot accept the validity of that reasoning. A final order having legal consequences was made on 31 August 2000. The fact that that order had some continuing operation under the 2000 Act did not mean that it was in some way incomplete. The fact that the respondent's rights as a prisoner after being taken into custody after the 2000 Act came into force were derived from that Act does not result in the order of 31 August 2000 having some altered legal consequences.

[55] I agree with the orders proposed by the Chief Justice.

[56] **MACKENZIE J:** The relevant chronology for the purposes of this appeal is that the respondent was convicted of offences on 8 May 1997 for which he was sentenced to concurrent terms of imprisonment, the highest of which was four years with a recommendation that he be considered for parole after serving 12 months. He was released on 23 November 1998 by a parole order under s 165 of the *Corrective Services Act* 1988 (Qld) ("the 1988 Act"). On 16 May 2000 he failed to report as directed, breaching a condition of his parole order. In consequence of this, his parole was cancelled on 31 August 2000 by an order of the Regional Corrections Board which had released him. A warrant for his apprehension was issued pursuant to s 188 of the 1988 Act under the hand of two of the members of the Board. Then, for relevant purposes, on 1 July 2001, the *Corrective Services Act* 2000 (Qld) ("the 2000 Act") came into force. Following receipt of information that the prisoner was in Victoria, an application was made to a Magistrate pursuant to s 150(2) of the 2000 Act for a warrant which issued on 28 October 2002. On 6 May 2003 the respondent was arrested in Victoria and returned to custody in Queensland on 9 May 2003.

[57] The effects of the order of the Regional Board cancelling the respondent's parole, according to s 190(1) were that:

(a) the original warrant of commitment or other authority for his imprisonment was in force again; and

(b) no part of the time between his release on parole and his recommencement to serve the unexpired part of the term of imprisonment was to be regarded as time served in respect of that term.

(Although not relevant for present purposes it was also an offence against s 177(1) of the 1998 Act to breach a condition of a parole order.)

[58] During the period when the prisoner was released on parole, he was regarded as still being under sentence and as not having suffered the punishment to which he had been sentenced (s 184, 1998 Act).

[59] The effect of the cancellation of the respondent's parole was that liability to serve, in custody, the whole of that part of the sentence from the date of release to the expiry of the four years imprisonment crystallised. The existence of the power under s 190(2) of the 1998 Act to direct, by order, that the prisoner serve only part of the unexpired portion of his term of imprisonment is separate and distinct from the cancellation itself. The existence of a power to subsequently make a direction of that kind does not render the original decision to cancel parole contingent or provisional, contrary to the submission to this effect by the respondent. The same applies to s 152(3) and the procedure in s 150(5), s 150(6), s 150(7) and s 150(8) of the 2000 Act.

[60] The process for returning the person liable to serve the unexpired period of imprisonment to actual custody was provided for in s 188 and s 189 of the 1988 Act, which relevantly authorised the issue of warrants, in cases where parole has been cancelled by a Regional Board, by two members of the Board (s 188(1)(c)), or a Magistrate (s 189(1)(c)). In the present case the warrant under s 188 was issued at a time when such a warrant could not be executed under the *Service and Execution of Process Act* 1992 (Cth). The warrant issued on 28 October 2002, after the 2000 Act had come into force, was issued under s 150(2)(d) which is identical in practical terms to s 189(1)(c) of the 1988 Act. Under the 2000 Act, there was also power to arrest a prisoner unlawfully at large without warrant (s 85(1)(a); s 85(6) proceeds on the premise that a prisoner whose post-prison community based release has been cancelled is thereafter unlawfully at large. The same would have been the case under the 1988 Act, at least by reason of s 190(1) and s 184).

[61] Section 152 of the 2000 Act approaches the question of credit for time spent on post-prison community based release differently from s 190(1) of the 1988 Act. Section 152(2) of the 2000 Act provides that the time for which the prisoner was released under the order before, inter alia, contravention of a condition of a post-prison community based release order, counts as time served for the prisoner's period of imprisonment. It seems probable that the change of approach to the treatment of time spent on post-prison community based release prior to breach was associated with the abolition of remission.

[62] The focal issue in the present appeal is posed by the learned trial judge in para [13] of his reasons, which is as follows:

> "…. had the applicant's parole been cancelled after the commencement of the current Act, then by s 152, the cancellation would have given him credit, as time served, for the period from his release until the contravention of the condition of his parole order.

> The question is whether s 152 also has that effect in the present case, where the cancellation was made under the repealed Act."

He concluded that, save for the transitional provision in s 268 of the 2000 Act, the respondent's obligation with regard to serving unexpired imprisonment would have been that prescribed by the 1988 Act.

[63] Section 268 provides as follows:

> "**268 Authorities**
>
> (1) This section applies to an authority—
> (a) that was made under a provision of the repealed Acts;
> and
> (b) in relation to which there is a corresponding provision under this Act; and
> (c) that was in force immediately before the commencement of this section.
>
> (2) The authority continues in force according to its terms, as if it had been made under the corresponding provision of this Act, with the changes necessary—
> (a) to make it consistent with this Act; and
> (b) to adapt its operation to the provisions of this Act.
>
> (3) In this section—
> ***authority*** means an approval, authorisation, certificate, classification, decision, declaration, determination, direction, delegation, guideline, home detention instrument, leave of absence instrument, parole or other order, permit, policy, procedure, register, transfer instrument or other authority."

[64] The learned trial judge's reasoning in concluding that each of the prerequisites for the operation of s 268 of the 2000 Act were satisfied in the case of an order cancelling parole, was that the order had continuing operation in that it authorised, up to the date when the 2000 Act came into force, an application to a Magistrate for a warrant. It was therefore in force immediately before the commencement of s 268. There was also a corresponding provision, s 150 of the 2000 Act. He concluded that the cancellation order under the 1988 Act was an "authority" which had the necessary characteristics to enliven s 268. It followed from s 268(2), that the cancellation order continued in force according to its terms as if it had been made under the corresponding provision of the 2000 Act, with changes necessary to make it consistent with the 2000 Act and to adapt its operation to the provisions of the 2000 Act.

[65] The learned trial judge rejected an interpretation relied on by the appellant below, that s 268 operated to have the cancellation order treated for some purposes and for some provisions of the 2000 Act, as if made under it but not for the purpose of the operation of s 152. He concluded that once the cancellation order was an authority

to which s 268 applied, upon the prisoner's apprehension, the unexpired portion of the period of imprisonment to which he had been sentenced was to be calculated in accordance with s 152(2) of the 2000 Act.

[66] Regretfully, I do not agree with this conclusion. In my view, the proper resolution of the matter is dictated by s 190 of the 1988 Act. Once an order was made under s 185(1) cancelling the prisoner's parole, the consequences of s 190(1) were, firstly, that the original warrant of commitment or other authority for the prisoner's imprisonment again came into force and, secondly, that no part of the time between the prisoner's release on parole and his recommencing to serve the unexpired portion of the term of imprisonment was credited. The order cancelling parole, having triggered those consequences, is spent insofar as the future liability of the prisoner is concerned.

[67] So far as the facilitating provisions for returning the prisoner to a prison to serve the imprisonment are concerned, the fact that parole had been cancelled by an order of the Regional Board provided authority for a warrant to be issued by the Board (s 188, 1988 Act), and for a Magistrate to issue a warrant (s 189(1)) so that the consequence of the cancellation of parole, that the respondent be returned to custody to serve the period fixed by the 1988 Act could be perfected. There is a corresponding provision to each of those sections in s 150(2) of the 2000 Act. Section 268 of the 2000 Act, if applicable, would permit a warrant issued under s 150(2) to operate as authority for the prisoner's arrest. If s 268 were not applicable, s 20 of the *Acts Interpretation Act* 1954 (Qld) would permit the prisoner's liability to undergo imprisonment under the original warrant of commitment or other authority to be enforced. In the present case, a warrant under s 150 was executed on the prisoner. The result was that he was returned to prison and the original authority in the form of the Calendar under the *Criminal Practice Rules* relating to his conviction and sentence on 8 May 1997 is authority for his continued imprisonment.

[68] I agree that the orders proposed by the Chief Justice should be made.