IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No M162 of 2018

BETWEEN

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

and

THE STATE OF VICTORIA
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the defendant.

Part III Argument

Issues presented

3. In summary, the NSW Attorney submits as follows:

   (a) Sections 74AAA and 74AB of the Corrections Act 1986 (Vic) ("Corrections Act") do not, as a matter of form or substance, interfere with, intrude into, or vary the

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plaintiff's sentence. At all relevant times, the statutory concept of eligibility for release operated as a legal qualification to having the question of parole considered by the relevant parole authority, pursuant to the provisions of the Corrections Act concerning release on parole in force from time to time. The expiry of the plaintiff's minimum term means that he is so qualified but the introduction of ss 74AAA and 74AB impose conditions on the Adult Parole Board ("the Board") exercising its power to grant him parole.

(b) If reached (which it should not be), the Court should reject the submission that the Victorian Parliament cannot validly exercise judicial power because to do so would be inconsistent with Ch III of the Commonwealth Constitution. Chapter III requires the enforcement by State courts exercising supervisory jurisdiction (and, on appeal, by this Court) of limits on the power of persons and bodies exercising State executive and judicial power, not legislative power.

(c) There is a critical distinction between acceptance of the rule of law as an assumption underpinning the Commonwealth Constitution and an implication that "inheres in the instrument" in a manner that would entail a corresponding limitation on legislative power. The plaintiff's argument disregards that distinction. In any case, the proposition that ss 74AAA and 74AB offend against the aspects of the rule of law on which the plaintiff relies (namely, that the provisions are arbitrarily disproportionate and destroy an expectation as to parole on which he has relied) could not be made good in view of Crump v New South Wales (2012) 247 CLR 1 ("Crump") and Knight v Victoria (2017) 261 CLR 306 ("Knight").

Alleged interference with sentencing decision

4. The NSW Attorney joins the defendant (Defendant's Submissions ("DS") at [2]) in submitting that at least three of the grounds pursuant to which the plaintiff challenges the validity of s 74AB of the Corrections Act (and s 74AAA of that Act, if its validity arises: the NSW Attorney submits it does not for the reasons set out in DS at [47]) depend on the proposition that s 74AB alters the sentence imposed by the Supreme Court of Victoria. The plaintiff's argument elevates one part of the sentence, the minimum term, to the status of a "discrete punitive element" that may not be lengthened "in substance or effect" by the legislature (Plaintiff's Submissions ("PS")

at [24]-[25]) and then takes the further step of characterising the impugned provisions as directed to his eligibility for parole, not only the conditions for a grant of parole.

5. The plaintiff's argument as to the effect of the impugned provisions on his minimum term is inconsistent with this Court's decisions in both Crump and Knight. Addressing s 74AA, the Court in Knight held that "neither in its legal form nor in its substantial practical operation does the section interfere with the sentences imposed by the Supreme Court": at [6]. That conclusion (first reached in Crump) reflects "the nature and purpose of a court's determination of a minimum term of imprisonment in the context of a statutory regime for parole as explained in Power v The Queen" (1974) 131 CLR 623: Knight at [25].

6. Contrary to the plaintiff's submission (PS at [65]-[66]), it would be necessary to re-open both the decisions in Crump and Knight in order to accept his argument. The plaintiff mischaracterises what he describes as the "central premise" of the decisions in Crump and Knight as being that provisions in the form of ss 74AAA and 74AB "do not *directly* alter or interfere with the sentence of imprisonment" (emphasis added). The decisions in Crump and Knight are authority for the proposition that such provisions do "not intersect at all with the exercise of judicial power that has occurred" and do not "contradict the minimum term that was fixed": Knight at [29]. Those decisions should not be re-opened, for the reasons set out by the defendant (DS at [12]-[15]).

The Victorian Parliament has not altered the plaintiff's sentence

7. Section 74AB (and s 74AAA) is not a law that operates on the sentence imposed by Vincent J. It is a law that directs the Board to order the release of the plaintiff on parole only in certain specified circumstances (of which the Board must be independently satisfied). The Board must be satisfied of the matters in s 74AB(3) (or, if s 74AAA arises, s 74AAA(5)) and there must be an application by the plaintiff under s 74AB(1) (or s 74AAA(3)) before the Board may make a parole order under ss 74 or 78 of the Corrections Act. Sections 74AB and 74AAA are, therefore, in both form and substance a direction to the Board by the legislative branch. They say nothing to or about the sentence imposed by the Supreme Court. Whether or not the plaintiff would be released on parole at the expiry of his minimum term "was simply

outside the scope of the exercise of judicial power constituted by the imposition of the sentences" (Knight at [28]) and so it remains.

8. The setting of the minimum term did not entitle the plaintiff to have his parole considered in any particular manner or using any particular criteria. In other words, it did not create any right or entitlement in the plaintiff to release on parole and, in that regard, had "no operative effect": Crump at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also Baker v The Queen (2004) 223 CLR 513 ("Baker") at [29] (McHugh, Gummow, Hayne and Heydon JJ).

9. The issue of whether a prisoner should be granted parole is (and has at all relevant
10 times been) a decision for the Board. The practical effect of fixing a minimum term under the Corrections Act was described by Dawson, Toohey and Gaudron JJ in Bugmy v The Queen (1990) 169 CLR 525 at 536 as being "that thereafter the Parole Board may, but of course need not, grant the prisoner parole." However, the plaintiff's sentence was one of life imprisonment; and "it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed": PNJ v The Queen (2009) 83 ALJR 384; 252 ALR 612 ("PNJ") at [11].

10. The possibility the Court foreshadowed in PNJ reflects the distinction, which is "apposite in the context of sentencing decisions and statutory regimes providing for
20 conditional release by executive authorities", between the legal effect of a judicial decision and consequences attached by statute to that decision: Crump at [36] (French CJ). The expiry of a non-parole period is one factum by reference to which a parole system usually operates: see relevantly s 74(1) of the Corrections Act; Crump at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). However, a State legislature may impose additional criteria which operate to broaden, or constrain, the circumstances in which parole can be granted following the expiry of that period. It may also amend or remove such criteria from time to time; or retain the criteria but change the policy with respect to their application: Crump at [36] (French CJ). That is all the Victorian Parliament has done in the present case. This reflects the comment
30 of Gleeson CJ in Baker at [7] that "... as should in any event be obvious, legislative and administrative changes to systems of parole and remissions usually affect people

serving existing sentences. The longer the original sentence, the more likely it is that an offender will be affected by subsequent changes in penal policy".

11. The reference in the joint judgment in Minogue v Victoria (2018) 92 ALJR 668 at [47] to the consequence of s 74AAA(4)'s application being "effectively to deny a prisoner an opportunity for parole" (see PS at [34]) should be taken to mean no more than what it says. Their Honours in this passage did not, as the plaintiff does, equate opportunity for release on parole – having satisfied the conditions attached to a grant of parole from time to time – with underlying eligibility for parole, having served the minimum term imposed.

12. The enactment of ss 74AB and 74AAA also has not altered the "qualitative" nature of the plaintiff's sentence, as asserted by the plaintiff (PS at [39]-[41]). Neither Bugmy nor R v Shrestha (1991) 173 CLR 48 provides authority for the proposition that the prisoner's hope of release is an essential and unalterable quality of a sentence featuring a minimum term, and the plaintiff has not identified any other authority for that proposition. As Mason CJ and McHugh J (dissenting in the result) observed in Bugmy (at 531), "although the fixing of a minimum term confers a benefit on the prisoner, it serves the interests of the community rather than those of the prisoner". Thus, "[r]elease on parole is a concession made when the Parole Board decides that the benefits accruing by way of rehabilitation and the recognition of mitigating factors outweigh the danger to the community of relaxing the requirement of imprisonment" (Bugmy at 532 (Mason CJ and McHugh J)). Knight also stands in the way of this aspect of the plaintiff's argument, the Court (at [29]) citing Baker (also at [29]) for the proposition that s 74AA did not make Mr Knight's life sentence (which featured a minimum term) "more punitive or burdensome to liberty".

Exercise of judicial power by the Victorian Parliament not inconsistent with Ch III

13. In view of the submissions above as to the effect of ss 74AB and 74AAA, it is unnecessary for the Court to reach the plaintiff's argument that the Victorian Parliament cannot validly exercise judicial power because to do so would be inconsistent with Ch III of the Commonwealth Constitution. This Court should therefore decline to deal with it: see Lambert v Weichelt (1954) 28 ALJ 282 at 283 (Dixon CJ); ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140 at [141] (Hayne, Kiefel and Bell JJ); Duncan v New South Wales (2015) 255 CLR 388 at [52].

14. If this argument is reached, it should be rejected. This Court has consistently declined to find that there is a separation of powers at the State level: see, for example, Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable") at 65 (Brennan CJ), 77-78 (Dawson J), 93-94 (Toohey J), 109 (McHugh J) and 137 (Gummow J); Kirk v Industrial Court (NSW) (2010) 239 CLR 531 ("Kirk") at [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Condon v Pompano Pty Ltd (2013) 252 CLR 38 at [22] (French CJ); [125] (Hayne, Crennan, Kiefel and Bell JJ). The NSW Court of Appeal found in Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372 ("BLF (NSW)") that the NSW Parliament was competent to exercise judicial power. Justice Toohey in Kable (at 93-94) referred to BLF (NSW) with approval in rejecting an argument that the NSW Parliament could not exercise judicial power: see also at 109 (McHugh J), and at 65 (Brennan CJ) and 77-78 (Dawson J), both dissenting in the result, but not on this issue.

15. The plaintiff's submission on this issue relies on Kirk, the existence of an integrated Australian court system with this Court exercising appellate jurisdiction at its apex, and the proposition that an exercise of judicial power by a State Parliament would create an island of judicial power "immune from supervision and restraint" (PS at [45]). The plaintiff's argument appears to be that in order to maintain the federal system of judicial power established by Ch III, all exercises of judicial power must be amenable to appeal through the Ch III hierarchy. However, this Court in Kirk found that the defining and constitutionally entrenched characteristic of State Supreme Courts is the supervisory jurisdiction by which those Courts enforce "the limits on the exercise of State executive and judicial power by persons and bodies other than the Court": Kirk at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). The critical point in Kirk concerns the enforcement by courts exercising supervisory jurisdiction (and, on appeal, this Court) of limits on the power of bodies exercising executive and judicial power, not legislative power. The laws made by State Parliaments set and define the limits of State executive and judicial power. To the extent that State Parliaments are themselves subject to limits, those limits are enforced by judicial review of State legislation for constitutional validity. No further implication under Ch III is required to safeguard that type of judicial review and none should be drawn.

The legislative power of the Victorian Parliament is not constrained by Art 10 of the Bill of Rights 1688

16. The plaintiff seeks to derive a further limitation on the legislative power of the Victorian Parliament from Art 10 of the Bill of Rights 1688, which is applied in Victoria by ss 3 and 8 of the Imperial Acts Application Act 1980 (Vic) (PS at [51]-[57]). This too is an argument which should not be reached, because the effect of ss 74AB and 74AAA is not to alter the plaintiff's sentence (see above at [13]). Nor is the effect of those sections to direct the Victorian Supreme Court, so the argument that the Parliament has employed a "circuitous device" (PS at [56]) to circumvent restrictions on legislation directing the Supreme Court simply does not arise.

17. Even if this argument was reached, a law of the Commonwealth will not be held to be invalid on the basis of alleged inconsistencies with the Bill of Rights 1688 alone: Re Cusack (1985) 60 ALJR 302 at 303-304 (Wilson J); see also Chia Gee v Martin (1905) 3 CLR 649 at 653 (Griffth CJ). Consistent with that proposition, provisions such as ss 3 and 8 of the Imperial Acts Application Act 1980 (Vic) receiving the Bill of Rights 1688 from English law serve only to "reinforce what are settled constitutional principles": Port of Portland Pty Ltd v Victoria (2010) 242 CLR 348 at [13]; see also Egan v Willis (1998) 195 CLR 424 at [23] (Gaudron, Gummow and Hayne JJ), [69] (McHugh J). The Bill of Rights 1688 does not constrain State legislative power in the manner advocated by the plaintiff.

The rule of law does not impose an implied limitation on State legislative power

18. The plaintiff relies on two aspects of the rule of law said to be offended by ss 74AB and 74AAA (PS at [62]). First, he contends that the provisions are arbitrarily disproportionate and second, that they are calculated to destroy the expectation as to parole on which he has relied throughout his sentence; that he might be released on parole if he could demonstrate rehabilitation to relevant parole authorities. Neither proposition could be made good in view of Crump and Knight. The Court in Knight rejected an argument seeking to distinguish Crump on the basis that s 74AA targeted Mr Knight alone: Knight at [23]-[26]. The Court held that the party-specific nature of s 74AA was not indicative of a tendency to interfere with an exercise of judicial power. As to the destruction of the "expectation" of the possibility of parole upon which the plaintiff says he has relied, any variation of that expectation as a result of

new conditions for a grant of parole does not offend that aspect of the rule of law concerned with stability and predictability (PS at [60]-[61]), for it "always remains a possibility that a prisoner may be required to serve the whole head sentence imposed": Minogue at [17], citing PNJ.

19. The statement of Dixon J regarding the rule of law in Australian Communist Party v The Commonwealth (1951) 83 CLR 1 (Communist Party Case) at 193, on which the plaintiff relies (PS at [58]-[59]), was made in the course of analysing the scope of the incidental power. His Honour observed that the incidental power was ancillary or incidental to sustaining and carrying on government "under the Constitution". The Constitution was, in turn, an instrument framed in accordance with many traditional conceptions, "to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed" (at 193). His Honour classified the rule of law as falling within the latter category and continued (emphasis added):

> In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth. Indeed, upon the very matters upon which the question whether the bodies or persons have brought themselves within a possible exercise of the power depends, it may be said that the Act would have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power. Nor do I think that if a wider basis for the power than s 51(xxxix) is accepted, the power itself would extend to a law like the present Act, using as it does, the legislature's characterization of the persons and bodies adversely affected and no factual tests of liability and containing no provision which independently of that characterization would amount intrinsically to an exercise of the power.

20. The context in which Dixon J made the statement on which the plaintiff relies does not suggest that his Honour directly had in contemplation that Commonwealth legislation could be invalid on the separate and independent basis of inconsistency

with the rule of law. Rather, his Honour relied on the rule of law as an assumption underpinning the Constitution in conceptualising the system of government to which the Constitution gives effect, so as to define the scope of the incidental power in s 51(xxxix).

21. As Mason CJ observed in Australian Capital Television v Commonwealth (1992) 177 CLR 106 ("ACTV") at 135, an unexpressed assumption of that nature stands outside the Constitution. Such an assumption may be relied on to inform the construction and/or scope of the provisions of the Constitution: see, for example, Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 at [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Thomas v Mowbray (2007) 233 CLR 307 at [61] (Gummow and Crennan JJ); South Australia v Totani (2010) 242 CLR 1 at [61] (French CJ); Graham v Minister for Immigration and Border Protection (2017) 91 ALJR 890, 347 ALR 350 at [39]-[40], [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), [105]-[108] (Edelman J). However, and by contrast with an implication, it does not "inhere in the instrument" in a manner that would necessarily entail a corresponding limitation on legislative power: ACTV at 135 (Mason CJ); see also Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29 at 81; Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 44 (Brennan J); Lisa Burton Crawford, The Rule of Law and the Australian Constitution (2017) at 74-75.

22. Even assuming that the rule of law could constitute some limitation upon Commonwealth legislative power, the plaintiff's submission that a State legislature would be similarly constrained by virtue of the Constitution applying "throughout the Commonwealth" (PS at [63]) does not bring to account the significant differences between State and Commonwealth legislative power. This Court has long held that a law will be for the peace, order and good government of a State if there is a real connection, even a remote or general connection, between the subject matter of the legislation and the State: Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1 at 14; Pearce v Florenca (1976) 135 CLR 507 at 518 (Gibbs J); Broken Hill South Limited v Commissioner of Taxation (NSW) (1937) 56 CLR 337 at 375 (Dixon J). Justice Fullagar observed in the Communist Party Case at 262, for example, that a law such as the Communist Party Dissolution Act "could clearly be passed by the Parliament of the United Kingdom or by any of the Australian states";

the difficulty for the Commonwealth Parliament was that its powers were "limited by an instrument emanating from a superior authority".

23. Limitations on the exercise of legislative powers conferred upon State Parliaments which are not spelled out in the constitutional text have, of course, been found. However, such limitations arise by implication, as a matter of logical or practical necessity, from the federal structure within which State Parliaments legislate: Durham Holdings v New South Wales (2001) 205 CLR 399 at [14] (Gaudron, McHugh, Gummow and Hayne JJ). The plaintiff has not articulated any basis for the implication of the rule of law (the imprecision of that concept is also highly problematic, for the reasons set out in DS at [39.1]-[39.2]) in the text or structure of the Constitution.

Section 118 of the Constitution

24. The NSW Attorney adopts the defendant's submissions (DS at [46]) in relation to the lack of authority for the application of s 118 of the Constitution in the manner advocated by the plaintiff.

Part IV Estimate of time for oral argument

25. It is estimated that 10 minutes will be required for oral argument.

Dated: 2 April 2019

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