

BETWEEN:



CRAIG WILLIAM JOHN MINOGUE
Plaintiff

and

STATE OF VICTORIA
Defendant

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OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL
FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I – Certification: This outline is in a form suitable for publication on the internet.

Part II – Outline of Propositions:


1. Under Australia’s constitutional framework, “the rule of law” does not itself operate as a directly enforceable limit on legislative power.
2. The fundamental commitment that is made to the “rule of law” in Australia is manifested in Australia’s constitutionalism: that it is the Constitution that possesses overarching supremacy as the delineator of the limits on governmental power, by which all are bound. (WS at [21]-[22])
3. The essential character of the Constitution as Australia’s ruling law mandates that any limitation on legislative power enforceable by the judicial branch be one that is given effect by, and anchored in, the text and structure of the Constitution. (WS at [20]-[21])
4. For the judicial branch to invalidate exercises of legislative power by reference to asserted limitations sourced outside, and unimplemented by, the Constitution would be to unravel this “rule of law” commitment. (WS at [23]-[24], [35])

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5. The text and structure of the Constitution give concrete form to the features of the rule of law aspiration that are implemented by the Constitution. In particular, features of Ch III including the strict separation of the judicial power of the Commonwealth, constitute a major plank of Australia's partial implementation of certain rule of law ideals. (WS at [25]-[28], [32])
6. That strict separation denies to the federal judicial branch the exercise of any power that is not judicial, and in so doing denies legitimacy to judicial invalidation of legislative action on grounds divorced from the text and structure of the Constitution such as that invoked by the plaintiff. (WS at [29]-[30])

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Dated: 15 May 2018



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M J Wait SC
Counsel for the Attorney-General
for the State of South Australia

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