IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M2 of 2017**

B E T W E E N:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

AND

STATE OF VICTORIA
Defendant

ANNOTATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia (**Western Australia**) intervenes pursuant to s 78A of the *Judiciary Act* 1903 (Cth) in support of the Defendant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. Western Australia accepts the Plaintiff's statement of relevant constitutional and legislative provisions and the Defendant's additional statement of statutory provisions.

Date of Document: 30 April 2018

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PART V: SUBMISSIONS

5. Western Australia makes submissions in relation to whether ss 74AAA and 127A of the *Corrections Act* 1986 (Vic) (***Corrections Act***) exceed the legislative power of the Parliament of Victoria on the ground that they are contrary to the "rule of law" as an implied limitation derived from and required by the Commonwealth *Constitution*.

6. In that regard, Western Australia adopts the submissions of the Defendant and makes the following supplementary submissions.

7. The Plaintiff's argument, in effect, proceeds in two stages:

(a) firstly, the Plaintiff contends that the legislative power of a State Parliament (in this case, Victoria) is subject to an implied limitation in the *Constitution*, the effect of which is that laws passed by the Parliament must not contravene or offend the "rule of law"[1]; and

(b) secondly, the Plaintiff contends that ss 74AAA and 127A of the *Corrections Act* contravene that implied limitation by:

(i) having retrospective operation[2];

(ii) empowering the Adult Parole Board (**Board**) to "go behind the Plaintiff's conviction and sentence"[3]; and

(iii) "purport[ing] to authorise the Board to inscribe on the Plaintiff's conviction additional elements of *actus reus* and *mens rea* that were not otherwise established"[4].

8. Each stage of this argument, it is submitted, should be rejected. In particular:

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1 Plaintiff's Submissions, [63], [68] and [69].

2 Plaintiff's Submissions, [61]-[68].

3 Plaintiff's Submissions, [70].

4 Plaintiff's Submissions, [73].

(a) there is no general implied limitation on legislative power prohibiting laws that are said to be inconsistent with the "rule of law". While the *Constitution*, by its terms and structure, gives practical effect to certain aspects of what may be broadly, *albeit* contentiously, described as "the rule of law", there is no overarching limitation meeting that description;

(b) in any event, those aspects of the "rule of law" that are given practical effect by Chapter III of the *Constitution*, are concerned with the Federal judicature (including State courts exercising federal jurisdiction). They are not independent limitations on State constitutions; and

(c) the provisions of the *Corrections Act*, in any event, do not have the effects said by the Plaintiff to "offend" the rule of law (however that expression may be understood).

A. The "Rule of Law" is not an implied limitation on State legislative power

9. The Plaintiff submits, in effect, that the legislative power of State Parliaments is subject to an implied limitation in the *Constitution* that laws enacted by the State Parliament must not contravene or offend the "rule of law"[5].

10. There is, it is submitted, no basis, in either the text or the structure of the *Constitution*, for drawing an implied limitation in those terms. Rather, the "rule of law" is a protean concept that stands outside the *Constitution* which, in those broad terms, could not afford a reliable basis upon which any implied limitation could be delimited.

11. It is now well-established that no implication can be drawn from the *Constitution* that is not based on the actual terms of the *Constitution* or on its structure[6]. In the case of a limitation on legislative power said to be based on the structure of the *Constitution*, the limitation must be logically or practically

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5 Plaintiff's Submissions, [63], [68] and [69].

6 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 per Knox CJ, Isaacs, Rich & Starke JJ at 145 and 155; *McGinty v Western Australia* (1996) 186 CLR 140 per Brennan CJ at 168; *New South Wales v Commonwealth* (2006) 229 CLR 1 per Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ at [190]-[194].

necessary for the preservation of the relevant structure[7]. It is not legitimate to construe the *Constitution* by reference to principles or theories that find no support in the text of the *Constitution*[8].

12. The Plaintiff does not identify any textual or structural basis for the implied limitation in the terms for which he contends (i.e. a limitation on laws that "infringe"[9] or "offend"[10] the rule of law).

13. Rather, the Plaintiff's submissions are built upon *part* of Sir Owen Dixon's dictum in the *Communist Party Case*[11] (repeated in later cases) that "the rule of law forms an assumption" of the *Constitution*[12].

10 14. Those references, it is submitted, do not support the Plaintiff's case. Indeed, quite the opposite. In this regard, Dixon J's reference to the rule of law in the *Communist Party Case* must be considered in its full context[13]:

> "Moreover, it is government under the Constitution and that is 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*. Among these I think that it may fairly be said that the rule of law forms an assumption." (emphasis added)

20 15. As this passage as a whole makes clear, Dixon J was drawing a distinction between traditional conceptions to which direct legal effect is given by the *Constitution* and those which are not. The "rule of law", so stated, forms part of the latter.

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7 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 per Mason CJ at 135; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, & Kirby JJ at 567; *Burns v Corbett* [2018] HCA 15 per Gageler J at [94].

8 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 per McHugh J at 198.

9 Plaintiff's Submissions, [61], [69].

10 Plaintiff's Submissions, [68].

11 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 per Dixon J at 193.

12 Plaintiff's Submissions, [62].

13 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 per Dixon J at 193.

16. This distinction was previously referred to by Dixon J in *Australian National Airways Pty Ltd v The Commonwealth*[14], in the context of an argument that the *Australian National Airlines Act* 1945 (Cth) was beyond the "trade and commerce power" on the ground that that power only contemplated the *regulation* of inter-State trade and not the entry into that field by government[15].

17. Justice Dixon rejected the argument, *inter alia*, on the ground that it "confuses the unexpressed assumptions upon which the framers of the instrument supposedly proceeded with the expressed meaning of the power"[16].

18. It is this passage that is referred to by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*[17] in the context of principles referred to in paragraph 11 above concerning the drawing of implications from the *Constitution*[18]:

> "It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument."

19. It is this critical difference that the Plaintiff's submissions, with respect, elide.

20. Similarly, in relation to the observations by Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner (NSW)*[19] that the "rule of law is one of the assumptions upon which the Constitution is based" and that it "is an assumption

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14 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

15 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 per Dixon J at 80.

16 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 per Dixon J at 81.

17 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

18 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 135.

19 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

upon which the Constitution depends for its efficacy"[20] the Plaintiff's submission[21] omits the crucial final component of that passage[22]:

> "Chapter III of the Constitution, which confers and denies judicial power, *in accordance with its express terms and its necessary implications*, gives practical effect to that assumption." (emphasis added)

21. The critical issue, therefore, is, with respect, not "what does the rule of law require?"[23]. Rather, it is to ask "to what does the *Constitution*, in accordance with its text and necessary implications, give effect?".

22. In this regard the proper starting point, it is submitted, is identical to that identified by this Court in *Lange v Australian Broadcasting Corporation*[24] in the context of the implied freedom of political communication:

> "[T]he *Constitution* gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it. In other words, to say that the *Constitution* gives effect to representative government is a shorthand way of saying that the *Constitution* provides for that form of representative government which is to be found in the relevant sections. Under the *Constitution*, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the *Constitution* prohibit, authorise or require?"

23. By adopting this approach (and substituting the expression "the rule of law" for "representative government"), it is submitted, it can readily be seen how certain aspects of the rule of law are effect is given by the *Constitution* when the text or structure so require.

24. A textual example may be found in s 75(v) of the *Constitution*, which confers upon this Court original jurisdiction in all matters in which a writ of mandamus

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20 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 per Gleeson CJ & Heydon J at [30].

21 Plaintiff's Submissions, [62].

22 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 per Gleeson CJ & Heydon J at [30].

23 Cf *Thomas v Mowbray* (2007) 233 CLR 307 per Gummow & Crennan JJ at [61]; Plaintiff's Submissions, [64].

24 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow & Kirby JJ at 567.

or prohibition or an injunction is sought against an officer of the Commonwealth. That provision, in ensuring that the limits of power or jurisdiction conferred upon officers of the Commonwealth are enforceable by this Court, "secures a basic element of the rule of law"[25]. It does so, however, through the text of s 75(v) and not by the direct operation of the "assumption" of the rule of law.

25. Similarly, an important structural example is the "axiomatic" principle in *Marbury v Madison*[26] that permits and requires the making of judicial determinations as to the constitutional validity or invalidity of statutes. That is a precept that was so well-established in the context of a written constitution, which limited and distributed constitutional power, that it was regarded as axiomatic in the framework of the *Constitution*[27]. Again, it is submitted, that that is a necessary consequence of the structure of the *Constitution* and not of the direct operation of the "assumption" of the rule of law.

26. Importantly, as has been noted[28], that structural principle, which arises from a written constitution itself, was well-established and recognised prior to Federation, including by Professor Dicey, to whom credit is usually given for the expression "the rule of law"[29]. In the context of his discussion of "Parliamentary Sovereignty and Federalism", for example, Professor Dicey identified, in the context of the United States Constitution, the essential role of judicial review for securing the limits of power in a federation[30]. Later editions

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25 *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 per Kiefel CJ, Bell, Gageler, Keane, Nettle & Gordon JJ at [44]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 per Gleeson CJ at [5].

26 *Marbury v Madison* (1803) 5 US 137.

27 See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 per Fullagar J at 262-263; *New South Wales v Kable* (2013) 252 CLR 118 per Gageler J at [50]; *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 per Kiefel CJ, Bell, Gageler, Keane, Nettle & Gordon JJ at [40].

28 *New South Wales v Kable* (2013) 252 CLR 118.

29 Lord Bingham, *The Rule of Law*, (2010) at 3.

30 A V Dicey, *The Law of the Constitution*, 5th Ed, (1897), at 148-153.

of Professor Dicey's treatise expressly recognised that principle as applying to the Australian *Constitution*[31].

27. In each of these examples, however, the relevant aspect of the "rule of law" is given practical effect by the text or structure of the *Constitution*. It is the text or structure of the *Constitution* that brings about that effect, not an *a priori* assessment of what the "rule of law" requires.

28. This is particularly important, given that, as the Defendant submits, the "rule of law" is a "notoriously imprecise concept"[32]. Indeed, it is notable that the work relied upon by the Plaintiff for the proposition that "there is now substantial agreement as to what the rule of law practically requires (at least in the so-called 'thin' sense)"[33] (for example that of Professors Fuller and Raz) is relatively recent (and certainly well after Federation). Even then, as Dr Crawford, whose work the Plaintiff also calls in aid[34], observed[35]:

> "Fuller and Raz each provide a very similar statement of the individuated requirements of the rule of law. [...] [But], despite these points of convergence, the Razian and Fullerian conceptions of the rule of law are rather different. Hence the superficial similarity of their respective 'laundry lists' of the rule of law requirements masks more nuanced points of disagreement. This further demonstrates the complexity of the rule of law."

29. Ultimately, the Plaintiff does not identify any basis, in either the text or the structure of the *Constitution*, upon which the Court could conclude that the "rule of law", in those terms, constitutes an implied limitation on the legislative power of a State Parliament. Nor, it is submitted, does the Plaintiff identify how the particular aspects of the rule of law said to be offended or infringed are found in the *Constitution's* text and structure. Those particular aspects include the allegation that the *Corrections Act*:

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31 See e.g. A V Dicey, *The Law of the Constitution*, 8th Ed, (1915), at 531.

32 Defendant's Submissions, [57].

33 Plaintiff's Submissions, [65].

34 Plaintiff's Submissions, [65].

35 Lisa Crawford, *The Rule of Law and the Australian Constitution* (2017), at 20.

(a) has retrospective operation[36]; and

(b) empowers the Board to "go behind the Plaintiff's conviction and sentence"[37].

30. Leaving aside whether the *Corrections Act* actually does these things, it is submitted that there is nothing to suggest a limitation in the Commonwealth *Constitution* to prevent a State Parliament from doing either one of these things:

(a) there is nothing in the *Constitution* to prevent a State Parliament from enacting a law that has retrospective or retroactive effect. Indeed, quite the opposite. This Court has held that Chapter III of the *Constitution* does not preclude the *Commonwealth* Parliament from enacting retrospective criminal offences[38]; *a fortiori* a State Parliament could do so; and

(b) outside of the context of the investiture of federal judicial power[39], there is, relevantly, no limitation to be found in the *Constitution* as to the functions that may be conferred on State administrative bodies or tribunals.

31. In that regard, as noted by Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner (NSW)*[40], it is Chapter III of the *Constitution*, in conferring and denying judicial power, that gives practical effect to those aspects of the rule of law identified above. The separation of judicial and executive power, as it is achieved by Chapter III, is not mandated by State constitutions in the same way, or with the same practical effects[41]. Likewise, those aspects of State judicial power that *are* guaranteed by Chapter III,

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36 Plaintiff's Submissions, [61]-[68].

37 Plaintiff's Submissions, [70].

38 *Polyukhovich v Commonwealth* (1991) 272 CLR 501; *The Queen v Kidman* (1915) 20 CLR 425.

39 *Burns v Corbett* [2018] HCA 15.

40 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

41 *Fardon v Attorney General (Qld)* (2004) 223 CLR 575 per McHugh J at 598 [37].

including institutional integrity of the State Supreme Courts[42], are unaffected by the *Corrections Act*.

32. In any event, it is submitted, the *Corrections Act* does not have the effects alleged by the Plaintiff to "offend" the rule of law.

B. The *Corrections Act* does not "offend" the rule of law

33. The Plaintiff submits that s 74AAA contravenes or offends the rule of law on the grounds that it operates retrospectively. On its proper construction, it is submitted, s 74AAA does not have retrospective operation.

34. Legislation can only properly be said to operate retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation[43]. Legislation is not retrospective merely because it governs or prescribes future acts by taking into account antecedent facts or circumstances[44].

35. In the present case, while s 74AAA of the *Corrections Act* requires the Board to take into account certain antecedent facts and circumstances (namely, whether a prisoner was convicted and sentenced for an offence which occurred in certain circumstances) it nevertheless operates only prospectively. That is because its only legal effect is to condition the future exercise of the power of the Board, pursuant to ss 74 and 78 of the *Corrections Act*, to order that a prisoner be released on parole. It does not change either the conviction or the sentence under which a prisoner is otherwise lawfully in custody.

36. Accordingly, even if an implied limitation on the legislative power of the State Parliament existed in the terms contended for by the Plaintiff, s 74AAA of the *Corrections Act* would not contravene or offend that limitation.

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42 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

43 *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23 per French J at 33.

44 *R v Roussety* (2008) 24 VR 253 per Nettle JA (Vincent, Ashley, Redlich & Weinberg JJA agreeing) at [19]-[20]; *WBM v Chief Commissioner of Police* (2012) 43 VR 446 per Warren CJ (Hansen JA agreeing) at [64].

37. The Plaintiff further submits that s 74AAA is invalid on the grounds that it empowers the Board to "go behind" the Plaintiff's conviction and sentence[45].

38. That submission appears to be based on the proposition that s 74AAA of the *Corrections Act* requires the Board to "re-open" the quelled controversy raised by the indictment and that it "purports to authorise the Board to inscribe on the Plaintiff's conviction additional elements of *actus reus* and *mens rea* that were not otherwise established upon the quelling of the controversy following the Plaintiff's trial"[46].

39. Both aspects of this submission, it is submitted, are misconceived.

10 40. As the Plaintiff acknowledges, the circumstance identified by s 74AAA (namely whether a prisoner knew, or was reckless as to, whether the victim was a police officer) do not form an element of the offence of murder[47]. Accordingly, any inquiry into those circumstances in no way requires the Board to re-agitate any of the elements of the offence of which the offender was convicted. Rather, it is simply an inquiry into the surrounding circumstances of the commission of the offence. This does not require the Board to reopen the quelled controversy that was raised by the indictment.

41. Nor, it is submitted, is there anything remarkable about the power of the Board being conditioned by matters other than the bare fact of the prisoner's conviction
20 and sentence. That was precisely the effect of the law in *Knight v Victoria*[48] in relation to which the Court held that the relevant section (s 74AA of the *Corrections Act*) "does not intersect at all with the exercise of judicial power that has occurred"[49].

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45 Plaintiff's Submissions, [70].

46 Plaintiff's Submissions, [73].

47 Plaintiff's Submissions, [73].

48 *Knight v Victoria* (2017) 91 ALJR 824.

49 *Knight v Victoria* (2017) 91 ALJR 824 per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ at [29].

42. Indeed, the circumstances of the commission of the offence by the prisoner have always been relevant to the assessment of suitability for the grant of parole in all cases under the *Corrections Act*. The considerations relevant to whether a prisoner should be released on parole have never been confined to the bare conviction and sentence imposed by the Court. In that regard, in determining whether to make a parole order, the Board "must give paramount consideration to the safety and protection of the community"[51]. The determination of that issue would always, it is submitted, require the Board to make some assessment of the circumstances of the commission of the relevant offence.

10 43. Finally, the decisions of this Court in *Crump v State of New South Wales* (***Crump***)[52] and *Knight v Victoria*[53] are a complete answer to the Plaintiff's submission that s 74AAA "purports to authorise the Board to inscribe on the Plaintiff's conviction additional elements of *actus reus* and *mens rea* that were not otherwise established upon the quelling of the controversy following the Plaintiff's trial"[54].

44. In *Crump*[55], the Court unanimously held that s 154A of the *Crimes (Administration of Sentences) Act* 1999 (NSW) did not impeach, set aside, alter or vary Mr Crump's original sentence of penal servitude for life[56]. This was so, notwithstanding that s 154A had changed the criteria in relation to which Mr
20 Crump may be granted parole and made gaining release on parole substantially harder[57].

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51 *Corrections Act*, s 73A.

52 *Crump v State of New South Wales* (2012) 247 CLR 1.

53 *Knight v Victoria* (2017) 91 ALJR 824.

54 Plaintiff's Submissions, [73].

55 *Crump v State of New South Wales* (2012) 247 CLR 1.

56 *Crump v State of New South Wales* (2012) 247 CLR 1 per Gummow, Hayne, Crennan, Kiefel & Bell JJ at 27 [60].

57 *Crump v State of New South Wales* (2012) 247 CLR 1 per Heydon J at 29 [71].

45. This Court held that neither the form nor the substance of a sentencing determination created rights or entitlements to be released on parole[58]. This reflected the critical distinction between the role of the court, in sentencing, and the role of the Executive following that sentence[59].

46. The Court in *Knight v Victoria*[60] held that *Crump*[61] could not be distinguished and should not be reopened.

47. *Knight v Victoria*[62] and *Crump*[63] cannot be distinguished from the present case. The only distinction between those cases and the present is the particular factum selected by the legislature as the trigger for consideration for parole. That is a distinction without difference. As observed by Gageler J in *Duncan v ICAC*[64], "there is no novelty in the proposition that 'in general, a legislature can select *whatever factum it wishes* as the trigger of a particular legislative consequence'"[65] [emphasis added].

C. Answer to questions in Special Case

48. The question in [37](c) of the Special Case [**SCB 84-85**] should be answered: No. Sections 74AAA and 127A of the *Corrections Act* are not invalid in their application to the Plaintiff by reason of the constitutional assumption of the rule of law.

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58 *Crump v State of New South Wales* (2012) 247 CLR 1 per Gummow, Hayne, Crennan, Kiefel & Bell JJ at 26 [60].

59 See *Power v The Queen* (1974) 131 CLR 623 per Barwick CJ, Menzies, Stephen & Mason JJ at 627-629; *Elliot v The Queen* (2007) 234 CLR 38 per Gummow, Hayne, Heydon, Crennan & Kiefel JJ at 42 [5].

60 *Knight v Victoria* (2017) 91 ALJR 824 at [25].

61 *Crump v State of New South Wales* (2012) 247 CLR 1.

62 *Knight v Victoria* (2017) 91 ALJR 824.

63 *Crump v State of New South Wales* (2012) 247 CLR 1.

64 *Duncan v ICAC* (2015) 256 CLR 83.

65 *Duncan v ICAC* (2015) 256 CLR 83 per Gageler J at 408 [42], citing *Baker v The Queen* (2004) 223 CLR 513 at 533 [43]; citing *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 178 [25], 188-190 [59]-[60], 200 [107], 232 [208], 280 [347].

PART VI: LENGTH OF ORAL ARGUMENT

49. It is estimated that the oral argument for Western Australia will take 15 minutes.

Dated: 30 April 2018

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