IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M251 of 2015

BETWEEN:

JULIAN KNIGHT
Plaintiff

and

STATE OF VICTORIA
First Defendant

ADULT PAROLE BOARD
Second Defendant

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 intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendants.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

Date of Document: 3 February 2017

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PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. The Attorney General for Western Australia accepts the Plaintiff's statement of relevant constitutional and legislative provisions and the First Defendant's additional statement of statutory provisions.

PART V: SUBMISSIONS

5. The Attorney General for Western Australia adopts the submissions of the First Defendant and makes the following supplementary submissions:

(a) In relation to the Plaintiff's first contention, that s 74AA of the *Corrections Act* 1986 (Vic) operates to interfere with an exercise of discretion by a Victorian judicial officer[1];

(i) The decision of this Court in *Crump v State of New South Wales* (2012) 247 CLR 1 is determinative of this issue and the Plaintiff's first contention, accordingly, is untenable; and further,

(ii) Chapter III of the Commonwealth *Constitution* does not preclude either the State or Commonwealth Parliaments from amending legislation which creates rights, duties or liabilities by reference to court orders, or which provides for the manner in which court orders are to be executed; and further

(iii) Legislation which amends criteria for release on parole does not set aside or vary the court order which fixes the head sentence but rather identifies the time during which parole authorities are precluded from considering the release of the prisoner on parole.

(b) In relation to the aspect of the Plaintiff's second contention, that s 74AA contravenes Chapter III in a way similar to legislation considered in *Wainohu v New South Wales* (2011) 243 CLR 181[2], the circumstances here are

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1 Plaintiff's Submissions at paragraph 5(a).

2 Plaintiff's Submissions at paragraph 49.

distinguishable, in that there is "no connection between the non-judicial function conferred upon an eligible judge"[3] and a later curial proceeding.

The decision of this Court in Crump

6. In *Crump*[4] the Plaintiff contended that s 154A of the *Crimes (Administration of Sentences) Act* 1999 (NSW) constituted an "impermissible alteration of the judicial decision of the Supreme Court" which had rendered Mr Crump eligible for parole[5].

7. The Court held unanimously that s 154A did not impeach, set aside, alter or vary Mr Crump's original sentence of penal servitude for life[6]. This was so, notwithstanding that s 154A had changed the criteria in relation to which Mr Crump may be granted
10 parole and made gaining release on parole substantially harder[7].

8. This Court held that neither the form nor the substance of a sentencing determination created rights or entitlements to be released on parole[8]. This reflected the critical distinction between the roles of the court, in sentencing, and the role of the Executive following that sentence[9].

9. The decision in *Crump*, in turn, followed the decision of *Baker v The Queen* (2004) 223 CLR 513, where the Court upheld the validity of earlier changes to the parole criteria, and where Gleeson CJ expressly stated[10]:

> "...legislative and administrative changes to systems of parole and remission usually affect people serving existing sentences. The longer the original sentence,

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3 *Wainohu v New South Wales* (2011) 243 CLR 181 per French CJ and Kiefel J at 219 [68].

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

5 *Crump v State of New South Wales* (2012) 247 CLR 1 per French CJ at 8 [4].

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

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

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

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

10 *Baker v The Queen* (2004) 223 CLR 513 at 520 [7].

the more likely it is that an offender will be affected by subsequent changes in penal policy."

10. The functions of determining whether a person has committed a criminal offence and the imposition of a penalty, including a sentence of imprisonment, are characterised as exclusively judicial. A sentence of imprisonment must be determined by an exercise of judicial power, not by the executive branch of government[11].

11. Once the sentence has been imposed, the exercise of judicial power is spent and "the responsibility for the future of the [offender] passe[s] to the executive branch of the government"[12].

10 12. While the Plaintiff endeavours to distinguish s 74AA from the legislation upheld in *Crump* on a number of bases, they may all be reduced, ultimately, to its *ad hominem* nature[13] and the submission that the legislation in *Crump* was "not *ad hominem*"[14].

13. In that regard, it is apparent from the observations of French CJ in *Crump* that the provision in that case, did have "an *ad hominem* component" in that it was directed to affecting the criteria for eligibility for parole of specific and identifiable individuals who had been the subject of a "non-release recommendation" in the past[15].

14. Even if s 74AA could be said to be more specifically *ad hominem*, in that it uses the Plaintiff's name and applies only to him, that does not distinguish it, in principle, from the legislation upheld in *Crump* and does not *of itself* render s 74AA invalid.

20 15. In that regard, it is submitted, there is no constitutional significance to be attached to the Plaintiff's characterisation of s 74AA as being referable to a "*particular* and *readily identifiable* exercise of judicial discretion". In the same way the existing prisoners to whom the legislation in *Crump* could apply were "*particular* and *readily*

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11 *Crump v New South Wales* (2012) 247 CLR 1 per Gummow, Hayne, Crennan, Kiefel and Bell JJ at 21 [42], citing *Browne v R* [2000] 1 AC 45 for the proposition that "the selection of a sentence is an integral part of the administration of justice which cannot be committed to the executive."

12 *Elliott v R* (2007) 234 CLR 38 at 41-42 [5]; quoted with approval in *Crump* per Gummow, Hayne, Crennan, Kiefel and Bell JJ at 26 [58].

13 Plaintiff's Submissions at paragraphs 26-28.

14 Plaintiff's Submissions at paragraph 26.

15 Including by way of specific reference to Mr Baker and Mr Crump in the Second Reading Speech: *Crump v New South Wales* (2012) 247 CLR 1 per French CJ at 15 [22].

identifiable" by reference to the statutory descriptions that were contained in the legislation. It is to be expected that those subject to a properly drafted law will be "readily identifiable", so that the scope and operation of the law may be properly applied.

16. The fact that the form of the law in the present case identifies the Plaintiff by name rather than some other criteria or description that would readily identify him and indeed might only apply to him (e.g. "persons sentenced to seven or more murders") cannot, it is submitted, affect its validity. The question as to whether s 74AA of the *Corrections Act* 1986 (Vic) operates to interfere with an exercise of discretion by a Victorian court is, it is submitted, to be answered as a matter of substance.

17. In that context, it is useful, it is submitted, to have regard to the execution and operation of court orders generally.

Legislative power to amend legislation which operates by reference to court orders or affects their execution

18. Court orders may operate, or be given operation, in a number of different ways.

19. In some cases the court order will do no more than itself establish an immediate right, duty or liability. For example, where a court finds a defendant to be liable to pay damages to a plaintiff for the commission of a tort or breach of contract the court order, with which the original cause of action merges[16], fixes the liability of the defendant to pay the plaintiff the judgment sum. The court order establishes the present liability of the defendant to pay the plaintiff the judgment sum by reference to the past conduct of the defendant.

20. In other cases the court order may operate for the future as a factum by reference to which State and Commonwealth laws may create rights, duties and liabilities. For example:

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16 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 per Gibbs CJ, Mason and Aickin JJ at 597.

(a) Dangerous sexual offenders legislation, of the kind considered in *Fardon v Attorney-General (Qld)*[17] sets up a regime which may be applied to a person by reason of the person being subject to a court order: the prisoner is liable to be the subject of a detention order by reason of the fact that they have been convicted and sentenced for a particular offence[18].

(b) A court may be authorised by child welfare legislation to make a protection order which places the child in State care. The child welfare legislation then creates rights, duties and liabilities by reference to the making of the protection order, such as vesting parental responsibility for the child in a State officer and providing for their placement and care[19].

(c) A court exercising insolvency jurisdiction may make a sequestration order causing a debtor to become a bankrupt[20], with the *Bankruptcy Act* 1966 (Cth) rather than the order itself providing for the legal consequences which follow from the making of the sequestration order.

(d) A court may be authorised to make an order granting probate or letters of administration, to which orders the estate administration legislation may attach legal consequences[21].

21. It is open to the Parliament to amend legislation which operates upon the factum of a court order to create rights, duties and liabilities and doing so does not involve a setting aside or variation of the court order. As observed by Gageler J in *Duncan v ICAC* (2015) 256 CLR 83, "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'"[22] [emphasis added]. So, for example, the Parliament may

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17 (2004) 223 CLR 575.

18 See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 per Gummow J at 619 [108], with whom Hayne J relevantly agreed at 647 [196].

19 See, for example, Part 4 of the *Children and Community Services Act* 2004 (WA).

20 See, the *Bankruptcy Act* 1966 (Cth) s 43.

21 See, for example, Part II of the *Administration Act* 1903 (WA).

22 *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].

amend laws as to dangerous sexual offenders, the obligation and powers of child welfare authorities, insolvency or estate administration without infringing any limitation upon legislative power derived from Chapter III of the *Constitution*.

22. Further, a State or Commonwealth law may operate to declare rights, duties and liabilities by reference to curial proceedings, including "particular and readily identifiable" curial proceedings[23], and to vary those rights, duties and liabilities from time to time.

(a) In *Re Macks; Ex parte Saint*[24] this Court held valid State provisions which created statutory rights by reference to the "ineffective judgments" of federal courts and provided for the subsequent variation of those rights on appeal. As Gummow J noted, the legislation attached consequences to the fact of the court order as an act in the law[25].

(b) In *Haskins v The Commonwealth*[26] this Court held valid Commonwealth legislation which declared the rights and liabilities of persons punished by the Australian Military Court to be the same as if the punishment had been validly imposed by a court martial. In doing so, the Commonwealth legislation reversed much of the practical effect of the decision of this Court in *Lane v Morrison*[27] which declared Div 3 of Part 4 of the *Defence Force Discipline Act* 1982 (Cth) to be invalid. The remedial Commonwealth legislation did not affect this Court's declaration of invalidity. However, it did change the rights and liabilities of persons which otherwise flowed as a practical consequence of this Court's declaration in *Lane v Morrison*.

(c) In *Duncan v Independent Commission Against Corruption*[28], this Court unanimously held valid Part 13 of the *ICAC Act* 1988 (NSW). It was "readily apparent" that Part 13 was "concerned to address only one problem", namely

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23 Cf Plaintiff's Submissions at [38].

24 (2000) 204 CLR 158.

25 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 per Gummow J at 232 [208], referring to the judgment of Stephen J in *Re Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243.

26 (2011) 244 CLR 22.

27 (2009) 239 CLR 230.

28 (2015) 256 CLR 83.

this Court's prior decision in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1[29] to the effect that certain findings of the ICAC were beyond the ICAC's power to the extent they concerned the applicant[30]. In attaching "new legal consequences and a new legal status" to things, which otherwise would not have had such legal consequences or status, by reference to the Court's decision in *Cunneen*, Part 13 did not interfere with judicial power contrary to Chapter III of the *Constitution*[31].

23. A State law may also amend the manner in which a court order is to be executed, a task that is entrusted to the Executive. Relevantly to the present case, this includes how a sentence of imprisonment is to be carried out: see *Baker v The Queen* (2004) 223 CLR 513 per Gleeson CJ at 520 [7]; *Elliott v The Queen* (2007) 234 CLR 38 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ at 41 [5].

24. In the present context, for example, French CJ in *Crump* observed that[32]:

> "The distinction between the legal effect of a decision and consequences attached by statute to that decision is apposite in the context of sentencing decisions and statutory regimes providing for conditional release by executive authorities".

25. Section 154A, upon which s 74AA was modelled, altered a statutory consequence of the plaintiff's sentence, namely the Parole Board's duty to give consideration to his release in accordance with the provisions of the Act; it did not alter the sentence's legal effect[33].

The effect of legislation changing the Plaintiff's release criteria

26. The imposition of a head sentence with a minimum term authorises the Executive to detain a person in a prison for the maximum term, and operates to preclude parole authorities from considering whether to release the person on parole until the end of

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29 The title of Part 13 read: "Validation relating to decision on 15 April 2015 in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

30 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 per French CJ, Kiefel, Bell and Keane JJ at 397 [8].

31 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 per French CJ, Kiefel, Bell and Keane JJ at 402 [25], 403 [26].

32 See *Crump v New South Wales* (2012) 247 CLR 1 per French CJ at 19 [36].

33 See *Crump v New South Wales* (2012) 247 CLR 1 per French CJ at 19 [35].

the minimum term (although it does not affect the Crown's capacity to exercise the Royal prerogative of mercy).

27. The authority to detain a person ordinarily conferred by a sentence of imprisonment is an authority to detain, and a liability by the prisoner to detention, for the whole of the term of the head sentence. When imposed in the exercise of a discretionary judgment, it is the head sentence which identifies the period of imprisonment reflecting the gravity of the crime, generally without regard to the effect of a discretionary system of remission[34]. As the Court noted in *PNJ v The Queen*[35] it is always necessary to recognise that the offender may be required to serve the whole of the head sentence that is imposed.

28. Since 1988, the Plaintiff has been serving a sentence of life imprisonment in respect of each of the seven counts of murder, and 10 years imprisonment for each of the 46 counts of attempted murder[36]. Hampel J set a minimum sentence of 27 years.

29. The function of fixing a minimum term has been expressed, in a variety of legislative contexts, as involving the determination of the minimum period for which, in the opinion of the sentencing judge and according to accepted principles of sentencing, the prisoner should be imprisoned[37]. The court order which fixes a minimum term does not create the power or duty of parole authorities to consider whether a prisoner should be released on parole. Rather the power or duty is created by sentence administration legislation which operates by reference to the order which the Court has made and empowers or requires the parole authority to consider the question of release only when the minimum term has expired. Indeed Hampel J, in setting a minimum term for the Plaintiff, specifically referred to the fact that a minimum term

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34 *Hoare v The Queen* (1989) 167 CLR 348 per Mason CJ, Dean, Dawson, Toohey and McHugh JJ at 353-354. This is subject to statutory exceptions of the kind referred to in *Western Australian BLM* (2009) 40 WAR 414.

35 (2009) 83 ALJR 384 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ at 387 [11].

36 To be served concurrently with each other and the life sentences.

37 See *Bugmy v the Queen* (1990) 169 CLR 525 per Dawson, Toohey and Gaudron JJ at 536; *Lowe v The Queen* (1984) 154 CLR 606 per Mason J at 615; *Power v The Queen* (1974) 131 CLR 623 per Barwick CJ, Menzies, Stephen and Mason JJ at 628-629; *Western Australia v BLM* (2009) 40 WAR 414 per Wheeler and Pullin JJA at 423-424 [14]-[15], with whom Owen JA agreed at 420 [1].

was not a period at the end of which is the prisoner is released, but rather a period before the expiration of which he cannot be released[38].

30. Given the purpose of setting a minimum term and the difficulties which attend predicting behaviour at a time many years into the future, a minimum term may be imposed notwithstanding that, at the time of setting the term, the available information does not engender much optimism for the offender's future[39]. A minimum term may therefore be set in circumstances where, at the time it is set, there appears to be no prospect that the offender will be suitable for release at the expiry of the minimum term. The practical effect of setting the minimum term is therefore simply that after the minimum term the Executive, in this case acting through the Second Defendant, may, but of course need not, grant the offender parole[40] in the context of the information available and the statutory regime in place at a later time.

31. The effect of the information available and the statutory regime in place at that later time may well be that, upon considering the question of release on parole, it would not be open to the authority considering that question to release the Plaintiff. Contrary to the Plaintiff's Submissions, this is not equivalent to the Plaintiff being denied access to a parole regime[41].

32. It is important to note in this regard that when an offender is released on parole, the offender obtains a mercy. As the plurality explained in *Baker v The Queen*[42]:

> "If the Executive exercised the power given by s 463, the offender obtained a mercy. But in no sense (whether as a matter of substance or as a matter of form) can later legislation, altering the circumstances in which such mercy could or would be extended to a prisoner sentenced to life imprisonment, make that sentence of life imprisonment more punitive or burdensome to liberty. Whether the power to reduce the effect of a life sentence is given to a court (as the legislation now in question did) or is retained by the Executive, the original sentence passed on the offender could not be and was not extended or made heavier".

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38 Special Case Book, page 38.

39 *Bugmy v The Queen* (1990) 169 CLR 525 per Dawson, Toohey and Gaudron JJ at 538.

40 *Bugmy v The Queen* (1990) 169 CLR 525 per Dawson, Toohey and Gaudron JJ at 538.

41 Plaintiff's Submissions at paragraphs 36.

42 (2004) 223 CLR 513 per McHugh, Gummow, Hayne and Heydon JJ at 528 [29].

33. As stated in the Defendant's Submissions at [28], the Plaintiff's Submissions at [32] invert the true meaning of this passage. Legislation that alters the circumstances in which the executive might extend a mercy to a prisoner serving a sentence of life imprisonment does not extend or make heavier that sentence, because such an extension of mercy does not affect the sentence at all.

34. Indeed this conclusion holds true in relation to finite sentences. In the case of, for example, a prisoner who is serving a sentence of ten years imprisonment, with a minimum term of six years, legislation which imposed more stringent conditions upon which the executive might order the prisoner's release upon the expiration of the six year term, would not "extend or make heavier" the ten year sentence imposed.

35. Accordingly, at the time of the Plaintiff's sentencing by Hampel J, it was the sentence administration legislation, rather than the sentence, which created the Second Defendant's obligation to consider parole and defined the release criteria. The specification of the minimum term in the sentence was a precondition to the existence of the relevant statutory power and duty. The sentence was not an indication that the Plaintiff would or should be released at the end of the minimum term.

Wainohu is distinguishable

36. Contrary to Plaintiff's Submissions[43], there is no comparison in these proceedings to the law held invalid in *Wainohu*[44].

37. In *Wainohu*, the Court held invalid the *Crimes (Criminal Organisations Control) Act* 2009 (NSW), which employed the Supreme Court of New South Wales to make control orders against members of declared organisations. An organisation would be "declared" by an "eligible judge" of the Supreme Court acting *persona designata*. The judge was expressly not required to give reasons for a declaration. This feature was considered to be inconsistent with the "essential incident[s] of the judicial

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43 Plaintiff's Submissions at paragraph 49.

44 (2011) 243 CLR 181.

function"[45]. The power was conferred, however, not on a court exercising the judicial function, but on an eligible judge.

38. The crucial feature of the decision, however, concerned whether the conferral of non-judicial functions upon state judges as *personae designatae*, in that case, was compatible with the institutional integrity of the court of which the judge was a member[46]. In that context, it was significant, as French CJ and Kiefel J observed, that the non-judicial function was "integral to the exercise of jurisdiction by the Court" and there was "a connection between the non-judicial function conferred... and the exercise of jurisdiction by the [court]"[47].

10 39. As the Defendant's Submissions at [45] state, the *Kable* principle depends on the effect of the law upon the functioning of the courts. The Plaintiff's Submissions do not identify how the function conferred by s 74AA undermines the integrity of Victorian courts as institutions.

40. Here, unlike in *Wainohu*, the functions of the Adult Parole Board are not connected with the later exercise of jurisdiction by a court nor integral to the exercise of jurisdiction. Indeed, there is no later exercise of jurisdiction by a court *at all*. Section 74AA confers a function on the Adult Parole Board, not a court, in respect of a distinctly executive decision. Once a prisoner has been sentenced, the exercise of the judicial function is complete and the prisoner passes into the control of the
20 administrative arm of government which exercises the administrative function of determining whether the prisoner should be released on parole[48].

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45 *Wainohu v New South Wales* (2011) 243 CLR 181 per French CJ and Kiefel J at 219 [67].

46 *Wainohu v New South Wales* (2011) 243 CLR 181 per Gummow, Hayne, Crennan and Bell JJ at 228-229 [105].

47 *Wainohu v New South Wales* (2011) 243 CLR 181 per French CJ and Kiefel J at 219 [68].

48 *Crump v New South Wales* (2012) 247 CLR 1 per French CJ at 16 [28] and Heydon J at 26 [58]. See also *Elliott v R* (2007) 234 CLR 38 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ at 41–42 [5].

PART VI: LENGTH OF ORAL ARGUMENT

41. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

Dated: 3 February 2017.

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