IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M251/2015

BETWEEN:

10 **JULIAN KNIGHT**
Plaintiff

and

THE STATE OF VICTORIA
First Defendant

ADULT PAROLE BOARD
20 Second Defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

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PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.[1]

PART II PLAINTIFF'S FIRST CONTENTION: INTERFERENCE WITH JUDICIAL SENTENCE

2. At the outset, it is necessary to reiterate certain aspects of the Plaintiff's case and, in particular, to reiterate what the Plaintiff does *not* contend.

   a. The Plaintiff does not contend that Parliament lacks the power to amend legislation governing the eligibility of prisoners for parole (PS, [24]).

   b. The Plaintiff accepts that the imposition of a "minimum term" did not "create any right or entitlement in the Plaintiff to his release on parole"[2] (PS, [23]).

10 c. The Amending Act does not, as a matter of legal effect, "impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty".[3]

Crump v NSW

3. In relation to *Crump*,[4] the Plaintiff contends that, contrary to the First Defendant's and interveners' submissions, *Crump* does not resolve this case.

4. The First Defendant and certain interveners refer to the NSW Act as having "an *ad hominem* component".[5] They rely on French CJ's reference to the NSW Act's second reading speech in *Crump*,[6] and on the proposition that the legislation in issue in *Crump* applied only to a finite group of persons. However, French CJ's comments were by way of background and did not form part of French CJ's central reasoning. Nor were they adopted
20 by the remainder of this Court. Further, in *Fardon* members of this Court explained that the express *ad hominem* character of the *Kable* legislation was central to its invalidity.[7]

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1 These submissions adopt the same abbreviations as the Plaintiff's principal submissions (**PS**), and reply to the First Defendant's submissions (**DS**) as well as those of the interveners.

2 (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

3 (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). (PS, [24])

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

5 DS, [33], [53]; WA, [13]); referring to *Crump* (2012) 247 CLR 1, 15 [22] (French CJ).

6 (2012) 247 CLR 1, 15 [22] (French CJ).

7 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 591 [16] (Gleeson CJ); 595-596 [33], 601-602 [43] (McHugh J); 617 [100] (Gummow J); 658 [233] (Heydon & Callinan JJ).

5. The Plaintiff contends that *Crump* did not concern *ad hominem* legislation and that it was determined by reference to the legislation's legal effect as a law that changed, in a general way, the legal regime applying to applications for parole.[8] If, contrary to that argument, *Crump* is regarded as holding that an *ad hominem* alteration to a parole regime applicable to a single, named individual by reference to that individual's particular sentence, then the Plaintiff contends that it was wrongly decided and seeks leave to re-open it.[9]

6. Further, the Plaintiff contends that the Court should have regard to the substance of the legislation as well as its form. In particular, the Court should have regard to s 74AA(6), which identifies and constrains the application of the section by express reference to a *particular* and *readily identifiable* exercise of State judicial sentencing discretion. In substance, s 74AA effectively amends the Plaintiff's sentence.[10] Section 74AA(3) substantially eliminates, for all practical purposes,[11] the Plaintiff's entitlement *to be considered* for parole under s 74, something to which he was entitled prior to the enactment of s 74AA by reason of the sentence imposed upon him and the generally applicable parole regime.

Section 74AA refers expressly to the sentence imposed on the Plaintiff

7. The First Defendant and certain interveners seek to dismiss the reference to Hampel J's sentence in s 74AA(6) as being "simply to identify the 'Julian Knight' to which the section applies" (Eg DS, [29]; CTH [20]). This contention raises "concrete, practical issues, resolution of which may be assisted by regard to what other course was available to legislature."[12] The practical reality is that the First Plaintiff could have been identified by a number of a different means other than his sentence at a particular time for certain identified crimes (including his birthdate, location of birth, or his parents). Further, if the

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8 The Plaintiff contended the State Parliament "lacked the power to set aside, vary, alter, or otherwise stultify the effect of that … sentence" granting him parole: (2012) 247 CLR 1, 25 [56] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

9 This course was foreshadowed in PS at footnote 2. If it is required, leave should be given because: *Crump* did not rest on a principle carefully worked out in a significant succession of cases (to the contrary only one decision would require reconsideration); *Crump* has not been independently acted on in a manner which militated against reconsideration of the decision; and it is appropriate for this Court faithfully to apply the Constitution, even where this may involve overruling an earlier decision. See, eg, *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-440.

10 Section 17(1), *Penalties and Sentences Act 1985* (Vic). (PS, [38]-[40]).

11 The Plaintiff's contends that satisfaction of the criteria in s 74AA is all but impossible. (Cf SA, [19]). The period in which, under s 74AA, the Plaintiff can be released is between the Plaintiff being in "imminent danger of dying, or… seriously incapacitated" and the Plaintiff actually dying.

12 *Wainohu* (2011) 243 CLR 181, 229 [107] (Gummow, Hayne, Crennan and Bell JJ); citing *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 158 [14] (Gleeson CJ).

Parliament were concerned with implementing parole policy, it could have enacted an amendment to the parole regime with general application, albeit to a limited class of persons. Rather, the Parliament's choice of words in s 74AA(6) implies that:

a. there is a connection between the Plaintiff's sentencing, referred to in s 74AA(6), and his exclusion from the general parole regime by operation of s 74AA(1)-(3); and

b. that exclusion in s 74AA(1)-(3) is seeking to address that sentencing.

Baker v R

8. The First Defendant and the interveners dispute the Plaintiff's reliance on a passage from *Baker*.[13] The Plaintiff maintains his submission.

a. The First Defendant contends at DS [28] that the passage quoted from *Baker* should be understood as directed to the factual impossibility of increasing the burden resulting from a sentence of life imprisonment.

b. However, in the quoted passage, the plurality was not solely referring to the fact that it was impossible for the Parliament to make a life sentence heavier. In particular, the Plaintiff refers to the language chosen by the plurality. Their Honours referred to "the power to *reduce* the effect of a life sentence", referred to the circumstances in which mercy "could or *would be* extended", and stated that "the original sentence passed could not be and *was not* extended or made heavier".

c. That language reveals that the plurality considered that the Parliament was precluded from making a sentence heavier with respect to a particular individual, not simply that it was impossible for it to do so where a life sentence had been imposed.

PART III THE PLAINTIFF'S SECOND CONTENTION: ENLISTMENT OF JUDICIAL OFFICERS

9. The Plaintiff contends that the validity of the Amending Act should be determined on the following basis of its intended legal and practical operation, understood from the language of the statute,[14] and not by reference to possibilities that might or might not eventuate.[15]

10. In this case the participation of judicial officers in decision-making about parole is integrated throughout the entire scheme under the *Corrections Act*. Whether sitting as the

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13 (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ). DS, [28]; SA, [21].

14 See eg *Totani* (2010) 242 CLR 1, 84 [213] (Hayne J).

15 *Wainohu* (2011) 243 CLR 181, 240 [151]-241 [153] (Heydon J).

Board or in a division, a sitting judge is authorized to participate in the s 74AA process. It is irrelevant that the Board's processes to date have not involved judicial officers.

11. Alternatively, even if it be assumed, for the purposes of determining the Amending Act's validity, that a sitting judge will not in future participate in the s 74AA process, the *Kable* principle is engaged by the appointment of a judicial officer to the Board and that person's consequential eligibility and legal authority to participate in the s 74AA process.

    a. Under its terms, it is the "Board" — not a "division" — that is the organ determining the s 74AA application. Sitting judges partially make up that organ, irrespective of how the Board chooses from time to time to discharge the function conferred by s 74AA. Nor does any reading down of s 74AA avoid the reality that the decision is made by the Board of which sitting judges of State Courts are presently members.

    b. As the First Defendant submits, "this is an instance where conferring functions on judges (albeit in a personal capacity) is to ensure that decisions are made impartially and independently" (DS, [50]). This is the "connection" that the opposing parties claim is lacking (DS, [59]; SA, [46]). For parole regimes to use judicial officers in this way may be unobjectionable in a general sense. However, it is the judicial officers' recruitment to *the Board*, not a division, that causes them to lend that body the qualities of impartiality and independence. To the extent sitting judges, as part of the Board, are eligible to participate in the *ad hominem* s 74AA process, they cloak the Board's processes in the neutral colours of judicial action.[16] It is necessary to maintain the appearance as well as the reality of impartiality and independence of the courts from the executive — this is necessary to the maintenance of public confidence in the judicial system.[17] These fundamental considerations are not answered by the proposition that the Board, when sitting as a division under s 74AA, may or may not include a sitting judge (eg QLD, [59]).

Necessary and appropriate for the Court to resolve this issue

12. The First Defendant contends that it is not necessary for this Court to decide this issue because a sitting judge might not ultimately participate in the determination of the

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16 *Mistretta v United States* 488 US 361, 404 (1989), quoted in *Kable* (1996) 189 CLR 51, 133 (Gummow J); and in *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 425 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

17 See, eg, *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 595 [40] (French CJ, Kiefel and Bell JJ), 619 [124] (Gageler J).

Plaintiff's application (DS, [38]). Notably, the First Defendant does not contend there is no "matter" for the purposes of s 75 of the Constitution, or that the Plaintiff lacks standing. The principle relied upon by the First Defendant[18] rests on a prudential rule of practice: that this Court should not decide constitutional issues unless necessary for the resolution of the matter or, in the words of Starke J in *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales*,[19] "to secure and protect the rights of a party before it against unwarranted exercise of legislative power to his prejudice."

13. In this case, the effect of the First Defendant's submissions is that the Plaintiff, having made an application under s 74AA, should wait some further unspecified time to see if a judicial officer ultimately sits on his application. That application has not progressed since 27 July 2016 due to the inaction of the Board and others charged with functions under the section. The First Defendant's argument should be rejected. Section 74AA applies in terms to the Plaintiff; and if s 74AA is valid, the Board is required to determine the application. It is necessary for the resolution of the Plaintiff's case for the Court to determine the validity of s 74AA, including on the basis of the involvement of sitting judges in the regime. The Board should not, through its inaction, be permitted to deprive the Plaintiff of his entitlement to have the validity of legislation directed at him determined by this Court.

Section 74AA cannot be read down

14. The First Defendant and certain interveners alternatively contend that, even if the involvement of a judicial officer in a decision under s 74AA leads to constitutional invalidity, the result would be simply that the appointment of the judicial officer to the Board would be invalid (DS, [38(b)]); or that that s 74AA would be read down so that it did not authorise a judicial officer to participate in that process (CTH, [43]). However, as explained in PS [53]-[56], State judges are expressly integrated throughout the parole regime by the Act and to restrict the use of judicial officers in the s 74AA process would go beyond reading down.

Dated: 3 March 2017

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18 *El Hajje* (2005) 224 CLR 159, 171 [28] (McHugh, Gummow, Hayne and Heydon JJ). See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 473-474 [248]-[252] (Gummow and Hayne JJ).

19 (1927) 40 CLR 333, 356 (Starke J).