IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S165 of 2011

BETWEEN:

KEVIN GARRY CRUMP
Plaintiff

AND:

STATE OF NEW SOUTH WALES
First Defendant

AND:

NEW SOUTH WALES PAROLE AUTHORITY
Second Defendant

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

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

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the plaintiff and the first defendant.

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Filed on behalf of: Attorney-General for the State of Queensland

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V. ARGUMENT

5. The plaintiff argues that s 154A of the *Sentencing Administration Act 1999* (NSW) is invalid in its application to him because it breaches Chapter III of the Constitution.

6. The plaintiff's argument proceeds in these steps:

   (a) Chapter III of the Constitution, particularly s 73, provides for an integrated judicial system and an integrated system of courts;[1]
   (b) Chapter III necessarily implies that non-judicial bodies cannot vary, set aside or otherwise alter the effect of all 'judgments, decrees, orders, and sentences' mentioned in s 73 of the Constitution;[2]
   (c) the order of McInerney J in 1997 setting a minimum term and an additional term under s 13A of the *Sentencing Act 1989* (NSW) was such an order;
   (d) that order did not declare existing rights but created an entitlement that the plaintiff have some prospect of release on parole upon the expiry of his minimum term;[3]
   (e) s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) ('the Sentencing Administration Act') removed that entitlement, and thereby altered the effect of McInerney J's order;[4] and
   (f) accordingly, s 154A, in its application to the plaintiff, is invalid.[5]

7. These submissions should be rejected.[6]

8. First, the implication that the plaintiff seeks to draw cannot be described as 'logically or practically necessary'[7] or securely based.[8] Section 73 establishes the High Court as the final court of appeal in relation to federal courts, the Supreme courts and courts exercising federal jurisdiction. That section necessarily invalidates State legislation that would prevent the High Court hearing and determining an appeal from a State Supreme Court[9] or would provide an appeal from the High Court to a State court. The implication urged by the plaintiff, however, goes considerably further. It would invalidate any State law that alters 'the effect' of any judgment, decree, order or sentence of

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1 Plaintiff's submissions, paras 37-40.
2 Plaintiff's submissions, para 40.
3 Plaintiff's submissions, para 56.
4 Plaintiff's submissions, para 57.
5 The plaintiff does not contend that s 154A would be invalid in relation to offenders in respect of whom no minimum term was set before s 154A commenced: see Plaintiff's submissions, para 52.
6 While it is clear from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 that Chapter III invalidates States legislation that would have the effect of substantially undermining the institutional integrity of their courts, s 154A of the *Sentencing Administration Act* is not directed to courts, but to the Parole Board. The principle in *Kable* therefore has no direct role to play.
7 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ).
8 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453 [389] (Hayne J).
9 *Peterswald v Bartley* (1904) 1 CLR 497 at 498-499.

any court mentioned in s 73, regardless of whether there has been or will be any appeal to the High Court.[10] In this way, the implication is not tied to terms or purpose of s 73 of the Constitution.

9. The plaintiff's reliance upon the function of the judicial branch in quelling controversies is misplaced. Although the judicial branch has the unique function of quelling controversies,[11] that fact has never meant that legislatures are unable to affect judgments and undercut their finality. Thus, legislatures can grant appeal rights, or empower courts to re-open or alter judgments in certain circumstances.[12] Legislatures can also change the law so as to circumvent the effect of judgments without any breach of Chapter III.[13] It is therefore difficult to see how the judicial function of quelling controversies supports an implication of the kind described by the plaintiff.

10. The plaintiff's reliance on the integrated judicial system is likewise misplaced. In *Re Wakim; Ex parte McNally*, Gummow and Hayne JJ observed:[14]

> [W]hen it is said that there is an "integrated" or "unified" judicial system in Australia, what is meant is that all avenues of appeal lead ultimately to this Court and there is a single common law throughout the country. This Court, as the final appellate court for the country, is the means by which that unity in the common law is ensured.

That system, however, does not entail that legislatures are unable to alter the effect of judgments. The position of the High Court today is similar to that occupied by the Privy Council in the British Empire before federation. In *Trimble v Hill*, the Privy Council opined that it was 'of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same'.[15] Neither that approach nor the availability of appeals to the Privy Council, however, implied that colonial legislatures in Australia (which, like States, were not subject to the separation of powers) were prohibited from altering the effect of court orders in all circumstances.

11. An implication that non-judicial bodies can never alter or otherwise affect the judgments of courts would also be difficult to reconcile with the historical role played by pardons. At common law, the exercise of the prerogative of mercy in granting a free pardon did not quash a conviction for an offence, but did

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10 Plaintiff's submissions, para 44.

11 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 20 [43] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

12 Section 13A of the *Sentencing Act 1989* (NSW) was an example.

13 See, for example, *Re Humby; Ex Parte Rooney* (1973) 129 CLR 231; *Nicholas v The Queen* (1998) 193 CLR 173; *Re Macks; Ex parte Saint* (2000) 204 CLR 158; *Haskins v Commonwealth* (2011) 85 ALJR 836.

14 (1999) 198 CLR 511 at [110].

15 (1879) 5 App Cas 342 at 345.

remove the consequences of the conviction.[16] An exercise of the prerogative of mercy in granting a remission had the same effect. Section 85ZR of the *Crimes Act 1914* (Cth), moreover, provides that where a person has been granted a free and absolute pardon because the person was wrongly convicted of the offence, the person shall be taken, for all purposes, never to have been convicted of the offence. It thereby deems the conviction, pronounced by a court, never to have taken place. In these various ways, pardons directly alter the effect of a judgment. It has never been suggested, however, that Chapter III prohibits the exercise of the prerogative of mercy or invalidates legislative provisions based upon it.[17]

12. For these reasons, there can be no implication from Chapter III of the Constitution preventing legislatures and executives from altering the effect of judgments. Such a widely expressed implication has no basis.

13. Secondly, the distinction that the plaintiff seeks to draw regarding judgments is unsound. The plaintiff distinguishes between judgments that declare pre-existing rights and those that create entitlements. The former, he accepts, can be 'sidelined' by legislation that changes the law; the latter, he says, cannot.[18] He submits that s 154A of the Sentencing Administration Act is a law of the latter kind.[19]

14. Quite apart from the difficulty of identifying into which category a judgment may fall, however, the distinction itself finds no support in the text of the Constitution. Put simply, for the purposes of the High Court's appellate jurisdiction in s 73, the distinction is irrelevant. Accordingly, if State legislatures can (as the plaintiff concedes) alter the effect of judgments that declare rights by changing the substantive law, it is difficult to see why, in at least some circumstances, they cannot alter the effect of judgments that create entitlements by changing the substantive law.

15. Finally, even if (contrary to the submissions above) the plaintiff's implication were securely based and his distinction between types of judgments and orders were sound, McInerney J's order was not an order creating an entitlement that s 154A varied or altered. Justice McInerney's order imposed no direct obligation on the Parole Board that could sound in contempt; indeed, it did not even mention the Board. The obligation on the Parole Board to consider the plaintiff's release on parole, and hence any prospect of the plaintiff being released, was derived from the statutory scheme relating to parole.

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16 *R v Cosgrove* [1948] Tas SR 99 at 106; *R v Foster* [1985] QB 115 at 128-130; *Kelleher v Parole Board (New South Wales)* (1984) 156 CLR 364 at 371 (Wilson J); *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at [98] (Heydon J, with whom Gleeson CJ, Gummow, Kirby, Hayne and Callinan J agreed).

17 See *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at [98], fn 64 (Heydon J) (pointing out that Parliament can give a pardon a wider effect than it has at common law).

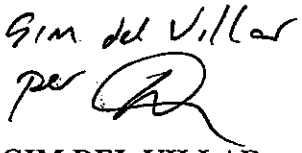
18 Plaintiff's submissions, para 57.

19 Plaintiff's submissions, para 57.

Furthermore, McInerney J's order could not guarantee to the plaintiff that the statutory scheme that gave him a prospect of release would remain unchanged. It follows that the alteration to that scheme by s 154A of the *Sentencing Administration Act*, which removed the Board's duty to consider whether to grant parole for serious offenders who were subject to a non-release recommendation, did not alter the effect of the order. It amounted to no more than change in the law that had the effect of circumventing the order, a result which Chapter III does not forbid.

10 16. Accordingly, the application must be dismissed.

Dated: 27 February 2012



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