IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M162 of 2018

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

and

THE STATE OF VICTORIA
Defendant

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OUTLINE OF ORAL ARGUMENT ON BEHALF OF ATTORNEY GENERAL FOR THE STATE OF NEW SOUTH WALES, INTERVENING

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

Alleged interference with sentencing decision

20 2. Contrary to the plaintiff's submissions ("PS") at [68], in reality the decisions in Crump v New South Wales (2012) 247 CLR 1 ("Crump") and Knight v Victoria (2017) 261 CLR 306 ("Knight") accept the difference between the exercise of sentencing as one of the functions of a court and the decision as to when, and if, parole would be granted to the subject of the sentencing process, the latter being a function of the executive government: Crump at 16-17 [28] per French CJ, referring to Elliott v The Queen (2007) 234 CLR 38 at 41-42 [5].

3. The relevant provision of the NSW parole legislation in Crump was effectively adopted by the Victorian Parliament in Knight and has likewise been adopted in the plaintiff's case. All members of the Court in Knight said that Crump could not be distinguished
30 and should not be reopened: Knight at 323 [25]. The decisions in Crump and Knight are authority for the proposition that provisions in the form of ss 74AAA and 74AB of the Corrections Act 1986 (Vic) ("Corrections Act") do "not intersect at all with the exercise of judicial power that has occurred" and do not "contradict the minimum term that was fixed": Knight at 323-324 [29]; NSW Submissions at [5].

4. It would be necessary to re-open both the decisions in Crump and Knight in order to accept the plaintiff's argument as to the effect of the impugned provisions of the Corrections Act on his minimum term. Those decisions should not be re-opened: NSW Submissions at [6].

5. Sections 74AB and 74AAA are in both form and substance a direction to the Adult
40 Parole Board by the legislative branch. Their enactment has not altered any aspect of

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the plaintiff's sentence: see Knight at 323-324 [28], [29]; Crump at 19 [36] per French CJ, 26 [60] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; Baker v The Queen (2004) 223 CLR 513 at 531 [39] per McHugh, Gummow, Hayne and Heydon JJ, NSW Submissions at [7], [9]-[12].

Alleged exercise of judicial power by the Victorian Parliament

6. If reached (which it should not be), the Court should reject the submission that the Victorian Parliament cannot validly exercise judicial power because to do so would be inconsistent with Ch III of the Commonwealth Constitution. The critical point in Kirk v Industrial Court (NSW) (2010) 239 CLR 531 at 581 [99] requires the enforcement by State courts exercising supervisory jurisdiction (and, on appeal, by this Court) of limits on the power of persons and bodies exercising State executive and judicial power, not legislative power. No further implication under Ch III is required to safeguard that type of judicial review and none should be drawn: NSW Submissions at [13]-[15].

The rule of law as a limitation on State legislative power

7. The proposition that ss 74AB and 74AAA offend against the aspects of the rule of law on which the plaintiff relies (that the provisions are arbitrarily disproportionate and destroy the expectation as to parole on which he has relied) could not be made good in view of Knight at 322-323 [23]-[26] and the necessity of recognising that an offender may be required to serve the whole of the head sentence imposed: PNJ v The Queen (2009) 83 ALJR 384 at 387 [11]; NSW Submissions at [18].

8. The plaintiff's argument concerning the rule of law as a limitation on State legislative power disregards (a) the critical distinction between acceptance of the rule of law as an assumption underpinning the Commonwealth Constitution and an implication that "inheres in the instrument" in a manner that would entail a corresponding limitation on (Commonwealth) legislative power; and (b) the significant differences between the constraints on Commonwealth and State legislative power: Australian Capital Television v Commonwealth (1992) 177 CLR 106 at 135 per Mason CJ; NSW Submissions at [19]-[22].

Dated: 18 June 2019

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