IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M162 of 2018**

BETWEEN:

CRAIG WILLIAM 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.

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PART IV: SUBMISSIONS

4. The plaintiff was convicted of murdering a police officer, who was on duty, on 27 March 1986, acting in concert or joint enterprise with others. The conviction was recorded on 24 August 1988. The plaintiff was sentenced for a term of imprisonment for life. The sentencing Court set a minimum non-parole period of 28 years. This period expired on 30 September 2016.[1] The plaintiff has not been released on parole.

5. The plaintiff challenges the constitutional validity of ss.74AAA and 74AB of the ***Corrections Act 1986*** (Vic). These provisions concern whether the plaintiff may be granted parole. In their present form, they were enacted in 2018, after the decision of the High Court upon the predecessor to s.74AAA in ***Minogue (No 1)***.[2] They apply retrospectively: s.127A.

6. Section 74AAA will apply to a person if a person has been convicted of murder and the victim was a police officer. As well, the Parole Board must be satisfied that the person intended to cause, or knew that it was probable that his or her conduct would cause, the death of, or really serious injury, to a police officer; or the person knew that the person whose death was caused was a police officer. Section 74AB applies specifically to the plaintiff.

7. The effect of ss.74AAA and 74AB is that, if they apply, the Parole Board is prohibited from releasing the person to whom they apply upon parole unless the Parole Board is satisfied that: (a) the person is in imminent danger of dying, or is seriously incapacitated and, as a result, that person no longer has the physical ability to do harm to any person; (b) the person does not pose a risk to the community; and (c) the making of a parole order is justified because of these circumstances. In other words, by reason of these provisions, a person to whom they apply will be required to serve the totality of a term of life imprisonment in prison, unless that person is near death or seriously incapacitated and no longer poses a threat to the community.

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1 ***Minogue v Victoria*** [2018] HCA 27; (2018) 92 ALJR 668 (***Minogue (No 1)***) at [2]-[3].

2 ***Minogue (No 1)***.

8. The plaintiff challenges the validity of these provisions upon the grounds that they purport to legislatively re-sentence the plaintiff: Statement of Claim, [21].

9. Upon that basis, the plaintiff says that the legislative re-sentencing is invalid because it is beyond the powers of the Victorian Parliament. That is for the following reasons:

(a) **The Legislative Punishment Argument** - Ch III of the Commonwealth Constitution, and Part III of the *Constitution Act 1975* (Vic), mean that the Victorian Parliament lacks power to act judicially and impose a new sentence, at least where it imposes further punishment: Statement of Claim, [24];

(b) **The Rule of Law Argument** - the Commonwealth Constitution is premised upon the assumption of the rule of law, which impliedly limits a State Parliament from acting judicially and imposing a new sentence: Statement of Claim, [26];

(c) **The Cruel Punishment Argument** - Ch III does not permit the imposition of any punishment which is cruel, inhuman or degrading treatment: Statement of Claim, [23]. The new sentence amounts to cruel, inhuman or degrading treatment or punishment contrary to Article 7 of the International Covenant on Civil and Political Rights. Although unpleaded, the plaintiff also refers to the *Bill of Rights* in his submissions.[3] The new sentence is said to be cruel, inhuman or degrading treatment or punishment because the imprisonment does not have any relevant prospect of release after the expiry of a minimum term fixed by the Court: Statement of Claim, [22];

(d) **The Full Faith and Credit Argument** - the new sentence is inconsistent with Victorian laws permitting judicial punishment of offenders in judicial proceedings, and those laws and proceedings have paramount effect by reason that s.118 of the Commonwealth Constitution requires full faith and credit to be given to the laws and judicial proceedings of every State: Statement of Claim, [25].

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3 Plaintiff's Submissions, [51]-[52], [55], [57].

No Legislative Re-sentencing

10. The starting point in the plaintiff's challenge, that ss.74AAA and 74AB amount to a legislative re-sentencing, should not be accepted.

11. The High Court has previously upheld the validity of provisions in materially identical terms to ss.74AAA and 74AB: ***Crump v NSW***,[4] ***Knight v Victoria***.[5] The High Court has recently and unanimously refused to re-open the correctness of these decisions: ***Knight***.[6] State legislatures have acted upon the basis of the correctness of the decisions in ***Crump*** and ***Knight***. For example, in WA, see the debate upon the ***Sentence Administration Amendment (Multiple Murderers) Act 2018*** (WA), where portions of the decisions of ***Crump*** and ***Knight*** were read to Parliament.[7]

12. The decisions of ***Crump*** and ***Knight*** establish that:

    (a) there is a distinction between the judicial function exercised by a judge in sentencing a prisoner to a term of imprisonment, and the administrative function exercised by the Executive in determining whether a prisoner eligible for release on parole (in accordance with the sentencing order) should be released.[8] Once sentenced, the exercise of judicial power is spent and the responsibility for the future of a prisoner passes to the Executive;[9]

    (b) neither the form nor the substance of a sentencing determination of a minimum term creates a right or entitlement to be released on parole.[10]

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4 [2012] HCA 20; (2012) 247 CLR 1 (***Crump***).

5 [2017] HCA 29; (2017) 261 CLR 306 (***Knight***).

6 ***Knight*** at [25] (The Court).

7 Hansard, Western Australia, Tuesday 6 November 2018, p 7868.

8 ***Crump*** at [27] (French CJ), [41]-[42] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); ***Knight*** at [28].

9 See ***Crump*** at [28] (French CJ), [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also ***Elliott v R*** (2007) 234 CLR 38 at [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

10 ***Crump*** at 26-27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); at 29 [73] (Heydon J); *Knight* at [27]. See also ***Minogue (No 1)*** at [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

It is always necessary to recognise that the offender may be required to serve the whole of the head sentence.[11] If the Executive exercises the power to release the prisoner on parole, the prisoner obtains a mercy;[12]

(c) the power of the Executive to order a prisoner's release on parole, and the criteria applicable to the exercise of that power, may be broadened, constrained or even abolished by the legislature of the State.[13] In so doing the legislature does not alter the legal effect of the court order which fixes the original sentence (including the minimum term).[14] Nor does it make the original sentence of life imprisonment "more punitive or burdensome to liberty"[15] or replace a judicial judgment with a legislative judgment.[16]

13. The sentence imposed upon the plaintiff is the term of life imprisonment. This is not altered at all by ss.74AAA and 74AB, which concern the ability of a prisoner to apply for and obtain parole. Release upon parole is an executive decision. In ***Knight***, the Court unanimously said that whether a person "would be released on parole at the expiration of the minimum term was simply outside the scope of the exercise of judicial power constituted by the imposition of the sentences".[17]

14. Further, the statement of a minimum non-parole period does not create any accrued right of the plaintiff to apply for or to be granted parole upon the

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11 ***PNJ v The Queen*** (2009) ALJR 384 at [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also ***Minogue (No 1)*** at [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

12 ***Baker v The Queen*** (2004) 223 CLR 513 at [29] (McHugh, Gummow, Hayne and Heydon JJ).

13 ***Crump*** at [36] (French CJ).

14 ***Crump*** at [35] (French CJ); [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); [70]-[71] (Heydon J); ***Knight*** at [29].

15 ***Knight*** at [29], quoting ***Baker v The Queen*** (2004) 223 CLR 513 at [29].

16 ***Knight*** at [29].

17 ***Knight*** at [28].

expiration of the minimum term.[18] The basis for an executive decision to release a prisoner may change over time with social values.[19]

15. 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.[20] In so doing, the legislature provides for:

> "...the mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regarding to all the circumstances of his offence".[21]

16. The court order which fixes a minimum term does not create the power or duty of the parole authority to consider whether a prisoner should be released on parole. That power or duty is created by the relevant 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 conditional release when the minimum term has expired.

17. Further, the fixing of a minimum term by the Court does not create any right or entitlement to be released on parole,[22] or give the prisoner any prospect of release at its conclusion.[23] At best, the prisoner is only provided with hope[24] of an earlier conditional release, subject to and in accordance with the sentence administration legislation in existence at that time. At any time the prisoner

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18 ***Crump*** at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

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

20 See ***Bugmy v The Queen*** (1990) 169 CLR 525 at 536 (Dawson, Toohey and Gaudron JJ); ***Lowe v The Queen*** (1984) 154 CLR 606 at 615 (Mason J); ***Power v The Queen*** (1974) 131 CLR 623 at 627-629 (Barwick CJ, Menzies, Stephen and Mason JJ); ***Western Australia v BLM*** (2009) 40 WAR 414 at [14]-[15] (Wheeler and Pullin JJA, with whom Owen JA agreed at [1]).

21 ***Bugmy v The Queen*** (1990) 169 CLR 525 at 536 (Dawson, Toohey and Gaudron JJ).

22 ***Crump*** at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); ***Knight*** at [27].

23 ***Crump*** at [73] (Heydon J).

24 ***Bugmy v The Queen*** (1990) 169 CLR 525 at 536 (Dawson, Toohey and Gaudron JJ).

may be required to serve the entire sentence.[25] Even accepting that the minimum term of a sentence of imprisonment constitutes a judicial order that may be appealed,[26] at all times there remains only one sentence.[27]

The Legislative Punishment Argument

18. If the plaintiff's starting premise is accepted (contrary to what has been submitted), the effect of the legislative re-sentencing is to alter the minimum period before which the plaintiff is entitled to obtain release upon parole, and to alter the criteria applicable to the parole decision. It is not a case where the sentence term is increased.

10 19. Consequently, the specific proposition which must be established by the plaintiff to succeed is that, by reason of Ch III of the Commonwealth Constitution, State Parliaments have no legislative power to alter the minimum term set as a non-parole period after a sentence has been imposed by a Court.

20. Nothing to that effect is expressly stated in Ch III of the Commonwealth Constitution.

21. No case has ever suggested that any implication has the relevant effect of preventing State Parliaments from altering a minimum period of parole. To the contrary, the High Court has accepted that State Parliaments do have such a power: ***Baker, Crump, Knight***.

20 22. The purpose of the ***Kable*** implication, which limits State and Federal legislative power in respect of judicial matters, is to protect the institutional integrity of all Courts exercising federal jurisdiction.[28] The sources of this limitation on State legislative power, rooted in the text of the Constitution, are the constitutional

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25 ***PNJ v The Queen*** (2009) ALJR 384 at [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also ***Minogue (No 1)*** at [17] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

26 Plaintiff's submissions, [19].

27 ***Power v The Queen*** (1974) 131 CLR 623 at 628-629 (Barwick CJ, Menzies, Stephen and Mason JJ); ***Lowe v The Queen*** (1984) 154 CLR 606 at 615 (Mason J).

28 ***International Finance Trust Co Ltd v NSW Crime Commission*** (2009) 240 CLR 319 at [55]-[56] (French CJ), [98] (Gummow and Bell JJ), [136], [140] (Heydon J); ***Crump*** at [31] (French CJ).

concepts of a "Supreme Court" from which an appeal lies to this Court under s.73 of the Constitution, and a "court of a State" in which the Commonwealth Parliament may vest federal jurisdiction under s.77(iii) of the Constitution.[29]

23. The legislative alteration of the rights of an individual, not involving any aspect of the Court's processes, does not have the capacity to affect the institutional integrity of Court's exercising federal jurisdiction at all. There can be no suggestion here that a Court is required to do anything which enlists the authority of the Court in achieving the will of the Executive. For example, the sentencing Court is not required to order that the minimum non-parole period for the plaintiff changes.

24. Nor does any alteration of the plaintiff's rights undermine the judicial process or the Court as an institution. A legislature is always able to change the rights of parties to an existing dispute, even in pending litigation, without infringing Ch III.[30] It follows even more strongly that a legislature is able to change the effect of judicial decision, so that previous rights or entitlements of parties which have been judicially determined are altered. This precise point was made, in relation to changes in a sentencing regime, in ***Baker v The Queen***.[31]

25. The plaintiff says that legislative re-sentencing in this case is contrary to Ch III because an exercise of judicial power by the Victorian Parliament "would stand outside [an integrated Australian court system], and would be incapable of both supervision by the Supreme Court of Victoria and appeal to [the High Court]".[32]

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29 See for example: ***Forge v ASIC*** (2006) 228 CLR 45 at [41] (Gleeson CJ with Callinan J concurring at [238], [63] (Gummow, Hayne and Crennan JJ); ***Wainohu v NSW*** (2011) 243 CLR 181, at [44]-[45] (French CJ and Kiefel J), [105] (Gummow, Hayne, Crennan and Bell JJ); ***South Australia v Totani*** (2008) 242 CLR 1, at [69] (French CJ), [201]-[207] (Hayne J), [426]-[427] (Crennan and Bell JJ).

30 See ***Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*** (1986) 161 CLR 88 at 96-97; ***H A Bachrach Pty Ltd v Queensland*** (1998) 195 CLR 547 at [19]. The power of a State Parliament to interfere in the judicial process is even greater: see ***Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations*** (1986) 7 NSWLR 372.

31 [2004] HCA 45; (2004) 223 CLR 513, esp at [30]-[33], [49].

32 Plaintiff's Submissions, [45].

26. In substance, that submission amounts to nothing more than a submission that a Parliament is not entitled to alter the rights of an individual by legislation after those rights have been pronounced by a Court, because the Court cannot supervise this legislative change. That is fallacious. If a Court is asked to enforce ss.74AAA or 74AB, it will do so in the usual way, and be subject to such appeals as are ordinarily available. That is consistent with its judicial function.

The Rule of Law Argument

27. The plaintiff submits that there is a constitutional implication in Ch III to the effect that the rule of law prevents a State Parliament from changing his potential entitlement to obtain parole after the expiry of the minimum non-parole period, particularly as a specific individual or a member of a narrow class, without a rational or relevant basis.[33]

28. In substance, this should be rejected for the same reasons as have been outlined in the last section. There is no basis for any constitutional implication based upon Ch III which restricts State legislative power from altering a person's rights and entitlements, so long as a Court is not enlisted in that process. No case has ever suggested such a restriction.

29. Equally, there is no basis for an implication that an exercise of State legislative power in altering the rights and entitlements of an individual or class may be subject to judicial review unless the Court thinks that the legislative action was rational and relevant.

30. The Plaintiff's contention is framed in terms of "the constitutional assumption of the rule of law" and is built upon Sir Owen Dixon's dictum in the ***Communist Party Case***[34] (repeated in later cases) that "the rule of law forms an assumption"

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33 Plaintiff's Submissions, [62].

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

of the Constitution.[35] Dixon J's reference to the rule of law in ***Communist Party Case*** should be considered in its full context: [36]

> "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)

31. Dixon J was drawing a distinction between traditional conceptions to which legal effect is given by the Constitution and those which are not. The "rule of law" formed part of the latter.

32. In ***Australian Capital Television Pty Ltd v The Commonwealth***, Mason CJ later said:[37]

> "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."

33. There is nothing in the "rule of law" which necessarily requires an implied constraint upon State legislative power to prevent a State Parliament from changing the plaintiff's potential entitlement to obtain parole after the expiry of the minimum non-parole period. It is also doubtful whether that was ever a specific assumption made by the framers of the Constitution. Nothing suggests that there was.

The Cruel Punishment Argument

34. To succeed, the plaintiff must show that there is an implication in the Commonwealth Constitution, which confines the otherwise plenary power of State Parliaments, so that the Victorian Parliament cannot undertake a legislative re-sentencing which involves a cruel, unusual or degrading punishment. The plaintiff must also demonstrate that altering the minimum

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35 Plaintiff's Submissions, [62].

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

37 ***Australian Capital Television v Commonwealth*** (1992) 177 CLR 106 at 135 (Mason CJ). See also Gleeson CJ and Heydon J in ***APLA Ltd v Legal Services Commissioner (NSW)*** [2005] HCA 44; (2005) 224 CLR 322 at [30].

non-parole period so that the plaintiff is in custody unless he is near death or seriously incapacitated is a cruel, unusual or degrading punishment.

35. The plaintiff identifies the implication upon State legislative power as arising out of Ch III: Statement of Claim, [23]. However, Ch III has no relevant operation in respect of the exercise of legislative power which alters the rights and liabilities of individuals, which does not affect (or even involve) the reputational integrity of Courts. See paragraphs [23]-[24] above. There is no other basis for the relevant constitutional implication relied upon by the plaintiff.

10 36. The High Court has also upheld provisions with identical effect as being within State legislative power. See ***Crump*** and ***Knight***. These cases implicitly accept either, or both, of the following propositions: a State Parliament's power to legislate is not confined by any implication of the type upon which the plaintiff relies; and provisions such as ss.74AAA and 74AB do not involve any cruel, unusual or degrading punishment.

The Full Faith and Credit Argument

37. The plaintiff argues that full faith and credit should be given to the judicial sentence imposed upon the plaintiff, and that any legislative re-sentencing is inconsistent with that first judicial sentence.

20 38. This is essentially the same as the argument that a State Parliament cannot alter rights and entitlements which have been judicially pronounced. That argument has been addressed above at paragraphs [23]-[24].

39. The additional element which is introduced by s.118 is that full faith and credit should be given to judicial proceedings. However, equally, full faith and credit should be given to ss.74AAA and 74AB. These provisions alter the outcome of the judicial proceedings. They do not deny the existence of the judicial proceedings or their outcome.

PART V: LENGTH OF ORAL ARGUMENT

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

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