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

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

AND

STATE OF VICTORIA
Defendant

ORAL OUTLINE OF SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document: 18 June 2019

Filed on behalf of the Attorney General for Western Australia by:

State Solicitor for Western Australia
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
Solicitor for the Attorney General for Western Australia

Tel: (08) 9264 1809
Fax: (08) 9321 1385
Ref: SSO 1234-19
Email: m.durand@sg.wa.gov.au

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ORAL OUTLINE

2. The critical constitutional issue is whether a State Parliament has legislative power to alter, extend or remove a minimum non-parole period set by a Court. This question specifically arises in the context of sentencing an offender to mandatory life imprisonment, where that minimum non-parole period has expired.

3. The Court may not reach the point of considering this issue, if the Court concludes that the legislation here does not alter, extend or remove a minimum non-parole period. The Court might alternatively characterise the legislation as simply imposing further conditions upon the Board before parole may be granted, without in substance changing the minimum non-parole period.

No Additional Punishment

4. The plaintiff says that altering or removing a minimum non-parole period involves Parliament imposing an additional punishment upon the offender. That contention should be rejected.

5. Altering or removing a minimum non-parole period does not involve a State Parliament imposing any additional punishment upon an offender. The head sentence is not altered at all. Nor is any personal right of the offender to gain the benefit of a minimum non-parole period affected. An offender does not obtain any accrued or vested right under sentence administration legislation to be released upon expiry of a minimum non-parole period. The expiry of the minimum period is simply a pre-condition for the exercise of executive power to ameliorate some of the effects of the head sentence, including to allow rehabilitation if the Executive considers the offender to be a suitable candidate. The exercise of executive power (whether to rehabilitate an offender or otherwise) depends upon whether the legislative scheme for parole remains available for the offender, when parole for the offender is considered. See ***Crump v NSW*** (JBA, vol 9, Tab 32) at [60], ***Knight v Victoria*** (JBA, vol 10, Tab 44) at [27]-[29].

6. The plaintiff requires leave to re-open this aspect of ***Crump*** and ***Knight***. His argument cannot succeed without overturning this point.

Further Arguments

7. If the defendant and intervenors are wrong about the first point, the plaintiff says that a State Parliament is not entitled to exercise judicial power by legislatively re-sentencing the offender to the additional punishment of a further non-parole period, because this would be contrary to Ch III and a constitutional assumption of the rule of law. No oral argument has been advanced about s.118.

Ch III and State Parliament

8. The Plaintiff claims that the imposition of an additional punishment is contrary to the requirements of Ch III, applying what was said in ***Chu Keung Lim*** at p 27 (JBA, vol 8, Tab 29) and ***Duncan*** at [41], [46] (JBA, vol 9, Tab 33). In ***Lim***, Brennan, Deane and Dawson JJ said that, putting aside exceptional cases: "... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."

9. That proposition has no direct relevance to the present case. At most, if there is any exercise of judicial power by the Victorian Parliament here, it is not an exercise which adjudges guilt and imposes an additional term of imprisonment. It is an exercise of judicial power which removes the hope that the effect of the head sentence may be reduced. The plaintiff's criminal guilt has been determined and punished by a court imposing the head sentence. The legislation under challenge does not alter this in any way. Nothing said in ***Chu Kheng Lim*** (JBA, vol 8, Tab 29) or ***Duncan*** (JBA, vol 9, Tab 33) concerns the present situation.

10. As well, ***Lim*** was concerned with Executive detention, and did not consider legislative detention. ***Duncan*** was not concerned with personal detention at all. Here, the Plaintiff is imprisoned as a matter of judicial order.

11. There is no constitutional reason why a State Parliament should not be able to alter or remove the possibility of parole, even if that somehow technically involves the exercise of judicial power. The Parliament is not adjudging guilt,

nor is it setting the maximum sentence. To hold otherwise would be inconsistent with ***Baker v The Queen*** (JBA, vol 6, Tab 22) at [30]-[33], [49].

12. Further, there is no cruel or unusual punishment in altering or removing the possibility of parole. The head sentence is not subject to any challenge. It could have been imposed by a Court without a minimum non-parole period.

13. Lastly, there is no textual or other basis for a constitutional implication that Ch III prevents legislative judgments at all, or which are cruel or unusual. Ch III is concerned with protecting the integrity of Courts and has nothing to do with separate legislative exercises of judicial power by a State Parliament. ***Kirk*** is not relevant in those circumstances.

Rule of Law

14. The rule of law is simply a rubric which may describe a number of independent principles. Which precise principles are covered by the "rule of law" is a matter of contention. The operation of each independent principle needs to be separately considered in the Australian constitutional context.

15. The particular principle which the Plaintiff says applies here by reason of the "rule of law" is that laws apply equally to all, save to the extent that objective differences justify differentiation. In other words, the so-called "rule of law" principle is said to prevent *ad hominem* legislation. That is not a principle accepted by the Court.

16. Any suggestion that the "rule of law" prevents an *ad hominem* change in a legislative parole regime means that ***Knight*** (which accepted that a minimum non-parole period for a named person can be altered) is inconsistent with this principle and wrongly decided. That conclusion should not be adopted.

Dated: 18 June 2019

J A Thomson SC
Solicitor General for Western Australia

F B Seaward
Senior Assistant State Counsel