IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M162 of 2018

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

and

STATE OF VICTORIA
Defendant

OUTLINE OF THE STATE OF VICTORIA'S ORAL SUBMISSIONS

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

- **Proposition 1 – No legislative punishment**

2. Section 74AB and s 74AAA (if it arises) of the *Corrections Act 1986* (Vic) do not impose additional punishment on the Plaintiff beyond the punishment imposed by the Supreme Court at the time of sentencing. Nor does the enactment of those provisions involve the exercise of judicial power.

3. There is a fundamental distinction between the judicial power exercised when sentencing an offender and the executive power exercised when determining whether to release a prisoner on parole following the expiration of the prisoner's minimum term of imprisonment: *Crump* (2012) 247 CLR 1 at 16 [28] (**JBA 9/32**, p 3434).

   3.1. The exercise of judicial power concludes with the passing of sentence: Defendant's Submissions (**DS**), paragraph 8.1; *Baker* (2004) 223 CLR 513 at 528 [29] (**JBA 6/22**, p 2452); *Elliott* (2007) 234 CLR 38 at 41-42 [5] (**JBA 9/35**, pp 3514-3515); *Crump* at 19 [34], 20-21 [41], 26 [58] (**JBA 9/32**, pp 3437-3439, 3444).

   3.2. The fixing of a minimum term says nothing about whether a prisoner will be released on parole at the end of the minimum term: DS, paragraph 8.2; *Knight* (2017) 261 CLR 306 at 323 [27] (**JBA 10/44**, p 3984); but constitutes a factum by reference to which the parole system operates: *Crump* at 26 [60] (**JBA 9/32**, p 3444); *Minogue* (2018) 92 ALJR 668 at 674 [17] (**JBA 10/51**, p 4279).

   3.3. The power to release a prisoner on parole after the expiry of the minimum term is reposed in the executive, subject to the relevant statutory and administrative regime, which is subject to change from time to time: DS, paragraphs 8.3-8.4; *Baker* at 520 [7] (**JBA 6/22**, p 2444); *Crump* at 17 [28], 19 [35]-[36], 26 [60], 28-29 [71]-[72] (**JBA 9/32**, pp 3435, 3437, 3444, 3446-3447).

   3.4. Legislative amendments to the parole system, which have the effect of restricting the grant of parole to circumstances of the kind described in ss 74AB and 74AAA, do not, in form or substance: (a) involve an exercise of judicial power; (b) make the sentence more punitive; or (c) otherwise alter or vary the sentence imposed: DS, paragraphs 8.5, 10, 22-24; *Baker* at 528 [29] (**JBA 6/22**, p 2452); *Crump* at 20 [38], 21 [41], 27 [60], 29 [72] (**JBA 9/32**, pp 3438-3439, 3444-3445, 3447); *Knight* at 317 [6], 323 [25], 323-324 [29] (**JBA 10/44**, pp 3978, 3984-3985). That is so even where those restrictions apply only: (a) as a matter of fact, to a small number of prisoners (*Crump*); or (b) to a single, named prisoner (*Knight*).

4. Sections 74AB and 74AAA are indistinguishable from the provisions upheld in *Crump* and *Knight*: DS, paragraphs 6-10, 16.

   4.1. *Crump* and *Knight* cannot be distinguished on the basis that ss 74AAA and 74AB constitute the imposition of "additional punishment", and hence "a separate

exercise" of judicial power by the Parliament, as distinct from an alteration of or interference with the exercise of judicial power by the Supreme Court: cf Plaintiff's Reply, paragraphs 8-9. That is a distinction without a difference.

4.2. This position is not altered by the extrinsic materials: DS, paragraphs 19-21.

5. *Crump* and *Knight* should not be re-opened: DS, paragraphs 11-15. Both cases involve a correct and consistent application of the line of authority identified in paragraph 3 above.

6. It is therefore unnecessary to consider whether the legislative imposition of additional punishment is beyond the power of the Victorian Parliament – because ss 74AB and 74AAA do not impose additional punishment: DS, paragraph 25.

- **Proposition 2 – Even if ss 74AB and 74AAA impose punishment, they are valid**

7. Alternatively, if ss 74AB and 74AAA increase the burden of the Plaintiff's life sentence by restricting the circumstances in which he may be released on parole, the provisions are nevertheless valid: DS, paragraphs 25-29.

7.1. There is no strict separation of powers at State level. A State Parliament's exercise of State judicial power is not, without more, contrary to Ch III: compare McHugh J in *Kable* (1996) 189 CLR 51 at 121.5 (**JBA 10/42**, p 3875): DS, paragraphs 26-27.

7.2. The Parliament has neither determined the Plaintiff's guilt nor imposed sentence on the Plaintiff. Legislative restriction of the circumstances in which a prisoner may be released on parole, even if it were to constitute punishment, does not usurp the judicial function or affect the integrated court system: DS, paragraphs 28-29.

- **Proposition 3 – Sections 74AB and 74AAA are not invalid on the ground of imposing cruel, inhuman or degrading treatment or punishment**

8. For the reasons given in Propositions 1 and 2, the Court need not consider whether the legislative imposition of punishment *of a particular kind* (cruel, inhuman or degrading treatment or punishment within article 7 of the ICCPR or cruel and unusual punishment within article 10 of the *Bill of Rights 1688*, which is not raised by the statement of claim or the special case) is beyond the power of the Victorian Parliament: DS, paragraph 31.

9. Alternatively, ss 74AB and 74AAA are not beyond power: DS, paragraphs 32-34.

9.1. The legislative power of the Victorian Parliament to stipulate the conditions that must be met before a prisoner may be released on parole is not constrained by article 7 of the ICCPR (nor by article 10 of the *Bill of Rights 1688*).

9.2. Sections 74AB and 74AAA are not directed to the Supreme Court and do not require or authorise that Court to impose punishment of any kind.

- **Proposition 4 – Sections 74AB and 74AAA are not invalid by reason of inconsistency with the rule of law**

10. There is no constitutional implication that State (or Commonwealth) legislative power is constrained by the rule of law: DS, paragraphs 35-40.

    10.1. The content of the rule of law is incapable of being given any precise definition: DS, paragraphs 39.1-39.2.

    10.2. Although particular aspects of the rule of law are given practical effect, or assumed, by Ch III of the Constitution, the Plaintiff's asserted implication is not securely based in the text or structure of the Constitution: DS, paragraphs 37-38, 39.3, 40.

11. In any event, a constitutional implication based on the rule of law would not preclude Parliament applying special conditions to the grant of parole to a prisoner by reason of the nature of the crime the prisoner had committed: DS, paragraphs 42-43; *Baker* at 521-522 [8]-[9] (**JBA 6/22**, pp 2445-2446); Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 July 2018, 2238 (**JBA 16/90**, p 6534).

12. A prisoner has no right or entitlement to, or expectation of, release on parole at any particular time or subject to any particular regime: DS, paragraph 44; *Crump* at 26 [60], 29 [71] (**JBA 9/32**, p 3444); *Knight* at 323 [27] (**JBA 10/44**, p 3984); *Minogue* at 674 [17] (**JBA 10/51**, p 4279).

- **Proposition 5 – No failure to give full faith and credit**

13. Because s 74AB and s 74AAA (if it arises) do not impose additional punishment on the Plaintiff or interfere with his sentence, it is unnecessary to consider this ground: DS, paragraph 45. However, if the ground is reached, the provisions are not inconsistent with s 118 of the Constitution, which relevantly goes no further than requiring that the judicial proceedings of one State be given full faith and credit in each other State and Territory: DS, paragraph 46.

- **Proposition 6 – Validity of s 74AAA does not arise for decision**

14. The validity of s 74AAA does not arise for decision: its application to the Plaintiff depends on the Parole Board's satisfaction of matters set out in s 74AAA(1)(c). The Board has not made, nor been asked to make, a decision on those matters: DS, paragraph 47.

Dated: 18 June 2019

PETER HANKS **ALISTAIR POUND** **SARAH ZELEZNIKOW**