IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M162 of 2018

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE

Plaintiff

and

STATE OF VICTORIA

Defendant

PLAINTIFF'S REPLY

I: Publication

1. This reply is in a form suitable for publication on the Internet.

II: Argument

Sections 74AB and 74AAA affect eligibility for parole

2. Section 74AB and, if it applies to the Plaintiff, s 74AAA of the Act affect the Plaintiff's eligibility for parole, in that they affect the period during which parole may not be granted: *cf.* Defendant's Submissions (**DS**) [2], [17]-[20]. The impugned provisions do not simply affect the conditions that must be satisfied before a parole order may be made by the Board: *cf.* DS [20]. Rather, they impose a temporal restriction that withdraws or denies the Board's power to grant parole during an additional period of time beyond the expiry of the Plaintiff's minimum term. The additional period is potentially lengthy, if not one which will endure for the remainder of the head sentence itself.

3. Section 74AB(3) relevantly provides that the Board may make a parole order '*if, and only if*' the Plaintiff is in imminent danger of dying or is seriously incapacitated. Similarly, s 74AAA(5) relevantly provides that the Board '*must not make a parole order ... unless*' the prisoner is in imminent danger of dying or is seriously incapacitated. It is an agreed fact that the Plaintiff is neither in imminent danger of dying nor seriously incapacitated (SC: [4]). The non-satisfaction of this so-called '*condition*' removes the Board's power to make a parole order in respect of the Plaintiff, notwithstanding the expiry of his minimum term. Until such time as the '*condition*' is satisfied, the Board's power to grant parole is not merely '*constrained*' (*cf.* DS [20]). It is removed.

4. The nature of ss 74AB(3) and 74AAA(5) is no different from that of a law which provides that a parole order must not be made unless, or may be made '*if, and only if*', the prisoner has served a fixed additional period of imprisonment beyond the minimum term imposed by the sentencing court. The '*condition*' in ss 74AB and 74AAA is necessarily temporal in operation, albeit that the additional period of ineligibility for parole is defined by reference

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to the occurrence of a future event[1] or future circumstances rather than a fixed period of time.[2]

5. It follows that the impugned provisions in their substantial and practical operation do not simply make it '*more difficult*' for the Plaintiff to obtain parole during the additional period: *cf.* DS [23]. Rather, the impugned provisions remove any possibility of the grant of parole during that period, so as to eliminate any relevant distinction between the '*opportunity*' for the Plaintiff to be released on parole and his '*eligibility*' to be considered for parole: *cf.* DS [18].

6. The Plaintiff does not assert an entitlement to be released on parole after the expiry of his minimum term. Nevertheless, the effect of the fixing of a minimum term is that the prisoner may be granted parole thereafter.[3] While the prisoner might of course be required to serve the whole of the head sentence,[4] that is only as a consequence of the refusal by the Board to exercise its discretionary power to grant parole, rather than as a consequence of a legislative withdrawal of any relevant prospect of release until the expiry of the head sentence. And in so far as responsibility for the prisoner once sentenced passes to the executive branch (*cf.* DS [8.3]), the executive function of deciding whether to release the prisoner on parole does not extend to the imposition of a further period during which parole cannot be granted.

7. That the objective purpose of the impugned provisions is to remove the Plaintiff's eligibility for parole is demonstrated by the extrinsic materials, which can legitimately inform the identification of the legislative purpose: *cf.* DS [19], [21].[5] In particular, the statement of compatibility which must be laid before the Parliament under s 28 of the *Charter* is an important aspect of the legislative process, and should be considered in the interpretation of the impugned provisions.[6] The statement discloses a legislative purpose to ensure that

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1 Compare, *e.g.*, a condition withdrawing the power to grant parole until the prisoner reaches a specified age.

2 Moreover, the occurrence of those circumstances (the Plaintiff's imminent death or serious incapacitation) cannot be relevantly regarded as being within the control of the Plaintiff.

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

4 *Cf. PNJ v The Queen* (2009) 83 ALJR 384 at [11].

5 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), followed in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [25] (French CJ and Hayne J). Moreover, '*context*', to which regard must be had '*in the first instance*' in accordance with the modern approach to statutory construction (*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ)), '*includes legislative history and extrinsic materials*': *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). See also *K-Generation Pty Ltd v Liquor Licensing Court (SA)* (2009) 237 CLR 501 at 521-522 [51]-[53] (French CJ). See further n 6 below.

6 See *Interpretation of Legislation Act 1984* (Vic), s 35(b)(iii), which (unlike s 15AB of the *Acts Interpretation Act 1901* (Cth)) does not in terms place any limit on the use which may be made of extrinsic material: *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 549 (Brennan and Gaudron JJ). Such use includes identifying the purpose or object underlying an Act: *Metropolitan Fire Brigades Board v St Catherine's School*

prisoners to whom ss 74AB and 74AAA apply '*are not granted parole*', and that the provisions are directed at '*removing the possibility of parole*' and '*removing the prospect of release*' for such prisoners, thereby '*diminishing their possibility of rehabilitation*'.[7] In that regard, the express statement of purpose in s 1 of the Amending Act is not definitive or conclusive,[8] and in any event does not alter the substantive operation and practical effect of ss 74AB and 74AAA as outlined above.

Sections 74AB and 74AAA impose legislative punishment

8. It is <u>not</u> a premise of the Plaintiff's arguments that ss 74AB and 74AAA alter or interfere with the sentencing order made by the Supreme Court of Victoria, or otherwise undermine the institutional independence or integrity of that Court: Plaintiff's Submissions (**PS**) [65]; *cf.* DS [9]-[10], [16]. Rather, the Plaintiff's argument is that the impugned provisions impose on him <u>additional</u> punishment to that imposed by the sentencing court, by requiring him to serve an additional period '*during which [he] shall not be eligible to be released on parole*'.[9]

9. That argument does not posit any '*intersection*' between the impugned provisions and the exercise of judicial power by the sentencing court: *cf.* DS [10], citing *Knight* at [29] (which was in terms addressed to the absence of any intersection with the exercise of judicial power '*that has occurred*').[10] Rather, the Plaintiff contends that the impugned provisions involve a <u>separate</u> exercise of judicial power by the Parliament.

10. Accepting that the punishment imposed by a sentence of imprisonment is not sufficiently described by identifying only the minimum term (DS [22]), it can equally be said that the punishment is not sufficiently or completely described by identifying only the head sentence. So much follows from the Defendant's acceptance that the fixing of a minimum term forms part of the sentence, and therefore the punishment, imposed on an offender: DS [22]. Tellingly, the Defendant does not address the authorities that establish that an increase in a prisoner's minimum term amounts to an increase in his or her punishment.[11]

[1993] 1 VR 351 at 358 (Byrne J). That is so even where there is no ambiguity in the statutory language: *Alcoa Portland Aluminium Pty Ltd v Victorian Workcover Authority* (2007) 18 VR 146 at 159 [39] (Chernov JA, with whom Maxwell ACJ and Neave JJ agreed).

7 Hansard, Legislative Assembly, 24 July 2018, pp 2235-2237.

8 *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129 at 152-153 (Evatt and Northrop JJ); *Eastman v Department of Justice and Community Safety* (2010) 4 ACTLR 161 at 173 [57]; *WMB v Chief Commissioner of Police* (2012) 43 VR 446 at 456 [40] (Warren CJ), 475 [133] (Hansen JA).

9 Section 17 of the now repealed *Penalties and Sentences Act*. See also s 11 of the *Sentencing Act 1991* (Vic).

10 See also *Knight* at [28], noting that release on parole after the expiration of the minimum term '*was simply outside the scope of the exercise of judicial power <u>constituted by imposition of the sentences</u>*' (emphasis added).

11 PS [19]-[24]. See also *Cole v The Queen* [2019] ACTCA 3 at [24] ('*a non-parole period has a penal element*': quoting *Director of Public Prosecutions (Vic) v Josefski* (2005) 158 A Crim R 185 at [43]).

11. The obiter dictum in *Baker v The Queen*[12] — that legislation altering the circumstances in which mercy could or would be extended to a prisoner sentenced to life imprisonment does not make that sentence '*more punitive or burdensome to liberty*' — was made in a different context, where the appellant's sentence was one of life imprisonment without any minimum term: PS [25] n 22, [68]; *cf.* DS [10], [12], [23].

12. The obiter dictum of French CJ in *Crump*[13] — that the power of the executive government of a State to order a prisoner's release on licence or parole may be '*abolished*' by the legislature — did not attract the support of any other member of the Court. Further, it should not be regarded as contemplating the abolition of the power to grant parole in respect of a particular prisoner by direct reference to the crimes for which he or she has been convicted and sentenced. In any event, the impugned provisions do not purport to repeal or abolish the parole system for all prisoners, and it is unnecessary for the Court to consider whether or not such legislation would be valid (at least without any transitional or other legislation to provide for those with a judicially determined minimum non-parole period): PS [37].

Sections 74AB and 74AAA are an impermissible exercise of judicial power by Parliament

13. The Plaintiff does not dispute that the exercise of judicial power was '*exhausted*' upon the passing of the sentence by the Supreme Court: *cf.* DS [8.1]. However, it follows that the Parliament cannot exercise power that is essentially and exclusively judicial in relation to the Plaintiff, by '*re-sentencing*' him to an additional non-parole period in respect of the specific crime of which he was convicted and sentenced.[14] That the practical effect of the provisions was '*equivalent to replacing a court sentence that includes a non-parole period with an effective sentence that does not include a [non-]parole period*' was acknowledged in the statement of compatibility for the Amending Act: PS [35]. Moreover, that this consequence was imposed on the Plaintiff because of his crime is highlighted by the Defendant's contention that the impugned provisions are directed to crimes which the Parliament finds to be '*so heinous*' as to justify its intervention: DS [14].

14. The Plaintiff does not contend for a strict separation of judicial power at the State level: *cf.* DS [27]. Rather, he contends only for such a separation in relation to the specific function of the adjudgment and punishment of criminal guilt, which is essentially and exclusively judicial in nature: PS [44], [57].

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[12] (2004) 223 CLR 513 at 528 [29] (McHugh, Gummow, Hayne and Heydon JJ).

[13] (2012) 247 CLR 1 at 19 [36], on which reliance is placed by the Defendant at DS [24], [34].

[14] Section 74AB operates by direct reference to a particular crime of which the Plaintiff was convicted. Section 74AAA identifies a class of prisoners who have been convicted of particular crimes, and further requires a '*trial*' to be conducted before the Board of facts relating to the prisoner's offending (albeit with restrictions on the material that the Board may consider, without any natural justice being afforded to the prisoner and without otherwise being bound by the rules of evidence): see ss 69(2), 71, 74AAA(2).

15. Contrary to DS [28], s 73 of the Constitution, and Ch III more generally, dictate that the adjudgment and punishment of criminal guilt may be conducted only by the Supreme Court or a body that is subject to the supervision of the Supreme Court. Otherwise, the Parliament could create and confer judicial power on a body to conduct criminal trials (whether as part of the executive or the legislative branch) and exclude the power of the Supreme Court to supervise the exercise of power by that body. Such a proposition would be directly inconsistent with *Kirk*.[15]

16. The ability of the High Court to review State legislation for constitutional validity cannot be equated with an ability to review the exercise of judicial power for error: *cf.* DS [28]. It also begs the very question whether ss 74AB and 74AAA are constitutionally invalid.

***The decisions in* Crump *and* Knight**

17. The arguments raised by the Plaintiff are substantively different to the arguments raised by the parties in *Crump* and *Knight*. Those decisions only hold that the legislative provisions impugned in those cases are not invalid on the grounds that were advanced (and defended) by the parties. They do not hold that the provisions, or provisions similar to them, are unimpeachable on a ground or grounds not argued or considered in those cases.[16]

18. Insofar as it may be necessary to re-open the decisions in *Crump* and *Knight*, the decisions in those cases did not relevantly rest on a principle that was carefully worked out in a number of cases: *cf.* DS [12]. While the distinction between the judicial function in sentencing and the executive function in granting parole has been addressed in a line of authorities, the Plaintiff does not dispute the propositions for which those authorities stand; indeed, he relies on them: PS [19]-[25]. However, the application of the dicta in *Baker* (referred to at [11] above) to a case such as the present arose for first time in *Crump* and *Knight*.

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[15] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

[16] See *Coleman v Power* (2004) 220 CLR 1 at 44-45 [79] (McHugh J); *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13] (Gleeson CJ, Gummow and Heydon JJ); *Muldoon v Church of England Children's Homes Burwood* (2011) 80 NSWLR 282 at 290 [39]-[41] and the cases there cited. Further, the orders in *Crump* were specifically directed to the question of whether the impugned provisions had the effect of varying or otherwise altering a judgment, decree, order or sentence of the Supreme Court of New South Wales in a '*matter*' within the meaning of s 73 of the Constitution.