IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M2 of 2017

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

and

STATE OF VICTORIA
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Certification

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

Part II Basis of intervention

2. The Attorney General for New South Wales ("NSW Attorney") intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth), in support of the defendant.

Part III Argument

3. On 24 August 1988, the plaintiff was sentenced to life imprisonment (Special Case ("SC") [4(a)]). By contrast with one of the plaintiff's co-accused, for whom no minimum term was set, Vincent J decided, "after a great deal of thought about the matter", to set a minimum term in respect of the plaintiff (SC [4(a)]; (Special Case Book ("SCB") at 100)). In concluding that the non-parole period should be of 28 years' duration, his Honour stated that while it was appropriate to fix a minimum term it was nevertheless necessary that the plaintiff "remain in prison for many years yet" (SCB 100).

Date of Document: 30 April 2018
Filed by:
L Armstrong, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Tel: (02) 9224 5249
Fax: (02) 9224 5255
Ref: Paolo Buchberger

4. Consistently with the observations of this Court in Power v The Queen (1974) 131 CLR 623 at 628, the non-parole period of 28 years was the "minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention"; see also Bugmy v The Queen (1990) 169 CLR 565 at 538. However, the sentence was one of life imprisonment; and "[i]t is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed": PNJ v The Queen (2009) 83 ALJR 384; 252 ALR 612 ("PNJ") at [11].

5. Upon Vincent J passing sentence, the exercise of judicial power with respect to the plaintiff's criminal trial was spent; and responsibility for his future passed to the executive branch of the government of the State: Elliott v The Queen (2007) 234 CLR 38 ("Elliott") at [5]. The possibility the Court foreshadowed in PNJ reflects the distinction, which is "apposite in the context of sentencing decisions and statutory regimes providing for conditional release by executive authorities", between the legal effect of a judicial decision and consequences attached by statute to that decision: Crump v New South Wales (2012) 247 CLR 1 ("Crump") at [36]. The expiry of a non-parole period is one factum by reference to which a parole system usually operates: see relevantly s 74(1) of the Corrections Act 1986 (Vic). However, a State legislature may impose additional criteria which operate to broaden, or constrain, the circumstances in which parole can be granted following the expiry of that period. It may also amend or remove such criteria from time to time; or retain the criteria but change the policy with respect to their application: Crump at [36].

6. As the plurality stated in Crump at [60], the prospect of legislative and administrative changes to parole systems is a practical reality facing sentencing judges. Their Honours referred in this context to the observations of Gleeson CJ in Baker v The Queen (2004) 223 CLR 513 ("Baker") that such changes usually affect people serving existing sentences; and the longer the original sentence, "the more likely it is that an offender will be affected by subsequent changes in penal policy" (at [7]).

7. The above context is significant to the constitutional issues that the plaintiff agitates in the present case in relation to s 74AAA and s 127A of the Corrections Act. Considered against that background, and for the reasons outlined below, the NSW Attorney supports the submissions of the defendant that the plaintiff's constitutional arguments should be rejected. The NSW Attorney will first address whether

s 74AAA of the Corrections Act impermissibly infringes Ch III of the Constitution in the manner alleged, before addressing whether s 74AAA and s 127A infringe the rule of law in their application to the plaintiff, such that they are unconstitutional and invalid.

The application of s 74AAA to a class of prisoner

8. Section 74(1) of the Corrections Act confers a discretion on the Adult Parole Board ("Board") to grant parole upon the expiry of a prisoner's non-parole period. Section 78(1) provides that the Board may release a prisoner on parole again, where the prisoner's parole has been cancelled on a previous occasion or on previous occasions in respect of the same prison sentence. In considering whether to make a parole order under s 74, s 73A requires the Board to give "paramount consideration to the safety and protection of the community".

9. By s 74AAA of the Corrections Act, the Victorian Parliament has imposed additional conditions with respect to the making of a parole order for a particular class of prisoner, namely, "a prisoner convicted and sentenced ... to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer" (s 74AAA(1)). Murder falls within the definition of "serious violent offence" in s 3(1) of the Corrections Act, with the consequence that, in respect of an offender convicted of that crime:

   a. only the Serious Violent Offender or Sexual Offender Parole division ("SVOSO division") of the Board can make an order under s 74 that the offender be released on parole: s 74AAB(3); and

   b. the SVOSO division can only make such an order if another division of the Board has recommended that parole be granted and the SVOSO division has considered the recommendation: s 74AAB(5).

10. In order to fall within the class of prisoner prescribed in s 74AAA(1), the Parole Board has to consider:

   a. whether the prisoner was convicted and sentenced to a term of imprisonment with a non-parole period for the offence of murder;

   b. whether the victim of the offence of murder for which the prisoner was convicted and sentenced was a police officer, as defined in s 74AAA(6); and

c. whether the prisoner knew that the victim was, or was reckless as to whether the victim was, a police officer.

11. In considering these matters, the Board must have regard to the record of the court in relation to the offending, including the judgment and the reasons for sentence: s 74AAA(3). If, upon consideration of such material, and such other material as may in the opinion of the Board be pertinent, the Board finds that the answer to each of the above three inquiries is "yes", the grant of parole with respect to that prisoner under s 74 or s 78 of the Corrections Act is subject to the additional constraints in s 74AAA: see s 74AAA(4), which is addressed further below.

12. The selection of facts to which particular legal consequences attach is generally a matter for the legislature: Baker at [43], citing Re Macks; Ex parte Saint (2000) 204 CLR 158 at [25], [59]-[60], [107], [208], [347]; Duncan v Independent Commission Against Corruption (2015) 256 CLR 83 at [12], [37]. Although the plaintiff contends (Plaintiff's Submissions ("PS") at [73]) that the nature of the fact-finding that s 74AAA(1) requires brings the provision into impermissible conflict with Ch III, the matters on which he relies do not support the contention. It cannot be said that in selecting the above matters, the legislature is enlisting the Board in a reopening of the plaintiff's trial (cf PS [73]), or in traversing the jury's verdict (cf PS [70]). Indeed, it is common ground between the parties that the status of the victim as a police officer, and the plaintiff's state of mind in relation thereto, are not elements of the offence (SCB 67: Defence [30C]). Nor does a finding by the Board that a prisoner knew that his or her victim was a police officer, or was reckless as to that fact, "add to or alter the Plaintiff's conviction and sentence" (PS [71]). The conviction remains one for murder; and the sentence one of life imprisonment.

13. Accordingly, the plaintiff's challenge to s 74AAA on Ch III grounds cannot be sustained. The plaintiff submits that this aspect of the provision is also contrary to the rule of law (PS [73]) but does not advance a basis for that contention that is independent of the Ch III argument. The plaintiff's argument as to infringement of the rule of law is developed more directly in relation to the application of s 74AAA, and s 127A, to the plaintiff in circumstances where he had applied for parole before either provision was enacted.

Application of the rule of law

14. If s 74AAA applies to a prisoner, before he may be granted parole the Board must be in receipt of an application from the prisoner (or made on the prisoner's behalf), lodged with the secretary of the Board: s 74AAA(1) and (2). By way of negative stipulation, s 74AAA(4) provides that after considering the application, the Board "must not" make an order for parole unless it:

(a) is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner—

(i) is in imminent danger of dying, or is seriously incapacitated and, as a result, the prisoner no longer has the physical ability to do harm to any person; and

(ii) has demonstrated that the prisoner does not pose a risk to the community; and

(b) is further satisfied that, because of those circumstances, the making of the parole order is justified.

15. The plaintiff in the present case does not challenge the validity of s 74AAA per se. In light of the similarity between the terms of the section and s 154A of the Crimes (Administration of Sentences) Act 1999 (NSW), the validity of which was upheld in Crump, it would be difficult for him to do so. Rather, he challenges the validity of its application to him – and the application of s 127A – on the basis that he had made an application for parole before the enactment of either section and the jurisdiction of the Board had been "enlivened, engaged and exercised" with respect to the law as it stood at that time (PS [68]).

16. The requirements of s 74AAA of the Corrections Act have been set out above. Section 127A provides that, for the avoidance of doubt:

a. the amendments made by Part 2 of the Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016 (Vic), which inserted s 74AAA, also apply to a prisoner convicted and sentenced as mentioned in that section regardless of whether, before the commencement of those amendments, the prisoner had become eligible for parole; or had taken any steps to ask the

Board to grant parole; or the Board had begun any consideration of the question of parole with respect to that prisoner (s 127A(a)); and

b. the Board may treat any steps the prisoner had taken to ask the Board to grant parole before the commencement of s 74AAA as being an application lodged for the purposes of s 74AAA(2) (s 127A(b)).

17. Section 127A confirms that the additional conditions, which s 74AAA of the Corrections Act imposes on the Board's consideration of granting parole to a prisoner who falls within its terms, apply to such a prisoner irrespective of whether, at the time s 74AAA was inserted, the prisoner was eligible for parole, or had requested parole to be considered, or Board the progressed its consideration of parole. The clear legislative intention of s 127A was to put beyond doubt the application of s 74AAA to all applicable prisoners, including those who had invoked the administrative procedures in relation to parole before s 74AAA was enacted.

18. Even if the jurisdiction of the Board had been enlivened with respect to the plaintiff's application for parole when s 74AAA was enacted (noting that the defendant's submissions to the contrary have significant force), it does not follow that legislative amendment of the exercise of that jurisdiction, in the form of s 74AAA and s 127A, before his application is determined infringes the rule of law. As the defendant points out (Defendant's Submissions ("DS") at [58]), the requirements of the rule of law on which the plaintiff relies are not expressed in absolute terms.

19. Further, and more significantly, it would not automatically follow from a conclusion that s 74AAA and s 127A infringed the rule of law in some way that they are unconstitutional (cf PS [63]). The statement of Dixon J regarding the rule of law in Australian Communist Party v The Commonwealth (1951) 83 CLR 1 (Communist Party Case), on which the plaintiff relies, was made in the course of analysing the scope of the incidental power. His Honour observed that the incidental power was ancillary or incidental to sustaining and carrying on government "under the Constitution". The Constitution was, in turn, an instrument framed in accordance with many traditional conceptions, "to some of which it gives effect, as, for example, in separating judicial power from other functions of government, others of which are simply assumed" (at 193). His Honour classified the rule of law as falling within the latter category and continued (emphasis added):

> In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth. Indeed, upon the very matters upon which the question whether the bodies or persons have brought themselves within a possible exercise of the power depends, it may be said that the Act would have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power. Nor do I think that if a wider basis for the power than s 51(xxxix) is accepted, the power itself would extend to a law like the present Act, using as it does, the legislature's characterization of the persons and bodies adversely affected and no factual tests of liability and containing no provision which independently of that characterization would amount intrinsically to an exercise of the power.

20. The context in which Dixon J made the statement on which the plaintiff relies does not suggest that his Honour directly had in contemplation that Commonwealth legislation could be invalid on the separate and independent basis of inconsistency with the rule of law. Rather, his Honour relied on the rule of law as an assumption underpinning the Constitution in conceptualising the system of government to which the Constitution gives effect, so as to define the scope of the incidental power in s 51(xxxix).

21. As Mason CJ observed in Australian Capital Television v The Commonwealth (1992) 177 CLR 106 ("ACTV") at 135, an unexpressed assumption of that nature stands outside the Constitution. Such an assumption may be relied on to inform the construction and/or scope of the provisions of the Constitution: see, for example, Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476 at [103]-[104]; Thomas v Mowbray (2007) 233 CLR 307 at [61]; South Australia v Totani (2010) 242 CLR 1 at [61]; Graham v Minister for Immigration and Border Protection (2017) 91 ALJR 890, 347 ALR 350 at [39]-[40], [44], [105]-[108]. However, and by contrast with an implication, it does not "inhere in the instrument" in a manner that would necessarily entail a corresponding limitation on legislative power: ACTV

at 135; see also Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 29 at 81; Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 44.

22. Even assuming that the rule of law could constitute some limitation upon Commonwealth legislative power, the plaintiff's assumption that a State legislature would be similarly constrained (PS [69]) does not bring to account the significant differences between State and Commonwealth legislative power. This Court has long held that a law will be for the peace, order and good government of a State if there is a real connection, even a remote or general connection, between the subject matter of the legislation and the State: Union Steamship v King (1988) 166 CLR 1 at 14; Pearce v Florenca (1976) 135 CLR 507 at 518; Broken Hill South Limited v Commissioner of Taxation (NSW) (1937) 56 CLR 337 at 375. Justice Fullagar observed in the Communist Party Case at 262, for example, that a law such as the Communist Party Dissolution Act "could clearly be passed by the Parliament of the United Kingdom or by any of the Australian states"; the difficulty for the Commonwealth Parliament was that its powers were "limited by an instrument emanating from a superior authority".

23. In relation to pending legal proceedings, the defendant has pointed to a number of decisions of the Court which have concluded that both Commonwealth and State Parliaments have power to alter the substantive law that applies to pending or even completed judicial proceedings (DS [59]). The NSW Attorney adopts the defendant's submission that it must follow from those cases that there is no implied constitutional limitation on the making of amendments to an executive decision-making process in similar circumstances (DS [59]).

24. Limitations on the exercise of legislative powers conferred upon State Parliaments which are not spelled out in the constitutional text have, of course, been found. However, such limitations arise by implication, as a matter of logical or practical necessity, from the federal structure within which State Parliaments legislate: Durham Holdings v New South Wales (2001) 205 CLR 399 at [14]. The plaintiff has not articulated any reasoned basis as to how the rule of law bears that character.

25. In circumstances where there is no support for a constitutional limitation of the nature for which the plaintiff contends, his attack on the constitutional invalidity of s 74AAA and s 127A of the Corrections Act should be dismissed.

Part IV Estimate of time

26. The NSW Attorney estimates that 15 minutes will be required for the making of oral submissions on his behalf.

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M G Sexton SC SG
T: 02 8093 5502
F: 02 8093 5544
E: michael.sexton@justice.nsw.gov.au

A M Mitchelmore
T: 02 9223 7654
F: 02 9232 1069
E: amitchelmore@sixthfloor.com.au