IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M2 of 2017**

BETWEEN:

CRAIG WILLIAM JOHN MINOGUE
Plaintiff

AND

10 **STATE OF VICTORIA**
Defendant

ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

OUTLINE OF ORAL ARGUMENT

PART I: SUITABILITY FOR PUBLICATION

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

PART II: OUTLINE OF ORAL SUBMISSIONS

20 **No constitutional prohibition on altering parole criteria (*WA Submissions*, [33]-[36]; *Plaintiff's Reply Submissions*, [15])**

2. The Plaintiff in reply, at [15], disclaims any reliance on a general constitutional prohibition against retrospective laws. The Plaintiff's narrower reliance focuses upon the denial of "the legal consequences that have already flowed from the expiration of the non-parole period".

3. In truth, however, there are no "legal consequences" flowing from the expiration of the non-parole period to which a narrower constitutional restriction could attach. Neither in form nor in substance did the Plaintiff have any right or entitlement to parole from the expiration of that period (WA Submissions at

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[45]). The most that may be said of s 74AAA is that the criteria to be applied by the Board were altered by its enactment. Accordingly, at its highest, the Plaintiff seeks to invoke (and entrench) an expectation that the law to be applied to his application for parole must remain unaltered during the pendency of that application.

4. This aspect of the Plaintiff's case, however, only arises if (contrary to the Plaintiff's first submission), s 74AAA of the *Corrections Act* 1986, properly construed, applies to the Plaintiff's parole application. If it does, no aspect of the "rule of law" can operate to deny that effect. On the contrary, it is the "rule of law" (in its most basic sense) that requires the Board to apply the *Corrections Act*, properly construed, as it is from time to time.

5. In that regard, absent a direction as to the conclusion that a court should reach, there is no prohibition on the legislature altering rights in issue, or the law to be applied, in pending legal proceedings. Even less, it is submitted, could there be a prohibition upon altering, by law, the criteria to be applied by an executive or administrative decision maker.

Australian Education Union v Fair Work Australia (2012) 246 CLR 117 per French CJ, Crennan & Kiefel JJ at [49]; Gummow, Hayne & Bell JJ at [78], [87].

No intersection with judicial determination (*WA Submissions*, [37]-[47]; *Plaintiff's Reply Submissions*, [16])

6. The Plaintiff seeks to distinguish *Knight v Victoria* (2017) 91 ALJR 824 on the basis that, unlike the law in that case, s 74AAA does "intersect" with the exercise of judicial power, by asking the Board to "reopen" or "recharacterise" the offence.

7. Section 74AAA, it is submitted, does no such thing. The factum selected by the legislature relates to the circumstances surrounding the offence for which a prisoner was convicted and sentenced. It does not relevantly affect, alter or intersect with that conviction or sentence.

8. In *Baker v The Queen* (2004) 223 CLR 513 and *Crump v New South Wales* (2012) 247 CLR 1, the facta selected by the legislature were non-release recommendations that previously had had no legal effect. Those facta, selected by the legislature as a measure of seriousness, were even closer to the relevant judicial determination than in the present case and yet did not "intersect" with it, in any relevant sense.

Baker v The Queen (2004) 223 CR 513 per Gleeson CJ at [8].

Crump v New South Wales (2012) 247 CLR 1 per French CJ at [36], per Gummow, Hayne, Crennan, Kiefel & Bell JJ at [60].

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