

BETWEEN:



CRAIG WILLIAM JOHN MINOGUE
Plaintiff

and

STATE OF VICTORIA
Defendant

10

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

Part I:

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

Part II:

A Sections 74AB and (if applicable) 74AAA in substance and effect extend the Plaintiff's minimum term by rendering him ineligible for parole for a further indefinite period beyond the minimum term imposed by the sentencing court: PS [25], [33]-[38]; Reply [2]-[7]

20

2. The sentencing court was required to fix a minimum term "during which the offender shall not be eligible to be released on parole" unless it considered doing so was inappropriate in the circumstances of the case: *Penalties and Sentences Act 1958* (Vic), s 17. The sentencing court fixed a minimum term of 28 years: SC pp 55 (Annex A), 66 (Annex B).

3. Section 74AB provides that the Board may make a parole order in respect of the Plaintiff "if, and only if" satisfied, amongst other things, that he is in imminent danger of dying or seriously incapacitated. If applicable to the Plaintiff, s 74AAA provides that the Board "must not make a parole order" in respect of him unless satisfied of the same matters.

30

4. The Plaintiff's minimum term has expired and he is not in imminent danger of dying or seriously incapacitated: SC [4]. The Plaintiff therefore remains ineligible for the making of a parole order by the Board, notwithstanding the expiry of his minimum term.

5. It follows that, as a matter of substance and effect, ss 74AB and (if applicable) s 74AAA extend the Plaintiff's minimum term. That, indeed, is their purpose.

- a. *Hansard*, Legislative Assembly, 24 July 2018, pp 2235-2239
- b. *Interpretation of Legislation Act 1984* (Vic) s 35(b)(ii)-(iii)

B Effective extension of minimum term is punitive: PS [19]-[24], [39]-[41], [46]-[50]; Reply [8]-[12]

40

6. The minimum term fixed by the Court forms part of the Plaintiff's sentence.
 - a. *Penalties and Sentences Act 1958* (Vic), s 17.
 - b. *R v Shrestha* (1991) 173 CLR 48 at 61.

- c. *Leeth v The Commonwealth* (1992) 174 CLR 455 at 465, 471, 472, 491.
 - d. *Postiglione v The Queen* (1997) 189 CLR 295 at 302.
 7. It is also a discrete punitive element of that sentence.
 - a. *Leeth v The Commonwealth* (1992) 174 CLR 455 at 471.
 - b. *R v Suarez-Mejia* (2002) 131 A Crim R 577 at [78].
 - c. *Hudson v The Queen* (2010) 30 VR 610 at [45].
 - d. *Cole v The Queen* [2019] ACTCA 3 at [24] and the authorities there cited.
 8. Accordingly, the extension in the Plaintiff's minimum term effected by ss 74AAB and (if applicable) 74AAA increases his punishment.
 - 10
 - a. *Lowe v The Queen* (1984) 154 CLR 606 at 625.
 - b. *R v Mason and Saunders* [1998] 2 Qd R 186 at 189.
 - c. *Olsen v Sims* (2010) 28 NTLR 116 at [55].
 - d. *Brown v Lusted* (2015) 25 Tas R 24 at [24].
 9. Especially is that so where the extension removes any relevant hope of release and thereby undermines a key object of the minimum term imposed by the sentencing court.
 - a. *Vinter v United Kingdom* (2012) 34 BHRC 605 at 648.
 - b. *R v Shrestha* (1991) 173 CLR 48 at 69.
 - 20 10. The increase in the Plaintiff's punishment effected by ss 74AB and (if applicable) 74AAA is, on the very terms of those provisions, on account of his criminal guilt.
- C *The Victorian Parliament cannot impose legislative punishment on account of criminal guilt: PS [42]-[45]; Reply [13]-[16]*
11. The imposition of punishment on account of criminal guilt is an exclusively judicial power or function.
 - a. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.
 - b. *Duncan v New South Wales* (2015) 225 CLR 338 at [41].
 - c. Defendant's Defence at [24.2].
 - 30 12. That power or function can only be exercised by the Supreme Court or a body subject to the supervision of the Supreme Court, the supervisory jurisdiction of which "was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State ... judicial power by persons and bodies other than the Supreme Court". It cannot consistently with the *Commonwealth Constitution*, be exercised by the Victorian Parliament. That is because such exercise would stand outside the integrated court system contemplated by Ch III of the *Constitution* and create an "island of power immune from supervision and restraint".
 - a. *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [98]-[99].

D Life without parole is a form of “cruel, inhuman or degrading treatment” and/or “cruel and unusual punishment”, which cannot be required by the Victorian Parliament: PS [51]-[57]

13. An irreducible life sentence, with no prospect of release on parole other than by way of so-called “*compassionate release*”, constitutes cruel, inhuman or degrading treatment, or cruel and unusual punishment contrary to the *Bill of Rights 1688*. Sections 74AB and (if it applies) 74AAA render the Plaintiff’s sentence such a sentence.
- 10 a. *Vinter v United Kingdom* (2012) 34 BHRC 605.
b. *Minogue v Victoria* (2018) 92 ALJR 668 at [53], [72].
14. The Victorian Parliament does not have power to impose such punishment legislatively.
- a. *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348 at [13].
b. *Union Steamship v King* (1988) 266 CLR 1 at 10.

15. If at all, such punishment is only capable of being imposed by a sentencing court.

E Sections 74AB and (if applicable) 74AAA are contrary to the implied constitutional assumption of the rule of law: PS [58]-[64]

- 20 16. The rule of law is an inherent assumption on which the *Constitution* is based and depends for its efficacy. It is not merely an extrinsic unexpressed assumption of the framers which is not given effect by or under the *Constitution*. It gives rise to implications which are “*securely based*”.
- a. *Australian Communist Party* (1951) 83 CLR 1 at 193, 262-263.
b. *Australian Capital Television Pty Ltd* (1992) 177 CLR 106 at 134-135.
c. *APLA Ltd* (2005) 224 CLR 322 at [30].
d. *South Australia v Totani* (2010) 242 CLR 1 at [61], [131], [233], [423].
17. A central aspect of the rule of law requires that laws be predictable and apply equally to all, save to the extent that objective differences justify differentiation.
- 30 a. *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 638.
18. Sections 74AB and (if applicable) 74AAA are offensive to the rule of law because they single out the Plaintiff (either by name or as one of a small class of prisoners) and place him outside the general operation of the otherwise substantive sentencing law as it was applied by the Supreme Court in his case without “*a rational and relevant basis for the discriminatory treatment*”.
- a. *Leeth v The Commonwealth* (1992) 174 CLR 455 at 488.

Dated: 18 June 2019

C J HORAN

A F SOLOMON-BRIDGE

R A MINSON