HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: RODNEY MICHAEL CHERRY
Plaintiff

AND: STATE OF QUEENSLAND
Defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

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1. This reply is in a form suitable for publication on the internet.
2. The following reply addresses the submissions of the defendant and intervenors in respect of the Plaintiff's major and minor premise.[1]
3. The defendant seeks to refute the major premise of the plaintiff's argument on two bases.
4. First, the defendant contends[2] that the major premise is inconsistent with the "ancient right of the Crown to pardon, partially or fully those who have been convicted of a public offence".[3] This contention ought to be rejected. The subsistence of the power of the executive to pardon offenders is not inconsistent with the plaintiff's major premise. Historical considerations have long played a role in the interpretation of the Constitution.[4]
20 Those considerations inform the context of the Constitution and the implicit assumptions that underpin its text. The power of the executive to pardon offenders is ancient.[5] The use of the power in England dates from the Middle Ages.[6] In the Australian Colonies, the prerogative power to pardon resided with the Imperial Crown, but was delegated to governors by letters of commission and royal instructions.[7]
5. The prerogative of mercy serves different purposes to rights of appeal.[8] It cannot have been envisaged that the scheme for appeal provided by s. 73 of the Constitution would supplant the availability of the prerogative of mercy following federation. On the contrary, it can be taken that the continued subsistence of that power is an implicit assumption that underpins

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[1] See defendant's submissions at [8].
[2] This contention is also made by the interveners. See submissions of: Attorney-General for NSW, at [23]; Attorney-General for the NT at [14]-[15]; Attorney-General for the State of South Australia, at [17] and Attorney-General for Victoria, at [26].
[3] Defendant's submissions at [9].
[4] See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 109 [67], per Gageler J; Bradley Selway, 'The use of history and other facts in the reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129, 140-157.
[5] Evidence of its existence dates from Athenian times and of course it was a power famously exercised by Pontius Pilate: see Catherine Greentree, 'Retaining the royal prerogative of mercy in New South Wales' (2019) 42(4) *UNSW Law Journal* 1328, 1334.
[6] See Julian Murphy et al, 'An Ancient Remedy for Modern Ills: the Prerogative Mercy and Mandatory Sentencing' (2020) 46(3) *Monash University Law Review* 252, 256.
[7] *Ibid* 256. See discussion in *Holzinger v Attorney-General (Qld) & Anor* (2020) 385 ALR 158 at [4]-[8].
[8] "The common law concept of a conviction is that, by it, the convicted person receives justice; the common law conception of a pardon is that, by it, the convicted person receives mercy, notwithstanding the demands of justice": *Eastman v Director of Public Prosecutions (ACT)* (2013) 214 CLR 318 at 351, per Heydon J.

the text of s. 73 of the Constitution. This framework is reflected in the legislative context which subsisted at the time of the imposition of the plaintiff's sentence, which continues to this day. In particular, both at the time of the plaintiff's sentence, and since, the Queensland *Criminal Code* expressly preserved the existence of the prerogative of mercy and therefore the power of the Governor to grant pardons.[9] Thus, the order of the sentencing judge was implicitly subject to the power to pardon the plaintiff. The grant of such a pardon will not, therefore, set aside the plaintiff's sentence or be inconsistent with the finality of it. Accordingly, the availability of the pardon power is not inconsistent with the plaintiff's major premise which can be expressed as subject to the availability of that power.

6. Secondly, the defendant contends that there is some inconsistency between the plaintiff's major premise and the existence of the power under s. 13A of the *Sentencing Act 1989* (NSW) considered in *Crump*.[10] That section was considered at some length in *Baker v The Queen*.[11] The section was a response to a practice that had emerged in New South Wales of sentencing judges recommending against the possibility of release of sentenced prisoners on licence. There was no statutory basis for those recommendations, and they had no legal effect.[12]

7. Until the introduction of s. 13A of the New South Wales provision, the judicial power to impose sentence upon a person convicted of murder was confined, with the only sentence that could be passed being that the offender suffered penal servitude for life. Upon the passing of that sentence, the judicial power was exhausted.[13] Once s. 13A was introduced, a new judicial power was introduced whereby, on an application to the Supreme Court, a person serving a life sentence could have that sentence, in effect, altered or varied by an order setting a minimum term which they would be required to serve and an additional term during which they could be released on parole.[14]

8. However, such orders did not interfere with the finality of the judicial determination of punishment consequent upon the adjudgment of guilt reflected in the original sentences. Those original sentences did not involve any exercise of power as to the minimum period that sentenced prisoners were required to serve before they could be granted parole. Upon the imposition of those life sentences, the "judicial power" was spent, and no exercise of that power involved determination of the minimum period that was required to be served before

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[9] *Criminal Code* (Qld), s.18.
[10] *Crump v New South Wales* (2012) 247 CLR 1 ("*Crump*").
[11] (2004) 223 CLR 513 ("*Baker*").
[12] *Baker* at 518 [2] (per Gleeson CJ).
[13] *Baker* at 528 [29] (per McHugh, Gummow, Hayne and Heydon JJ).
[14] *Baker* at 529 [31]-[33] (per McHugh, Gummow, Hayne and Heydon JJ).

release. Thus, as a matter of substance, the exercise of that power, did not alter the judicial determination of punishment consequent upon the adjudgment of guilt. It would not circumvent s. 73 of the Constitution by providing for a process for overturning that determination outside of the appellate structure provided by s. 73 nor frustrate the requirement of that section that this Court's determination of an appeal against a sentence imposed by a State Supreme Court be "final and conclusive".

9. It is a large step to reason from the examples advanced by the defendant and the intervenors that a State Legislature has the power itself, or to authorise a State Executive, to interfere with a punishment imposed by a State Supreme Court in consequence of that Court's adjudgment of criminal guilt.

10. The defendant seeks to refute the plaintiff's minor premise with a contention that the material features of the legislative scheme in this case are indistinguishable from those in *Crump*,[15] *Knight*[16] and *Minogue*[17], merely making the conditions for a grant of parole more restrictive.[18] This begs the question; to what extent can it be said that legislation merely makes the conditions for the grant of parole more restrictive, without interfering with the exercise of judicial power manifested by the sentence of a prisoner? This may be illustrated by a hypothetical example where a law permits a State Executive to order that prisoners sentenced by a State Supreme Court to mandatory minimum periods of imprisonment of ten years may only be released on parole after serving twelve years of their sentence. Can it be said that this law has merely made the conditions for the grant of parole more restrictive?

11. It is submitted that the above hypothetical example illustrates the relevance of the issue foreshadowed by Justice Edelman in *Minogue*,[19] namely the validity of a law with the practical effect of altering a punitive sentence which has been enacted for the purposes of imposing additional punishment, and thus amending the sentence.

12. In substance, the effect of both categories of declaration in issue in this case is that the plaintiff is rendered ineligible for parole even after reaching the date by which he would otherwise be eligible in consequence of the determination of the judge who sentenced him. In none of *Crump*, *Knight* or *Minogue* did the legislation render the prisoners ineligible to even be considered for release on the dates which, as a consequence of the sentences passed upon them, they would be eligible to be so considered.

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[15] (2012) 247 CLR 1.
[16] (2017) 261 CLR 306 ("*Knight*").
[17] (2019) 268 CLR 1 ("*Minogue*").
[18] Defendant's submissions at [40], [56]. The same argument is made by the interveners. See submissions of: the Attorney General for NSW at [3], [18], [27], [33] and the Attorney-General for the Northern Territory at [5].
[19] *Minogue*, at 23 [41].

13. A restricted prisoner declaration is made by one member of the Parole Board, the President, as opposed to the Board itself, based on the President's view of the public interest, which may give pre-eminence to the President's view of the seriousness of the prisoner's offending and the likely effect of the prisoner's release on the victims of the prisoner's offending. The legislation[20] prevents the Parole Board from considering applications for parole by "restricted prisoners" before the President has decided whether to make restricted prisoner declarations in respect of those prisoners. In substance, the declaration alters the date upon which the prisoner would otherwise be eligible to be considered for release on parole by the executive authority with responsibility for considering whether to grant that release, by precluding the prisoner from applying for parole after the declaration is made, and mandating the refusal of any extant parole application.

14. The discretion of the President of the Parole Board to make a restricted prisoner declaration is cast in such terms as to permit its exercise for the purpose of effectively extending the mandatory minimum period of imprisonment fixed by the sentencing court. The defendant's submissions[21] that the making of such a declaration is not punitive should be rejected.

15. The legislative scheme prevents the Parole Board from considering applications for parole by "no body-no parole" prisoners before deciding whether to make no cooperation declarations for those prisoners. When those declarations are made, those prisoners are precluded from making applications for parole and any extant applications for parole by them must be refused. Once that point is reached, unless the President or Deputy President exercises statutory discretions, the Board will not ever again reconsider the making of a no cooperation declaration and, if it does not lift such a declaration, it cannot ever consider granting parole to a prisoner subject to the declaration. For the reasons set out in the plaintiff's primary submissions, the statutory purpose of restricted prisoner declarations is punitive and, in substance, it interferes with the judicial determination of punishment reflected in mandatory minimum periods of imprisonment.

16. The Attorney-General for NSW intervening submits that the distinction drawn by the plaintiff, "between legislation which permits a parole application to be made but requires parole to be refused unless strict conditions are met (as in *Crump*, *Knight* and *Minogue*) and legislation which prevents the making of a parole application unless strict conditions are met (as in the present case) is a distinction without a difference".[22] The importance placed by the

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[20] *Corrective Services Act* 2006 ("CSA"), s 193AA(4).
[21] Defendant's submissions at [41]-[49].
[22] Submissions of the Attorney-General for NSW intervening at [21].

plurality in *Minogue* upon the fact that the plaintiff remained – at least in theory – eligible for parole, belies this submission.[23] The same cannot be said of prisoners about whom a restricted prisoner or no body-no parole declaration has been made. Indeed, under both categories of declaration, a declaration may be made prior to the expiry of a prisoner's non-parole period.[24]

17. Finally, the plaintiff makes the following submissions in response to the defendant's submissions in respect of no cooperation declarations.

18. The defendant argues that the requirement that the Parole Board consider the capacity of a prisoner to give cooperation regarding the location of the victim[25] ameliorates the impossibility of a prisoner giving such cooperation in circumstances where doing so will render it likely that they will be murdered. Of course, for that to have any prospect of occurring, the Board would need to be informed that the prisoner in question stands in such jeopardy. However, the prospect of that occurring is unlikely because if a prisoner faces being murdered by giving cooperation, informing the Board that they face such a prospect is also likely to result in the prisoner being murdered. This places them in the impossible position of being unable to apply for parole in circumstances where such applications are precluded unless they give cooperation which it is impossible for them to give.

19. The remedies available to an innocent person convicted through a miscarriage of justice to which the defendant makes reference[26] are the petitioning of the executive for a pardon or referral by the Attorney-General of the matter to the Court of Appeal under the *Criminal Code*.[27] However, many years may pass before an innocent person obtains relief through those avenues (if they do at all). For example, it took twenty years after the conviction of Kathleen Folbigg for the murder of her three children before she was pardoned based on scientific evidence that was not available at her trial.[28] Plainly, the possibility exists that an innocent person may spend many years, even their entire life, in prison because of a view that they have not given satisfactory cooperation in the location of the victim of a murder which they have no capacity at all to assist in locating.

Dated: 23 January 2025

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[23] *Minogue* at 17 [18]: "The plaintiff's non-parole period has expired and, thus, contrary to the plaintiff's submissions, he remains eligible for parole even though the circumstances in which parole may be granted by the Board have been severely constrained".
[24] CSA, ss 175K (no cooperation declaration); ss 175F and 175G (restricted prisoner declaration).
[25] Defendant's submissions at [49].
[26] Defendant's submissions at [49].
[27] *Criminal Code* (Qld), s. 672A.
[28] See Justice Gleeson, "The Legal Case for Mercy", 2024 Barry O'Keefe Memorial Lecture, 20 March 2024, page 11.