

BETWEEN:



CRAIG WILLIAM JOHN MINOGUE

Plaintiff

and

STATE OF VICTORIA

Defendant

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**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: Certification: This outline is in a form suitable for publication on the internet.

Part II: Outline of Propositions:

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1. Under Australia's constitutional framework, "the rule of law" does not itself operate as a directly enforceable limit on legislative power.
2. The fundamental commitment that is made to the "rule of law" in Australia is manifested in Australia's constitutionalism: that it is the Constitution that possesses overarching supremacy as the delineator of the limits on governmental power, by which all are bound. (WS at [20]-[21])
3. The essential character of the Constitution as Australia's ruling law mandates that any limitation on legislative power enforceable by the judicial branch be one that is given effect by, and anchored in, the text and structure of the Constitution. (WS at [20]-[21])
- 30 4. For the judicial branch to invalidate exercises of legislative power by reference to asserted limitations sourced outside, and unimplemented by, the Constitution would be to unravel this "rule of law" commitment. (WS at [22]-[23], [33])

5. The text and structure of the Constitution give concrete form to the features of the rule of law aspiration that are implemented by the Constitution. In particular, features of Ch III, including the strict separation of the judicial power of the Commonwealth, constitute a major plank of Australia's partial implementation of certain rule of law ideals. (WS at [24]-[28], [32])
6. The plaintiff's oral submission to the effect that the rule of law reinforces the implications in Ch III (including by creating a "bridge" between Ch III and state constitutions referred to in s 106) impermissibly:
 - 6.1. seeks to deploy the aspiration that is represented by elements of the rule of law to
10 create a formal separation of powers at state level;
 - 6.2. ignores that s 106 is a saving provision;
 - 6.3. detracts from the well-recognised plenary nature of state power as preserved by s
 107;
 - 6.4. attempts to fill a purported constitutional lacuna by asserting an implication that is
 not securely based in the text and structure of the Constitution (WS at [28]); and
 - 6.5. seeks to rely on an abstraction for the purpose of creating a rights-based
 jurisprudence of the Constitution (by referring to the tyranny of the majority
 against the rights of the individual) notwithstanding that ss 106 and 107 exist as
 key provisions of the federal constitutional structure and notwithstanding the
20 diverse jurisprudence that speaks directly to the contrary (WS at [31]).

Dated: 18 June 2019



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Solicitor-General for the State of South Australia