**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY** **No. S165 of 2011**

**BETWEEN**



**KEVIN GARRY CRUMP**
Plaintiff

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**AND**

**STATE OF NEW SOUTH WALES**
First Defendant

**NEW SOUTH WALES STATE PAROLE AUTHORITY**
Second Defendant

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# PLAINTIFF'S SUBMISSIONS IN REPLY

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**Part I:**

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

**Part II:**

*The effect of s 154A*

2. The first defendant advances as a complete answer to the plaintiff's case the proposition that s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) ("**the Administration of Sentences Act**") is a law addressed to the exercise of power by the Parole Authority.[1] It is said to follow from this, and presumably from this alone, that in its purported application to the plaintiff, s 154A does not operate to set aside, vary or otherwise alter the effect of, the orders made by McInerney J on 24 April 1997 ("**the Minimum Term Determination**").

3. However, to reason in this manner is to ignore the circumstance that the powers of the Parole Authority are exercised in the context of a regime which applies, in the case of any individual offender serving a life sentence, only because of a decision by the Supreme Court of New South Wales ("**the NSW Supreme Court**") to set a minimum term or non-parole period. The effect of that decision is thus to confer upon the offender an entitlement not previously enjoyed by him or her, an entitlement which has variously been described in the parties' submissions as the prospect of being released on parole or an entitlement "to have the question of parole considered by the Parole [Authority]".[2] It is in this specific sense, which finds reflection in the remarks of Gleeson CJ in *Thomas v Mowbray*,[3] that contrary to what is asserted by the first defendant,[4] the effect of the Court's decision to set a non-parole period is to "create" an entitlement. After all, there can be no suggestion that the plaintiff was entitled to insist upon consideration of the question of parole in the absence of the Minimum Term Determination.

4. Nor is it completely accurate to suggest, as do the Attorneys-General for South Australia, Western Australia and the Commonwealth, that a determination of that sort is no more than a factum selected by the Parliament of New South Wales "as the trigger of a particular statutory consequence".[5] As was observed in *Baker v The Queen*,[6] s 13A of the *Sentencing Act 1989* (NSW) ("**the Sentencing Act**") "was an illustration of legislation which performed a double function of creating new rights and conferring jurisdiction to administer a remedy". It is inapt to describe as a mere "factum" the order of a Court pronounced in the administration of a remedy, as if that order were an act or event otherwise devoid of legal significance to which a State legislature may assign a series of changing legal consequences – even consequences which effectively stultify the remedy – well after its pronouncement. Indeed, the use of the expression "remedy" focuses attention upon the beneficial character, from the perspective of a prisoner, of a minimum term determination. As has been emphasised throughout the plaintiff's submissions, that beneficial character lies in the entitlement conferred by the determination, operating within the context of the parole regime.

5. Thus, any law which purports to stultify that entitlement, even if addressed, in terms, to the Parole Authority, should be seen as operating impermissibly to interfere with a judgment,

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[1] Submissions of the First Defendant ("**NSW Submissions**") at [8].
[2] NSW Submissions at [20].
[3] (2007) 233 CLR 307 at 327-328 [15]-[16].
[4] NSW Submissions at [20].
[5] Submissions of the Attorney-General for South Australia (Intervening) ("**SA Submissions**") at [17] and [22]; Intervenor's Submissions – Attorney General for Western Australia ("**WA Submissions**") at [29]; Commonwealth Submissions at [9].
[6] (2004) 223 CLR 513 at 529 [32].

order or decree of the NSW Supreme Court in a "matter". That proposition is entirely consistent with this Court's admonition in *HA Bachrach Pty Limited v Queensland*[7] that "it is the operation and effect of [a] law which defines its constitutional character", where this is "a matter of substance and not merely of form".

6. It is, moreover, no answer to the plaintiff's case to describe as "highly contingent" the prospect of release on parole to which an offender becomes entitled upon the expiration of his or her non-parole period.[8] That quality of contingency was conceded in the plaintiff's submissions in chief.[9] But it is one thing to say that upon the expiration of an offender's non-parole period, he or she comes into receipt of a prospect of being released on parole; and it is quite another to say that upon the expiration of the offender's non-parole period, he or she has no prospect of being so released unless dying or incapacitated. The former was the state of affairs created, in relation to the plaintiff, by the Minimum Term Determination, and the latter the state of affairs prevailing as a consequence of s 154A of the Administration of Sentences Act. In the difference between the two lies the basis for concluding that s 154A operates impermissibly to alter the effect of a judgment, decree or order of the NSW Supreme Court.

7. The first defendant seeks to avoid this by contending that the concept of eligibility for parole does no more than to operate "as a legal qualification to having the question of parole considered in a particular case".[10] This, combined with the invocation of previous descriptions of release on parole as a "concession",[11] indicates an attempt on the part of the first defendant to ascribe such minimal significance to the concept of eligibility for parole as would favour a conclusion that a law which purports to deprive the plaintiff of any prospect of release unless he is dying or incapacitated would involve no detraction from the order of the NSW Supreme Court which rendered him eligible for parole.

8. However, it must be borne in mind that s 14(2) of the Sentencing Act, which prescribed the pre-conditions to such eligibility, was preceded by s 14(1), which provided simply that "[p]risoners may be released on parole in accordance with this Act". Similarly, s 126(2) of the Administration of Sentences Act, which now serves a function identical to that previously served by s 14(2) of the Sentencing Act, is preceded by s 126(1), which states, "Offenders may be released on parole in accordance with this Part". The manner in which these provisions are structured suggests that the concept of eligibility for parole does not merely provide a legal qualification or condition precedent to having the question of parole considered in a particular case. Rather, it is one among a number of legal qualifications, along with the subsequent satisfaction of the Parole Authority as to various matters, to being *released* on parole, as contemplated, first by s 14(1) of the Sentencing Act, and then by s 126(1) of the Administration of Sentences Act.

9. That being so, in the period between the expiration of his or her non-parole period and the making of a determination by the Parole Authority, a prisoner must be regarded as having satisfied, not merely some pre-condition to having the question of parole considered, but rather one of the pre-conditions to being released on parole. It follows that upon the expiration of his or her minimum term or non-parole period, the prisoner must, as a matter of law, and by reason only of having met the pre-conditions prescribed by s 126(1) of the Administration of Sentences Act, have some prospect of being released on parole. This is a matter which, with their focus only upon what is said to be "the plaintiff's right to have the

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[7] (1998) 195 CLR 547 at 561 [12].
[8] NSW Submissions at [15].
[9] Plaintiff's Submissions at [18].
[10] NSW Submissions at [21]. This proposition finds reflection in the suggestion in the SA Submissions at [18] that "the passing of the non-parole period comprises one of the steps that must be satisfied before the parole of a serious offender subject of [sic] a non-release recommendation may be considered".
[11] *Bugmy v The Queen* (1991) 196 CLR 525 at 532.

Parole Authority consider his release", the submissions filed on behalf of the Attorney-General of Victoria ("**the Victoria Submissions**") completely ignore.[12]

10. It is true that, as a matter of form alone, s 154A of that statute appears to effect no more than a change in the criteria by which the Parole Authority is to determine whether the plaintiff should be released on parole. So much was emphasised by the Attorneys-General for South Australia[13] and Western Australia;[14] and the plaintiff does not now contest that, as a general proposition, legislation purporting to change such criteria is, in constitutional terms, unobjectionable. However, where the criteria are amended so that there is a departure from the entitlement flowing from the NSW Supreme Court's determination of a minimum term – namely, that upon the expiry of that term alone, the relevant prisoner is to enjoy some prospect of being released on parole – then there is, an impermissible alteration to the effect of that determination.

11. It is consequently a matter of little moment that the release criteria for parole in Western Australia have changed over time, even in ways that have adversely affected the prospects of release of prisoners serving existing sentences. That legislative history sheds little, if any, light upon the difficulties that arise when, as in this case, changes to the release criteria are in a state of tension with the previous determination of a prisoner's non-parole period. If anything, that history serves only to highlight the extent to which the position of the first defendant and the interveners proceeds upon the elevation of form above substance.

*Chapter III of the Constitution*

12. As has already been observed, even though the Sentencing Act was in effect as at 24 April 1997, the plaintiff would not, but for the Minimum Term Determination, have been eligible for parole on 13 November 2003. He thus did not enjoy any entitlement associated with such eligibility, including the entitlement to insist upon having the question of parole considered by the Parole Authority, independently of the orders of McInerney J.

13. Crucially, neither *Federated Engine-Drivers and Fireman's Association of Australia v Broken Hill Proprietary Co Limited*[15] nor *Bachrach*,[16] both of which are relied upon by the first defendant,[17] involved purported legislative revisions of, or detractions from, rights, privileges or entitlements which were enjoyed by particular persons by reason of a judgment or decree of the Supreme Court of a State. Indeed, contrary to what was said in the first defendant's submissions, *Bachrach* was not a case in which the Queensland Planning and Environment Court rejected a development proposal, after which legislation was enacted permitting the proposed development. Rather, the second defendant council had made a decision to approve a proposed rezoning sought by the third defendant, a challenge to which decision failed in the Planning and Environment Court. It was whilst an appeal from this decision was pending that the Queensland Parliament enacted a law, in effect, allowing the pursuit of the development in relation to which the third defendant had sought the rezoning of the relevant land. It is immediately apparent that this litigation is far removed from the circumstances considered in *Bachrach*, which should properly be regarded as a case concerning a legislative pronouncement upon rights the subject of pending litigation. And as the first defendant itself notes, that "is not this case".[18] Or as was put on behalf of the Attorney-General of South Australia, "authorities concerning the

[12] Victoria Submissions at [27]-[28].
[13] SA Submissions at [18].
[14] WA Submissions at [30] and [33]-[34].
[15] (1913) 16 CLR 245.
[16] (1998) 195 CLR 547.
[17] NSW Submissions at [27]-[28].
[18] NSW Submissions at [31].

power of the legislature to alter rights in issue in ongoing legal proceedings are not to the point".[19]

14. Notwithstanding that, the Attorney-General of Victoria calls those authorities in aid, apparently in support of the proposition that if a State legislature can alter rights in issue in pending litigation, then it must also be able to alter rights determined or "created" in concluded proceedings, presumably provided that it does not actually set aside or vary a judgment or order of a State Supreme Court.[20] A similar contention appears to be advanced on behalf of the Attorney-General of the Commonwealth.[21] It will be recalled that the plaintiff has conceded the existence of a power in a State legislature, even retrospectively, to vary rights or obligations enjoyed by or imposed upon persons independently of, but which are recognised and enforced by, such a judgment or order.[22] This is plainly because such variation would not involve any interference with judicial power and the pendency or conclusion of the relevant litigation would, in a sense, be fortuitous.

15. However, where a State legislature purports to alter rights or entitlements conferred or created in the exercise of judicial power, in circumstances where that exercise is subject to the superintendence of this Court, it is difficult to understand how it could be said that the legislature is addressing something in relation to which the invocation and exercise of judicial power were merely fortuitous or adventitious. Accordingly, it is to fall into error to suggest, as does the Attorney-General for Queensland,[23] that the distinction posited by the plaintiff between judgments which recognise and enforce pre-existing rights and judgments which "create" rights is of no constitutional significance. And as for the contention that difficulty attends the task of identifying into which category a judgment may fall,[24] it need only be said that in the context of giving content to the concept of judicial power, a similar distinction has, even in modern times, been applied by this Court with some facility in cases such as *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* [25] and *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia*.[26]

16. Returning to the submissions of the Attorney-General of Victoria, it should be observed that where a State legislature does alter rights or entitlements conferred or created by an order of a State Supreme Court, there is little, if any, scope for drawing any meaningful distinction between laws that do not actually set aside or vary that order and laws that do. When an attempt is made to revise by legislation the rights or entitlements created or conferred by a Court order, the result is a direct alteration of what is provided for in its terms. There is nothing to distinguish a law which expressly varies the order of the Court and one which merely has that effect. It is for this reason that the plaintiff's submissions in chief spoke of the invalidity of laws that vary or alter the "effect" of judgments, decrees, orders or sentences of State Supreme Courts. The situation described above may be contrasted with one in which a State law merely revises rights that exist independently of a Court order. In this latter situation, the law may well render an order irrelevant, without having the effect of altering any entitlement for which it is the source. In such a case, there would be no variation to or alteration of the effect of that order, in the relevant sense.

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[19] SA Submissions at [20].
[20] Victoria Submissions at [41]-[43].
[21] Commonwealth Submissions at [15].
[22] Plaintiff's Submissions at [43].
[23] Submissions on behalf of the Attorney-General for the State of Queensland (Intervening) ("**Queensland Submissions**") at [14].
[24] Queensland Submissions at [14].
[25] (1987) 163 CLR 140 at 148-149 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.
[26] (1987) 163 CLR 656 at 663 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

17. Those criticisms of the plaintiff's case advanced by the Attorney-General of Queensland that target some heresy discerned in the plaintiff's use of the term "effect",[27] assign to that word a greater width and significance than do the submissions in chief of the plaintiff. Given the plaintiff's concession that State legislatures may, even retrospectively, alter the independently existing rights or obligations upon which final judgments are based, it is to misapprehend the plaintiff's case to characterise it as suggesting, even if only implicitly, that State legislatures are "prohibited from altering the effect of court orders in all circumstances".[28]

18. There is no substance in the proposition that the plaintiff's case does not adequately account for the exercise of the prerogative of mercy, as submitted on behalf of the Attorney-General of Queensland.[29] The tradition, history and legislative course of the judicial authority to sentence convicted offenders has always been subject to the executive power of pardon. That is fundamentally different from being subject to executive increase of a sentence. Its existence does not provide any constitutional footing for legislative increases of sentence. Nor should it provide footing for detraction from a judicial order creating an entitlement to have the manner of serving a sentence substantially altered. Nothing in the plaintiff's case would detract from the power of a State Executive to pardon offenders.

19. It is no part of the plaintiff's case to suggest as do the submissions of the Attorney-General of Queensland that "legislatures are unable to affect judgments and undercut their finality".[30] Indeed, the plaintiff's submissions in chief emphasised the qualification provided by the existence of an appellate system to the finality of judgments in this country.[31] It was also said that the first defendant might have sought validly to reduce the prospects of the plaintiff being released on parole by creating a regime under which the NSW Supreme Court could extend a prisoner's non-parole period until such time when the prisoner could show that he or she was dying or incapacitated.[32] These matters are insufficiently recognised in the submissions of the Attorney-General of Queensland.

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[27] Queensland Submissions at [8]-[11].
[28] Queensland Submissions at [10].
[29] Queensland Submissions at [11].
[30] Queensland Submissions at [9].
[31] Plaintiff's Submissions at [31]-[32].
[32] Plaintiff's Submissions at [59]-[61].