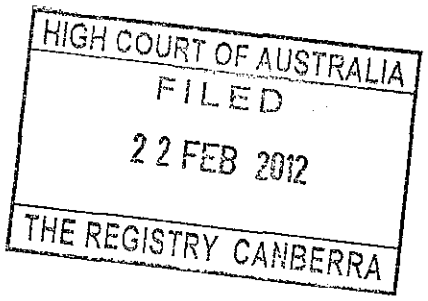
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S165 OF 2011**

BETWEEN: **KEVIN GARRY CRUMP**
Plaintiff

AND: **STATE OF NEW SOUTH WALES**
First Defendant

NEW SOUTH WALES STATE PAROLE AUTHORITY
Second Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)



Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the State of New South Wales (**New South Wales**).

PART III LEGISLATIVE PROVISIONS

3. The Commonwealth accepts Mr Crump's statement of applicable constitutional provisions and legislation and the additional provisions set out in the schedule to New South Wales' submissions.

PART IV ARGUMENT

A. INTRODUCTION

4. Mr Crump's major premise is that s 73 of the Constitution denies to a State Parliament power to enact a law that would "alter the effect" of an order of the Supreme Court of that State: see PS [40]. His minor premise is that s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) (**Administration of Sentences Act**) alters the effect of the order of McInerney J on 24 April 1997 (SCB 179): see PS [43].

5. The minor premise is wrong from which it follows that there is no occasion to consider the major premise and the Court should not do so.[1] If it were necessary to reach the major premise, the constraining effect of s 73 of the Constitution is more limited than Mr Crump suggests.

B. SECTION 154A DOES NOT ALTER THE EFFECT OF THE ORDER

6. The order of McInerney J was a determination of a minimum term of imprisonment and an additional term pursuant to s 13A of the *Sentencing Act 1989* (NSW): SC 179-180.

7. An appeal from that order was available to the Court of Criminal Appeal and from there, by special leave, to the High Court. Mr Crump's co-accused, Mr Baker, pursued that very course: his application for an order under s 13A

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1 *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 171 [28] (McHugh, Gummow, Hayne and Heydon JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [250]-[252] (Gummow and Hayne JJ); *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ); *Attorney-General (NSW) v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 590 (Higgins J).

was dismissed; an appeal was heard and dismissed by the Court of Criminal Appeal; the High Court granted special leave and dismissed the appeal.[2]

8. As explained in *Baker v The Queen*:[3]

> The effect of an order under s 13A, setting for an existing life sentence both a minimum term of imprisonment and an additional term **during which the prisoner might, by the exercise of statutory authority given a non-judicial body, be released on parole**, is to alter or vary the order of the sentencing judge. Accordingly, the new jurisdiction conferred by s 13A may readily be seen as attracting the exercise of judicial power.

9. The nature of a judicial order determining an additional term under s 13A is that it is a factum upon which statutory authority to release on parole operates from time to time. The order does not incorporate any part of the statutory scheme pursuant to which that authority is granted. Much less does it freeze that statutory scheme at a moment in time. "What must always be unknown to a sentencing judge and the Court of Criminal Appeal are the paths that may be taken with respect to any status quo by future legislation".[4] New South Wales' submissions at [11]-[15] detail how the applicable statutory regime has in fact been varied by legislation enacted since the date of the order.

10. Section 154A is not a legislative variation to or alteration of the order of McInerney J: cf PS [63]. It is just one of a number of subsequently enacted provisions that leave the terms of the order untouched and that alter the conditions to be met before Mr Crump may be released on parole.[5] That the conditions he must meet are more onerous is not "a departure from the effect of what was ordered by McInerney J": cf PS [55]). The order did not create a right or entitlement for Mr Crump to be released on parole and s 154A does not operate to extinguish any right or entitlement for Mr Crump to be released on parole: cf PS [56].

C. SECTION 73 OF THE CONSTITUTION

11. Mr Crump argues that s 73 of the Constitution has the effect that any attempt by a State Parliament to "set aside, vary or otherwise alter the effect of, any

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2 *Baker v The Queen* (2004) 223 CLR 513.

3 (2004) 223 CLR 513 at 529 [33] (McHugh, Gummow, Hayne and Heydon JJ); see also: *Bugmy v The Queen* (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J), 536 (Dawson, Toohey and Gaudron JJ); and McInerney J's comments on the possibility of the plaintiff's release on parole: SC 173.

4 *Elliot v R; Blessington v R* (2007) 234 CLR 38 at 50 [41] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

5 For example, the Parole Authority "must have regard to the need to preserve the safety of the community": s 154(2) (SC 190).

judgment or order of a State Supreme Court" is beyond power: PS [40]. The argument is overstated. It reflects neither the constitutional text nor the authorities.

12. Section 73 of the Constitution confers jurisdiction on the High Court to hear and determine "appeals" from "judgments, decrees, orders and sentences" of the Supreme Court of a State. The "judgments, decrees, orders and sentences" are limited to those made in the exercise of judicial power[6] and the appeal is an appeal in the strict sense: the only question for the High Court being whether the order was correct on the evidence before the Supreme Court and on the law existing at the time of the Supreme Court's decision.[7] The judgment of the High Court "shall be final and conclusive".

13. Section 73 is one aspect of the "integrated" or "unified" judicial system in Australia,[8] in which the Supreme Courts retain supervisory jurisdiction to enforce limits on the exercise of State executive and judicial power, subject to the ultimate superintendence of the High Court.[9] Any limitation on the powers of State Parliaments, based on a negative implication to be drawn from s 73, must be necessary to maintain the efficacy of that system. A State Parliament may not, for example, "expand or contract the scope of the appellate jurisdiction of the Court conferred by s 73".[10]

14. Section 73 would therefore prevent a State Parliament: exercising the jurisdiction conferred on the High Court to determine finally and conclusively an appeal from a State Supreme Court; legislating to prevent the High Court hearing or determining an appeal from a judgment, decree, order or sentence of a Supreme Court; or enacting legislation that would render a judgment of the High Court, made on appeal under s 73, not final and conclusive.

15. However, there is no basis in the text or structure of s 73 for treating it as preventing a State Parliament from altering the substantive law so as to

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6 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 300 and 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), 312 (Brennan J); *Mobil Oil Australia Pty Limited v State of Victoria* (2002) 211 CLR 1 at 38 [63] (Gaudron, Gummow and Hayne JJ) and the cases cited there.

7 *Mickelberg v The Queen* (1989) 167 CLR 259 at 267 (Mason CJ), 298 (Toohey and Gaudron JJ); *Eastman v The Queen* (2000) 203 CLR 1 at 33 [104] (McHugh J); cf an appeal by way of rehearing in which an appellate court may substitute its own decision based on the facts and the law as they then stand: *Allesch v Maunz* (2000) 203 CLR 172 at 181 [23] (Gaudron, McHugh, Gummow and Hayne JJ) and the cases cited at fn 32. However, the position might be different in, for instance, an appeal in a constitutional case.

8 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 574 [110] (Gummow and Hayne JJ); see also *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 622 [34] (Gleeson CJ, Gummow and Hayne JJ).

9 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

10 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 618 [20] (Gleeson CJ, Gummow and Hayne JJ).

affect rights and obligations in issue in pending litigation or to alter the consequences of a judicial decision.[11]

Dated: 22 February 2012

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11 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Limited* (1913) 16 CLR 245 at 281-282 (Higgins J); *Nelungaloo Pty Limited v The Commonwealth* (1948) 75 CLR 495 at 503 (Williams J), 579-580 (Dixon J); *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ); *H.A. Bachrach Pty Limited v Queensland* (1998) 195 CLR 547 at 562 [16] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).