



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

No B11/2024

BETWEEN:

RODNEY MICHAEL CHERRY
Plaintiff

and

STATE OF QUEENSLAND
Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL
FOR THE STATE OF VICTORIA (INTERVENING)**

PART I: CERTIFICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. There is no distinction of constitutional significance between a provision that imposes strict limiting conditions on a prisoner's eligibility for *a grant* of parole, and a provision that imposes strict limiting conditions on a prisoner's eligibility *to apply* for parole.

Vic [3], [15]-[23]; see also Def [40].

3. *First*, both types of provision can have the practical effect of removing any meaningful prospect of release on parole.

Vic [15], [19], [22]-[23]; *Minogue* (2019) 268 CLR 1 (**JBA vol 5, tab 34**) at 21 [32]-[33] (Gageler J); see also at 22-23 [40] (Edelman J).

4. *Secondly*, each of the principles applying to provisions conditioning the grant of parole applies equally to provisions conditioning the ability to apply for parole. Contrary to Pff [5], it was not essential to the conclusion in *Minogue* that the prisoner remained "eligible" to be considered for release on parole.

- (1) The exercise of judicial power concludes with the passing of the sentence: *Minogue* (2019) 268 CLR 1 at 15-17 [14]-[19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Hatahet* (2024) 98 ALJR 863 (**JBA vol 6, tab 46**) at 869 [19]-[20] (Gordon A-CJ, Steward and Gleeson JJ).

- (2) The minimum term is part of the sentence, but its legal effect is only to set a period during which a prisoner is *not* to be released on parole (putting aside exceptional circumstances parole, where available, or the prerogative of mercy): Vic [10], SCB 32; *Knight* (2017) 261 CLR 306 (**JBA vol 4, tab 28**) at 323 [27]-[28] (the Court).
 - (3) The order setting the minimum term does not create any eligibility to apply for or be granted parole after that time. Eligibility for parole is created and conditioned by the statutory scheme and administrative policies: Vic [11]-[12]; *Minogue* (2019) 268 CLR 1 at 16-17 [15]-[17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
 - (4) In other words, the order is not concerned with what might happen *after* expiry of the minimum term. What happens after (while the prisoner is still under sentence) is a matter for the Executive, subject to the statutory scheme in force from time to time: Vic [24]-[29]; *Minogue* (2019) 268 CLR 1 at 15-17 [14]-[17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Hatahet* (2024) 98 ALJR 863 at 870 [25]-[28] (Gordon A-CJ, Steward and Gleeson JJ).
 - (5) Amendments to the parole scheme limiting, postponing or removing a person's eligibility to apply (or re-apply: Vic [21] fn 47) for parole therefore do not alter the legal effect of the court's order: Vic [13], [21]; *Crump* (2012) 247 CLR 1 (**JBA vol 3, tab 18**) at 19-20 [36] (French CJ); *Minogue* (2019) 268 CLR 1 at 21 [32]-[33] (Gageler J), 22-23 [40] (Edelman J).
5. Similarly, imposing limiting conditions of either kind, or even removing eligibility for parole entirely, does not constitute additional punishment. The deprivation of liberty is brought about by the head sentence. Denial of parole withholds an executive "concession", "mercy" or "mitigation" of that punishment: Vic [14], [26]-[27]; *Minogue* (2019) 268 CLR 1 at 14 [9], 17-18 [20] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 21 [32] (Gageler J), 22-23 [40] (Edelman J); *Hatahet* (2024) 98 ALJR 863 at 872 [34] (Gordon A-CJ, Steward and Gleeson JJ).

Dated: 4 February 2025



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