IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M162 of 2018

BETWEEN: CRAIG WILLIAM JOHN MINOGUE

Plaintiff

and

STATE OF VICTORIA

Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for Intervention

2. The Attorney-General for the State of South Australia ("**South Australia**") intervenes pursuant to s 78A of the *Judiciary Act 1903* in support of the appellant.

Part III: Leave to Intervene

3. Not applicable

Part IV:

4. The plaintiff seeks to impugn the validity of s 74AB and (if it applies to the Plaintiff) s 74AAA of the *Corrections Act 1986* (Vic) (**the Act**) on four bases:

   a. first, that the provisions extend the minimum term during which the Plaintiff shall not be released on parole which is "*beyond the legislative powers of the Parliament of Victoria as it is inconsistent with the proposition... that imposing punishment or punitive treatment on an individual as a consequence of criminal guilt is an exclusively judicial power or function*";[1] and

   b. second, that a State Parliament may not impose treatment or punishment that is "*cruel, inhuman and degrading*" as it is "*not within the range of punishments capable of being imposed by the Supreme Court as a repository of federal jurisdiction, or otherwise by reason of the* Bill of Rights 1688";[2] and

   c. third, that the provisions are "*inconsistent with the constitutional assumption of the rule of law, on the basis that they arbitrarily single out the Plaintiff by placing him outside the general legislative scheme which governs the sentencing of offenders and the administration of sentences in Victoria.*"[3]

   d. fourth, in so doing, the provisions fail to give full faith and credit to the plaintiff's sentence as required by s 118 of the Constitution.[4]

5. In respect of the first, second and fourth alleged basis for invalidity, South Australia adopts the submissions of the defendant.[5]

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[1] Plaintiff's Submissions (**PS**) at [5a] and Special Case at [41]; Special Case Book at 50.
[2] PS at [5b].
[3] PS at [5c].
[4] PS at [5c].
[5] Defendant's Submissions (**DS**) at [6]-[34] and [45]-[46].

6. As to the third alleged basis for invalidity, the plaintiff's contention comprises four essential components:

   a. The rule of law forms an assumption of the Constitution, *"upon which the Constitution depends for its efficacy"*.[6]

   b. Therefore, *"any law that conflicts with or is abhorrent to the rule of law will be unconstitutional and invalid"*.[7]

   c. Even on a *"thin"* conception of the rule of law, its content includes notions that the law must be accessible, intelligible, clear, predictable and ascertainable by the citizen.[8]

   d. Sections 74AB and 74AAA offend these aspects of the rule of law because *"those provisions single out the Plaintiff.... and place him outside the general operation of the otherwise operative sentencing law as it was applied by the Supreme Court in the Plaintiff's matter without a* "rational and relevant basis for the discriminatory treatment" *and certainly not a rational and relevant basis justifying the* 'extraordinary degree of disproportionality' *of that discriminatory treatment."*[9]

7. South Australia directs its submissions in support of the validity of ss 74AB and 74AAA to refutation of the second of these propositions. South Australia submits:

   a. The abstract nature and ill-defined (and disputed) content of *"the rule of law"* identify it as a concept ill-suited to operating as a directly enforceable criterion of legal validity.

   b. In any event, Australia's Constitution itself – both in manifesting the very notion of constitutionalism, and by giving form and content to that constitutionalism in the way that it does – simultaneously implements certain features of the rule of law, whilst denying it legitimacy as an extraneous, freestanding enforceable limit on legislative power.

   c. Any limitation on legislative power is sourced in the text and structure of the Constitution. For the judicial branch to invalidate governmental action on a basis extraneous to this would itself offend those aspects of the rule of law that

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[6] PS at [58].
[7] PS at [59].
[8] PS at [60].
[9] PS at [62].

are implemented in Australia.

8. Further, and in any event, s 74AB and, if it arises for decision, s 74AAA are valid enactments of the Victorian Parliament for the reasons given by the defendant.[10]

"The rule of law": ill-suited to operating as a criterion of validity

9. To answer the plaintiff's proposition that absent compliance with *"the rule of law"* a given law will be invalid, it is necessary to engage with the nature and content of that concept.

10. The *"rule of law"* is commonly described as a political aspiration or ideal. At its most basal conception, it may be said to represent an ideal of a *"government of laws rather than of men"*;[11] that is, that public power ought to be constrained by law such that people are ruled by law and not the whims of the people in power.

11. That said, the precise content of the rule of law has been described variously as *"protean"*,[12] *"exceedingly elusive"*[13] and *"contested"*.[14] Formalistic (or *"thin"*) versions of the concept have been espoused, which focus on the ability of the law to guide human conduct, for example by favouring laws that are prospective, clear and stable.[15] More substantive (or *"thick"*) conceptions emphasise a need for law to be morally legitimate, for example by being compatible with fundamental human rights.[16] On any view, the concept is internally complex. These difficulties as to precision and certainty of content cast doubt on the plausibility and workability of the rule of law as a direct criterion of legal validity.

12. However, even assuming the *"intractable"*[17] debate as to content were capable of satisfactory resolution, other features of the concept render it yet still ill-suited to such a function. First, the range of content ascribed to it includes features that appear to

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[10] DS at [42]-[44].
[11] L Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) Federation Press at 1, 10; AV Dicey, *Introduction to the Study of the Law of the Constitution* (1885) Macmillan, 1st ed (10th ed. 1959) at 202; J Harrington, *Commonwealth of Oceana* (1656), Book I, ch 2; *Constitution of Massachusetts*, Part the First, art. XXX (1780).
[12] K Mason, "What is wrong with top-down legal reasoning?" (2004) 78 ALJR 574 at 579.
[13] Prof B Tamanaha, as quoted by T Bingham, *The Rule of Law* (2011) Penguin Books at 5.
[14] See, eg, L McDonald, "The entrenched minimum provision of judicial review and the rule of law" (2010) 21 PLR 14 at 25; J Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 *L & Phil* 137; L Green, "The Political Content of Legal Theory" (1987) 17 *Philosophy of the Social Sciences* 1 at 18.
[15] See, e.g., J Raz, *The Authority of Law: Essays on Law and Morality* (1983) at 214-218.
[16] See, e.g., T Bingham, *The Rule of Law* (2011) Penguin Books at 67.
[17] L Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) Federation Press at 1, 11.

speak peculiarly to the operation of a legal system as a whole,[18] whilst others are capable of application directly to individual specific laws.[19] Second, but relatedly, compliance with the rule of law – either by the system of law as a whole, or by any given individual law – is a matter of degree.[20] Third, total compliance even with a *"thin"* conception of the rule of law is incompatible with the pursuit of many other purposes pursued by law.[21] Accepting this, the goal of compliance with the rule of law necessarily falls to be balanced with other competing values. The tension between social and political demands for legislative change and the rule of law aspiration of *"stability"* provides an obvious example.

10 13. The concept of the rule of law, however thinly characterised, is consequently inherently ill-suited to operation as a direct enforceable limit on legislative power, conformity with which is a precondition to legal validity.

The rule of law as an "assumption" of the Australian Constitution

14. In advocating that the rule of law itself operates as a direct limitation on State and Commonwealth legislative power, the plaintiff invokes the statement of Dixon J that *"the rule of law forms an assumption"*[22] of the Constitution.[23] Notwithstanding his acceptance that there exists a distinction between such an *"assumption"* and an implication derived from the Constitution itself,[24] the plaintiff seeks to take the Constitution's assumption of this abstract notion[25] as producing a positively
20 enforceable legal limit on legislative power. Such an approach must be rejected.

15. First, the contention ignores the significance and quality attributed to the distinction by Dixon J himself, and undermines over a century of jurisprudence of this Court concerning the proper derivation from the Constitution of implicit limitations on legislative power.[26]

16. In the very passage upon which the plaintiff relies, Dixon J noted that the Constitution is *"framed in accordance with many traditional conceptions"*, only *"some of which"*

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[18] For example, that both government and citizens must comply with the law.
[19] For example, that laws only operate prospectively.
[20] J Raz, *The Authority of Law: Essays on Law and Morality* (1983) at 215, 228.
[21] J Raz, *The Authority of Law: Essays on Law and Morality* (1983) at 227-229.
[22] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J).
[23] PS at [58].
[24] PS at [59].
[25] Even if the abstract notion so invoked is characterised as a "thin" conception of the rule of law: PS at [60].
[26] See, e.g., *D'Emden v Pedder* (1904) 1 CLR 91 at 110.

are given *"effect"* by the Constitution.[27] To illustrate the distinction, his Honour contrasted the separation of the judicial power (a conception to which the Constitution *does* give effect)[28] and the notion of *"the rule of law"*.[29] Indeed, in an earlier case, Dixon J rejected a submission on the basis that it *"confuse*[d] *the unexpressed assumptions upon which the framers of the* [Constitution] *supposedly proceeded"* with the meanings that find expression in the Constitution itself.[30] It is only the latter that carries legal force and effect.[31]

17. Citing Dixon J's recognition of the distinction, Mason CJ expressed it thus:[32]

> *"It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument. Thus, the founders assumed that the Senate would protect the States but in the result it did not do so."*

18. This is not to say that no aspect or feature commonly associated with the rule of law is not manifest in the Constitution itself, or advanced by it; undoubtedly some are.[33] It is, however, to deny the legitimacy of a direct normative operation of some notion of the rule of law, or features popularly attributed to it, as a limit on legislative power, absent sourcing such a limitation in the Constitution itself.[34] Properly understood, Dixon J's statement *"provides no support for the notion that judges are empowered to strike down legislation on the basis that it infringes some unwritten aspect of the rule of law."*[35]

19. This Court's extensive jurisprudence concerning the proper manner and occasion for recognising constitutional implications, including implied limitations on State or Commonwealth legislative power, is determinative against the thesis advanced by the

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[27] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J).
[28] This implied separation had been recognised prior to the decision in the *Communist Party Case*: see *New South Wales v Commonwealth* (1915) 20 CLR 54; *Waterside Workers' Federation v JW Alexander* (1918) 25 CLR 434. Although the separation of the judicial power now comprises two interrelated rules, the second of which was not authoritatively recognised until 1956 (*R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254), Dixon J had advocated for it previously in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73: see L Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) Federation Press at 73.
[29] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J).
[30] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81 (Dixon J).
[31] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81 (Dixon J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ).
[32] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ).
[33] See [20]-[21], [24]-[31], [32] below.
[34] See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [72] (McHugh and Gummow JJ).
[35] *Western Australia v Ward* (2002) 213 CLR 1 at [963], fn 1091 (Callinan J).

plaintiff. That any such implication *"must be securely based"* in the Constitution,[36] and is legitimate only insofar as it sourced in the text and structure of the Constitution,[37] reflects the overarching premise that it is the Constitution – not unimplemented notions extraneous to it – which is ultimately governing.

The Constitution as supreme and binding on all

20. This Court's adherence to recognising only limitations on legislative power that are anchored in the text and structure of the Constitution itself reflects the most fundamental commitment that *is* made to the rule of law in Australia: the supremacy of the Constitution itself as the paramount law that creates Australia's legal system, binds all within it and delineates and apportions the exercise of governmental power.[38]

21. Covering clause 5 of the Constitution renders the Constitution (as set out by s 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp))[39] *"binding on the courts, judges, and people of every State and of every part of the Commonwealth"*. By this, it is the scheme manifested in the text and structure of the Constitution that is rendered binding on all.[40] It may only be added to, or altered, in accordance with s 128.

22. Perhaps ironically, the plaintiff's contention – if correct – would constitute a grievous departure from the major *"rule of law"* premise that is manifest in Australia's constitutionalism. It would deny the Constitution its overarching supremacy as the delineator of governmental power by which all are bound, by permitting the judicial branch to give force and effect to asserted limitations on legislative power that are sourced from outside the Constitution itself.

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[36] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 134 (Mason CJ); quoted with approval in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [389] (Hayne J).
[37] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [14] (Gaudron, McHugh, Gummow and Hayne JJ). *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [32]-[33] (Gleeson CJ and Heydon J); [56]-[57] (McHugh J), [385], [389] (Hayne J), see also [240]-[242] (Gummow J), [469]-[470] (Callinan J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [20], [39] (Gleeson CJ, Gummow and Hayne JJ), [171] (Heydon, Crennan and Kiefel JJ), see also at [82]-[84] (Kirby J).
[38] See L Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) Federation Press at 53, 173; C Saunders and K Le Roy, "Perspectives on the Rule of Law", in C Saunders and K Le Roy (eds), *The Rule of Law* (2003) Federation Press at 11; M Gleeson, "Courts and the Rule of Law", in C Saunders and K Le Roy (eds), *The Rule of Law* (2003) Federation Press at 182. See also *Unions NSW v New South Wales* [2019] HCA 1 at [62] (Gageler J).
[39] 63 & 64 Vict, c 12.
[40] *MZXOT v Minister for Immigration and Border Protection* (2008) 233 CLR 601 at [19]-[20] (Gleeson CJ, Gummow and Hayne JJ), quoted with approval in *Burns v Corbett* [2018] HCA 15 at [47] (Kiefel CJ, Bell and Keane JJ).

23. In Australia, the Constitution is the law that rules. That is the rule of law characteristic upon which the Constitution *"depends for its efficacy"*.[41] If its supremacy is not faithfully maintained, because the division of powers expressed within it is undermined or supplemented by extraneous political ideals or nebulous or contingent abstract notions that the Constitution itself does not implement, then its essential character as the ruling law is unravelled.

An ideal partly implemented

24. The binding nature of the Constitution as Australia's highest law manifests an implementation of a fundamental feature[42] of the rule of law. However, it is the text and structure of the Constitution, so made binding, that give concrete form to certain features of the rule of law aspiration.

25. That text and structure creates three arms of Government of the Commonwealth.[43] It distributes power between those arms, and limits the powers of each. It continues the States[44] and defines the relationship between the Commonwealth Government and those of the States.[45] State and Commonwealth power alike are subject to, and bound by, the limits imposed by the Constitution.[46] Whilst the legislative power of the States is subordinated to that of the Commonwealth by s 109, the scope of the Commonwealth's legislative power is expressly confined. Neither the States nor the Commonwealth, nor any arm of governmental power within them, has power to alter the Constitution.[47]

26. The strict separation of the judicial power of the Commonwealth, and other features express and implicit in Ch III, constitute a major plank of Australia's (partial) constitutional implementation of certain rule of law ideals. It is for this reason that Ch III has been described as giving *"practical effect to the assumption of the rule of*

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[41] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [30] (Gleeson CJ and Heydon J), quoted with approval in *Thomas v Mowbray* (2007) 233 CLR 307 at [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at [61] (French CJ).

[42] That those who hold public power should be constrained by law, such that it may be said that the people are ruled, not by the people who hold public power, but by law itself: L Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) Federation Press at 10; AV Dicey, *Introduction to the Study of the Law of the Constitution* (1885) Macmillan, 1st ed (10th ed. 1959) at 202; S Rutherford, *Lex, Rex* (1644);

[43] See Chapters I, II and III, and in particular ss 1, 61 and 71, of the Constitution.

[44] See ss 106-108, 118, Constitution.

[45] See, eg, ss 52, 73(ii), 75(iv), 77(ii), 90, 99, 100, 109. 112, 114, 119.

[46] Covering clause 5, *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12.

[47] Section 128, Constitution. See also L Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) Federation Press at 163.

law";[48] it gives form and content to the legal limits on power rendered binding by covering clause 5.

27. In separating strictly the federal judicial power from the executive and legislative powers of the Commonwealth, Ch III both *"confers and denies judicial power"*.[49] In the exercise of that judicial power, the courts are empowered to declare and enforce the limits that attend Commonwealth legislative[50] and executive[51] power. Both of these judicial review functions are *"manifestations of one and the same constitutional duty of a court to police (declare and enforce) the whole of the law (constitutional and legislative) that limits and conditions the exercise of a repository's power"*.[52]

10 28. Equally, and critically, that strict separation at the federal level also denies to the federal judicial branch the exercise of any power that is not judicial.[53] As Brennan J has observed:[54]

> *"The Court, owing its existence and its jurisdiction ultimately to the Constitution, can do no more than interpret and apply its text, uncovering implications where they exist. The Court has no jurisdiction to fill in what might be thought to be lacunae left by the Constitution ... Under the Constitution, this Court does not have nor can it be given nor, a fortiori, can it assume a power to attribute to the Constitution an operation which is not required by its text ... The notion of 'developing' the law of the Constitution is inconsistent with the judicial power it*
20 *confers."*

29. This limitation itself constitutes an important aspect of the rule of law that is implemented under the Constitution.[55] Indeed, it is the limitation that positively denies the force the plaintiff seeks to give to features of the concept of the rule of law that are divorced from the text and structure of the Constitution and unimplemented by it.

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[48] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [30] (Gleeson CJ and Heydon J), quoted with approval in *Thomas v Mowbray* (2007) 233 CLR 307 at [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at [131] (Gummow J), [233] (Hayne J), [423] (Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at [593] (Crennan and Kiefel JJ).

[49] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [30] (Gleeson CJ and Heydon J).

[50] Whether said to flow from the United States precedent of *Marbury v Madison* 5 US (1 Cranch) 137, or from the colonial recognition that legislation that conflicted with Imperial legislation could be struck down by the courts, that power has been recognised as an axiom of the Constitution: see, e.g., *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 258, 262 (Fullagar J).

[51] Section 75(iii) and, in particular, s 75(v) of the Constitution. See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [5]; *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 at [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[52] Gageler, "The Constitutional Dimension" in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University press, 2014) at 172.

[53] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[54] *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 143-144 (Brennan J).

[55] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [76] (McHugh and Gummow JJ); see also C Saunders and K Le Roy, *The Rule of Law* (2003) Federation Press at 185 (Gleeson).

30. Although there is no strict separation of the judicial power at State level, and s 75(v) entrenches only the judicial review of Commonwealth executive action, Ch III nevertheless partially implements some similar features of the rule of law at State level. Constitutional limitations on State legislative power are enforceable by the judiciary.[56] One such limitation, imposed by the requirement of Ch III that there be a body fitting the description of a *"Supreme Court of a State"*, is that it is beyond the legislative power of the States so to alter the constitution or character of its Supreme Court that it ceases to meet that constitutional description.[57] That limitation, in turn, entrenches in those Supreme Courts their ability to declare and enforce the legal limits on State executive and judicial power by persons and bodies other than the Supreme Court.[58] Similarly, the *"autochthonous expedient"* provided for in s 77(iii), which denies State legislative power to confer on a State court a power or function that would render it an unfit repository for the exercise of federal judicial power,[59] limits the ability of State Parliaments to, for example, impair the independence and impartiality of such courts.[60]

31. Each of these features of Ch III – whether express or implied – represents a partial implementation by the Constitution of the basal conception of the rule of law: that of a government of laws, not people. Indeed, Ch III has been described as revealing a *"clear and coherent vision of the rule of law – one that is firmly anchored in the text and structure of the Constitution"*.[61] That said, decisions of this Court reveal that the constitutional implementation of the rule of law in Australia is far from wholesale, regardless of which conception one invokes. For example, while a State Parliament cannot confer on a State court a power or function that impairs its institutional integrity in such a way as to render it unfit to exercise federal judicial power,[62] those Parliaments remain competent to:

    a. enact ad hominem legislation;[63]

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[56] *Unions NSW v New South Wales* [2019] HCA 1 at [62] (Gageler J).
[57] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[58] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[59] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[60] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); see also *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[61] L Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) Federation Press at 133.
[62] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[63] *Knight v Victoria* (2017) 345 ALR 560 at [23]-[26] (the Court).

b. enact retrospective legislation, including retrospective criminal offences,[64] or which serves to overcome the effect of a judicial decision;[65]

c. enact legislation which alters the substantive law to be applied by a court in pending judicial proceedings;[66] and

d. confer power on State courts to rely upon information provided by the executive that is not disclosed to an adversely affected party. [67]

Each of these competencies offends even a *"thin"* conception of the rule of law; that *"the law of the land should be certain, general and equal in its operation"*.[68]

32. Even the nature of the *"principle of legality"* as an interpretative presumption rebuttable by *"express language or necessary implication to the contrary"*[69] denies that compliance with the rule of law operates as a direct criterion of legal validity. The presumption imposed by the principle of legality[70] has even been described by Gleeson CJ as a *"working hypothesis"* that itself was *"an aspect of the rule of law"*.[71] Notwithstanding its status as such, the common law rights and freedoms it operates to protect, are *"not formally entrenched against legislative repeal"*.[72]

33. An analysis of the text and structure of the Constitution reveals, and the authorities of this Court confirm, that the political aspiration of the rule of law is an ideal only partly implemented under Australia's constitutional framework. Nevertheless, the major rule of law value that *is* implemented is that which is manifest in Australia's constitutionalism itself. The supremacy of the Constitution as the law that creates Australia's legal system, binds all within it and delineates and apportions the exercise of governmental power itself denies that State or Commonwealth legislative power is constrained by abstract notions extraneous to the text and structure of that document.

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[64] *Polyukhovic v The Queen (War Crimes Act Case)* (1991) 172 CLR 501.
[65] *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117 at [30], [50], [53] (French, Crennan and Kiefel JJ), [97] (Gummow, Hayne and Bell JJ), [116]-[117] (Heydon J).
[66] *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ); see also *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117.
[67] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.
[68] Sir Ninian Stephen 'The Rule of Law' (2003) 22(2) *Dialogue* 8.
[69] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.
[70] That is, a presumption against modification or abrogation of fundamental common law rights and freedoms: *Coco v The Queen* (1994) 179 CLR 427 at 437-438 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[71] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [21] (Gleeson CJ).
[72] *Momcilovic v The Queen* (2011) 245 CLR 1 at [45] (French CJ).

To hold otherwise would offend the fundamental rule of law characteristic that is embodied in the Constitution, and upon which it depends for its efficacy.

Sections 74AB and 74AAA are valid

34. Further and in any event, whatever elements of the rule of law might be protected by the Constitution, the features of ss 74AB and 74AAA upon which the plaintiff founds his complaint cannot be such as to render those provisions invalid. In this respect, South Australia adopts the submissions of the defendant.[73] Sections 74AB and 74AAA of the Act are valid. Question (a) stated in the special case[74] ought to be answered "no", and if the answer to question (b) is "yes", question (c) ought to be answered "no".

Part V:

35. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

Dated 2 April 2019

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[73] DS at [42]-[44].
[74] Special Case at [45]; Special Case Book at p 52.