IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M251/2015

BETWEEN:

JULIAN KNIGHT

Plaintiff

and

THE STATE OF VICTORIA

First Defendant

ADULT PAROLE BOARD

Second Defendant

PLAINTIFF'S SUBMISSIONS

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PART I CERTIFICATION

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

PART II ISSUES

2. The Plaintiff, Julian Knight, was sentenced by the Supreme Court of Victoria in 1988 to life imprisonment with a minimum term of 27 years. The minimum term has expired. Section 74AA of the *Corrections Act 1986* (Vic) provides that the Adult Parole Board may make an order for release "of the prisoner Julian Knight if, and only if," he is in imminent danger of dying or seriously incapacitated and does not pose a risk to the community. Is s 74AA invalid because it:

10 (a) interferes with a particular, identifiable exercise of Supreme Court judicial power in relation to a single, named individual; and/or

(b) enlists Victorian judicial officers in a decision making process undermining their judicial independence from the executive;

and is thereby contrary to Ch III of the Constitution, by reason of the principle identified in *Kable v New South Wales*[1] or otherwise?

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The Plaintiff has given notice to the Attorneys-General of the Commonwealth and of the States in accordance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

20 4. The relevant facts are set out in the Special Case filed 4 November 2016 (SCB 27-32) and in *R v Knight* [1989] VR 705 (Hampel J) (Annexure A to the Special Case).

PART V ARGUMENT

5. In summary, the Plaintiff contends that s 74AA is inconsistent with Ch III of the Constitution and invalid for two reasons:

(a) First, as a matter of substance, s 74AA operates to interfere with a particular and readily identifiable exercise of judicial power by the Supreme Court of Victoria, namely the sentence imposed on the Plaintiff by Hampel J following the Plaintiff's guilty plea and conviction for criminal offences (the Plaintiff's **first contention**).

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1 (1996) 189 CLR 51.

(b) Second, s 74AA authorises Victorian judicial officers to participate in a decision making process that undermines their judicial independence from the executive and hence renders the courts on which they sit unsuitable to be repositories of federal judicial power (the Plaintiff's **second contention**).

6. The Plaintiff emphasises the *ad hominem* nature of s 74AA, which names and applies only to "the prisoner Julian Knight". In this regard, s 74AA is distinguishable from the regime considered and upheld by this Court in *Crump v New South Wales*.[2]

7. Both aspects of s 74AA, either alone or together, cause it to offend Ch III of the Constitution, understood by reference to the *Kable* principle.

A. HAMPEL J'S DECISION

8. In sentencing the Plaintiff, Hampel J fixed a minimum term of 27 years pursuant to s 17 of the *Penalties and Sentences Act 1985* (Vic) (now repealed), giving reasons why a minimum term was appropriate in the circumstances.[3] Certain aspects of Hampel J's decision to set a minimum term should be noted:

(a) First, a substantial part of the plea hearing was dedicated to whether the Court should set a minimum term.[4] The Plaintiff sought that such a term be fixed. The Crown took no position on the matter.[5]

(b) Second, the "minimum term" was, under s 17(1) of the *Penalties and Sentences Act*, "part of the sentence." In this way, both the head sentence and the minimum term were directed to the Plaintiff's punishment.

(c) Third, various considerations underlay the minimum term. Under s 17(1) of the *Penalties and Sentences Act*, Hampel J was obliged, in sentencing the Plaintiff, to "fix a lesser term" of imprisonment (or "minimum term") during which the Plaintiff would "not be eligible to be released on parole." This obligation, however, was subject to an exception in s 17(2):

> A court shall not be required to fix a minimum term if the court considers that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate.

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2 (2012) 247 CLR 1. In the alternative, if the Court concludes that *Crump* cannot be distinguished, the Plaintiff seeks leave to re-open *Crump*.

3 *R v Knight* [1989] VR 705, 711 (Hampel J). A minimum term is now called a "non-parole period": see *Sentencing Act 1991* (Vic).

4 *R v Knight* [1989] VR 705, 710 (Hampel J).

5 *R v Knight* [1989] VR 705, 711 (Hampel J).

9. Accordingly, in not availing himself of that exception, Hampel J determined that a minimum term was not, at least, "inappropriate." That determination was based on various considerations:[6]

> In my view, the fixing of a minimum term in this case is appropriate because of your age and your prospects of rehabilitation, as well as the other mitigatory factors I have already mentioned which justify some amelioration of your sentence, not only in your interest, but in the interest of the community.
>
> [H]aving regard to the crimes which you have committed, it is most unlikely that a decision to release you would be made if, after a very thorough investigation, there was any doubt about your presenting a danger to the community.
>
> In fixing the minimum term, it is necessary to ensure that it does not destroy the punitive effect of the head sentences. On the other hand, in a case such as this an unduly high minimum term would defeat the main purpose for which it is fixed, namely your rehabilitation and possible release at a time when you would still be able to adjust to life in the community.

10. By entering the order that he did, Hampel J determined that the Plaintiff should at least "be *eligible to be considered* for release on parole at that future time".[7]

B. THE LEGISLATION

11. Section 74AA relevantly provides as follows:

> **Conditions for making a parole order for Julian Knight**
>
> (1) The Board must not make a parole order under section 74 in respect of the prisoner Julian Knight unless an application for the order is made to the Board by or on behalf of the prisoner.
>
> (2) The application must be lodged with the Secretary of the Board.
>
> (3) After considering the application, the Board may make an order under section 74 in respect of the prisoner Julian Knight if, and only if, the Board—
>
> (a) is satisfied (on the basis of a report prepared by the Secretary to the Department of Justice) that the prisoner—
>
> (i) is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person; and
>
> (ii) has demonstrated that he does not pose a risk to the community; and
>
> (b) is further satisfied that, because of those circumstances, the making of the order is justified.
>
> ...
>
> (6) In this section a reference to the prisoner Julian Knight is a reference to the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder.

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6 *R v Knight* [1989] VR 705, 711 (Hampel J).

7 *R v Shrestha* (1991) 173 CLR 48, 72-73 (Dawson & Toohey JJ) (emphasis added); see also s 17(1), *Penalties and Sentences Act 1985*, a "minimum term" is defined as a term "during which the offender shall not be eligible to be released on parole."

12. Section 74AA was inserted into Part 8 of the *Corrections Act* by the *Corrections Amendment (Parole) Act 2014* (Vic) ("**the Amending Act**"). Section 1 of the Amending Act stated that "[t]he purpose of this Act is to amend the *Corrections Act 1986* in relation to the conditions for making a parole order for the prisoner Julian Knight".

13. Part 8 of the *Corrections Act* provides for prisoners' "Temporary Absence from Prison." Division 5 of Part 8 provides for a parole regime under the direction of the Adult Parole Board (**the Board**).[8] Five matters are relevant here:

(a) The Board may be constituted in part by judicial officers. Section 61(2) provides for the appointment of Judges and Associate Judges of the Supreme Court, Judges of the County Court and Magistrates to the Board by the Governor-in-Council on the recommendation of the relevant head of jurisdiction. If a person so appointed ceases to be a Judge or a Magistrate, he or she will immediately cease to hold office on the Board.[9]

(b) Section 64 of the *Corrections Act* provides that the Board may exercise its powers and functions in "divisions." Under s 64(2), either a judicial officer or retired judicial officer must be a member of, and chairperson of, a division. In contrast to other provisions of the *Corrections Act*,[10] no special regime has been created for the constitution of a division of the Board in exercising s 74AA. Whether sitting in a division or as the Board, the *Corrections Act* authorises judicial officers to exercise the jurisdiction purportedly conferred by that section.

(c) The Board's main function is to manage and direct the temporary release of Victorian prisoners. More specifically, the Board is empowered by s 74 to order that a prisoner in respect of whom a non-parole period has been fixed be released from prison "on parole." This release may be subject to conditions[11] and may be cancelled, whereupon the prisoner will return to prison.[12] A prisoner on parole is "deemed" to be still under sentence,[13] but the salient feature of parole is clear: the physical release of a prisoner from custody "through conditional freedom."[14]

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8 The Board is established by s 61, *Corrections Act*.

9 Section 63(6) to (6A), *Corrections Act*.

10 See ss 64A and 74AAB, *Corrections Act*.

11 Section 74(5)(a), *Corrections Act*.

12 Sections 77 and 77B, *Corrections Act*.

13 Section 76, *Corrections Act*.

14 *Power v R* (1974) 131 CLR 623, 629 (Barwick CJ, Menzies, Stephen & Mason JJ).

(d) Under s 73A of the *Corrections Act*, in exercising its principal powers the Board's "paramount consideration" is the "safety and protection of the community;" otherwise, the Board's powers are broad. Section 69(2) expressly excludes any requirement to accord a prisoner natural justice.

(e) Under s 74 of the *Corrections Act*, for all Victorian prisoners, other than the Plaintiff and a certain class of prisoner,[15] the principal jurisdictional preconditions for a parole order are that a non-parole order has been made in respect of that prisoner and that non-parole order has now expired.

14. In March 2014, shortly before the Plaintiff's non-parole period was due to expire, the Victorian Parliament passed the Amending Act, inserting s 74AA into the *Corrections Act*. As is apparent from its terms, s 74AA has amended the jurisdictional preconditions to s 74 being exercised. It applies to the Plaintiff alone. As explained in the second reading speech:[16]

> [The Amending Act] changes the preconditions for Julian Knight's eligibility for parole in Victoria to have the effect of preventing Julian Knight from being released on parole unless the parole board is satisfied that he is in imminent danger of death or seriously incapacitated and as a result that he lacks the capacity to harm another.

15. The Amending Act came into operation on 1 April 2014. The Plaintiff's non-parole period expired on 8 May 2014.[17] It is agreed for the purposes of this proceeding that, at present, the Plaintiff is not in imminent danger of dying or seriously incapacitated.[18]

Constructional issue: relationship between ss 74AA and 74AAB

16. In its Defence the First Defendant contends that, in addition to s 74AA, the Plaintiff is subject to a further regime, found in s 74AAB, which governs parole for persons convicted of serious violent offences or sexual offences.[19] For this class of persons, s 74AAB requires that parole only be granted by the "Serious Violent Offender or Sexual Offender Parole division" (the **SVOSO division**) after another division has recommended a grant of parole. The Plaintiff contends that he is not subject to s 74AAB, but only to s 74AA.

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15 See s 74AAB, *Corrections Act*, regulating the release on parole of persons imprisoned for sexual offences or serious violent offence.

16 Second Reading Speech for the Corrections Amendment (Parole) Bill 2014 (Vic), Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, pp 746-747 (Kim Wells).

17 [4]-[5], Special Case (SCB p 28).

18 [15], Special Case (SCB p 31).

19 [12(b)], First Defendant's Defence (SCB pp 21-22).

(a) The natural reading of s 74AA, supported by s 1 of the Amending Act, is that its preconditions are a comprehensive statement of the conditions applicable to the Plaintiff before s 74 is engaged. In other words, the specific terms of s 74AA in relation to the Plaintiff's parole impliedly exclude that subject matter from the more general regime found in s 74AAB.[20]

(b) Section 74AA(3) provides that the Board ***may*** make an order under s 74 in relation to Julian Knight if it is satisfied of the relevant matters. That suggests there is no other set of conditions to be satisfied in relation to Julian Knight.

17. In any event, the Plaintiff contends that it is ultimately not essential to resolve this issue because the parties appear to agree that the exercise of jurisdiction under s 74AA is a necessary integer in the Plaintiff's path to parole. If that is so, then whether that jurisdiction stands alone or, as the First Defendant contends, precedes a decision under s 74AAB, is irrelevant to the constitutional validity of s 74AA.

C. THE *KABLE* PRINCIPLE

18. The ways in which State legislation can offend the *Kable* principle are not closed and cannot be easily defined.[21] In summary, however, the authorities reveal that a State Parliament cannot:

(a) confer powers on State courts that are repugnant to or incompatible with their continued exercise of Commonwealth judicial power;[22]

(b) confer on a State judge, as *persona designata*, a non-judicial function repugnant to or incompatible with the functions of the State court on which the judge sits;[23]

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20 *Generalia specialibus non derogant*. See *Smith v The Queen* (1994) 181 CLR 338, 348 (Mason CJ, Dawson, Gaudron & McHugh JJ); *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (Gavan Duffy CJ & Dixon J); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 589 (Gummow & Hayne JJ); *Plaintiff M70/2011 v Minister for Immigration* (2011) 244 CLR 144, 187 [84]-192 [99] (Gummow, Hayne, Crennan & Bell JJ).

21 *Fardon* (2004) 223 CLR 575, 618 [104] (Gummow J): "[T]he critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes". See also *Wainohu* (2011) 243 CLR 181, 201 [30] (French CJ & Kiefel J); *Kuczborski v Queensland* (2014) 254 CLR 51, 72-73 [38] (French CJ); 90 [106] (Hayne J).

22 *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38, 89 [123] (Hayne, Crennan, Kiefel & Bell JJ); *Fardon* (2004) 223 CLR 575, 617 [101] (Gummow J); both citing *Kable* (1996) 189 CLR 51, 103 (Guadron J).

23 *Wainohu* (2011) 243 CLR 181, 210 [47] (French CJ & Kiefel J).

(c) directly enlist State courts in the implementation of the legislative or executive policies of the State;[24] or

(d) require a State court to depart to a significant degree from the methods and standards which have historically characterized the exercise of judicial power.[25]

19. These principles are examples of a broader constitutional principle. Even if no separation of powers doctrine inheres in State constitutional arrangements, the function of State courts as repositories of Ch III judicial power means that a State Parliament cannot pass laws derogating from the institutional integrity or independence of those courts so as to render them unsuitable for this purpose.[26] The touchstone is the State law's repugnancy to, or incompatibility with, the institutional integrity of the State court.[27]

20. Legislatures may not avoid constitutional constraints by deploying fine drafting mechanisms. As the plurality observed in *Crump*, "regard properly may be had to matters of substance as well as of form and to practical as well as legal effect."[28] The importance of substance is consistent with one of the *Kable* principle's underlying rationales, being public confidence in State courts.[29] In this regard, public confidence is not some academic concept. As Gleeson CJ said in *Baker*:[30]

> In some of the judgments in *Kable*, references were made to public confidence in the courts. *Confidence is not something that exists in the abstract. It is related to some quality or qualities which one person believes to exist in another. The most basic quality of courts in which the public should have confidence is that they will administer justice according to law.*

21. In this case, matters of substance and public confidence take on different complexions in assessing the Plaintiff's first contention and second contention.

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24 *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ); 67 [149] (Gummow J); 92 [236] (Hayne J); 160 [436] (Crennan & Bell); 173 [481] (Kiefel J).

25 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne & Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow & Crennan JJ); *Totani* (2010) 242 CLR, 62-63 [131] (Gummow J); 157 [42] (Crennan & Bell JJ).

26 *Kable* (1996) 189 CLR 51, 103 (Gaudron J); *Baker v the Queen* (2004) 223 CLR 513, 519 [5] (Gleeson CJ); *Wainohu* (2011) 243 CLR 181, 210 [46] (French CJ & Kiefel J); *Totani* (2010) 242 CLR 1, 48 [71] (French CJ); 82 [205]-83[205] (Hayne J); 156 [426] (Crennan & Bell JJ).

27 *Kuczborski* (2014) 254 CLR 51, 72 [38] (French CJ); 90 [106] (Hayne J); *Fardon* (2004) 223 CLR 575, 617 [101]-618 [102] (Gummow J); *Totani* (2010) 242 CLR 1, 82 [205] (Hayne J).

28 (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel & Bell JJ); *Silbert v DPP (WA)* (2004) 217 CLR 181, 191 [27] (Kirby J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane & Dawson JJ).

29 *Fardon* (2004) 223 CLR 575, 617-618 [102] (Gummow J); 638 [166] (Kirby J); 653 [213] (Callinan & Heydon JJ); cf *Totani* (2010) 242 CLR 1, 20 [1], 49 [72]-50 [73] (French CJ); 82 [206] (Hayne J).

30 (2004) 223 CLR 513, 519 [6] (Gleeson CJ) (emphasis added).

D. *CRUMP* IS NOT CONTROLLING

22. Before turning to the Plaintiff's two contentions, it is appropriate to address this Court's decision in *Crump*. The terms of s 74AA are modelled, in part, on the legislative regime upheld in *Crump* — the two preconditions applied to the Plaintiff by s 74AA are in substance the same as the two preconditions applied to Crump by s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) (the **NSW Act**). In the second reading speech to the Amending Act the Hon Kim Wells MP stated that the "preconditions [in s 74AA] have been upheld in the *Crump* case."[31] However, the Plaintiff contends that *Crump* can be distinguished.

23. Section 154A of the NSW Act was a law of general application that imposed preconditions for parole on a certain class of prisoner. The Plaintiff, falling within that class, contended the State Parliament "lacked the power to set aside, vary, alter, or otherwise stultify the effect of that ... sentence" that entitled him to be considered for parole.[32] Emphasising the State Parliament's power to determine the conditions on which the executive may grant parole,[33] the plurality rejected the Plaintiff's characterisation of the sentence, holding that the sentence did not "create any right or entitlement in the Plaintiff to his release on parole".[34] French CJ rejected the contention the legislation altered the "effect" of the sentence.[35]

24. The Plaintiff accepts that, as a consequence of *Crump*, the Parliament has power to pass legislation embodying its policy on parole as varied from time to time, even if that legislation renders parole a more difficult prospect.[36] Further, the Amending Act in this case does not, purely as a matter of legal effect, "impeach, set aside, alter or vary the sentence under which the Plaintiff suffers his deprivation of liberty."[37]

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31 Second Reading Speech, Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, pp 746-747 (Kim Wells).

32 (2012) 247 CLR 1, 25 [56] (Gummow, Hayne, Crennan, Kiefel & Bell JJ).

33 (2012) 247 CLR 1, 16 [28], 19 [36] (French CJ); 26 [60] (Gummow, Hayne, Crennan, Kiefel & Bell JJ); 28 [70], 29 [72] (Heydon J).

34 (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel & Bell JJ).

35 (2012) 247 CLR 1, 18 [34] (French CJ).

36 (2012) 247 CLR 1, 16 [28] and 19 [36] (French CJ); 26 [60] (Gummow, Hayne, Crennan, Kiefel & Bell JJ); 28 [70], 29 [72] (Heydon J).

37 (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel & Bell JJ).

25. However, to adapt what the plurality said in *Pompano*,[38] the questions of validity presented in this case cannot be decided simply by taking what the Court has said about the validity of another law and assuming, without examination, that what is said in the earlier decision can be applied to the legislation now under consideration. Relevantly, four matters distinguish the legislation in this case from that in *Crump*.

26. ***First***, s 74AA is applicable by reference only to the Plaintiff's identity.[39] This did not arise in *Crump* because the legislation was not *ad hominem*.[40]

27. ***Second***, s 74AA(6) expressly refers to a particular judicial determination, being the Plaintiff's sentence. In this way, as a matter of form, s 74AA is referrable to a *particular* and *readily identifiable* exercise of judicial discretion. This was not the case in *Crump*. In *Crump*, the question was whether or not the relevant legislative amendment replaced a party specific *judicial* judgment about rights or liabilities with a party specific *legislative* judgment about the same rights or liabilities.[41] The answer was no. In substance, 74AA does precisely that.

28. ***Third***, as a matter of substance, s 74AA effectively eliminates the operation of part of that judicial determination (a contention expanded on below). Matters of substance did not arise in *Crump* because that case was, to a significant degree, decided on the challenged legislation's precise legal effect on the relevant prisoner's sentence. This Court held that questions of substance must give way to a "practical reality;" namely, that legislative and administrative changes in parole systems and policies occur from time to time.[42] The changes referred to, however, were changes of general application. It may be accepted that a State Parliament can legislate to reflect changing policies regarding parole. However, the Amending Act does not effect a change of this kind. It is an *ad hominem* determination about a particular individual.

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38 (2013) 252 CLR 38, 94 [137] (Hayne, Crennan, Kiefel & Bell JJ).

39 As for the significance of which, see *Kable* (1996) 189 CLR 51, 98-99 (Toohey J); 108 (Gaudron J); 121-122 (McHugh J); 125 (Gummow J). That the *ad hominem* character of the legislation was central to its invalidity was stressed in *Fardon* (2004) 223 CLR 575, 591 [16] (Gleeson CJ); 595-596 [33]; 601-602 [43] (McHugh J); 617 [100] (Gummow J); 658 [233] (Heydon & Callinan JJ).

40 French CJ described the law as having an "ad hominem component" (*Crump* (2012) 247 CLR 1, 15 [22]). His Honour was referring to the fact that two people, Crump and Baker, were referred to in the second reading speech as prisoners who would be affected by s 154. However, s 154A did not itself refer to Crump or Baker — it was expressed in general terms.

41 (2012) 247 CLR 1, 5 (argument on behalf of the Attorney-General of the Commonwealth, intervening); *Crump v State of New South Wales* [2012] HCATrans 81 at p 31, lines 1329-30.

42 (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel & Bell JJ); see also 17 [28], 19 [35]-[36] (French CJ); *Baker* (2004) 223 CLR 513, 520-521 [7] (Gleeson CJ).

29. ***Finally***, unlike the legislation in *Crump*, the Amending Act and s 74AA lack an historical analogue.[43] The Parliament has never served the function of determining when a particular individual should be eligible for parole. As explained in *Baker*,[44] the exercise of parole powers has been for the executive through the exercise of a statutory discretion or inherent prerogative power. (A further contrast may be drawn with the Parliament's historical role in winding-up companies without judicial order[45] or in dissolving marriages without judicial order.[46])

E. FIRST CONTENTION: INTERFERENCE WITH JUDICIAL SENTENCE

(a) Relevant Principles

10 30. It is an incident of Ch III that "the adjudgment and punishment of criminal guilt" is a function "essentially and exclusively judicial in character."[47] With respect to the impact of this proposition on State constitutional arrangements, Hayne J in *Totani* summarised the position as follows:[48]

> As Gummow J also pointed out in *Fardon*, the proposition stated by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*, that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt", was applied as a step in the reasoning in *Kable* of Toohey J and Gummow J, and was reflected in the reasoning of Gaudron J and McHugh J.
>
> 20 ...
>
> Having regard to these matters, Gummow J proffered, as a formulation of the relevant principle derived from Ch III, "that, the 'exceptional cases' aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts".

31. In *Re Macks; ex parte Saint*,[49] McHugh J alluded to the notion, but did not in the circumstances need to hold, that State Parliaments may not, by reason of *Kable*, determine an "essentially judicial question."[50] For the reasons just described, punishment

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43 As for the significance of which, see *Re Macks; Ex Parte Saint* (2000) 204 CLR 158, 175 [15] (Gleeson CJ); 233 [210]-234 [211] (Gummow J); cf *Totani* (2010) 242 CLR 1, 30 [32] (French CJ); *Wainohu* (2011) 243 CLR 181, 225 [94] (Gummow, Hayne, Crennan & Bell JJ).

44 (2004) 223 CLR 513, 520-521 [7] (Gleeson CJ).

45 *Re Macks; Ex Parte Saint* (2000) 204 CLR 158, 234 [211] (Gummow J).

46 *R v Humby* (1972) 129 CLR 231, 243 (Stephen J); cited in *Re Macks; Ex Parte Saint* (2000) 204 CLR 158, 234 [211] (Gummow J).

47 *Chu Kheng Lim* (1992) 176 CLR, 27 (Brennan, Deane & Dawson JJ); see also eg *Baker* (2004) 223 CLR 513, 529 [32]-[33] (McHugh, Gummow, Hayne & Heydon JJ).

48 (2010) 242 CLR 1, 82 [208] (Hayne J) (citations omitted).

49 (2000) 204 CLR 158.

50 (2000) 204 CLR 158, 203-204 [116] (McHugh J).

for criminal guilt is such a question. Similarly, in *Duncan v NSW*,[51] this Court considered that a State legislature might, if it enacted legislation in the nature of a bill of pains and penalties, purport to exercise judicial power. However, the Court did not characterize the impugned legislation in that way because the legislation did not:[52]

(a) determine a breach of some antecedent standard of conduct, or fasten upon previous factual findings of a particular statutory body relevant in that case; nor

(b) impose a legal burden on the individuals concerned.

These principles apply in assessing the Amending Act as a source of punishment for a past act.

10 32. Further, in *Baker* the majority held that legislation cannot make a sentence heavier:[53]

> If the executive exercised the power [to release on licence], the offender obtained a mercy. *But in no sense (whether as a matter of substance or as a matter of form) can later legislation, altering the circumstances in which such mercy could or would be extended to a prisoner sentenced to life imprisonment, make that sentence of life imprisonment more punitive or burdensome to liberty.* Whether the power to reduce the effect of a life sentence is given to a court (as the legislation now in question did) or is retained by the executive, the original sentence passed on the offender could not be and was not extended or made heavier.

33. These observations, which are applicable to the legislation in this case, are consistent with the line of authority, applicable in the federal sphere, that Parliament may not
20 purport to set aside the decision of a Court exercising federal jurisdiction.[54] This Court has foreshadowed, but not yet applied, this line of authority in State constitutional arrangements under the rubric of *Kable*.[55]

34. That *Kable* should be applied by reference to these lines of authority is consistent with Ch III. Under s 73(ii) of the Constitution, this Court has entrenched jurisdiction to hear appeals from "sentences" of the State Supreme Courts.[56] If the Plaintiff's characterisation of s 74AA is accepted, Hampel J's sentence has, as a matter of substance, been rendered subject to legislative intervention contrary to Ch III.

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51 (2015) 255 CLR 388.

52 (2015) 255 CLR 388, 408 [42]-[43] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane & Nettle JJ).

53 (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne & Heydon JJ) (emphasis added).

54 See eg *AEU v Fair Work Australia* (2012) 246 CLR 117, 143 [53] (French, Crennan & Kiefel JJ).

55 In *Crump*, French CJ queried whether "a law of a State altering a judicial decision" would engage *Kable*, but rejected the underlying contention that the relevant legislation actually had this effect. *Crump* (2012) 247 CLR 1, 18 [33]-19 [34] (French CJ); see also *Duncan v ICAC* 256 CLR 83, 95 [16]-98 [28] (French CJ, Kiefel, Bell & Keane JJ).

56 Cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 579 [95]-581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

(b) Application in this Case

35. As a matter of both legal form and substance, the only "factum"[57] by which s 74AA operates is the Plaintiff's identity as a person sentenced by the Supreme Court of Victoria at a particular time for certain identified crimes:[58]

> (6) In this section a reference to the prisoner Julian Knight is a reference to the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder.

Two matters follow from this, which cause the section to contravene Ch III.

36. ***First***, s 74AA's additional preconditions pose a significant barrier to the Board's s 74 parole jurisdiction ever being meaningfully enlivened for this particular individual. In this regard, although s 74AA does not as a matter of legal form affect the operation of Hampel J's sentence,[59] in substance its preconditions deny the Plaintiff access to a parole regime, being a regime directed to a prisoner's physical liberty from punitive detention.[60] Contrary to this Court's admonitions in *Baker*, s 74AA "alter[s] the circumstances in which such mercy could or would be extended to a prisoner sentenced to life imprisonment."[61] This is, it is submitted, a relevant imposition.

37. Further, on its face, s 74AA is an imposition directed at the Plaintiff not only by reason of his identity, but by reason of his past actions, being "7 counts of murder." Due to the historical role the executive and Parliament have played in the control of parole, this may not be a Bill of Attainder in its traditional form, nor a legislative usurpation of judicial power *per se*. However, by reason of its substantive operation, s 74AA is at least akin to these things. In *Baker* this Court held that s 13A of the *Sentencing Act 1989* (NSW), which conferred a power on a court to determine a minimum term for a person serving an existing sentence of life imprisonment (and hence to vary that person's sentence) was an exercise of judicial power.[62] The effect of s 74AA is similar in nature.

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57 Cf *Crump* (2012) 247 1, 26 [60] (Gummow, Hayne, Crennan & Bell JJ).

58 As for the significance of which, see *Kable* (1996) 189 CLR 51, 98-99 (Toohey J); 108 (Gaudron J); 121-122 (McHugh J); 125 (Gummow J). That the *ad hominem* character of the legislation was central to its invalidity was stressed in *Fardon* (2004) 223 CLR 575, 591 [16] (Gleeson CJ); 595-596 [33]; 601-602 [43] (McHugh J); 617 [100] (Gummow J); 658 [233] (Heydon & Callinan JJ).

59 *Crump* (2012) 247 CLR 1, 19 [35] (French CJ); 27 [60] (Gummow, Hayne, Kiefel & Bell JJ).

60 *R v Shrestha* (1991) 173 CLR 48, 72-73 (Dawson & Toohey JJ).

61 (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne & Heydon JJ).

62 (2004) 223 CLR 513, 529 [33] (McHugh, Gummow, Hayne & Heydon JJ).

38. ***Second***, the significance of s 74AA and the Amending Act's *ad hominem* nature extends further. Both on its face and understood in a broader context, it is referrable to a *particular* and *readily identifiable* exercise of State judicial discretion:

(a) As disclosed by the provision itself, in November 1988, the Supreme Court sentenced the Plaintiff to life imprisonment for 7 counts of murder.

(b) As part of that "sentence,"[63] the Supreme Court order prescribed a minimum term of 27 years, due to expire on 8 May 2016.

(c) Shortly prior to the expiry of that term, in March 2014, the Parliament passed the Amending Act inserting s 74AA into the *Corrections Act*.

(d) The effect of s 74AA is that the only prospect the Plaintiff has of release on parole is in the time period between:

(i) the Plaintiff being in "imminent danger of dying, or... seriously incapacitated"; and

(ii) the Plaintiff actually dying.

39. Given the limited time period in which parole can be granted, being between "imminent death" and death, the provision substantially legislates Hampel J's "minimum term" — being a particular exercise of a discretion by the Victorian Supreme Court — out of existence. Unlike the legislation challenged in *Nicholas v the Queen,*[64] which proceeded on the basis that a previous judicial decision was correct, the provision here evinces a legislative opinion that:

(a) the sentence should not have included a minimum term; or

(b) the sentence's minimum term was inadequate; or

(c) the particular judicial discretion otherwise miscarried.

40. The timing of the Amending Act, shortly before the expiry of the parole period, is also critical. Recalling that "public confidence in the courts" is not "something that exists in the abstract,"[65] the impact on public confidence in the Supreme Court in this case is obvious. Parliament intervened to address what it regarded an inadequacy in Hampel J's

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63 Section 17(1), *Penalties and Sentences Act*.

64 (1998) 193 CLR 173.

65 *Baker* (2004) 223 CLR 513, 519 [6] (Gleeson CJ); see also (2004) 223 CLR 513, 519 [10] (Gleeson CJ): "Parliament is not functioning in a hermetically sealed environment."

sentence. Such intervention by the Parliament in relation to an individual sentence is calculated to undermine public confidence in the courts in a real and practical way.

41. For these reasons, as a matter of substance, s 74AA imposed a penalty on the Plaintiff, intruding into and varying the sentence previously determined by the Supreme Court. In doing so, it renders the Supreme Court unsuitable to be a repository of Commonwealth judicial power, as described in *Kable v New South Wales*.[66]

F. SECOND CONTENTION: ENLISTMENT OF JUDICIAL OFFICERS

42. The Plaintiff's second contention is that s 74AA is invalid because it causes, permits or authorises Victorian judicial officers to participate in a process that is incompatible with the exercise of federal jurisdiction.

(a) Relevant Principles

43. In *Wainohu* this Court applied the *Kable* principle by reference to the *persona designata* doctrine applicable to Ch III judges.[67] In this context, a majority endorsed and applied three principles articulated by Gaudron J in *Wilson v Minister for Aboriginal and Torres Straight Islander Affairs*,[68] as follows:[69]

(a) ***First***, the confidence reposed in judicial officers:

> depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process.

(b) ***Second***, with respect to openness and outside influence:

> In general terms, a function which is carried out in public, save to the extent that general considerations of justice otherwise require, [and which is] manifestly free of outside influence and which results in a report or other outcome which can be assessed according to its own terms, will not be one that gives the appearance of an unacceptable relationship between the judiciary and the other branches of government.

(c) ***Lastly***, in terms of historical precedent:

> [T]here may be functions (for example, the issuing of warrants such as those considered in *Hilton v Wells* and in *Grollo*) which do not satisfy these criteria but which, historically,

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66 (1996) 189 CLR 51.

67 See eg *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

68 (1996) 189 CLR 1, 22 (Gaudron J).

69 (2011) 243 CLR 181, 225-226 [94] (Gummow, Hayne, Crennan & Bell JJ); cf 208 [44], 220 [72] (French CJ & Kiefel JJ).

> have been vested in judges in their capacity as individuals and which, on that account, can be performed without risk to public confidence. However, history cannot justify the conferral of new functions on judges in their capacity as individuals if their performance would diminish public confidence in the particular judges concerned or in the judiciary generally.

44. Heydon J in *Wainohu*,[70] dissenting in the result but not in relation to the relevant principles, applied the plurality judgment in *Wilson*.[71] He addressed three questions:[72]

(a) whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the executive Government;

(b) whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the executive Government, other than a law or an instrument made under a law (if an affirmative answer does not appear, it is clear that the separation has been breached); and

(c) whether any discretion purportedly possessed by the Ch III judge is to be exercised on political grounds (that is, on grounds that are not confined by factors expressly or impliedly prescribed by law).

45. Finally, again applying the plurality judgment in *Wilson*,[73] he observed:

> In considering these questions, it will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests.

46. The above principles, the Plaintiff contends, govern the Plaintiff's second contention.

(b) Application in this Case

47. The *Corrections Act* provides for Judges or Associate Judges of the Victorian Supreme Court, Judges of the County Court, and Magistrates to be appointed to the Board. Each of these Courts is capable of exercising, and has been vested with, federal jurisdiction.[74]

48. As a matter of fact, the Board does not presently include any Judge or Associate Judge of the Supreme Court (although that does not preclude the appointment of such a judge in the future). The Board presently includes a County Court judge and eight Magistrates.[75]

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70 (2011) 243 CLR 181, 243 [160]- 244 [163] (Heydon J).

71 (1996) 189 CLR 1 (Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ).

72 (2011) 243 CLR 181, 243 [160]- 244 [163] (Heydon J).

73 (2011) 243 CLR 181, 244 [163] (Heydon J).

74 See eg ss 39, 39A and 68 of the *Judiciary Act 1903* (Cth).

49. The Plaintiff contends that the *Corrections Act*, insofar as it includes s 74AA, contravenes Ch III in a way similar to the legislation considered in *Wainohu*.[76] The legislation impugned in that case was held to "utilise confidence in impartial, reasoned and public decision-making of eligible judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making".[77]

50. Importantly, the Plaintiff does not contend that the *Kable* principle precludes the involvement of judicial officers in the general parole regime established by the *Corrections Act*. It is the involvement, or potential involvement, of judicial officers in the decision-making under s 74AA that contravenes Ch III.

Composition of the Board in its initial consideration of the Plaintiff's application

51. Before elaborating on the Plaintiff's argument, it is convenient to deal with an aspect of the First Defendant's Defence concerning the composition of the Board:

(a) Section 64(1) of the *Corrections Act* allows the Board to sit in "divisions." Accordingly a sitting judicial officer need not be involved in the making of a decision under s 74AA.[78]

(b) When the Board sat in a division on 27 July 2016 to consider the Plaintiff's application it did not have a sitting judicial officer.[79]

(c) When the Board makes a final decision on the Plaintiff's application it can be constituted without any sitting judicial officer (although this proposition is, at present, hypothetical).[80]

52. A law's validity is decided by reference to its intended legal and practical operation garnered from the face of the statute.[81] The Court must bear in mind "practical realities and likelihoods, not remote or fanciful possibilities."[82] However, it is irrelevant that a decision maker has exercised, or could exercise, a discretion in a particular way to

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75 [10], Special Case (SCB p 30).
76 (2011) 243 CLR 181.
77 *Wainohu* (2011) 243 CLR 181, 230 [109] (Gummow, Hayne, Crennan & Bell JJ).
78 [12(b)(viii) and (c)], First Defendant's Defence (SCB p 22).
79 [15(c)], First Defendant's Defence (SCB p 23).
80 [15(c)], First Defendant's Defence (SCB p 23).
81 See eg *Totani* (2010) 242 CLR 1, 84 [213] (Hayne J).
82 *Wainohu* (2011) 243 CLR 181, 240 [151]-241 [153] (Heydon J).

attenuate or avoid a law's contravening aspects. In *Wilson*[83] the majority considered that the special reporter might take steps to maintain her independence from the executive, but such measures were irrelevant to the legality of her appointment.[84] As French CJ and Kiefel J recently emphasized in *Wainohu*, referring to *Wilson*, "the Court is not concerned with the conduct of the judge, but with the limits on legislative power."[85]

53. Section 74AA of the *Corrections Act* does not create a separate regime for constituting the Board (unlike ss 74A and 74AAB). Rather, under s 61, sitting judicial officers appointed as members of the Board are authorised to sit on a division of the Board as constituted from time to time. The participation of judicial officers is integrated throughout the entire scheme. Even when sitting as a division, the chair must be a judicial officer or a retired judicial officer. Absent some statutory indication otherwise, the proposition that a sitting judicial officer could be expected to sit in determining the Plaintiff's application is not remote or fanciful. Thus it is irrelevant that the Board has to date constituted itself without any judicial officer in relation to the Plaintiff's application.

54. Similarly, the First Defendant's plea that the Secretary, while empowered to sit, has never done so[86] is an attempt to avoid the legal effect of ss 61 and 64 by reference to historical practice. That plea says nothing of the future. Further, under s 64A(3), the Secretary is expressly precluded from sitting on the Detention and Supervision Order division of the Board. No such provision exists regarding s 74AA, which is a power to be exercised by the Board of which the Secretary is a mandatory *ex officio* member.[87]

55. In sum, neither internal administrative arrangements nor historical practice can save legislation that is otherwise unconstitutional.

56. Further, fundamental as judges are to the regime created under the *Corrections Act*, s 74AA's difficulties cannot be avoided by an implied constraint on the Board's power to constitute itself.

    (a) ***First***, any implied constraint would be complex and might be achieved in various ways. For example, it might *require* that the Board, in making a decision under

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83 (1996) 189 CLR 1.

84 *Wilson* (1996) 189 CLR 1, 20 (Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ).

85 (2011) 243 CLR 181, 220 [69] (French CJ & Kiefel J): The fact that the judge "might choose to provide reasons for [a] decision to make a declaration does not answer the constitutional question".

86 [15(c)(iii)], First Defendant's Defence (SCB p 23).

87 Section 61(2)(f), *Corrections Act.*

s 74AA, constitute itself as a division for the purpose of making a decision under s 74AA (contrary to the text of s 64, which provides that the Board *may* exercise its powers and functions in divisions); coupled with a further implication that a judicial officer could not be a member of a division acting under s 74AA.

(b) ***Second***, any implication would create a separate regime for the constitution of the Board under s 74AA, in circumstances where, in light of ss 64A and 74AAB, it should be inferred that the Parliament has deliberately declined to do so. This would go beyond a process of reading down and "require the Court to perform a feat which is in essence 'legislative and not judicial'". [88]

The operation of 74AA in its application to the Plaintiff

57. Under s 74AA the following steps are required if the Plaintiff is to be granted parole:

(a) ***First***, under s 74AA(1), the Plaintiff must make an application (which he has done). This requirement is unique to the Plaintiff.

(b) ***Second***, under s 74AA(3)(a), the Secretary must prepare a report as to whether the Plaintiff:

(i) is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person; and

(ii) has demonstrated that he does not pose a risk to the community.

This has not yet occurred. This requirement is also unique to the Plaintiff.

(c) ***Third***, also under s 74AA(3)(a), the Board — potentially including both judicial officers and the Secretary — will then consider the Plaintiff's application and satisfy itself, "on the basis of the report" prepared by the Secretary, whether the Plaintiff answers the descriptions set out above. This has not yet occurred.

(d) ***Fourth***, under s 74AA(3)(b), the Board must then be "satisfied that, because of those circumstances [in the report], the making of the order is justified."

(e) ***Finally***, under s 74, the Board may then make an order for the Plaintiff's parole. In doing so, under 73A of the *Corrections Act*, the Board's "paramount consideration" is the "safety and protection of the community."

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88 *Pidoto v Victoria* (1943) 68 CLR 87, 111 (Latham CJ).

58. The Plaintiff contends that this process is repugnant to the institutional integrity of Victorian courts in the following interconnected ways.

59. ***First***, judicial officers on the Board will be exercising executive power.[89] Further, they will have been appointed to the Board by reason of their judicial position, and on the recommendation of their head of jurisdiction (being the Chief Justice, Chief Judge or Chief Magistrate as appropriate).[90] They will also cease to hold office immediately upon ceasing to be a judicial officer.[91] As already noted, the Plaintiff accepts that judicial officers have previously exercised executive power in the parole context. But they have not done so in connection with the other aspects of this process, described below.

10 60. ***Second***, like *Kable*,[92] the s 74AA process is, on its face, directed at one named individual. In *Fardon*[93] this Court explained that the *ad hominem* character of the *Kable* legislation was central to its invalidity.

61. ***Third***, in making determinations under s 74AA(3)(a) and (b), the Board is required to be satisfied "on the basis of" the Secretary's report. This function is not being performed "independently of any instruction, advice or wish of the Legislature or the executive Government."[94] To the contrary, the Board is bound to act on the basis of a report by the Secretary (who may also sit on the Board).

62. ***Fourth***, recalling that the Board's "paramount consideration" under s 74 is the "safety and protection of the community,"[95] the exercise of its discretion under that provision
20 will be heavily informed, if not foreclosed, by that part of the Secretary's report directed to the Plaintiff demonstrating "that he does not pose a risk to the community."

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89 *Wainohu* (2011) 243 CLR 181, 243 [160]-244 [163], where Heydon J considered an essential question was "whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the executive Government."

90 *Wainohu* (2011) 243 CLR 181, 218 [66] (French CJ & Kiefel J); cf 245 [167] (Heydon J), citing *Hilton v Wells* (1985) 157 CLR 57, 72 (Gibbs CJ, Wilson & Deane JJ): "The distinction is between the conferral of power on a judge as a judge, and the conferral of power on a judge 'as an individual who because he is a judge possesses the necessary qualifications to exercise it."

91 Section 63(6) to (6A), *Corrections Act*.

92 *Kable* (1996) 189 CLR 51, 98-99 (Toohey J); 108 (Gaudron J); 121-122 (McHugh J); 125 (Gummow J).

93 *Fardon* (2004) 223 CLR 575, 591 [16] (Gleeson CJ); 595-596 [33], 601-602 [43] (McHugh J); 617 [100] (Gummow J); 658 [233] (Heydon & Callinan JJ).

94 *Wilson* (1996) 189 CLR 1 at [23] (Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ); *Wainohu* (2011) 243 CLR 181, 243 [160]- 244 [163] (Heydon J).

95 Section 73A, *Corrections Act*.

63. ***Fifth***, the Board is not bound by the rules of natural justice.[96] In itself, this is not fatal to the involvement of judges in the parole regime. However, it is significant in the context of s 74AA because, contrary to this Court's remarks in *Wainohu*[97] regarding fair and proper procedures, the Plaintiff's application will be determined behind closed doors. The Plaintiff will likely not be heard on the content of the Secretary's report. The process carries within it the inherent potential for apprehended bias. A State judicial officer may be required to engage in a decision-making process on the basis of a report prepared by the Secretary, who also potentially sits on the Board with that judicial officer.

64. By causing, authorising or permitting Victorian judicial officers to participate in this process s 74AA seeks to cloak an exercise of executive power with the neutral colours of judicial power in a way that undermines the impartiality and independence of the courts.[98] This renders the courts on which the judicial officers sit unsuitable to be repositories of Commonwealth judicial power.

PART VI RELEVANT CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

65. The relevant constitutional and legislative provisions are set out in the Annexure.

PART VII ORDERS SOUGHT

66. The questions set out in paragraph 19 of the Special Case should be answered as follows:

(a) Is s 74AA of the *Corrections Act* invalid on the ground it is contrary to Ch III of the Constitution? The answer is "yes."

(b) Who should pay the costs of the proceeding? The answer is "the First Defendant."

PART VIII ORAL ARGUMENT

67. The Plaintiff anticipates that he will require two hours for oral argument.

Dated: 16 December 2016

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96 Section 69(2), *Corrections Act*.

97 (2011) 243 CLR 181, 225 [94] (Gummow, Hayne, Crennan & Bell JJ); 244 [163] (Heydon J).

98 *Mistretta v United States* 488 US 361, 404 (1989), quoted in *Kable* (1996) 189 CLR 51, 133; and in *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 425 [41] (French CJ, Hayne, Crennan, Kiefel, Bell & Keane JJ).

ANNEXURE

Section 73 of the *Constitution*

Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

1. of any Justice or Justices exercising the original jurisdiction of the High Court;

2. of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

3. of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

...

Section 17 of the *Penalties and Sentences Act 1985* (Vic)

Fixing minimum term to be served before parole granted

17. (1) Subject to sub-section (2), where any person is convicted by a court of any offence and sentenced to be imprisoned then, if the term imposed is not less than two years the court must, and if the term imposed is less than two years but not less than twelve months the court may, as part of the sentence, fix a lesser term (in this section called a "minimum term") that is at least six months less than the term of the sentence during which the offender shall not be eligible to be released on parole.

(2) A court shall not be required to fix a minimum term if the court considers that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate.

Section 1 of the *Corrections Amendment (Parole) Act 2014* (Vic)

Purpose

The purpose of this Act is to amend the Corrections Act 1986 in relation to the conditions for making a parole order for the prisoner Julian Knight.

Section 61 of the *Corrections Act 1986* (Vic)

Establishment of Board

...

(2) The Board consists of—

(a) such number of Judges of the Supreme Court as are appointed by the Governor in Council on the recommendation of the Chief Justice of the Supreme Court; and; (sic)

(ab) such number of Associate Judges of the Supreme Court as are appointed by the Governor in Council on the recommendation of the Chief Justice of the Supreme Court; and

(b) such number of Judges of the County Court as are appointed by the Governor in Council on the recommendation of the Chief Judge of the County Court; and

(c) such number of Magistrates as are appointed by the Governor in Council on the recommendation of the Chief Magistrate;

...

(f) the Secretary.

Section 63 of the *Corrections Act 1986* (Vic)

Terms of Office

...

(6) If a member who is a Judge of the Supreme Court or the County Court ceases to be a Judge, the member ceases to hold office as a member.

(6AA) If a member who is an Associate Judge of the Supreme Court ceases to be an Associate Judge, the member ceases to hold office as a member.

(6A) If a member who is a Magistrate ceases to be a Magistrate, the member ceases to hold office as a member.

...

Section 64 of the *Corrections Act 1986* (Vic)

Divisions

(1) The Board may exercise its powers and functions in divisions of the Board.

(2) Subject to sections 64A and 74AAB, a division of the Board consists of at least 3 members of whom at least one must be a Judge, retired Judge, Associate Judge, Magistrate or retired Magistrate and that Judge, retired Judge, Associate Judge, Magistrate or retired Magistrate is to be chairperson of that division.

...

Section 69 of the *Corrections Act 1986* (Vic)

Functions of the Board

(2) In exercising its functions, the Board is not bound by the rules of natural justice.

Section 73A of the *Corrections Act 1986* (Vic)

Safety and protection of the community paramount in parole decisions

The Board must give paramount consideration to the safety and protection of the community in determining whether to make or vary a parole order, cancel a prisoner's parole or revoke the cancellation of parole.

Section 74 of the *Corrections Act 1986* (Vic)

Release on parole after service of non-parole period

(1) Subject to section 74AAB and 78(3), the Board may by instrument order that a prisoner serving a prison sentence in respect of which a non-parole period was fixed be released on parole at the time stated in the order (not being before the end of the non-parole period) and, unless the Board revokes the order before the time for release stated in the order, the prisoner must be released at that time.

(1A) The time fixed for release stated in the parole order must be at least 14 days after the day of making the order, unless the Board determines that the notice period under section 30A(1B) should be waived in the circumstances.

(2) The Board may revoke a parole order before the prisoner is released under the order.

Section 74AA of the *Corrections Act 1986* (Vic)

Conditions for making a parole order for Julian Knight

(1) The Board must not make a parole order under section 74 in respect of the prisoner Julian Knight unless an application for the order is made to the Board by or on behalf of the prisoner.

(2) The application must be lodged with the Secretary of the Board.

(3) After considering the application, the Board may make an order under section 74 in respect of the prisoner Julian Knight if, and only if, the Board—

(a) is satisfied (on the basis of a report prepared by the Secretary to the Department of Justice) that the prisoner—

(i) is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person; and

(ii) has demonstrated that he does not pose a risk to the community; and

(b) is further satisfied that, because of those circumstances, the making of the order is justified.

...

(6) In this section a reference to the prisoner Julian Knight is a reference to the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder.

Section 74AAB of the *Corrections Act 1986* (Vic)

Release on parole of person imprisoned for sexual offence or serious violent offence

(1) There is to be a Serious Violent Offender or Sexual Offender Parole division (SVOSO division) of the Board consisting of—

(a) the chairperson of the Board; and

(b) one full-time member or one part-time member of the Board selected by the chairperson; and

(c) any other members of the Board selected by the chairperson from time to time.

(2) The sole function of the SVOSO division is to decide whether or not to release a prisoner on parole in respect of a sexual offence or a serious violent offence.

(3) An order under section 74 that a prisoner be released on parole in respect of a sexual offence or a serious violent offence may only be made by the SVOSO division.

(4) Subsection (3) applies whether the prisoner was sentenced to imprisonment in respect of the offence before or after this section comes into operation.

(5) The SVOSO division may only make an order that a prisoner be released on parole in respect of a sexual offence or a serious violent offence if—

(a) another division of the Board has recommended that parole be granted; and

(b) the SVOSO division has considered the recommendation.

(6) For the purposes of subsection (5), a member of the SVOSO division must not have sat as a member of the division making the recommendation.

(7) After considering the recommendation of another division of the Board, the SVOSO division may refuse to make an order that a prisoner be released on parole in respect of a sexual offence or a serious violent offence even if the recommendation is that the prisoner be released on parole.

(8) In this section, serious violent offence and sexual offence have the same meaning as in section 77(9).