IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S137 OF 2011**

On appeal from
Court of Criminal Appeal of the Supreme Court of New South Wales

BETWEEN: **JIHAD MAHMUD**
Applicant

AND: **THE QUEEN**
Respondent

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

HIGH COURT OF AUSTRALIA
FILED
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THE REGISTRY CANBERRA

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondent to submit that:

   2.1. Div 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**the Act**), which provides a procedure by which a New South Wales court is to determine a non-parole period for specified offences, is not inconsistent with Ch III of the Constitution.

   2.2. The procedure mandated by the relevant provisions of the Act involves the exercise of judicial power by that court, and is exercised in accordance with orthodox judicial process. Such a procedure would, accordingly, be capable of being conferred, consistently with Ch III of the Constitution, on a federal court or a State court exercising federal jurisdiction; it can, therefore, be validly conferred on a State court by a State law.

PART III LEGISLATIVE PROVISIONS

3. The Commonwealth agrees with the statement of applicable constitutional and statutory provisions set out in Annexure A to the applicant's submissions.

PART IV ISSUES PRESENTED BY THE APPLICATION FOR SPECIAL LEAVE TO APPEAL

4. The applicant submits that Div 1A of Part 4 of the Act is invalid on the basis that it amounts to an impermissible legislative interference in the exercise of the court's judicial discretion in respect of sentencing and, therefore, substantially interferes with, compromises or impairs the institutional integrity of the courts exercising that discretion in a manner contrary to Ch III of the Constitution.

5. This submission should be rejected.

Div 1A of Part 4 of the Act would be valid if enacted by the Commonwealth Parliament

6. The Commonwealth contends that the enactment of provisions to the effect of Div 1A of Part 4 of the Act by the Commonwealth Parliament, so as to confer such a sentencing function on a federal court or a State court exercising federal jurisdiction, would be consistent with Ch III of the Constitution.

7. It follows that this function can also be validly conferred on a State court exercising State jurisdiction by a State law consistently with Ch III of the Constitution.[1]

8. Where there would be no breach of the separation of powers doctrine and the requirements for the exercise of judicial power in federal jurisdiction under Ch III of the Constitution, no occasion arises to consider the principle formulated in *Kable v Director of Public Prosecutions (NSW)*,[2] and developed in later cases,[3] upon which the applicant relies.

Mandatory sentencing is constitutionally permissible

9. Before turning to the attributes of judicial power, and the consistency of the impugned provisions with the exercise of such power, a fundamental flaw in the applicant's submissions must first be highlighted – they are contrary to the authoritative acceptance of mandatory sentencing.

10. In *Palling v Corfield*,[4] the High Court accepted that a mandatory sentence for a Commonwealth offence did not usurp the judicial power in Chapter III of the Constitution or otherwise infringe the separation of powers. Barwick CJ said:[5]

> It is beyond question that the Parliament can prescribe such penalty for the offences it creates. It may make the penalty absolute in the sense that there is

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1 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14] per the Court; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [10]-[11] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; *Baker v The Queen* (2004) 223 CLR 513 at 534-535 [51] per McHugh, Gummow, Hayne and Heydon JJ; *Hogan v Hinch* (2011) 85 ALJR 398 at 421 [91] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; 275 ALR 408 at 434.

2 (1996) 189 CLR 51.

3 See, for example, *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 85 ALJR 19; 271 ALR 662.

4 (1970) 123 CLR 52.

5 (1970) 123 CLR 52 at 58. Likewise, in *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 119, Latham CJ had observed that "[i]t has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law".

but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court the duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute ... It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose a specific punishment. If Parliament chooses to deny the court such a discretion, and to impose such a duty, ... the court must obey the statute in this respect assuming its validity in all other respects. It is not, in my opinion, a breach of this Constitution not to confide any discretion to the court as to the penalty to be imposed.

11. In the same case, Walsh J said that "[i]t could not be disputed ... that the Parliament may make a valid law by which no discretion is given to the court as to the punishment of a person convicted of an offence".[6]

12. The authority of *Palling v Corfield*[7] in relation to mandatory sentencing has not been called into question in the High Court.[8]

13. Furthermore, it has been applied in relation to statutory schemes in existence in State and Territory jurisdictions.[9] It was applied, for example, in *Wynbyne v Marshall*,[10] in relation to a constitutional challenge to s 78A of the *Sentencing Act 1995* (NT), which obliged the court to sentence the offender to imprisonment for a minimum of 14 days despite the fact that she had no prior convictions, she had pleaded guilty to stealing a can of beer valued at

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6 (1970) 123 CLR 52 at 68. See also, 62-63 per McTiernan J; 64-65 per Menzies J, 65 per Windeyer J (agreeing with the other members of the Court), 67 per Owen J, 70 per Gibbs J (agreeing with the other members of the Court). See also, in different constitutional contexts – United Kingdom: *Hinds v R* [1977] AC 195 at 226 per Lord Diplock; Ireland: *Deaton v Attorney-General* [1963] IR 170 at 181-182 per Ó Dálaign CJ; Solomon Islands: *Gerea v Director of Public Prosecutions* [1986] LRC (Crim) 3 at 10-11 per Connolly JA (with whom White P agreed).

7 (1970) 123 CLR 52.

8 *Palling v Corfield* has been cited with approval in relation to the constitutionality of a Commonwealth law that requires a court exercising federal jurisdiction to make specified orders if a pre-condition to the order depends on a decision of the executive: *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49] per French CJ; *Totani v South Australia* (2010) (2010) 85 ALJR 19 at 43-44 [71] per French CJ; 271 ALR 662 at 689.

9 *Wynbyne v Marshall* (1997) 117 NTR 11; *Lloyd v Snooks* (1999) 9 Tas R 41 at 44-47 [6]-[9] per Wright J (with whom Cox CJ and Evans J agreed); *R v Barnett* (2009) 198 A Crim R 251 at 257 [16] per Gray J: "It is settled that a state parliament can legislate to require the imposition of a mandatory term of imprisonment." His Honour went on to say, relevantly, that "[i]t follows that state parliaments have power to legislate with respect to mandatory minimum non-parole periods". See also, *King v Automotive, Food, Metals, Engineering, printing and Kindred Industries Union* (2001) 109 FCR 447 at 473-474 [62] per Gyles J (with whom Finkelstein J agreed).

10 (1997) 117 NTR 11.

$2.50 and she had provided restitution for property damage.[11] The Full Court of the Northern Territory Supreme Court rejected a constitutional challenge to the legislation based on the contention that Ch III prevents the Parliament depriving the courts of their sentencing discretion.[12] The proposition derived from *Palling v Corfield*, namely that the imposition of a duty to impose a particular sentence is within the competence of the Parliament, was described as "firmly established".[13]

14. That mandatory sentencing is constitutionally permissible is consistent with the well-established proposition that the conferral by the legislature of a power on a court with a duty to exercise it if certain conditions are satisfied is consistent with Ch III of the Constitution.[14] This proposition extends not only to whether there is to be imposed a particular minimum sentence for an offence, but also, if there is to be a custodial sentence, the minimum length of any custodial sentence or non-parole period. The Commonwealth Parliament has acted on the view that laws setting minimum sentences and minimum non-parole periods are valid.[15]

15. It is against this background that the applicant's challenge[16] to the correctness of *Palling v Corfield*[17] must be viewed. That challenge is made without reference to the factors set out in *John v Federal Commissioner of Taxation*,[18] and is made despite no doubt being cast upon the proposition that a law conferring a power on a court to impose a mandatory sentence is constitutionally valid.

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11 (1997) 117 NTR 11 at 16.

12 *Wynbyne v Marshall* (1997) 117 NTR 11 at 21-26 per Mildren J (with whom Bailey J agreed). The High Court (Gaudron and Hayne JJ) refused the appellant special leave to appeal: *Wynbyne v Marshall* [1998] HCATrans 191 (21 May 1998).

13 *Wynbyne v Marshall* (1997) 117 NTR 11 at 14 per Martin CJ.

14 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49] per French CJ, 360 [77] per Gummow and Bell JJ, 372-373 [120]-[121] per Hayne, Crennan and Kiefel JJ, 386 [157] per Heydon J; *South Australia v Totani* (2010) 85 ALJR 19 at 43-44 [71] per French CJ, 52-53 [133] per Gummow J, 94 [339] per Heydon J, 110 [420]-[421] per Crennan and Bell JJ; 271 ALR 662 at 689, 701, 757-758, 778-779.

15 See *Crimes Act 1914* (Cth), s 19AG (which sets minimum non-parole periods for certain federal offences, including offences relating to terrorism, and which was the subject of a constitutional challenge, which was later abandoned, in *R v Lodhi* (2007) 179 A Crim R 470 at 528 [216] per Price J; see also in relation to s 19AG, *Hili v The Queen* (2010) 85 ALJR 195 at 201-202 [23]-[29] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; 272 ALR 465 at 471-473); *Migration Act 1958* (Cth), s 236B (which sets minimum sentences of imprisonment and minimum non-parole periods for certain offences, including aggravated offences of people smuggling). At the State level, see also *Criminal Law (Sentencing) Act 1988* (SA), s 32A (which was discussed by the High Court in *PNJ v* R (2009) 83 ALJR 384; 252 ALR 612 and the constitutionality of which was upheld in *R v Ironside* (2009) 104 SASR 54 at 68 [71]-[72] per Doyle CJ (with whom Kourakis J relevantly agreed), 89-90 [150] per Gray J).

16 Applicant's submissions, paragraph 46.

17 (1970) 123 CLR 52.

18 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ. See also, *Queensland v The Commonwealth (The Second Territorial Senators Case)* (1977) 139 CLR 585 at 630 per Aickin J; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350-353 [65]-[71] per French CJ.

16. An inevitable consequence of mandatory sentencing is that the usual principles of sentencing do not apply. That is to say, a court is obliged to impose the specified sentence without having regard, as is usually relevant to sentencing, to the particular circumstances of the offence and the offender.

17. The impartial administration of justice by an independent judiciary has for centuries accommodated the existence of mandatory sentences.

18. At the time of federation, there were in existence statutory provisions that required the imposition of a mandatory sentence of death for treason[19] and murder.[20] Even after the removal of the death penalty as a penalty for murder in Australia,[21] imprisonment for life was mandatory for that crime in Australia[22] and remains so in some jurisdictions.[23] Although such mandatory sentences were generally subject to commutation to life sentences (in the case of a mandatory death sentence) and early release schemes, known as "tickets-of-leave" (in the case of a mandatory life sentence),[24] the conferral of a duty on the courts to impose a mandatory sentence on a person upon conviction for particular offences was undoubtedly accepted.

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19 Although only in some jurisdictions, see, for example, *Crimes Act 1890* (Vic), s 7; *Criminal Code 1899* (Qld), s 37; contrast *Crimes Act 1900* (NSW), s 12 and *The Treason Felony Act 1868* (Tas), s II.

20 See, for example, *Crimes Act 1900* (NSW), s 19; *Crimes Act 1890* (Vic), s 3; *Criminal Code 1899* (Qld), s 305; *Criminal Law Consolidation Ordinance 1865* (WA), which relevantly applied s 2 of the *Offences Against the Person Act 1861* (UK) 24 & 25 Vic c 100 (see also *Criminal Code 1902* (WA), s 280); *Criminal Law Consolidation Act 1876* (SA), s 6; *Offences Against the Person Act 1863* (Tas), s II. This is consistent with the position in the United Kingdom at the time of federation. There, s 2 of the *Offences Against the Person Act 1861* (UK) 24 & 25 Vic c 100 provided for a mandatory sentence of death following a conviction for murder.

21 See, for example, *Crimes (Amendment) Act 1955* (NSW), s 5(b); *Crimes (Capital Offences) Amendment Act 1975* (Vic), s 2; *Criminal Code Amendment Act 1922* (Qld), s 3(xiv); *Acts Amendment (Abolition of Capital Punishment) Act* 1984 (WA), s 20; *Statutes Amendment (Capital Punishment Abolition) Act* 1976 (SA), s 6; *Criminal Code Act 1968* (Tas), s 4.

22 *Crimes Act 1900* (NSW), s 19 (as amended in 1955); *Crimes Act 1890* (Vic), s 3 (as amended in 1975); *Criminal Code 1899* (Qld), s 305 (as amended in 1922); *Criminal Code Act 1913* (WA), s 282 (as amended in 1984); *Criminal Law Consolidation Act 1935* (SA), s 11 (as amended in 1976); *Criminal Code* (in the *Criminal Code Act 1924*) (Tas), s 158 (as amended in 1968).

23 In Queensland, South Australia and the Northern Territory, there remains a mandatory life sentence for the crime of murder: see, respectively, *Criminal Code 1899* (Qld), s 305; *Criminal Law Consolidation Act 1935* (SA), s 11; *Criminal Code* (NT), s 157. The mandatory life sentence for murder was removed in other jurisdictions as follows: *Crimes (Homicide) Amendment Act 1982* (NSW), s 3; *Crimes (Amendment) Act 1986* (Vic), s 8; *Criminal Law Amendment (Homicide) Act 2008* (WA), s 10; *Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994* (Tas), s 4.

24 See the discussion of this procedure in the context of the New South Wales legal system, where it dates back to the days of Governor Phillip, in *Baker v The Queen* (2004) 223 CLR 513 at 527-528 [27]-[29] per McHugh, Gummow, Hayne and Heydon JJ.

19. It is, therefore, clear that, at the time of federation, a State Parliament could confer a duty on State courts to require them to impose a mandatory sentence, and thereby remove any sentencing discretion.[25]

20. If the legislature may impose a duty on the court to impose a particular mandatory penalty if the person is convicted of an offence without regard to any of the usual sentencing principles, there is no logical reason why it cannot impose a duty on a court to impose a non-parole period by reference to a particular procedure, including the prescription of standard non-parole periods. To put it another way, if Parliament can give a court *no* discretion regarding the imposition of the head sentence, it must be able to give a court a discretion regarding a non-parole period such as that conferred by Div 1A of Part 4 of the Act. Having referred to *Palling v Corfield,* Gray J said in *R v Ironside*,[26] in relation to the minimum non-parole period prescribed by s 32A of the *Criminal Law (Sentencing) Act 1988* (SA):

> It follows that legislation requiring State courts to impose mandatory or minimum sentences is not offensive to Chapter III of the *Constitution*. If State legislation can validly require a court to impose a mandatory or minimum head sentence for all persons found guilty of a particular offence, then there is no reason in principle why State legislation cannot validly require the imposition of a minimum non-parole period. That period could be expressed in absolute terms or as a percentage of the head sentence to be imposed in the particular case.

21. That this is so follows from the proposition that it would be open to the Commonwealth Parliament to either require a non-parole period, or specify a formula or another means of determining a non-parole period without violating any limitation in Chapter III of the Constitution.[27]

22. For the reasons which follow, far from requiring the imposition of a mandatory sentence, the impugned provisions vest in the sentencing court a significant discretion as to the appropriate non-parole period in the circumstances of the case.

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25 Compare *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 580-581 [97]-[98] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

26 (2009) 104 SASR 54 at 90 [150] (citations omitted).

27 Compare *Leeth v Commonwealth* (1992) 174 CLR 455 at 469 per Mason CJ, Dawson and McHugh JJ: "It was for Parliament to determine whether the minimum term to be served was to be fixed by reference to State laws or by some other means". The impugned Commonwealth legislation in *Leeth* required a court to fix the non-parole period by reference to State and Territory laws, one of which provided that the non-parole period should be at least three-quarters of the length of the sentence for a serious offence: see (1992) 174 CLR 455 at 462-463.

The application of Div 1A of Part 4 of the Act involves the exercise of judicial power

23. Div 1A of Part 4 of the Act provides a procedure whereby, in setting the non-parole period required by s 44 of the Act, the sentencing court is to have regard to "standard non-parole periods" set out in the Table to that Division. Therein, the Parliament has prescribed a standard period, which "represents the non-parole period for an offence in the middle of the range of objective seriousness for [the specified] offences".[28]

24. Relevantly, the applicant was convicted of two such specified offences, namely:

    24.1. supplying a large commercial quantity of methylamphetamine contrary to s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW), to which a standard non-parole period of 15 years applies; and

    24.2. unauthorised possession of more than three firearms contrary to s 51D(2) of the *Firearms Act 1996* (NSW), to which a standard non-parole period of ten years applies.

25. The subject matter of Div 1A of Part 4 of the Act doubtless involves the exercise of "judicial power": it requires the court to make "a decision settling for the future, as between defined persons ..., a question as to the existence of a right or obligation" so as to create "a new charter by reference to which that question is in future to be decided as between those persons or classes of persons"[29] and it results in the "quelling" of a controversy "by ascertainment of the facts, by application of the law and by exercise ... of judicial discretion".[30] That subject matter stands in contrast to the guideline judgment in issue in *Wong v The Queen*, the making of which at least began "to pass from the judicial to the legislative".[31]

26. It is true that the concept of parole developed from the Crown's royal prerogative of mercy, which could be exercised by the Governor of New South Wales.[32] The modern parole system was introduced in NSW by the *Parole of Prisoners Act 1966* (NSW), and in other States and Territories at

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28 See s 54A(2) of the Act.

29 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 301 at 374 per Kitto J.

30 *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 20 [43] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

31 (2001) 207 CLR 584 at 614 [80] per Gaudron, Gummow and Hayne JJ.

32 See the discussion in *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364 at 371 per Wilson J.

about the same time.[33] Section 4 of the *Parole of Prisoners Act 1966* (NSW) originally provided that for persons sentenced to imprisonment, after the commencement of the Act, of not less than 12 months, the court, judge or justice shall specify a period of not less than six months before the end of which the person sentenced shall not be released on parole. The Commonwealth submits that, under Chapter III of the Constitution, the determination of a non-parole period is a power which could be exercised by the Commonwealth executive or a federal court.[34]

27. The procedure set out in Div 1A of Part 4 of the Act also involves an orthodox judicial process: it involves the conduct of "an inquiry concerning the law as it is and the facts as they are, following by an application of the law as determined to the facts as determined"[35] in proceedings that are open to the public and in which both parties have the opportunity to present evidence and make submissions.[36] The conferral of this sentencing jurisdiction on the courts of New South Wales brings with it the usual incidents of the exercise of jurisdiction by those courts.[37]

28. The impugned provisions here under consideration vest significant discretion in the sentencing court. Section 54B(2) of the Act provides:

> When determining the sentence for the offence ... the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

29. The only reasons for which a court may set a longer or shorter non-parole period are set out in s 21A of the Act, and include a number of specified aggravating and mitigating factors to which the court may have regard, as well as "any other objective or subjective factor that affects the relative

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33 Australian Law Reform Commission, *Report No. 15 (Interim) Sentencing of Federal Offenders* (1980), paragraph 288. There was significant variation in the State and Territory systems: see paragraph 297.

34 *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [12]-[13], per Gleeson CJ, Gaudron, McHugh and Gummow JJ; *Farbenfabriken Bayer Aktien-Gesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652.

35 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 301 at 374 per Kitto J; *Harris v Caladine* (1991) 172 CLR 84 at 152 per Gaudron J.

36 *Bass v Permanent Trustees Co Ltd* (1999) 198 CLR 334 at 356 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Harris v Caladine* (1991) 172 CLR 84 at 150 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 per Gaudron J.

37 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560 per Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ; *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 491 [7] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 555 [19] per Gummow, Hayne, Heydon and Kiefel JJ; *South Australia v Totani* (2010) 85 ALJR 19 at 68 [225] per Hayne J; 271 ALR 662 at 722-723.

seriousness of the offence".[38] There is nothing unusual in an Act of Parliament prescribing the permitted considerations to which regard may be had in exercising a discretion, particularly in the context of a sentencing discretion.[39] Moreover, it is accepted that a Commonwealth law may permissibly alter the way in which a judicial discretion is to be exercised.[40]

30. As such, if the Commonwealth Parliament enacted provisions of the type found in Div 1A of Part 4 of the Act, their conferral of a function on a court exercising federal jurisdiction would not interfere with the exercise by that court of the judicial power of the Commonwealth, nor would it be otherwise inconsistent with the exercise of such power. The provisions do not purport to direct the manner and outcome of the exercise of jurisdiction in a manner that would constitute an "impermissible intrusion" into the judicial power of the Commonwealth.[41] Nor do the provisions seek to enlist a court in the implementation of a legislative or executive plan by a judicial process which is used to lend legitimacy to the implementation of that plan, as was the case with the legislation the subject of the High Court's decision in *South Australia v Totani*.[42] The impugned provisions here under consideration set out the procedure by which the sentencing function is to be exercised, including prescription of standard non-parole periods which are subject to change in the exercise of judicial discretion, leaving the court to be the ultimate arbiter of the sentence to be imposed.

31. The facility to increase or to reduce the standard non-parole period is antithetical to the applicant's characterisation of the impugned provisions as providing a "binding substantive role that impermissibly interferes with the flexibility of judicial discretion".[43] To the contrary, the impugned provisions were intended to,[44] and indeed do, maintain a broad discretion in the sentencing court.

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38 Section 21A(1)(c). As such, it is also consistent with the importance which judges should attach to the objective seriousness of the offence for which the person is being sentenced: see, for example, *R v Dodd* (1991) 57 A Crim R 349 at 354 per Gleeson CJ, Lee CJ at CL and Hunt J.

39 See, for example, *Crimes Act 1914* (Cth), s 16A (which was discussed in *Hili v The Queen* (2010) 85 ALJR 195; 272 ALR 465); *Penalties and Sentences Act 1992* (Qld), s 9(2); *Criminal Law (Sentencing) Act 1988* (SA), s 10; *Sentencing Act 1995* (NT), s 5(2).

40 *Nicholas v The Queen* (1998) 193 CLR 173. See also, *Lodhi v The Queen* (2007) 179 A Crim R 470, in which the New South Wales Court of Criminal Appeal accepted the constitutionality of s 31(8) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), which required a court to give the "greatest weight" to national security matters in deciding whether to make orders in relation to the disclosure of information in a federal criminal proceeding.

41 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37 per Brennan, Deane and Dawson JJ.

42 (2010) 85 ALJR 19; 271 ALR 662.

43 Applicant's submissions, paragraph 25.

44 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002 (Bob Debus, Attorney-General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts): "The scheme being introduced by the Government today provides further guidance and structure to judicial discretion. These reforms are primarily aimed

32. Section 54B(4) specifically requires the court to make a record of its reasons for increasing or decreasing the non-parole period. The provision of reasons is a normal incident of the judicial process.[45]

33. A procedure such as that found in Div 1A of Part 4 of the Act is typical of the exercise of judicial power. It confers upon the court a broad discretion, constrained only by the standard non-parole period,[46] and the prescribed matters to which regard must be had in increasing or decreasing the standard non-parole period.[47] No question arises that the breadth of the discretion is such as to deny it the character of judicial power or to "involve the exercise of authority by recourse to non-legal norms".[48] Furthermore, the outcome of the exercise of that discretion results in the pronouncement of a sentence which is capable of being the subject of an appeal to the High Court, consistently with s 73 of the Constitution.[49] The impugned provisions provide standards capable of judicial evaluation on such an appeal. The specification of such standards is an unexceptional exercise of legislative power.[50]

34. The very breadth of the discretion vested in the court to increase or decrease the standard non-parole period is clearly demonstrated by the Court of Criminal Appeal's reasoning in this case.

35. RS Hulme J (with whom Giles JA and Latham J agreed) had regard[51] to the standard non-parole periods for the offences for which the applicant was convicted contained in the Table in Div 1A of Part 4 of the Act,[52] namely 15 years for the drugs offence[53] and ten years for the firearms offence.[54] In

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at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process. By preserving judicial discretion we ensure that the criminal system is able to recognise and assess the facts of an individual case. This is the mark of a criminal justice system in a civilised society. By preserving judicial discretion, we ensure that when, in an individual case, extenuating circumstances call for considerations of mercy, considerations of mercy may be given".

45 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 667 per Gibbs CJ (with whom the other members of the Court relevantly agreed), citing *Housing Commission (NSW) v Tatmar Pastoral Co* [1983] 3 NSWLR 378 at 386 per Mahoney JA.

46 See the Table set out after s 54D of the Act.

47 See s 54B(2) of the Act, which is extracted at paragraph 28 above.

48 *Baker v The Queen* (2004) 223 CLR 513 at 532 [42] per McHugh, Gummow, Hayne and Heydon JJ. See also, *Hinch v Hogan* (2011) 85 ALJR 398 at 419 [80], per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; 275 ALR 408 at 432; *Thomas v Mowbray* (2007) 233 CLR 307 at 331-334 [20]-[28] per Gleeson CJ, 344-348 [71]-[82], 349-351 [88]-[92], 507-508 [596] per Callinan J; *Attorney-General (Commonwealth) v Alinta Ltd* (2008) 233 CLR 542 at 553-554 [14], 597 [168]-[169] per Crennan and Kiefel JJ.

49 Contrast the applicant's submissions at paragraphs 31-33.

50 Contrast *Wong v The Queen* (2001) 207 CLR 584 at 613-615 [80]-[83] per Gaudron, Gummow and Hayne JJ, 644 [168] per Callinan J. Contrast also applicant's submissions at, for example, paragraphs 27 and 34.

51 *R v Mahmud* [2010] NSWCCA 219 at [4]: AB 131-132.

52 See the Table set out after s 54D of the Act.

53 See s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW), referred to at item 19 of the Table.

relation to the latter offence, his Honour concluded that, having regard to the plea of guilty and the fact that this offence was below the mid-range of objective seriousness, "the standard non-parole period has no direct application but it remains as a guide".[55]

36. Having considered various factors relevant to the appropriate non-parole period which should be imposed, including the applicant's subjective circumstances, his Honour imposed a non-parole period of six and a half years in relation to the drugs offence and three years and nine months in relation to the firearms offence, both of which are significantly lower than the standard non-parole period. In these circumstances, it is difficult to see how the impugned provisions amount to a "fixing" of the custodial sentence for an offence by the Parliament, as alleged by the applicant,[56] or a usurpation of the court's discretion.[57] To the contrary, the sentencing procedure applied by RS Hulme J involved what is undoubtedly a procedure which is judicial in nature, namely the application of the sentencing law, as evinced by the provisions of Div 1A of Part 4, the ascertainment of the facts by which to apply that law, and the exercise of judicial discretion in so doing.[58]

37. In so far as the applicant contends that the impugned provisions are in the nature of a bill of attainder,[59] or a bill of pains and penalties, this contention is misconceived. First, to put the contention in those terms is apt to distract. The real question, at least in the context of a Commonwealth law, is whether the provisions in the nature of those here impugned involve a purported exercise of the judicial power of the Commonwealth in a manner contrary to the separation of legislative and judicial powers for which Ch III of the Constitution provides.[60] Secondly, and in any case, there is an absence of the characteristics of such bills, namely a legislative adjudication of guilt as well as a legislative imposition of punishment by the Parliament. There is no infliction of punishment without a judicial trial; that is to say, the sentencing process "does not operate independently of a judicial determination of

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54 See s 51D(2) of the *Firearms Act 1996* (NSW), referred to at item 23 of the Table.

55 *R v Mahmud* [2010] NSWCCA 219 at [72]: AB 160. Contrast the applicant's characterisation of the sentencing procedure as involving the "fixing" of a non-parole period: see paragraph 36 below.

56 Applicant's submissions, paragraphs 27, 39-40.

57 Applicant's submissions, paragraph 42.

58 *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 20 [43] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

59 Applicant's submissions, paragraph 40. See the discussion of the nature of a bill of attainder in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535-537 per Mason CJ, 646 per Dawson J, 721-722 per McHugh J. See also, *Kariapper v Wijesinha* [1968] AC 717 at 736 per Sir Douglas Menzies (delivering the judgment of the Board).

60 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 649-650 per Dawson J. Contrast the question that arises in respect of an express and specific prohibition on bills of attainder, such as that which applies under the United States Constitution (Art I, s 9, cl 3 of the US Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed". Article I, s 10, cl 1 provides: "No State shall ... pass any Bill of Attainder, [or] ex post facto law"). This distinction is made clear by Mason CJ in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 534.

liability".[61] To the contrary, Div 1A of Part 4 of the Act applies only after a conviction has been secured and the person is to be sentenced. Thirdly, the impugned provisions do not adjudge "a specific person or specific persons guilty of an offence constituted by past conduct and [impose] punishment in respect of that offence".[62] To so contend misunderstands that the Act is a legislative instrument of general application to *all* persons who have been convicted of certain specified offences. Fourthly, there is no question of its retrospective operation.

Conclusion

38. There is nothing in the impugned provisions that has the effect that a court is required to "do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court".[63] The very nature of judicial power often involves the application of a law enacted by the Parliament which imposes a duty on the court to exercise a power if specified criteria are met. The sentencing function prescribed by Div 1A of Part 4 of the Act is such a duty.

39. As Brennan CJ said in *Nicholas v The Queen*:[64]

> It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice.

40. The determination by the New South Wales Parliament of a standard non-parole period (which remains amenable to change in the exercise of the sentencing discretion by operation of s 54B(2) of the Act) reflects the Parliamentary intention that, for certain specified offences, there should be a standard non-parole period by reference to which the sentencing discretion should be exercised. Nothing in Ch III of the Constitution prevents such an enactment.

41. For these reasons, the applicant's constitutional objection to Div 1A of Part 4 of the Act is not such as to warrant the grant of special leave to appeal.

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61 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 367 [99] per Gummow and Bell JJ. See also, 389 [167] per Heydon J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 621 [118] per Gummow J, at 654-656 [218]-[219] per Callinan and Heydon JJ.

62 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535 per Mason CJ.

63 *Totani v South Australia* (2010) 85 ALJR 19 at 43 [70] per French CJ; 271 ALR 662 at 688-689. Contrast also, *Totani v South Australia* (2010) 85 ALJR 19 at 52 [132] per Gummow J, 111-112 [427]-[428] per Crennan and Bell JJ, 115 [443] per Kiefel J; 271 ALR 662 at 701, 781, 785; *International Finance Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 355 [56] per French CJ, 366-367 [97] per Gummow and Bell JJ, 386 [159] per Heydon J.

64 (1998) 193 CLR 173 at 197 [37]. See also, 275-276 [242] per Hayne J. Brennan CJ's statement was cited with approval by Gleeson CJ in *Baker v The Queen* (2004) 223 CLR 513 at 519-520 [6].

If special leave is, however, granted by the High Court, the constitutional objection must, in any case, be rejected for the same reasons.

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